

1987

Western Surety Company v. Joel Murphy,
Christopher Dowling, Brasher's Southern
California Auto Auction, Shawn Patten, Yon Hee
Lee, Colorado Auto Auction, Inc., Leon Stubbs,
MJH Dehzadi, Earl Snyder, Donna Curran,
University of Utah Credit Union, and John Does 1
through 20 : Brief of Respondent

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO.

870209-CA

IN THE UTAH COURT OF APPEALS

WESTERN SURETY COMPANY,
Plaintiffs-Appellants,

vs.

JOEL MURPHY, CHRISTOPHER
DOWLING, BRASHER'S SOUTHERN
CALIFORNIA AUTO AUCTION,
DENVER AUTO AUCTION, SHAWN
PATTEN, YON HEE LEE, COLORADO
AUTO AUCTION, INC., LEON
STUBBS, MJH DEHZADI, EARL
SNYDER, DONNA CURRAN,
UNIVERSITY OF UTAH CREDIT
UNION, AND JOHN DOES 1
THROUGH 20,

Defendants/Respondents.

Case No. 870209-CA

Category No. 14b

BRIEF OF DEFENDANT-RESPONDENT

APPEAL FROM JUDGMENT OF THE FOURTH JUDICIAL
DISTRICT COURT IN AND FOR UTAH COUNTY, STATE OF UTAH
HONORABLE GEORGE E. BALLIF, JUDGE

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Attorney for Defendants-Respondents

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COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

WESTERN SURETY COMPANY,
Plaintiffs-Appellants,
vs.

Case No. 870209-CA

JOEL MURPHY, CHRISTOPHER
DOWLING, BRASHER'S SOUTHERN
CALIFORNIA AUTO AUCTION,
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IN THE UTAH COURT OF APPEALS

WESTERN SURETY COMPANY,	:	
	:	
Plaintiffs-Appellants,	:	Case No. 870209-CA
	:	
vs.	:	
	:	
JOEL MURPHY, CHRISTOPHER	:	
DOWLING, BRASHER'S SOUTHERN	:	
CALIFORNIA AUTO AUCTION,	:	
DENVER AUTO AUCTION, SHAWN	:	
PATTEN, YON HEE LEE, COLORADO	:	
AUTO AUCTION, INC., LEON	:	
STUBBS, MJH DEHZADI, EARL	:	
SNYDER, DONNA CURRAN,	:	
UNIVERSITY OF UTAH CREDIT	:	Category No. 14b
UNION, AND JOHN DOES 1	:	
THROUGH 20,	:	
	:	
Defendants/Respondents.	:	

STATEMENT OF JURISDICTION

Jurisdiction in this matter is founded upon Section 78-2(a)-3(2)(h)(1986).

NATURE OF PROCEEDING

Appellant brought suit to require the defendants to interplead to protect their Twenty Thousand Dollar (\$20,000.00) Motor Vehicle Dealer bond. The primary issue involved is whether the bond is subject to an aggregate annual limit of \$20,000.00, or whether each individual claim is subject to the \$20,000.00 limit.

STATEMENT OF ISSUES PRESENTED ON APPEAL

Is the appellant, Western Surety Company, liable on its bond to each claimant up to \$20,000.00 or is appellant liable only for an aggregate of \$20,000.00.

DETERMINATIVE STATUTES AND CASES

A. Statutes.

Section 41-3-2, Utah Code Annotated, 1953.

Section 31-19-26, Utah Code Annotated, 1953.

Section 31-7-14, Utah Code Annotated, 1953.

B. Cases.

Dennis Dillon Oldsmobile, GMC, Inc. v. Zdunich, et al.,
668 P.2d 557 (1983).

J. F. Tolton Investment Company v. Maryland Casualty
Company, 77 Utah 226, 230; 293 P. 611, 612 (1930).

M. H. Walker Realty Company v. American Surety Company,
60 Utah 435, 463-464, 211 P. 998, 1009-1010 (1922).

STATEMENT OF THE FACTS

On May 7, 1985, Respondent Donna Curran purchased a 1984 Mercury Topaz GS automobile from Joel Murphy and Christopher Dowling dba Auto Sports. Curran paid the agreed purchase price (including sales tax, license and title fees) of \$5,851.25 to Joel Murphy. Joel Murphy, dba Auto Sports, violated the provisions of the Utah Motor Vehicle Business Administration Act by failing to deliver title and registration to respondent within thirty (30) days of the date of purchase.

Western Surety Company issued Motor Vehicle Dealer Bond No. 58035172 to Christopher Dowling and Joel Murphy, dba Auto Sports. (R. 21) The bond issued to Christopher Dowling and Joel Murphy protects "any and all persons, firms, and corporations, for any loss suffered by reason of violation of the conditions

hereinafter contained in the penal sum of \$20,000.00..." (R. 21)
In compliance with Utah Code Annotated Section 41-2-18, Curran notified the Motor Vehicle Business Administration and Appellant Western Surety Company of Joel Murphy's failure to deliver title.

Respondent Donna Curran is unable to drive the vehicle because it is not properly registered and licensed and is subject to a superior claim to title and ownership of the vehicle by another entity.

SUMMARY OF ARGUMENT

The summary judgment granted to Donna Curran against appellant, Western Surety Company, should be affirmed by the Court for the reasons that appellant, Western Surety Company issued a vehicle salesman bond to Christopher Dowling and Joel Murphy dba Auto Sports and provided for \$20,000.00 coverage to each and every person, firm or corporation suffering loss by reason of any violation of the conditions of the bond by Christopher Dowling and Joel Murphy. Donna Curran suffered a loss by reason of a violation of the conditions of the bond committed by Joel Murphy and Christopher Dowling. The effort by appellant to amend its bond to limit its liability to an aggregate of \$20,000.00 was not and is not effective as against Donna Curran.

ARGUMENT

POINT I

APPELLANT'S BOND PROVIDES COVERAGE FOR THE LOSS INCURRED BY RESPONDENT FOR THE ACTS OF JOEL MURPHY AND CHRISTOPHER DOWLING, DBA AUTO SPORTS.

The motor vehicle dealer bond issued by Western Surety to Christopher Dowling and Joel Murphy, dba Auto Sports, provides indemnification to:

...Any and all persons, firms, and corporations for any loss suffered by reason of violation of the conditions hereinafter contained in the penal sum of Twenty Thousand and No/100 Dollars (\$20,000.00) lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executives, successors and assignees, jointly and severally, and firmly by these presents... (R. 21)

The bond covers losses resulting from "...fraud or fraudulent representations made or ...violation of any of the provisions of said Motor Vehicle Business Act or any law respecting commerce in motor vehicles..." (R. 21) Utah Code Annotated, Section 41-3-2 requires the dealer to process the title to the vehicle within thirty (30) days after sale and delivery of a motor vehicle. The section, in pertinent part states:

(1) Every Motor vehicle dealer...upon the sale and delivery of any...used motor vehicle...shall, within thirty days, submit a Certificate of Title...for such motor vehicle endorsed according to law, to the Motor Vehicle Department, accompanied by all documents required to obtain a new Certificate of Title...in the new owner's name...

POINT II

WESTERN SURETY IS RESPONSIBLE FOR ALL LOSS TO EACH CLAIMANT TO A MAXIMUM OF \$20,000.00 PER CLAIMANT.

The bond issued by the appellant to Christopher Dowling and

Joel murphy, dba Auto Sports, expressly protects "any and all persons, firms or corporations for any loss suffered by reason of a violation of the conditions of the bond in an amount up to \$20,000.00." Despite this express language, the appellant attempts to limit its liability to an aggregate amount of \$20,000.00 by relying on Utah Code Annotated, 1953, Section 41-3-16.

This Court has ruled on this precise issue several times. In Dennis Dillon Oldsmobile, GMC, Inc. v. Zdunich, et al., 668 P2d. 557, (1983), this Court stated that: "Our own Court is committed to the rule that the contract of a surety, for hire, is to be strictly construed against the surety." (Quoting J. F. Tolton Investment Company v. Maryland Casualty Company, 77 Utah 226, 230; 293 P. 611, 612 (1930)). This Court made clear that when a surety makes insurance his business for compensation, the Court imposes a strict rule of construction. Any doubtful provisions in the contract, the performance of which the surety guarantees, are to be construed strictly in favor of the insured. Only in the case of a voluntary surety who is acting as such without compensation, should ambiguous terms be construed in favor of the surety. See M. H. Walker Realty Company v. American Surety Company, 60 Utah 435, 463-464; 211 P. 998, 1009-1010 (1922).

In a fact situation similar to that in the present case, the Dillon case dealt with multiple claims on a motor vehicle dealer's bond issued pursuant to Utah Code Annotated, 1953,

Section 41-3-16(1). The language of that bond was identical to the language in the bond which Western Surety issued to Joel Murphy and Christopher Dowling, dba Auto Sports. In the Dillon case this Court found that the language in the bond was not ambiguous. This Court stated:

By the literal language of the bonds, the sureties rendered themselves liable up to a maximum of \$20,000.00 for any loss suffered by any and all persons. In accordance with the general rule of construction referred to above, this language should be strictly construed against the sureties and in favor of the claimants. Furthermore, if the instant bonds were intended only to fulfill the statute, as the sureties insist, the parties could easily have drawn their contract in the exact wording of the statute. Dillon at 562, quoting Royal Indemnity Company v. Special Services Supply Company, 82 Nev. 148, 152; 413 P2d 500, 503 (1966).

This Court held that the sureties had extended their liability beyond that required by statute to \$20,000.00 per claim, holding that it was not against public policy to compel the sureties to do that which they had already bound themselves to do.

In Western Surety Company v. Redding, 62 P2d. 437, 439, (1981), this Court, referring to Utah Code Annotated, 1953, Sections 41-3-16 and 41-3-18, stated that: "This statute should be construed broadly, for the bond was intended to protect all persons doing business with a motor vehicle dealer." This Court previously expressed the same opinion on the subject in the case of Lawrence v. Ward, 300 P2d 619, 621 (1956).

These cases are dispositive of the issue as to whether the appellant is liable in an aggregate amount of \$20,000.00 or in

an amount up to \$20,000.00 per claim. The precise language which was used in the bond in this case has already been held by this Court to be dispositive, and was interpreted to mean that the surety is liable in an amount up to \$20,000.00 per claim. Although the Utah Code Annotated states that the motor vehicle dealer is required to have a bond in an aggregate amount of \$20,000.00, the bond language which the appellant chose to use extended the appellant's liability in excess of the statutory requirement.

POINT III

APPELLANT'S BLANKET RIDER IS INVALID AND INAPPLICABLE TO THE CLAIM OF DEFENDANT DONNA CURRAN.

On June 2, 1982, Christopher Dowling and Joel Murphy, dba Auto Sports, entered into a motor vehicle dealers bond with Western Surety Company. Said bond indemnified that "any and all persons, firms and corporations for any loss suffered by reason of violation of the conditions hereinafter contained, in the penal sum of Twenty Thousand and No/100 Dollars (\$20,000.00)..." (R. 21) Appellant Western Surety Company filed a blanket rider with the Motor Vehicle Department of the State of Utah on August 31, 1983, in which it attempted to retroactively amend all of its bonds then in effect... (R. 122-124) Utah Code Annotated, 1953, Section 31-19-26 states:


No modification of any insurance contract shall be effective unless in writing executed by the insurer, and if it contains conditions limiting or reducing benefits or protection otherwise applicable, such writing shall also be executed by the insured.
(Emphasis added.)

The blanket rider filed by appellant was signed only by a private attorney representing Western Surety Company. The blanket rider was not signed by the insured as required by statute, nor did the original bond provide for the issuance of such a blanket rider. In addition, the blanket rider was not signed by the officers of Western Surety Company as required by Section 31-7-14, Utah Code Annotated, 1953. The blanket rider, is therefore, wholly ineffective.

CONCLUSION

The summary judgment granted to Donna Curran against appellant, Western Surety Company, should be affirmed by the Court for the reasons that appellant, Western Surety Company issued a vehicle salesman bond to Christopher Dowling and Joel Murphy dba Auto Sports and provided for \$20,000.00 coverage to each and every person, firm or corporation suffering loss by reason of any violation of the conditions of the bond by Christopher Dowling and Joel Murphy. Donna Curran suffered a loss by reason of a violation of the conditions of the bond committed by Joel Murphy and Christopher Dowling. The effort by appellant to amend its bond to limit its liability to an aggregate of \$20,000.00 was not and is not effective as against Donna Curran.

Respectively submitted this 1st day of October, 1987.


GARY H. WEIGHT
Attorney for Defendant-Respondent

CERTIFICATE OF MAILING

I hereby certify that I have mailed eight true and accurate copies of the above Respondent's Brief to the Utah Court of Appeals, 400 Midtown Plaza, 230 South 500 East, Salt Lake City, Utah 84102 and one true and accurate copy to Mr. Robert L. Moody, Taylor, Moody & Thorne, 2525 North Canyon Road, P. O. Box 1466, Provo, Utah 84603, postage prepaid this 15th day of October, 1987.


GARY H. WEIGHT

ADDENDUM

58035172

KNOW ALL MEN BY THESE PRESENTS That we Christopher Dowling & Joel Murphy DBA Auto Sport:

_____ of
 Street Address _____ City Provo, Utah
 County of Utah Utah as Principal and WESTERN SURETY COMPANY

a Surety Company qualified and authorized to do business in the State of Utah as Surety are jointly and severally held and firmly bound to the people of the State of Utah to indemnify any and all persons firms and corporations for any loss suffered by reason of violation of the conditions hereinafter contained in the penal sum of Twenty Thousand and no Dollars (\$ 20,000.00) lawful money of the United States for the payment of which well and truly to be made we bind ourselves our heirs executors administrators successors and assigns jointly severally and firmly by these presents

THE CONDITION OF THIS OBLIGATION IS SUCH That

WHEREAS the above bounden principal has applied for a license to do business as a _____ Motor Vehicle Dealer within the State of Utah and that pursuant to the application a license has been or is about to be issued

NOW THEREFORE if the above bounden principal shall obtain said license to do business as such _____ Motor Vehicle Dealer and shall well and truly observe and comply with all the requirements and provisions of THE ACT PROVIDING FOR THE REGULATION AND CONTROL OF THE BUSINESS OF DEALING IN MOTOR VEHICLES as provided by Chapter 3 Title 41 Utah Code Annotated 1953 as amended and indemnify any and all persons firms and corporations for any loss suffered by reason of the fraud or fraudulent representations made or through the violation of any of the provisions of said Motor Vehicle Business Act or any law respecting commerce in motor vehicles or rule or regulation respecting commerce in motor vehicles promulgated by a licensing or regulating authority and shall pay all judgments and costs adjudged against said principal on account of fraud or fraudulent representations or for any violation or violations of said laws rules or regulations during the time of said license and all lawful renewals thereof then the above obligation shall be null and void otherwise to remain in full force and effect Said bounden principal shall also pay reasonable attorneys fees in cases successfully prosecuted to judgment

The Surety herein reserves the right to withdraw as such surety except as to any liability already incurred or accrued hereunder and may do so upon the giving of written notice of such withdrawal to the principal and to the Motor Vehicle Business Administrator provided however that no withdrawal shall be effective for any purpose until sixty days shall have elapsed from and after the receipt of such notice by the said administrator and further provided that no withdrawal shall in anywise affect the liability of said surety arising out of fraud or fraudulent representations or for any violation or violations of said laws rules or regulations by the principal hereunder prior to the expiration of such period of sixty days regardless of whether or not the loss suffered has been reduced to judgment before the lapse of sixty days

Signed and sealed this 2nd day of June 19 82

ATTEST

By _____

I do hereby certify that this photostatic copy is a true and correct copy of the document on file with the Motor Vehicle Business Administration, State of Utah

Approved as to form

Utah State Attorney General's Office

AUTO Sports

BK

Principal

WESTERN SURETY COMPANY

Surety

BY

V. Hintze, Ass't. Sec
 Attorney-in-Fact

INDIVIDUAL ACKNOWLEDGMENT OF PRINCIPAL

STATE OF UTAH

COUNTY OF _____

On this _____ day of _____, 1962, _____ personally came before me, _____, a Notary Public in and for the State of Utah, known to me to be the person, and described in _____, being _____, and acknowledged to me that he executed the same.

(SEAL)

Commission Expires _____

PARTNERSHIP OR FIRM ACKNOWLEDGMENT OF PRINCIPAL

STATE OF UTAH

COUNTY OF _____

On this 25th day of June, 1962, _____ personally appeared _____, known to me to be one of the firm of _____, _____, and who executed the same as and for the said _____.

(SEAL)

Commission Expires October 1964

CORPORATE ACKNOWLEDGMENT OF PRINCIPAL

STATE OF UTAH

COUNTY OF _____

On the _____ day of _____, 1962, _____, in the presence of _____, before me personally came _____, known to me to be the person, who, being by me duly sworn, did depose and say: That he resides in _____, _____, that he is _____ of the _____, the corporation described in and which executed the above instrument, that he was authorized by the Board of Directors of said corporation, and that he signed his name thereto by the order.

(SEAL)

Commission Expires _____ Notary Public

CORPORATE ACKNOWLEDGMENT OF PRINCIPAL

(To be executed by corporation without corporate seal)

STATE OF UTAH

COUNTY OF _____

On the _____ day of _____, 1962, _____, in the year _____, before me personally appeared _____, known to me to be the person, who, being by me duly sworn, did depose and say: That he resides in _____, _____, that he is _____ of the _____, the corporation which executed the above instrument and which is described therein; that he signed the above mentioned instrument on behalf of said corporation; that he was authorized to do so by Article _____ of the Articles of Incorporation of the said corporation, and by order of the Board of Directors of said corporation; and that his signature as it thus appears in the above instrument is binding upon the corporation.

(SEAL)

Commission Expires _____ Notary Public

AFFIDAVIT OF QUALIFICATION

SQU. DAKY
ST. OF _____

COUNTY OF _____

I, _____, being first duly sworn, on oath depose and say that _____, V. Hintze, Ass't. Sec., of _____, and that he is duly authorized to execute and deliver the foregoing obligations, that said company is authorized to execute the same and has complied in all respects with the Laws of Utah in reference to becoming sole surety upon bonds, undertakings and obligations.

Subscribed and sworn to before me this _____ day of _____, 1962.

My Commission Expires _____

W. Swanson

V. Hintze, Ass't. Sec.

BLANKET RIDER

It is agreed and understood that any Motor Vehicle Dealer Bond issued by Western Surety Company in the State of Utah filed with the Motor Vehicle Department, State of Utah, is hereby amended pursuant to the attached bond form, shown as Exhibit "A".

This is a blanket rider pertaining to all Utah Motor Vehicle Dealer Bonds and in effect for all such bonds now on file or to be subsequently issued by Western Surety Company as if it were attached to all bonds individually.

DATED this 31st day of August, 1983.

WESTERN SURETY COMPANY

BY: LS/
TERRY M. PLANT
Attorney for Western Surety Co.

SUBSCRIBED AND SWORN TO before me this _____ day of _____, 1983.

NOTARY PUBLIC
Residing at:

My Commission Expires:

BOND OF MOTOR VEHICLE DEALER, SALESMAN OR CRUSHER

KNOW ALL MEN BY THESE PRESENTS: That we, _____
_____ of
Street Address _____ City _____
County of _____, Utah, as Principal and _____

_____ a Surety Company qualified and authorized to do business in the State of Utah as Surety, are jointly and severally held and firmly bound to the people of the State of Utah to indemnify persons, firms and corporations for loss suffered by reason of violation of the conditions hereinafter contained, in the total aggregate annual penal sum of _____ Dollars (\$ _____), as required by Utah Code Annotated, Section 41-3-16(1), 1953 as amended, lawful money of the United States for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly, severally and firmly by these presents. The total aggregate annual liability of this bond, regardless of the number of claims, may not exceed \$ _____.

THE CONDITION OF THIS OBLIGATION IS SUCH, That,

WHEREAS, the above bounden principal has applied for a license to do business as a _____ Motor Vehicle _____ within the State of Utah, and that pursuant to the application, a license has been or is about to be issued.

NOW, THEREFORE, if the above bounden principal shall obtain said license to do business as such _____ Motor Vehicle _____ and shall well and truly observe and comply with all requirements and provisions of THE ACT PROVIDING FOR THE REGULATION AND CONTROL OF THE BUSINESS OF DEALING IN MOTOR VEHICLES, as provided by Chapter 3, Title 41, Utah Code Annotated, 1953, as amended, and indemnify persons, firms and corporations in accordance with Utah Code Annotated, Section 41-3-16(1), 1953 as amended, for loss suffered by reason of the fraud or fraudulent representations made or through the violation of any of the provisions of said Motor Vehicle Business Act or any law respecting commerce in motor vehicles, or rule or regulation respecting commerce in motor vehicles promulgated by a licensing or regulating authority and shall pay judgments and costs

judged against said principal so as not to exceed a total aggregate annual liability of \$ _____ regardless of the number of claims on this bond on account of fraud or fraudulent representations or for any violation or violations of said laws, rules or regulations during the time of said license and all lawful renewals thereof, then the above obligation shall be null and void, otherwise to remain in full force and effect. Said bounden principal shall also pay reasonable attorney's fees in cases successfully prosecuted to judgment.

The Surety herein reserves the right to withdraw as such surety except as to any liability already incurred or accrued hereunder and may do so upon the giving of written notice of such withdrawal to the principal and to the Motor Vehicle Business Administrator; provided, however, that no withdrawal shall be effective for any purpose until sixty days shall have elapsed from and after the receipt of such notice by the said administrator, and further provided that no withdrawal shall in anywise affect the liability of said surety arising out of fraud or fraudulent representations or for any violation or violations of said laws, rules or regulations by the principal hereunder prior to the expiration of such period of sixty days, regardless of whether or not the loss suffered has been reduced to judgment before the lapse of sixty days.

Signed and sealed this _____ day of _____, 19 _____

ATTEST

By _____

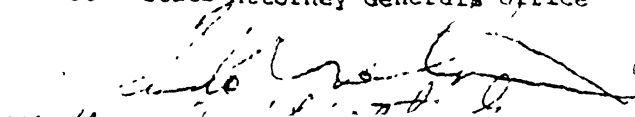
Principal

Surety

Attorney-in-Fact

Approved as to form

Utah State Attorney General's Office

 5-27-53