

1998

James K. Rawson and Rebecca R. Rawson v. Kim Edward Conover and Karen Jane Conover : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JAMES K. RAWSON, Trustee, and)	10
REBECCA R. RAWSON, Trustee,)	DOCKET NO. <u>980298-CA</u>
)	
Plaintiffs/Appellants,)	Case No. 980298 CA
)	
vs.)	ARGUMENT
)	PRIORITY 15
)	
KIM EDWARD CONOVER and)	
KAREN JANE CONOVER, a Utah)	
General Partnership, dba K & K SALES;)	
KIM EDWARD CONOVER dba K & K)	
SALES; K & K SALES, INC., a)	
Corporation; KIM EDWARD)	
CONOVER, dba K & K SALES, INC.;)	
PAUL W. CLARK; and OLD)	
REPUBLIC SURETY CO., a)	
Corporation,)	
)	
Defendants/Appellees.)	

REPLY BRIEF OF APPELLANTS

APPEAL FROM ORDER ON DEFENDANTS' MOTION FOR SUMMARY
JUDGMENT, DATED OCTOBER 14, 1996; AND FROM ORDER
ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, DATED
MAY 28, 1998

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FILED

ORAL ARGUMENT AND PUBLISHED DECISION IS REQUESTED

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STATEMENT OF MATERIAL FACTS

The brief of Appellees attempts to discredit plaintiffs' Statement of Material Facts by stating the same is conclusory, nonobjective, unsupported and misleading. The record reflects the defendants' overstatement. Defendants' fail to cite a single incident that supports their claim that plaintiffs mislead the Courts. The record is replete with references to defendants' multiple admissions of civil and criminal violations of the laws respecting commerce in motor vehicles.

The record herein establishes that the material facts are clear, the law is clear and the trial courts' application of the law to the facts of this case warranted the imposition of liability upon the defendants as a matter of law. The trial courts' refusal to follow the law or apply the law to the facts of this case warrants reversal.

Contrary to defendants' assertions, the record is full of references to defendants' abuses of their motor vehicle dealer's license and privileges. In addition to the initial citations in appellants' brief each fact previously set forth is supported by the following additional references in the record:

1. Fact Number 1. (R. 184 – 188, 378.)
2. Conover knowledge that he committed civil and crime violations of the Motor Vehicle Act when he and Clark bought, advertised, displayed and sold the subject vehicle from Clark's home. (R. 186, 277 – 281, 378, 385, 397, 419.)

3. Clarks' conduct as an unlicensed, unbonded, motor vehicle salesman in purchasing, advertising, displaying and selling the subject vehicle for Conover from Clark's home. (R. 186, 277 – 281, 379, 391.)

4. Old Republic Surety Co, dealer bond issued for the benefit of K & K Sales covers losses suffered by reason of the principal's violation of any laws or rules respecting commerce in motor vehicles. (R. 3, 61, 233, 378.)

5. The defendants common enterprise acted as (a) a "Supplier" under the Utah Consumer Sales Practices Act, and (b) a "Merchant" under the Utah Uniform Commercial Code. (R. 218, 252 - 53, 276 – 82.)

6. Defendants' admit to multiple civil and criminal violations of the Motor vehicle Act when they induced plaintiffs' purchase by Clark's placement of advertisements, displays and sale of the subject vehicle from Clark's home. (R. 252 - 53, 276 – 82, 373, 375.)

7. Conover at all material times owned the subject vehicle, allowed all repairs to be performed in Conover/K & K's name and assisted in defrauding the State of Utah of Sales Tax revenue. (R. 201, 276 – 82, 372 – 80.)

8. Defendants did not properly, safely, completely, or professionally repair the subject vehicle and sold the same with the incomplete, improper, unprofessional and unsafe repairs that were concealed by the vehicle's exterior skin and body parts. (R. 244 - 45, 248 – 49, 276 – 82, 366, 373 – 88, 402, 403.)

9. Clark failed to inform plaintiffs of the facts concerning the unsafe, inadequate and incomplete repairs, which the defendants' knew existed.

Defendants controlled, contracted and paid for the repairs that were made. In addition, Clark offered his personal guarantee that *he* (Clark) had properly repaired the subject vehicle and that the same was safe and fit for use as a passenger car and for plaintiffs' particular purposes. (R. 215 – 31, 245, 248, 252, 256 – 59, 276 – 82, 373 – 88, 391 – 97, 417 – 19.)

10. Defendants knew the subject vehicle's crush zones, collapse zones and structural integrity were not repaired or restored because they attempted no such repairs to the subject vehicle. The costs the defendants incurred in connection with their repairs evidence the defendants' knowledge of the nature and extent of their inadequate repairs. The defendants' hiding their incomplete repairs under the subject vehicle's outer skin to hide their failures to re-manufacture, re-construct and restore the subject vehicle to industry and manufacturer's standards and specifications. (R. 215 – 31, 245, 248, 252, 256 – 59, 276 – 82, 373 – 88, 391 – 97, 417 – 19.)

11. Clark personally financed, advertised, displayed and sold the subject vehicle from Clark's home. Clark's advertising, display and sell of the subject vehicle violated civil and criminal provisions of the Utah Motor Vehicle Act. (R. 215 – 31, 245, 248, 252, 256 – 59, 276 – 82, 373 – 88, 391 – 97, 417 – 19.)

12. Following plaintiffs' decision to purchase the subject vehicle Conover prepared all of the purchase documents. The purchase documents reflect that K & K Sales owned the subject vehicle and that it was part of K & K Sales'

dealer inventory. The sale documents wholly failed to reflect Clark's ownership interest therein (R. 186, 195 - 213, 370, 373 - 388.)

13. Plaintiffs were subsequently involved in a minor accident. When repairs resulting from the accident were attempted, the magnitude of the incomplete, inadequate, unprofessional and unsafe repairs made by or at the direction of the defendants became obvious when the subject vehicle's outer skin was removed. (R. 215 - 19, 243 - 54, 370 - 71, 380, 402 - 03.)

14. The subject vehicle was then disassembled for repairs and inspection by the repair shop it had been taken to, by plaintiffs' insurance adjuster, by an investigator from the Motor Vehicle Enforcement Division of the Utah State Tax Commission and others. Each person who inspected the subject vehicle concluded that the repairs made by or at the direction of the defendants were defective and unsafe and that the cost of restoring the subject vehicle to safe operation exceeded its fair market value. (R. 215 - 19, 243 - 45, 401 - 02.)

15. Defendants' refused to take corrective action concerning their breaches of civil and criminal provisions of their contractual duties owed by each of them to plaintiffs and their breaches of the laws respecting commerce in motor vehicles. As a result plaintiffs filed this lawsuit in order to obtain the remedies provided by law. (R. 1 17, 18 - 20, 95 - 112.)

ARGUMENT

POINT I

THE DEFENDANTS' ADMISSIONS OF MULTIPLE CIVIL AND
CRIMINAL VIOLATIONS OF THE LAWS RESPECTING
COMMERCE IN MOTOR VEHICLES HAS GIVEN RISE TO
PLAINTIFFS' PRIVATE, INDEPENDENT CAUSES OF ACTION

Appellants brief suggests that an appropriate theoretical approach to deciding this case is to determine whether the statutes' upon which plaintiff claims are based create independent or dependent causes of action. (Brief of Appellants at 11 –12.) This Court's determination that consumers may pursue independent causes of action against licensed and bonded dealers for multiple civil and criminal violations of statutes would clearly define the public policy that governs and controls the following acts:

1. The Utah Motor Vehicle Act ("Motor Vehicle Act").
2. The Utah Consumer Sales Practices Act ("Sales Practices Act"), and
3. The Utah Uniform Commercial Code ("Commercial Code").

The trial court determined that plaintiffs' claims and causes of action, based upon the defendants admitted civil and criminal violations of these statutes, were dependent and by themselves insufficient to afford any relief for their violation. Plaintiffs believe that the statutes create independent causes of action based on the following statutory language.

The Sales Practices Act, § 13-11-19(1), (2), (3) & (4) unconditionally recognize that a consumer may bring an independent action regardless of whether or not an adequate remedy at law exists. (R. 201, 254, 281, 282, 402 - 403.) The defendants concede the "Sales Practices Act provides for the potential private

enforcement of any violation of the Act.” (See Brief Of Appellees at page 16.) The Motor Vehicle Act § 41-3-205(2) & (3) provides for a cause of action against licensed and bonded dealers together with an award of attorney’s fees in cases successfully prosecuted or settled against the surety or principal. § 41-3-210(1)(b, c, d, i, l, m, n), and (6) identify specific acts that are prohibited and which the defendants admit violating. (R. 277 – 281.)

§ 41-3-401, enacted in 1991, is conspicuously missing from defendants’ Motor Vehicle Contract of Sale. (R. 196.) § 41-3-401(5) & (6) provide a cause of action to enforce the rights and remedies provided for under this section in addition to sanctions under §41-3-701. § 41-3-404 states that a person may maintain an action against a dealer on the dealer’s corporate surety bond. (R. 277 – 280.) §§ 41-3-701 and 41-3-702 set forth the criminal and civil penalties associated with the defendants’ actions complained of herein. § 41-3-702 (1)(b)(i, ii & iv), (c)(iv &vii) (4) and (5) state the civil penalty and the availability of a civil action by a purchaser for violations set forth under subsection (1). (R. 233 – 236, 277 – 280.)

The Uniform Commercial Code, §§ 70A-1-203, 70A-1-205, 70A-2-102 through 70A-2-106 defines the scope, breadth and application of the same to the facts of this case. (R. 223 – 230.) Defendants’ concede that the Commercial Code applies to plaintiffs’ claims. (See Brief of Appellees at page 24.) The Honorable Pat Brian properly applied Utah’s statutory law to the undisputed material facts in determining that plaintiffs claims for breach of contract, breach of express and

implied warranties and liability for inadequate repairs were factual determinations for the jury to make. (R. 274, 374 – 381.) The Honorable Glen Iwasaki lacked authority to overrule Judge Brian. (R. 374, 375, 380, 381.) Where the defendants presented no new arguments or additional facts and did not correct their contradictory and inconsistent statements, a sufficient showing of pretext was established to have the jury decide which versions of defendants' facts, if any, were to be believed. (R. 380, 381.)

This Court's ruling that one may pursue and maintain a private independent cause of action should clarify the manner in which the laws applicable to consumers are to be applied to consumer transactions. This Court's ruling should plainly state the State's public policy as set forth in the statutes and as articulated by the Utah Supreme Court. *Woodhaven Apt v. Washington*, 942 P.2d 918 (Utah 1997). Finally this Court should remind the district courts that Utah's public policy, as expressed by Utah statutes, are to be followed and applied in consumer litigation.

Alternatively, if it were determined that the statutes in question create dependent causes of action, then it becomes necessary to identify what the statutes are dependent upon in order to obtain relief thereunder. A ruling that the statutes create dependent causes of action would effectively repeal them by judicial fiat. Such a ruling would sanction the defendants' assertion that one may simply avoid liability for shoddy, incomplete, unsafe and incompetent work by closing one's eye's to the truth and claiming ignorance. (R. 382.) *Haynes v. Manning*, 917 F.2d

450, 453 (10th Cir. 1990). Such a ruling would create greater incentives for dealers, merchants and suppliers to hide and conceal material facts concerning the products they sell thereby further polluting the stream of commerce and rendering less merchantable their products' fitness for ordinary use and for one's particular purposes. (R. 385.)(§§'s 70A-2-313, 70A-2-314 and 70A-2-315). This would result in greater incidence of fraudulent and unfair sales practices.

POINT II

THE TRIAL COURTS IGNORED STATE LAW WHEN THEY IMPROPERLY DISMISSED PLAINTIFFS' CLAIMS

Defendants' claim that plaintiffs' did not cite specific statutory provisions or particular conduct in opposition memoranda filed with the Court is without merit. (R. 172 – 179). The record speaks for itself. (R. 214 – 254, 275 – 282, 373 – 388, 417 – 419, as does the Reporter's Transcript Of Videotaped Proceedings, dated April 16, 1998 pages 20 through 29.) Defendants' focus on plaintiffs' complaint overlooks the obvious facts that were developed by means of defendants' discovery responses and depositions in addition to the facts that were known at the inception of the lawsuit. Defendants' assertion that plaintiffs offered no facts or allegations that defendants had violated any statutes cited by plaintiffs is likewise incorrect. (R. 214 – 254, 276 – 282, 373 – 397, 417 – 419.)

The record also contradicts defendants' claims that plaintiffs' brief for "the first time in this litigation" alleged conduct, which if proven constituted violations of the generally cited acts. (R. 95 – 102, 172 – 180, 184 – 188, 196, 200 – 203,

208, 215 – 231, 233, 237, 245, 248, 252, 253, 256 – 259, 276 – 282, 373 – 388, 391 – 397, 417 – 419.) The facts as presented and argued before the trial court established that the defendants knew and the trial court was charged with notice that plaintiffs’ claims were appropriately set forth and the law applicable thereto was clearly articulated. Discussions with defendants’ counsel to withdraw their improvident Order On Defendants’ Motion For Summary Judgment, dated October 4, 1996 so that this case could be resolved in one trial were unfruitful. Opposing counsel eventually conceded that plaintiffs’ facts and legal arguments were sufficient to sustain plaintiffs’ claims on appeal.

“ . . . 90 percent of what Mr. Martineau talked about [in argument to Judge Iwasaki] had to do with things that Judge Brian has already ruled upon. Judge Brian had every fact and plaintiffs had every fact that was talked about right here before him at the time.

. . . .
When plaintiffs’ didn’t like the form of the order they objected. It was again argued and the Court signed the order as stated with the findings.

This thing – frankly it’s going to come back because – well, I don’t know if it will come back. It will be appealed. Prior to the judge that Brian was told it was going to be appealed. I have a real hard time with this matter getting tried twice now, going up on appeal and perhaps coming back again to be tried a second time.”

(See Reporter’s Transcript Of Videotaped Proceedings, dated April 16, 1998
paged 28 & 29.)

POINT III

PLAINTIFF ALLEGED SUFFICIENT EVIDENCE TO SUSTAIN
A PRIMA FACIE CASE UNDER THE SALES PRACTICES ACT

The record at 95 – 102, 172 – 180, 184 – 188, 196, 200 – 203, 208, 215 – 231, 233, 237, 244, 248, 252, 253, 256 – 259, 276 – 282, 373 – 388, 390 – 397, 417 – 419, reflects the lack merit in defendants’ comment that plaintiffs’ failed to specify violations of the Sales Practices Act. The Sales Practices Act is not complex, long or involved. The Sales Practices Act has only two sections, §§ 13-11-4 and 13-11-5, that could possible apply to this case.

Count I, Intent To Defraud, and Count II, Tortuous Misrepresentations, of plaintiffs’ Amended Complaint (R. 102, 103) go directly to the requirements of § 13-11-4. A prima facie violation of the Sales Practices Act is established by one’s showing that a supplier’s acts were knowing, intentional or committed with intent to deceive. Plaintiffs’ Amended Complaint alleged a prima facie case that raised the inference of deceptive acts and practices as required by law. This inference exists only because the statute presumes that a supplier’s acts, if unexplained, were more likely than not based on impermissible factors as enumerated in § 13-11-4(2)(a – o).

Plaintiffs met their burden of establishing a prima facie case when they presented a preponderance of the evidence that supported their claims. *Haynes*, 917 F.2d at 452. This should have resulted in a factual determination for the jury to consider in deciding whether the defendants’ reasons were legitimate or pretextual. The Sales Practices Act does not impose rigid, mechanical or ritualistic elements in creating a prima facie case. Neither should public policy impose onerous requirements in order to establish a prima facie case.

Plaintiffs suggest that a sensible orderly way to evaluate and apply the Sales Practices Act is to consider the evidence in light of common experience as it bears on the critical questions set forth in the statutes and decisional law construing it. *Woodhaven*, 942 P.2d at 924 (Utah 1997) The specific elements that must be then proven depend on the nature of the challenged act or practice committed by the supplier.

Deceptive and Unconscionable Acts and Practices, Count III of plaintiffs' Amended Complaint meets the requirements of § 13-11-5. Whether or not an act or practice is unconscionable is for the court to determine after the parties have been given a reasonable opportunity to present evidence to aid the court in making its determination. Plaintiffs' argued unsuccessfully to the trial court that the defendants' multiple civil and criminal violations of the laws respecting commerce in motor vehicles were per se unconscionable and deceptive act and practices. Defendants' conduct also constituted negligence per se. (R. 281, 381 –388.)

Plaintiffs' twice briefed and argued to the trial court the facts and law concerning defendants' misrepresentation concerning the standard, grade, and quality of the subject vehicle. The facts are uncontested that the subject vehicle sustained major damage to its structural integrity. That the defendants' did not fully, professionally, or properly repair the subject vehicle's crush zones, collapse zones or energy absorbing structural component parts. They left the floor pan crumpled, the seat belt brackets cut and screwed to the floor instead of mounted in the mounting brackets.

More importantly, the plaintiffs' were given Clark's personal guarantee that he had performed the repairs on the subject vehicle. Plaintiffs' believed they were dealing with Clark as a neighborhood layperson and could only conclude that the damages the vehicle had sustained must not have been that bad or Clark could not have performed the repairs. The defendants' intent for criminally acquiring, advertising, displaying, showing and selling the subject vehicle is a factual determination for the jury to have made and not the trial court. (R. 274, 276 –82)

The defendants' intent was clearly for the jury to decide. The facts and evidence that the jury would have considered in determining the defendants' intent were the following. (a) Defendants' knowledge of the nature and extent of the damage that resulted in the subject vehicle being declared a total loss salvage. (R. 396, 397) (b) Defendants' controls over the repairs they caused to be performed on the subject vehicle. (R. 390, 395, 400, 401) (c) Defendants' controls over the money they spent in repairing the subject vehicle's structural integrity, which in this case amounted to a little over \$900.00 in repairs to the unibody and other major structural component parts. (R. 390, 395, 400, 401) (d) Defendants' controls in choosing and directing those whom they contracted to perform the repairs in question. (R. 390, 395, 400, 401) (e) Defendants' illegal purchase (i.e., not paying sales tax on Clark's purchase), advertisement, display, and sell of the subject vehicle. (R. 394, 395) (f) Defendants' concealment that Clark did not perform the repairs as represented. (R. 393, 395) (g) Defendants' concealment of the inadequate, incomplete, unprofessional and unsafe repairs. (R. 244, 392, 395,

396) (h) Expert testimony that adequate and safe repairs required much more than the defendants spent on the subject vehicle, in addition to other evidence disclosed in the course of discovery (R. 244, 248, 249, 334, 339).

Defendants' attempt to support the trial court rulings by referring to the "as is" and "no warranty" disclaimer language. In considering defendants' defense, it is significant that plaintiffs answered an advertisement placed by Clark. Plaintiffs' then went to Clark's home to look at, test drive and more fully consider whether the subject vehicle met their needs. (R. 276 – 282.) It was not until after the agreement to purchase had been reached and the paperwork needed to complete the deal that plaintiffs first learned that Conover was in fact the owner of the subject vehicle. Assuming without conceding that these facts validate defendants' disclaimer language, the disclaimer would only run in favor of K & K Sales, not Clark or Conover in any event. Defendants' reliance upon the Federal Trade Commission regulations is likewise misplaced.

16 CFR § 455.2(a) has nothing to do with the rebuilding, marketing or sale of salvage motor vehicles. Neither does it address incomplete, unprofessional, unsafe or damages that are concealed and not repaired. Nor does it preempt Utah's health and safety standards such as § 41-3-210 (1)(l – n), or Utah's motor vehicle regulation (i.e., §§ 41-3-205, 41-3-210(1)(a – d), 41-3-701 and 41-3-7021, 4, & 5) in addition to others). Finally, federal law does not override the Sales Practices Act 13-11-1 etc., or the duties, breaches of duties, and damages provided under the statutes relied upon by plaintiffs herein.

Defendants' next assert that they had no knowledge of defects in their repairs prior to selling of the same to plaintiffs. (See Appellees Brief at page 19). Plaintiffs' believe that the laws respecting commerce in motor vehicles impose affirmative duties upon automobile dealers to discover defects. *Haynes*, 917 F.2d at 453 (quoting *Jones v. Fenton Ford, Inc.*, 427 F. Supp. 1328, 1335 (D. Conn. 1977)). Defendants' knowledge or intent to deceive may be found where there was a reason to know yet they failed to take reasonable steps to determine whether their repaired were adequate. (R. 281, 381 –387.) *Haynes*, 917 F.2d at 453 (quoting *Tusa v. Omaha Auto. Auction Inc.*, 712 F.2d 1248, 1253 -54 (8th Cir. 1983) and *Nieto v. Pence*, 578 F.2d 640, 642 (5th Cir. 1978)). (R. 381 – 388.)

Defendants next state that there were no allegations or legal support that the defendants had some unidentified duty to discover defects. (See Appellees Brief at page 19.) The argument ignores allegations in plaintiffs' Amended Complaint. Under Utah law, to state a claim for misrepresentation, plaintiffs must allege:

“(1) one having a pecuniary interest in a transaction, (2) is in a superior position to know material fact, and (3) carelessly or negligently makes false representations concerning them, (4) expecting the other party to rely and act thereon, and (5) the other party reasonably does so and (6) suffers loss in that transaction”

Iadanza v. Mather, 820 F. Supp. 1371, 1384 (D. Utah 1993) (quoting *Debry v. Mortgage Co.*, 835 P.2d 1000, 1008 (Utah Ct.App. 1992); *Jardine v. Brunswick Corp.*, 18 Utah 2d 378, 423 P.2d 659, 662 (1967)). Plaintiffs' Amended Complaint taken at face value alleges each of these elements in the Common Factual Allegations section thereof (R 98 – 192). Count IV, Breach of Express

and Implied Warranties, (R. 105, 106) and Count V, Breach of Covenant of Good Faith and Fair Dealing, (R. 106 – 108) restate plaintiffs' claims of that the defendants misrepresented the subject vehicles condition and repairs. (R 274).

On a motion to dismiss a court cannot weigh the evidence as the trial court did and determine that the statutes were not violated or that there was no evidence that support their violation. These were questions for the trier of fact based upon plaintiffs' actual reliance, the reasonableness of their reliance, the character of the representations, and the circumstances of the alleged misrepresentations. *Iadanza*, 820 F. Supp. at 1384 (citing *Condas v. Adams*, 15 Utah 2d 132, 388 P.2d 803, 805 (1964); accord *St. Joseph's Hospital and Medical Ctr v. Reserve Life Ins. Co.*, 154 Arz. 307, 742 P.2d 808, 815 (1987); *Stauth v. Brown*, 241 Kan. 1, 734 P.2d 1063, 1068-69 (1987); *Epperson v. Roloff*, 102 Nev 206, 719 P.2d 799, 803 (1986), (*Second*) of Torts § 552 comment e (1977).

Defendants' disclaimer argument does violence to the conceptual foundation of a parties' duty to act in good faith in performing contractual obligations. One's duty of good faith does not arise from the contract itself, rather it is from the "overriding public policy in promoting the creation of and reliance on contracts and the public's interest in promoting fairness and reasonableness in commercial transactions." *Iadanza*, 820 F. Supp. at 1388. One's duty of good faith "emphasizes faithfulness to an agreed common purpose and consistency with the justified expectation of the other party." *Restatement (Second) of Contracts* § 205 comment a (1981).

The implied covenant does not arise from the express terms of the contract as asserted by the defendants (Appellees Brief at page 25 – 27), “but from the ‘grounds of justice that are independent of expressed intentions.’” *Iadanza*, 820 F. Supp. at 1388 (citing 3A *Corbin on Contracts* § 632, at 22 – 23 (1960)). Breach of the duty of good faith and fair dealing gives rise to claims for breach of contract. *Id.*, *Beck v. Farmers’ Ins. Exchange*, 701 P.2d 795, 798 (Utah 1985). One complies with his duty to perform a contract in good faith, when his actions are consistent with the agreed common purpose and the justified expectations of the other party. *Id.* (Citing *St. Benedict’s Dev. v. St. Benedict’s Hosp.*, 811 P.2d 194, 200 (Utah 1991)).

Defendants’ assertions that plaintiffs failed to introduce any factual evidence to support their claims that the defendants’ violated the Motor Vehicle Act are simply false (Appellees Brief at page 20 - 22.) The record clearly sets forth the facts plaintiff’s alleged, introduced and argued. (R. 96 – 109, 185, 196, 200 – 203, 205 – 231, 233, 244 –45, 248 – 49, 253 – 253, 256 – 260, 274, 276 – 282, 373 – 380 and the exhibits attached thereto.) Defendants’ reading of § 41-3-404 as the codification of the common law tort of fraud overreaches. § 41-3-404 simply allows recovery for losses or damages suffered by reason of fraud, fraudulent representation or violations of the laws respecting commerce in motor vehicles.

Common law fraud need not be proven in order to recover under § 41-3-404. One need only show that in transacting any business with a licensed and

bonded motor vehicle dealer he or she suffered a loss. A review of the annotated cases following § 41-3-404 reveals the inaccuracy and lack of merit in defendants' assertions that common law fraud must be proven. The defendants' claims that without fraud the multiple civil and criminal violations of Motor Vehicle Act create no independent cause of action brings this Court back to plaintiffs' initial suggestion that it is necessary for this Court to decide whether or not the statutes create a dependent or independent cause of action. This issue appears to be one of first impression in this jurisdiction.

The foremost rule in statutory construction is that the court "give effect to the intent of the legislature in light of the purpose the statute was meant to achieve." *Reeves v. Gentile*, 813 P.2d 111, 115 (Utah 1991) see also *Savage Indus., Inc. v. Utah State Tax Comm'n*, 811 P. 2d 664, 670 (Utah 1991); *American Coal Co. v. Sandstrom*, 689 P. 2d 1, 3, (Utah 1984); *Marc Dev. Inc. v. FDIC*, 771 F. Supp. 1163, 1165 (D. Utah 1991). Courts must "look at the plain meaning of the language at issue to discern the legislative intent." *Chris & Dick's Lumber v. Utah State Tax Comm'n*, 791 P.2d 511, 514 (Utah 1990).

The plain meaning of the Sales Practices Act, the Motor Vehicle Act, the Commercial Code, defendants' Bond Of Motor Vehicle Dealer, Salesperson, Or Crusher (R. 233) and other laws respecting commerce in motor vehicles does not support defendants' arguments. Neither are the purposes or intent of the legislature achieved through defendants' narrow construction. Nor are defendants' assertions that plaintiffs' failed to refer to applicable statutes well taken. The

record at 96 – 111, 167 – 78, 184 – 87, 196, 200 – 03, 215- 31, 233, 237, 244 –45, 248 – 49, 252 – 53, 256 – 70, 274, 276 – 282, 373 – 388 and the exhibits referred to therein as well as the Reporter’s Transcript Of Videotaped Proceedings, dated April 16, 1998 at pages 20 – 29 unequivocally contradict such assertions.

POINT IV

PLAINTIFF’S INTRODUCED SUFFICIENT EVIDENCE TO SUSTAIN A PRIMA FACIE CASE FOR BREACHES OF CONTRACT, EXPRESS AND IMPLIED WARRANTIES

The record is packed with references to the inaccuracy of defendants’ claims that plaintiffs omitted from the trial court the issues that are now before this Court. (R. 95 – 102, 172 – 180, 184 – 188, 196, 200 – 203, 208, 215 – 231, 233, 237, 244, 248, 252, 253, 256 – 259, 276 – 282, 373 – 388, 390 – 397, 417 – 419). All the Counts’ in plaintiffs’ Amended Complaint directly or indirectly dealt with defendants’ breaches of contract. Count IV specifically alleged “Breach of Express and Implied Warranties.”

As with the Sales Practices Act and Motor Vehicle Act, it is the court’s duty to give effect to the statutory provisions requiring that the statutes be liberally construed in order to achieve the statutes’ objectives. *Brickyard Homeowners’ Ass’n Man. Comm v. Gibbons Realty Co.*, 668 P.2d 535, 538 (Utah 1983). § 13-11-2 directs that the “act be construed liberally to promote” its policies. The cases that construe § 41-3-404 require that this section be “construed broadly to protect persons doing business with motor vehicle dealers. *Western Sur. Co. v. Redding*,

626 P.2d 437 (Utah 1981); *Lawrence v. Ward*, 5 Utah 2d 257, 300 P.2d 619 (1956).

The Commercial Code has a similar provision as found in §§ 70A-1-102(1), 70A-1-103 and 70A-1-106. The issue of defendants' breach of contract was twice briefed and argued to the trial court. Judge Brian's Minute Entry properly found in part:

"Court hears argument from respective counsel Re: Motions (sic) for summary judgment. Summary Judgment is denied. The Court finds there is only one factual issue for trial and that is what seller represented to buyer Re: The condition of the vehicle and repairs that were made to the vehicle. The issue of punitive damages and of fraud are dismissed"

(R. 274). Notwithstanding the limitations contained in Judge Brian's Minute Entry the form of the Order presented for entry far exceeded the language, scope and content of the trial court's actual ruling. For this reason plaintiffs' objected to the form of the order (R. 275 – 283). All of plaintiffs' claims that related to defendants' breach of contract remained intact following Judge Brian's ruling (i.e., Intent To Defraud, Tortuous Misrepresentation, Deceptive and Unconscionable Acts and Practices, Breach of Express and Implied Warranty, and Breach of Covenant of Good Faith and Fair Dealing.)

Plaintiffs' have no dispute with defendants' "as is," "no warranty" disclaimers to the extent such disclaimers are limited to the facts defendants made known and disclosed to them. Serious legal, moral and ethical problems are presented however with defendants' attempts to disclaim liability for conditions,

issues and defects they concealed, hid or intentionally failed to disclose. This is even more true when one considers the serious safety issues that arise when an unsuspecting and uninformed consumer buys a vehicle that was improperly, unprofessionally, incompletely and dangerously repaired.

§§ 41-3-210(1)(l, m, & n) 78-15-6, and 13-11-4(a, b, c, & e), 70A-2-303, 70A-2-313 (a & b), 70A-2-314, 70A-2-315 uniformly and consistently identify and describe the acts, errors and omissions that warrant imposition of liability on those who breach the duties assumed or imposed on those with superior knowledge. Defendants' request that this Court relieve them of such liability.

POINT V

THE ISSUE OF DEFENDANTS' BREACHES OF CONTRACT, AND WARRANTY DISCLAIMERS WERE ACCURATELY AND FULLY BRIEFED AND ARGUED TO THE TRIAL COURT

The District Courts were presented with the facts, the law and the arguments that accurately, fully, and properly present the legal consequence of defendants' breach of contract as measured against defendants' warranty disclaimers. (R. 215 – 231, 233, 237, 244 – 45, 248 – 49, 252 - 53, 255 – 73, 274, 276 – 82, 344 – 71, 372 – 407, 417 – 19).

The new issues and arguments raised by defendants' in their appellees brief, pages 24 – 31, concerning their breaches of contract and breaches of express and implied warranties were already fully briefed to the trial court. In the interests of avoiding duplicity, plaintiffs respectfully request that this Court refer to the following parts of the record:

1. Plaintiffs' Memorandum In Opposition To Defendants' Motion For Summary Judgment, dated July 8, 1996 (R. 214 – 254).

2. Minute Entry, dated August 2, 1996 (R. 274), and

3. Plaintiffs' Memorandum In Opposition To Defendants' Second Motion For Summary Judgment, dated March 16, 1998 (R. 372 – 407.)

There are certain procedural and due process rights and principles that are meant to govern and control litigation and trial court decisions while being litigated. One such principle is that trial courts of comparable authority lack the authority to sit as appellate courts on one another decisions. Another such principle is the Doctrine Of Law Of The Case. Plaintiffs' believe that the trial court's handling of their claims violated these established procedural rights. Plaintiffs' likewise believe that the trial court usurped the authority of the jury in deciding the factual issues identified and presented in this appeal. Finally plaintiffs' believe that the trial court simply ignored the law or misapplied the law to the undisputed material facts of their case.

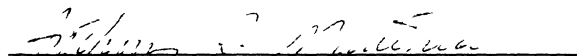
The Honorable Pat Brian properly denied defendants' motion for summary judgment and determined that factual issues warranted a trial to determine what the sellers represented to the buyers concerning the condition of the subject vehicle and its repairs. The facts and the law did not change. Accordingly the Honorable Glen Iwasaki improperly overruled Judge Brian in making findings of fact in connection with the dismissal of plaintiffs' remaining claims.

CONCLUSION

This Court should clearly state that plaintiffs' claims and causes of action constitute independent basis for imposing liability. An opinion is sorely needed that clearly sets forth the public policy of this State concerning the application and construction of the laws respecting commerce in motor vehicles and their inter-relationship. Such a decision would assist in establishing the minimum standards motor vehicle dealers must adhere to and would result in greatly reducing the deceptive and unfair sales practices that the defendants engaged in herein.

This Court should rule: (A) That the defendants had positive non-abandonable legal duties to know the physical condition of the subject vehicle at the time it was sold by them to the plaintiff's and to honestly, fully, fairly and timely advise plaintiffs of all relevant facts concerning such condition. (B) That the plaintiffs are entitled to pursue each and all of the rights and remedies which are expressly afforded them by the Sales Practices Act, the Motor Vehicle Act, the Commercial Code, the Utah Administrative Code, the Dealer's Bond and the Sales Contract. (C) That the Trial Court's award of costs was in error. And (D) that the aforementioned Acts are to be construed liberally and broadly in favor of consumers, such as the plaintiffs, to insure that the rights and remedies of the consuming public are safe guarded and rendered effective and meaningful.

RESPECTFULLY SUBMITTED this 18th day of March, 1999.


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Certificate of Service

I hereby certify that a true and correct copy of the foregoing Reply Brief Of Appellants was served upon the following individual by mailing a copy thereof, postage prepaid, to said individual at the following address this 15th day of March, 1999.

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