

1988

# Irshad A. Aadil v. Toyota Motor Sales USA Inc., a California Corporation : Brief of Respondent

Utah Court of Appeals

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BRIEF

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ET NO. 880604

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

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IRSHAD A. AADIL,

Appellant,

Case No. CA-880604-CA

vs.

TOYOTA MOTOR SALES U.S.A.,  
INC., a California corporation,

Case Priority No.: 14(b)

Respondent.

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BRIEF OF RESPONDENT TOYOTA MOTOR SALES U.S.A, INC.

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Appeal from Judgment of Dismissal of the  
Third Judicial District Court for Salt Lake County  
Honorable Pat B. Brian

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**FILED**

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COURT OF APPEALS

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BRIEF OF RESPONDENT TOYOTA MOTOR SALES U.S.A, INC.

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STATEMENT OF ISSUES ON APPEAL

I. Whether the trial court properly entered its Judgment of Dismissal because appellant's Amended Complaint fails to state a claim upon which relief can be granted?

II. Whether this Court will assume the correctness of the lower court's judgment where, as here, appellant fails to cite the Record to support his factual contentions on appeal and further mischaracterizes the Record on procedural matters?

III. Whether this Court should refuse to consider issues improperly raised and addressed by appellant for the first time on appeal?



IV. Whether Respondent is entitled to an award of attorneys' fees and double costs for the reason that the present appeal is frivolous, having no legal or factual basis?

#### DETERMINATIVE RULES AND STATUTES

The Rules and Statutes relevant to a determinative resolution of this matter are: (1) Rule 33(a), Rules of the Court of Appeals; (2) Rules 8 and 12, Utah Rules of Civil Procedure; (3) Williams v. State Farm Insurance Co., 656 P.2d 966 (Utah 1982); and (4) Heathman v. Hatch, 13 Utah 2d 266, 372 P.2d 990 (1962).

#### STATEMENT OF THE CASE

##### A. Nature of the Case.

This case is based upon an unrecognized theory of recovery asserted by attorney Irshad A. Aadil ("Aadil") against Respondent Toyota Motor Sales, U.S.A., Inc. ("Toyota"), in order to recover for Aadil's subjective dissatisfaction with the power and adequacy of the engine contained in the 1987 4x4 Toyota Van.

##### B. Course of Proceedings In Lower Court:

1. On or about July 10, 1987, Aadil commenced this action on behalf of Sanjida Hasan, M. Hasan and himself by filing a Complaint which generally alleged plaintiffs' personal

dissatisfaction with the power and adequacy of the engine contained in Toyota's 1987 4x4 Van. (R. at 2-10.)

2. On August 17, 1987, Toyota filed a Motion to Dismiss the Complaint based upon plaintiffs' failure to state any claim upon which relief could be granted, or in the alternative, for a More Definite Statement and to Strike. (R. at 29-30.)

3. On October 16, 1987, at the hearing on Toyota's Motion to Dismiss, the court ordered Toyota to respond to plaintiffs' discovery requests and allowed plaintiffs an opportunity to amend their otherwise deficient Complaint. The court also continued the hearing on Toyota's Motion to Dismiss until the plaintiffs had an opportunity to amend their Complaint. (R. at 56.)

4. Toyota answered Aadil's non-objectionable discovery requests on November 9, 1987. (R. at 61-62.) Aadil moved the court to compel discovery of matters to which Toyota had objected. (R. at 58-59.) At the hearing on Aadil's Motion to Compel, Judge Brian indicated that Toyota "responded in good faith in answering" Aadil's discovery requests, (R. at 80) and also allowed a supplemental discovery response which was filed by Toyota on February 2, 1988. (R. at 79-80.)

5. Despite their inclusion in Aadil's List of Parties, (Appellant Brief at p. i), on December 18,

1987, the claims of Sanjida Hasan and M. Hasan were dismissed with prejudice. (R. at 84.) No appeal was taken from such dismissal.

6. On April 5, 1988, Aadil filed his Amended Complaint with the lower court, alleging the same theories of recovery contained in his original Complaint. (R. at 85-98.)

7. On May 12, 1988, Toyota filed a Second Supplemental Answer to Aadil's discovery requests which was composed of a simple acknowledgment of the existence of magazine test results, other than those contained in Toyota files, the contents of which Aadil already possessed. (R. at 99.)

8. On May 13, 1988, Toyota renewed its Motion To Dismiss which was heard by Judge Brian on May 27, 1988. (R. at 101-102 and 118.) Judge Brian dismissed Aadil's claims with prejudice for the reason that the Amended Complaint failed to set forth any "short plain statement of claims showing the pleader to be entitled to relief." (R. at 143-144.)

9. On June 2, 1988, the trial court entered its Order of Dismissal. (R. at 143-144.) Aadil's Notice of Appeal was filed on July 1, 1988. (R. at 157.)

**B. Statement Of Facts**

The unsupported Statement of the Case contained in Aadil's opening brief goes beyond the Record and reasonable

inferences which might be made therefrom. Therefore, Toyota offers the following Statement of Facts to accurately present and clarify the Record.

1. Plaintiff allegedly purchased a 1987 Toyota 4x4 Van. (R. at 90.)

2. Plaintiff alleged that the engine was not as powerful as he subjectively desired. (R. at 89, 90 and 91.)

3. Aadil did not allege that the engine he actually received was physically different from what was represented, or that the engine for the subject Van contained any defect. (R. at 85-92.)

4. Count I of Aadil's Amended Complaint, brought on behalf of Sanjida and M. Hasan asserts the Hasan's opinion that the subject van "did not have an adequate and competent engine." (R. at 89.)

5. The claims of Sanjida Hasan and M. Hasan have been dismissed with prejudice. (R. at 83.) The Stipulation and Order of Dismissal is signed by Aadil. Id.

6. Count II of Aadil's Amended Complaint alleges that the engine of the subject van failed to show its "real guts" after the initial fifteen hundred miles. (R. 90.)

7. Count III of Aadil's Amended Complaint alleges that Toyota neglected to install an "adequate" engine in the

subject van and that due to such alleged neglect, Aadil has suffered inconvenience and hardship. (R. at 91.)

8. Count IV of Aadil's Amended Complaint alleges that Toyota knowingly and willfully misrepresented the performance of the engine with which the subject van is equipped. (R. at 91.)

9. Aadil failed to assert any factual basis for the allegation that Toyota "knowingly" or "willfully" misrepresented the performance of the subject van's engine. (R. at 88-92.)

10. The Amended Complaint did not allege and Aadil did not present any argument with respect to the following issues, addressed for the first time in Aadil's appellate brief:

- (a) products liability;
- (b) "Lemon Law Reform" and "breach of agreement;"
- (c) choice of remedies; and
- (d) "culpable conduct" of Toyota. (R. at 88-92.)

11. The Amended Complaint did not allege any breach of warranty. (R. at 88-92.)

#### SUMMARY OF THE ARGUMENT

The focus of Toyota's response to Aadil's attempted appeal is upon the deficiency of Aadil's Amended Complaint and its failure to state any legal claim upon which relief can be

granted. The Amended Complaint in the instant case does not even satisfy the minimal requirements of Rules 8 and 12 of the Utah Rules of Civil Procedure. Critically, Aadil admits in his brief that his claims for recovery are based upon "belief" and "internal reliance." Under these circumstances, the Utah Supreme Court has consistently declared that general accusations in the nature of conclusions of the pleader will not stand up against a motion to dismiss, especially where, as here, plaintiff does not suggest that the subject van engine was physically different from what was represented or that the engine contained any physical defect. Indeed, plaintiff's allegations are not only inadequately conceived, but also fail to provide notice of any recognized legal claim.

Although Aadil suggests that the judgment of dismissal in this matter was inappropriately entered, Aadil had adequate time to prepare an amended pleading. Nevertheless, Aadil failed to modify the Counts of his original Complaint, even after being allowed to conduct discovery and after the lapse of several months. In addition, the Court properly entered its judgment of dismissal after service of the proposed Order to Aadil. Accordingly, Aadil abandoned any objections he may have made as to the form of such Order by failing to secure a ruling with respect thereto. In any event, Aadil's objections are denied by necessary implication.

Although Aadil raises numerous issues relating to warranty, breach of agreement, Lemon Law reform and merchantability, none of these arguments are contained within the Amended Complaint and were not sufficiently raised before the trial court to obtain a ruling thereon. Therefore, such arguments cannot be properly considered by this Court because they were presented for the first time on appeal.

Finally, because this appeal is taken without any legal or factual basis, and because Aadil has harassed Toyota through other litigation, Toyota is entitled to an award of double costs and attorneys' fees due to the frivolous nature of this appeal.

#### ARGUMENT

##### POINT I

PLAINTIFF'S AMENDED COMPLAINT FAILS TO STATE  
A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

A. Count I of Aadil's Amended Complaint Relating to the  
Claims of Sanjida Hasan and M. Hasan Has Been  
Dismissed with Prejudice.

Count I of the Amended Complaint deals only with the claims of Sanjida Hasan and M. Hasan. (R. at 83.) On December 15, 1987, Aadil, attorney for the Hasans, stipulated and moved the lower Court for an order of dismissal with prejudice of the claim asserted by the Hasans. Id. Based upon the Stipulation and Motion of the parties, the lower Court entered its Order

dismissing the Hasan claims with prejudice. (R. at 84.) No appeal was taken from such Order. Accordingly, Count I of plaintiff's Amended Complaint cannot, under any set of facts state a claim upon which relief can be granted and the lower Court's Order must be affirmed.

B. Counts II And III of Aadil's Amended Complaint Do Not Satisfy the Requirements of Rules 8 and 12, Utah Rules of Civil Procedure.

The Utah Supreme Court has stated that the objective of Rules 8 and 12 of the Utah Rules of Civil Procedure:

is to require that the essential facts upon which redress is sought be set forth with simplicity, brevity, clarity and certainty so that it can be determined whether there exists a legal basis for the relief claimed and, if so, so that there will be a clearly defined foundation upon which further proceedings by way of . . . trial can go forward in an orderly manner.

Heathman v. Hatch, 13 Utah 2d 266, 372 P.2d 990, 992 (1962).

The Utah Supreme Court declared that general accusations in the nature of conclusions of the pleader "will not stand up against a Motion to Dismiss. . . ." Heathman, 372 P.2d at 991. The Court also declared that "[a] Complaint must give the opposing party fair notice of the nature and basis or grounds of the claims and general indication of the type of litigation involved. Utah Steel & Iron Co. v. Bosch, 25 Utah 2d 85, 475 P.2d 1019, 1020 (1970).



Aadil's Amended Complaint fails to meet these standards. In his Amended Complaint, Aadil alleges that he was personally dissatisfied with the power and adequacy of the subject van's engine. (R. at 90-92.) Aadil did not, however, even suggest that the van's engine was physically different from what was represented or that the engine contained any physical defect. Rather, Aadil merely asserted his personal disagreement with Toyota's advertising which states that its van was capable of "quick acceleration" and a "nimble mover." Notably, Aadil's Amended Complaint does not contain any allegation of "breach of warranty," "Duty" or "Merchantability" as Aadil now argues on appeal. (Aadil Brief at pp. 13-17.) Instead Aadil's pleading merely complains generally that the engine contained in Toyota's 1987 424 van was not as powerful as he would have liked it to be. (R. at 88-92.)

For example, Count II of the Amended Complaint alleges the van failed to demonstrate its "real guts." (R. at 90.) No such vague and subjective theory of recovery can or should be recognized by this Court. Count III of plaintiff's Complaint is likewise, based solely upon plaintiff's subjective dissatisfaction with the "adequacy" of the engine installed in the subject van. (R. at 91.) Under these circumstances, Aadil urges this Court to allow recovery because "he strongly believes" that there are questions as to "warranty, duty and

merchantability." (Aadil's brief at p. 16.) Nevertheless, Aadil acknowledges that he "does not claim his expert witnesses are absolutely right" or that "he has greater chance of prevailing than" Toyota. Id. In summary, Aadil was subjectively disappointed with his 1987 Toyota 4x4 van and believes, without more, he is entitled to recover damages.

In support of his nebulous allegations of dissatisfaction, Aadil cites: Christopher v. Larson Ford Sales Inc., 557 P.2d 1009 (Utah 1976); Seekings v. Jimmy GMC of Tucson, Inc., 638 P.2d 210 (Ariz. 1981); Morris v. Russell, 120 Utah 2d 545, 236 P.2d 451 (1951); Nielson v. Hermansen, 109 Utah 180, 166 P.2d 536 (1946); and Winegar v. Slim Olsen, Inc., 122 Utah 487, 252 p.2d 205 (1953). None of these cited authorities serve to validate Aadil's unrecognized and ill conceived theories of recovery. On the contrary, Aadil's cited authorities support Defendants Motion to Dismiss and are otherwise distinguished from and not applicable to the instant case.

For example, in Christopher, the Court stated that:

In transactions such as the sale of a motor vehicle a certain amount of sales talk or "puffing" by the seller is to be expected, for which the law should make due allowance.

Christopher, 557 P.2d at 1013. Surely, Toyota's statements that its van is capable of "quick acceleration" and that it is a "nimble mover" are acceptable sales talk and puffing for

which Utah law makes due allowance. Furthermore, the Christopher, decision is clearly distinguished from the facts of the instant case because the vehicle in Christopher, contrary to dealer warranties, was not what it was represented to be and had various physical defects, including:

difficulty in starting, the engine overheating, the transmission slipping in and out of gear, the interior auxiliary motor refusing to operate, and the interior appliances, including the sink and toilet, not working properly.

Id. at 1011. In contrast, the engine in the Toyota 1987 4x4 van purchased by Aadil was precisely what it was represented to be, a "2.2 liter 4 cylinder overhead valve EFI engine that develops 101 hp," without any physical defect. Aadil merely complained that the van engine did not satisfy him personally.

Similarly, the Seekings decision is inapplicable to this case because the plaintiffs therein discovered and alleged that the vehicle purchased had physical defects as follows:

the gas gauge and power generator did not work, the furnace would not start, the carburetor did not function properly, and the gas mileage was poor . . . . the passenger door was drafty, the motor stalled, the air conditioner malfunctioned, and sewage backed upon into the bathtub.

Seekings, 638 P.2d at 213. In contrast, Aadil simply maintains that he should be compensated for his subjective dissatisfaction and his "inner reliance on Toyota." (Aadil's Brief at pp. 14 and 16.)

The Winegar decision is also distinguished from the instant case for the reason that the plaintiff alleged negligent repair of a vehicle's oil line as opposed to an undefined personal dissatisfaction with a product's composition. Winegar, 252 P.2d at 206. Critically, all of Aadil's cited authorities involved claims of breach of warranty. No such claim is even mentioned in Aadil's Amended Complaint. (R. at 85-92.)

Both the Morris and the Nielson decisions are inapplicable to the instant case because the plaintiffs therein were given a product or payment other than what they were represented to be. In Morris, the plaintiff was promised pay of one hundred dollars per month but never received any such payment in over a six years of employment. Morris, 236 P.2d at 454. In Nielson, the plaintiff was promised "Federation seed wheat," but the evidence was that he received something different. Nielson, 166 P.2d at 538. In the instant case there is no allegation that the engine received by Aadil was physically different from what was represented, or that the van engine had any defect. (R. at 85-92.)

Under the circumstances of the instant case, public policy weighs heavily against recovery for Aadil's subjective dissatisfaction with a product which has no physical defect and which is precisely what it was represented to be. If Aadil desired a more powerful vehicle, he should have purchased an

automobile with a larger engine. Clearly, the judicial process should not be used for the purpose of litigating an individual's general accusations and unsupported conclusions in the form of vague and unrecognized theories of recovery.

Because Counts II and III of Aadil's Amended Complaint constitute general accusations in the nature of Aadil's personal dissatisfaction and conclusory opinion, they fail to give Toyota fair notice of any recognized legal claims or the nature and basis of such claims. Accordingly, Counts II and III of the Amended Complaint cannot "stand up against a Motion to Dismiss . . ." Heathman, 372 P.2d at 991.

C. Count IV of Aadil's Amended Complaint Constitutes A General Accusation In The Nature Of A Conclusion Of The Pleader And Is Subject To Dismissal As A Matter Of Law.

When the pleader complains of conduct described as knowing and willful misrepresentation, the allegation of the conclusion is not sufficient. "The pleading must describe the nature or substance of the acts or words complained of." Williams v. State Farm Insurance Co., 656 P.2d 966, 971 (Utah 1982).

In Williams, Supreme Court clearly stated the scope and necessity of particularized pleading as follows:

The rule 9(b) [Utah Rules of Civil Procedure] requirement should not be understood as limited to allegations of common-law fraud. The purpose of that requirement dictates that it reach all circumstances where the pleader alleges the kind of misrepresentations, omissions, or other deceptions covered by

the term "fraud" in its broadest dimension. Consequently, if the pleading had merely alleged that the insured had given "fraudulent" or "deceptive" or "misrepresenting" answers, it would have been insufficient.

Indeed with respect to allegations of fraud and misrepresentation, Rule 9(b) specifies that "the circumstances constituting fraud . . . shall be stated with particularity." In Heathman v. Hatch, 13 Utah 2d 266, 267-68, 372 P.2d 990, 991 (1962), a complaint charging a lawyer with "fraud," "conspiracy," and "negligence" was dismissed for failure to state a cause of action. In affirming unanimously, the Utah Supreme Court stated:

It is to be noted that the terms "fraud," "conspiracy" and "negligence" are but general accusations in the nature of conclusions of the pleader. They will not stand up against a motion to dismiss on that ground.

Id.

In the instant case Count IV states unsupported allegations of willful misrepresentation, without making any plain statement of the prima facie elements of any recognized cause of action or of facts upon which such any such claim might be based. In short, the Amended Complaint fails to provide any simple, concise or direct allegation of legal impropriety.

If, a Complaint fails to provide notice of the nature and basis of the claim, the court has held that "it is clear beyond question that no claim [is] stated upon which relief [can] be

granted." Utah Steel, 475 P.2d at 1020. As noted by the Utah Supreme Court, the plaintiff has the responsibility to set forth "basic facts . . . with sufficient particularity to show what facts are claimed to constitute such charges." Williams v. State Farm Insurance, 656 P.2d 966, 971 (Utah 1982). Having failed this burden, Aadil's claims of knowing and willful misrepresentation must be dismissed. This is especially true in the context of the sale of a vehicle, where the Utah Supreme Court has declared that "a certain amount of sales talk or 'puffing' by the seller is to be expected, for which the law should make due allowance." Christopher, 557 P.2d at 1013.

## POINT II

THIS COURT SHOULD ASSUME THE CORRECTNESS OF  
THE JUDGMENT BELOW.

A. Aadil Failed to Refer to the Record to Factually  
Support His Contentions on Appeal.

The Utah Supreme Court has consistently held that it will assume the correctness of the judgment below, where, as here, an appellant does not support facts set forth in his or her Brief with citations to the Record. Trees v. Lewis, 738 P.2d 612, 613 (Utah 1987) and State v. Tucker, 657 P.2d 755, 756-57 (Utah 1982). In Trees, this Court declared that it:

will assume the correctness of the judgment below  
where counsel on appeal does not comply with the  
requirements of Rule 75(p)(2)(2)(d), Utah Rules of

Civil Procedure, as to making a concise statement of facts and citation of the pages in the record where they are supported. (Citations omitted.)<sup>1</sup>

In Trees, the fact statement in the appellant's Brief referred to documents by their exhibit numbers, but contained no citations to the Record. Occasional references to the record appeared in the Argument section of the Brief. Trees, 738 P.2d at 612, n.2.

Similarly, in State v. Tucker, 657 P.2d 755, 756-57 (Utah 1982), the Court concluded that:

A separate and independent basis for the affirmance of the trial court is that the defendant failed to refer to any portion of the record that factually supports his contention on appeal.

In the instant case, despite references to his own Addendum, containing information provided for the first time an appeal and otherwise outside the scope of the Record, Aadil failed to refer to the Record to support any of the factual contentions contained in paragraphs 1-11, 19, 22-24, 27-28 of his Statement of the Case. (Aadil's Brief at pp. 4-6, 8-10.)

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<sup>1</sup>Rule 24(a)(6), Rules of the Court of Appeals, which became effective in April 1987, ultimately replaced former Utah Rule of Civil Procedure 75(p)(2)(2)(d), but did not alter the requirement that citations to the record to support the fact statement in the Briefs. See Trees, 738 P.2d at 613, n.3.



Likewise, Aadil's Statement of the Nature of the Proceedings is unsupported, argument of counsel and otherwise mischaracterizes the claims contained in Aadil's Amended Complaint. The other paragraphs contained in Aadil's Statement of the Case merely make reference to the case's procedural history and include Aadil's own editorial and argumentative commentary. Accordingly, this Court should assume the correctness of the judgment below based upon Aadil's failure to refer to any factual support in the Record, and may affirm the judgment on this independent basis.

**B. The Trial Court Properly Dismissed Aadil's Ill-Conceived and Unrecognized Theories of Recovery.**

Aadil contends that the lower Court's Order of Dismissal should be reversed because he was not allowed a sufficient opportunity to amend his Complaint and because the Court improperly entered its Order of Dismissal with prejudice prior to the expiration of five days from service of such document. Aadil's contentions, however, are unsupported by the facts and law as set forth in detail below.

Aadil's contention that there was no opportunity to amend his Complaint is so transparently contrived as to warrant sanctions for a frivolous appeal. The facts of this case demonstrate that Appellant had ample opportunity to amend his

Complaint. At the initial hearing on Toyota's Motion to Dismiss in October of 1987, the Court indicated that Aadil's Complaint was deficient. As an accommodation to Aadil, the Court allowed certain discovery to proceed in order to provide for a possible amended complaint. (R. at 56.) The Court also continued Toyota's Motion to Dismiss to a future date, due to the obvious lack of any factual or legal basis for relief in the original Complaint.

Toyota provided a good faith discovery response to Aadil by November 9, 1987. (R. at 61-62.) On February 2, 1988, Toyota provided Aadil with a complete Supplemental discovery response, with the limited exception of Toyota's May 12, 1988 acknowledgment of the existence of certain magazine articles already in Aadil's possession. (R. at 99.) Thus, Appellant had numerous months to prepare an Amended Complaint and to remove the claims of the Hasans which had been previously dismissed from his Complaint. Indeed, Appellant had at least ten days to prepare an amended complaint following the filing of Toyota's Second Supplemental Discovery Response and before the hearing on Toyota's Motion to Dismiss.

Moreover, the Second Supplemental Discovery Response added nothing to the information already available to Aadil as early

as February 2, 1988.<sup>2</sup> (R. at 99.) Appellant's contention concerning the provision of only a "rough draft" of an Amended Complaint to Mr. Chai is hardly tenable in light of the fact that the alleged "draft" was also filed as Aadil's Amended Complaint with the lower court on April 5, 1988. Appellant's suggestion that it was evident that the Amended Complaint was only a "rough draft" based upon the list of parties that needed to be removed is likewise untenable for the reason that the same parties are currently listed in Aadil's appellate brief at p. i.

Under these circumstances, the trial court properly reviewed the pleadings of record and determined that Aadil's essentially unchanged Amended Complaint failed to state a claim upon which relief could be granted.

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<sup>2</sup>The February 2, 1988 response to Interrogatory No. 15 states as follows:

15. Please state the names of the magazines which have tested your 1985, 1986 and 1987 van models.

ANSWER: Vans & Trucks, Truckin' and Motor Trend. Attached are copies of these articles.

The May 12, 1988 discovery response merely acknowledged the following:

Interrogatory No. 15: Please state the names of the magazines which have tested your 1985, 1986 and 1987 van models.

ANSWER: Toyota acknowledges the existence of magazine test results other than those contained in Toyota files. Copies of materials provided by Irshad Aadil are attached hereto as Exhibit "A." (R. at 99.)

Aadil's contentions relative to the provisions of Rule 2.9 of the Rules of Practice for the District Courts are likewise inapplicable in the instant case. Aadil contends that Rule 2.9 was violated as a result of the court's signing of the Order of Dismissal prior to the expiration of five days from service of documents and prior to Aadil's submission of objections.

Under similar circumstances, in Tolboe Construction Co. v. Staker Paving & Construction Co., 682 P.2d 843, 848 (Utah 1984), the Utah Supreme Court concluded that:

The fact that the court signed the documents prior to plaintiffs' submission of objections and prior to the expiration of five days from the service of the documents, does not constitute a violation of this latter requirement. The requirement as well as the rule itself are binding only upon counsel, not upon the trial court. The rule does not therefore preclude the court from signing the documents, as it did, within five days of their service upon counsel.

In the instant case, Toyota sent a copy of its proposed Order to Appellant on May 31, 1988. (Appellant's Brief at p. A-16.) Toyota's proposed Order was neither signed nor filed by the Court until June 2, 1988. Under these circumstances, the Court was not precluded from signing and entering its Order. Tolboe, 682 P.2d at 849.

Any Objection to the Order of Dismissal must be considered abandoned because Aadil failed to secure a "ruling on [his] claimed pending" objection. In Zions First National Bank v.

C'Est Bon Venture, 613 P.2d 515, 517 (Utah 1980), the court noted:

The Rules of Civil Procedure are so designed as to promote the finality of judgments by an expeditious resolution of any post-judgment motions.

Not only did the unmodified judgment of dismissal have the effect of denying Aadil's objections by necessary implication, but the action of Aadil also indicated an intention to abandon the pending objections by pursuing this appeal, without first securing a ruling on his objections. Id. Accordingly, Aadil's assertion of impropriety lacks both legal support and factual merit.

### POINT III

#### AADIL'S IMPROPERLY RAISED CONTENTIONS CANNOT BE CONSIDERED FOR THE FIRST TIME ON APPEAL.

The Utah Supreme Court has forcefully and consistently held that it will not consider issues raised for the first time on appeal. Sorenson v. Larsen, 740 P.2d 1336 (Utah 1987); Topik v. Thurber, 739 P.2d 1101, 1103 (Utah 1987); and Insley Manufacturing Corp. v. Draper Bank & Trust, 717 P.2d 1341, 1347 (Utah 1986).

This Court has stated that the record must clearly show that an issue was "timely presented to the trial court in a manner sufficient to obtain a ruling thereon. We cannot assume

that it was properly raised." Franklin Financial v. Empire Development Co., 659 P.2d 1040, 1044 (Utah 1983). If a party fails to present an issue to the trial court, they will have "waived the right to raise it" on appeal. Utah County v. Brown, 672 P.2d 83, 85 (Utah 1983).

In the instant case, Aadil alleges numerous legal arguments and facts which are beyond the scope of the Record and does so for the first time on appeal. One example of Aadil's flagrant disregard of this appellate rule is the submission of the Affidavit of Lynn Ashcroft (Appellant's Brief at A-14). The affidavit was never submitted to the trial court. Indeed, the affidavit was not even created until more than nine months after entry of final judgment in this case.

Appellant has also included arguments relative to provisions of the Utah Commercial Code, Utah Code Ann. § 70A-2-1, et seq. warranty provisions, Lemon Law Reform, breach of agreement and merchantability, none of which were even included within the allegations of Aadil's Amended Complaint. (Aadil's Brief at pp. 13-17.) Accordingly, these arguments should not be considered for the first time by this Court on appeal.

POINT IV

TOYOTA IS ENTITLED TO AN AWARD OF ATTORNEY'S FEES AND DOUBLE COSTS ON THE GROUND THAT THE PRESENT APPEAL IS FRIVOLOUS, HAVING NO LEGAL OR FACTUAL BASIS.

In Porco v. Porco, 752 P.2d 365, 366 (Utah App. 1988), this Court recognized that sanctions should be imposed for frivolous appeals:

This court is distressed both by the frivolous nature of this appeal and by plaintiff's apparent harassment of defendant through repeatedly bringing civil actions against her, thereby forcing her to pay substantial court costs and attorney's fees. Rule 33(a) of the Rules of Utah Court of Appeals provides that "[i]f the court determines that a motion made or an appeal taken under these rules is either frivolous or for delay, it shall award just damages and single or double costs, including reasonable attorney's fees, to the prevailing party."

A frivolous appeal is defined as "one having no reasonable legal or factual basis . . . ." O'Brien v. Rush, 744 P.2d 306, 310 (Utah App. 1987); see also Barber v. The Emporium Partnership, 750 P.2d 202 (Utah App. 1988).

In the instant case, there is no legal or factual basis for this appeal. Indeed, most of the argument stated in Aadil's brief constitutes unsupported facts, opinions or issues raised for the first time on appeal. In addition, this is the second claim made against Respondent for a Toyota vehicle purchased by Aadil in recent years. (R. at 82.) It appears to Toyota that appellant has brought these lawsuits for apparent harassment

through repeatedly bringing civil actions. The fact that Mr. Aadil is an attorney and should know better than to bring such a cause of action based upon no recognized legal theory of recovery only serves to emphasize the fact that sanctions should be imposed.

In imposing sanctions upon Mr. Aadil, there will be no improper chilling of the right to appeal erroneous lower court decisions. This is especially true inasmuch as the lower court gave Aadil an opportunity to conduct discovery and several months to amend his pleading. Nevertheless, attorney Aadil still failed to modify the allegation of his original Complaint. Most importantly, Aadil failed to make any short plain statement of any claim for relief other than his own conclusory accusations. For these reasons, Aadil's appeal has no reasonable factual or legal basis and must be considered frivolous.

#### CONCLUSION

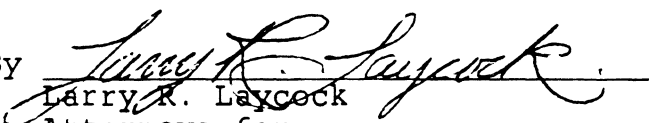
Based on the foregoing, Respondent Toyota Motor Sales U.S.A., Inc. respectfully requests that this Court affirm the dismissal of Aadil's Amended Complaint with prejudice. Toyota further requests this Court to award attorneys fees and double costs, thus, remanding this matter to the trial court for a proper determination of the full amount of costs and attorney's



fees, without reduction, reasonably incurred by the defendant Toyota on this appeal.

DATED this 21st day of April, 1989.

SNOW, CHRISTENSEN & MARTINEAU

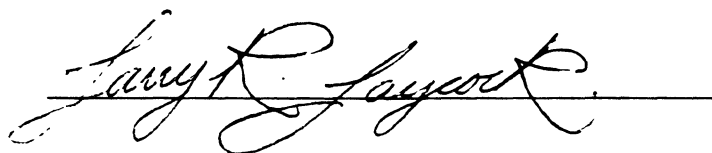
By   
Larry R. Laycock  
Attorneys for  
Respondent/Defendant Toyota  
Motor Sales U.S.A. Inc.

SCMLRL215

CERTIFICATE OF SERVICE

I do hereby certify that on the 21st day of April, 1989, I caused four (4) true and correct copies of the Brief of Respondent Toyota Motor Sales, U.S.A., Inc., to be served upon the following:

Irshad A. Aadil  
1104 E. Ashton Ave, #118  
Salt Lake City, Utah 84106  
Attorney for Appellant

A handwritten signature in cursive script, reading "Larry R. Laycock", is written over a horizontal line.