

1987

Western Surety Company v. 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 Behzadi, Earl  
Snyder, Donna Curran, University of Utah Credit  
Union, and John Does 1 through 20 : Amicus Brief

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 BEHZADI, EARL  
SNYDER, DONNA CURRAN,  
UNIVERSITY OF UTAH CREDIT  
UNION, and JOHN DOES 1 through  
20,

Defendants/Respondents.)

Case No. 870209-CA

Category No. 14b

AMICUS CURIAE BRIEF OF  
UNIVERSITY OF UTAH CREDIT UNION

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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MAR 17 1998

IN THE UTAH COURT OF APPEALS

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Plaintiffs/Appellants,	)	
	)	
-vs-	)	
	)	Case No. 870209-CA
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Defendants/Respondents.)	)	

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AMICUS CURIAE BRIEF OF  
UNIVERSITY OF UTAH CREDIT UNION

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NATURE OF CASE

Appellant Western Surety Company filed an interpleader action on a Motor Vehicle Dealer Bond. Appellant now appeals from a Summary Judgment in favor of Respondent Donna Curran. The trial court, in granting Partial Summary Judgment for University of Utah Credit Union and Summary Judgment for Donna Curran concluded that Appellant's Motor Vehicle Dealer Bond was "not subject to an aggregate annual limit of \$20,000.00 but that each

individual claim is subject to a \$20,000.00 limit." This conclusion is the primary issue on appeal.

#### DISPOSITION IN LOWER COURT

1. The Fourth Judicial District Court entered a ruling on September 30, 1986, granting partial summary judgment in favor of Defendant University of Utah Credit Union, holding that the Plaintiff's liability on its bond was not limited to a total of \$20,000.00 and that Plaintiff's liability was up to \$20,000.00 to each person who would be entitled to recover on the bond. Partial Summary Judgment was entered on or about November 12, 1986. This Partial Summary Judgment is not the subject matter of this appeal.

2. On January 20, 1987, (based on its ruling of January 6, 1987) the District Court entered Summary Judgment against Plaintiff in favor of Defendant Donna Curran, on the basis of liability that the bond is not limited to a total of \$20,000.00.

3. On January 22, 1987, Plaintiff-Appellant filed its Notice of Appeal.

4. On March 6, 1987, the District Court deemed its judgment entered January 20, 1987 to be final as to Defendant Curran, but that such action did not terminate the action of the

other parties (including the University of Utah Credit Union) which remained undetermined.

#### RELIEF SOUGHT ON APPEAL

Donna Curran has requested that this court affirm the lower court's determination that the motor vehicle dealer bond was not limited to an aggregate amount of \$20,000.00; and that the lower court appropriately awarded attorney's fees to Defendant. University of Utah Credit Union, as Amicus Curiae, supports the position of Donna Curran.

#### STATEMENT OF FACTS

The facts of this case as applicable to this Appeal are set forth in the Briefs of the Appellant and the Respondent.

#### ARGUMENT

##### POINT I

PLAINTIFF'S LIABILITY ON THE 1982 BOND IS NOT LIMITED TO AN AGGREGATE ANNUAL AMOUNT OF \$20,000.00 BECAUSE OF A SUBSEQUENT CHANGE IN A STATUTE.

Appellant asserts that liability on the 1982 bond is limited to \$20,000 aggregate annual liability because of the change made in 1983 to Utah Code Annotated, 1953, §41-3-16(1). The amendments are applicable as a condition applicable before a new or used motor vehicle dealer license is issued. The 1982 bond was already in place when the statutory change was made and



a motor vehicle license for Autosports was in effect. The amendment to §41-3-16(1) is not applicable retroactively to existing bonds.

The Utah Supreme Court construed the same bond in Dennis Dillon Oldsmobile GMC, Inc. v. Zdunich and American Manufacturers Mutual v. Resort Campers Ltd., et. al., 668 P.2d 557, (Utah 1983). In ruling on this exact bond language involved in this case, the Court held that:

By the literal language of the bonds, the sureties rendered themselves liable up to a maximum of \$20,000 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, '[i]f the instant bond[s] 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.'" (quoting Royal Indemnity Company v. Special Service Supply Company, 82 Nev. 148, 152, 413 P.2d 500, 503 (1966)).

Id. at 561.

Recently, the Utah Court of Appeals followed Dillon in Shelter America Corporation v. Ohio Casualty and Insurance Company, 745 P.2d 843 (Utah App. 1987). In Shelter America Corporation, the Court recognized the statutory changes which took place in 1983 but ruled that the terms of the bond applied. Liability was extended for multiple claims of \$20,000.00 each by Shelter America Corporation.

In Zele v. Industrial Commission, 102 Utah 164, 167, 128 P.2d 751, 752 (1942), the Utah Supreme Court stated, as a general proposition, that: "But where a bond is by its terms more comprehensive than required by the statute the surety is liable to the full extent of the bond."

Also, in Smith v. Bowman, 32 Utah 33, 39, 88 P.687, 689 (1907), the Utah Supreme Court stated:

"Such an undertaking [in excess of the minimum required by statute], if not expressly authorized by statute, is, nevertheless, not prohibited. It is not against public policy or good morals, nor in contravention of any statute. To hold such an undertaking valid and binding is only to compel the sureties to do the things they bound themselves to do". (emphasis added)

Western Surety is obligated to the full extent of the bond issued to Autosports. This liability is the liability Western Surety contractually agreed to. The District Court correctly ruled that Western Surety was so obligated.

## POINT II

### APPELLANT'S BLANKET RIDER IS INVALID AND/OR INAPPLICABLE TO DEFENDANTS' CLAIMS

The blanket rider referred to by Appellants was signed only by a private attorney representing Western Surety Company. The blanket rider was not signed by the officers of Western Surety Company as required by statute. Utah Code Annotated,

1953, §31-7-14 requires "Every insurance contract shall be executed in the name of and on behalf of the insurer by its officer, employee, or representative duly authorized by the insurer." In addition, the blanket rider was not signed by the insured as required by Utah Code Annotated, 1953 §31-19-26. This statute 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)

Moreover, the original bond did not provide for the issuance of such a blanket rider. The blanket rider is, therefore, ineffective to modify the bond liability.

### POINT III

DEFENDANTS ARE ENTITLED TO RECOVER ATTORNEY'S  
FEES UNDER THE BOND AND AS PART OF ITS  
DAMAGES INCURRED IN THIS TRANSACTION.

Defendant Curran was granted attorneys fees by the trial court based on the terms of the bond. The University of Utah Credit Union alternatively believes attorneys fees are recoverable as a part of the loss suffered by reason of the violation of the bond conditions.

The Motor Vehicle Dealers Bond #58035172, issued by Western Surety Company to Autosports provides indemnification to

"any and all persons...for any loss suffered by reason of violation of the conditions" contained in the bond. The measure of damages for the loss suffered by the University of Utah Credit Union by reason of the violation of the condition contained in the bond is the loss resulting from the promissory note which was fully secured by the motor vehicle in question.

Pursuant to paragraph 10 of the University of Utah Credit Union promissory note, the amount due on the note includes (in addition to principal and interest), "all usual and customary costs of collection permitted by law, including reasonable attorney's fees and costs of court." Since the attorney's fees incurred with collection of the note are recoverable as damages involved with the loan transaction, Western Surety Company is liable for the entire amount due on the note including a reasonable attorney's fee. If similar contract conditions do not apply to the Curran transaction, the Court should establish the right to recover attorneys fees in appropriate circumstances as a part of the loss incurred as an additional basis for recovery of fees.

#### CONCLUSION

Appellant Western Surety Company bound itself to pay each claimant up to \$20,000.00, and is responsible to pay reasonable attorney's fees to each claimant who successfully prosecute to judgment. The bases for these conclusions are:

1. Plaintiff is responsible to indemnify losses to the extent of its contract.

2. Plaintiff's blanket rider was not signed by either the insured nor an officer of Western Surety Company and is, therefore, ineffective.

3. The 1983 amendment to Utah Code Annotated, 1953, §41-3-16(1) is not applicable retroactively. The amendment applies to bonds associated with applications after 1983.

4. The language used by Western Surety Company in its 1982 bond with Christopher Dowling and Joel Murphy dba Autosports provides for payment up to \$20,000.00 to each claimant.

5. The language used by Western Surety Company in its 1982 bond with Christopher Dowling and Joel Murphy dba Autosports indemnifies any and all persons for any loss suffered by reason of violation of the conditions contained in the bond. The loss suffered includes attorneys fees and/or collection costs recoverable according to the contract provisions.

DATED this \_\_\_\_ day of March, 1988.

BRUCE L. RICHARDS & ASSOCIATES

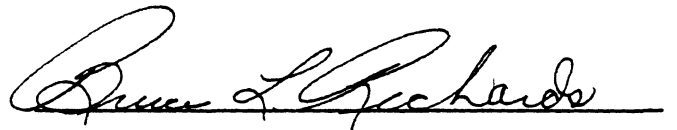
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MAILED POSTPAID this 10th day of March, 1988, four (4)  
copies of the attached Amicus Curiae Brief of University of Utah  
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A handwritten signature in cursive script, reading "Bruce L. Richards", written over a horizontal line.