

1998

James K. Rawson and Rebecca R. Rawson v. Kim
Edward Conover and Karen Jane Conover :
Petition for Rehearing

Utah Court of Appeals

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Recommended Citation

Petition for Rehearing, *James K. Rawson and Rebecca R. Rawson v. Kim Edward Conover and Karen Jane Conover*, No. 980298 (Utah Court of Appeals, 1998).

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IN THE UTAH COURT OF APPEALS

JAMES K. RAWSON, Trustee,
and REBECCA R. RAWSON,
Trustee,

Plaintiffs-Appellants.

vs.

KIM EDWARD CONOVER and
CONOVER, a Utah General
Partnership, dba K & K SALES;
KIM EDWARD CONOVER dba
K & K SALES; K & K SALES,
INC.; PAUL W. CLARK; and
OLD REPUBLIC SURETY CO.,
a corporation,

Defendants-Appellees.

DOCKET NO

980298-CA

Case No. 980298 CA

ARGUMENT PRIORITY 15

PETITION FOR REHEARING

APPEAL FROM A FINAL CIVIL JUDGMENT OF THE
THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

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FILED

Utah Court of Appeals

JUL 22 1999

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Defendants-Appellees.

Case No. 980298 CA

ARGUMENT PRIORITY 15

PETITION FOR REHEARING

MEMORANDUM DECISION

A copy of the Memorandum Decision of the Court, filed June 24, 1999, is attached.

SUMMARY OF ARGUMENT

This Court affirmed dismissal of plaintiffs' claims for breach of express and implied warranties, relying on the written documents stating the vehicle was sold "as is." This ruling misapprehended that there was a factual issue concerning whether the entire transaction, including the limitation of warranties, was induced by the seller's misrepresentation that the vehicle had been properly repaired. Because of the misrepresentations

regarding the repairs, the exclusion of implied warranties was unreasonable and not enforceable.

Summary judgment on the claimed violations of the Motor Vehicle Act was also improper. The facts establishing the violations were clear in the record and the issue was raised in plaintiffs' initial memorandum. The detailed arguments submitted after oral arguments but before entry of the ruling should have been considered. Because summary judgment may be entered only where there are no factual disputes *in the record*, summary judgment was improper even though plaintiffs' memorandum did not initially focus on that issue.

ARGUMENT

POINT I THERE WAS A FACTUAL ISSUE CONCERNING THE REASONABLENESS OF THE EXCLUSION OF IMPLIED WARRANTIES.

Defendants did not dispute for purposes of summary judgment that Paul Clark, the salesman, had represented to James Rawson that the vehicle had been properly repaired following the accident. (Affidavit of James Rawson (R. 251-254) at ¶ 4.) John Kirk, an investigator with the Utah Motor Vehicle Enforcement Division, and who had prior experience with repair of damaged auto bodies and frames, testified by affidavit that the vehicle had not been properly repaired, and that it was unsafe to be operated. (Affidavit of John F. Kirk (R. 243-246) at ¶ 6.) Andy Anderson, plaintiffs' expert who was in business of performing similar repairs, testified the repair was "the worst one I've ever seen." (Deposition of Andy Anderson (R. 328, 400) at p. 9.) Mr. Rawson testified that his purpose in purchasing the van was to acquire a "good, safe vehicle for providing dependable transportation for ourselves and our family." (Affidavit of James K. Rawson (R. 251-254) at ¶ 3.) Finally, the car remained titled in the name of the dealership and was ultimately sold by the dealership; Clark's statements concerning the car must be deemed to have been made on behalf of the dealership.

These facts in the record establish, for purposes of summary judgment, that Clark and the dealership represented that the van was properly repaired and was safe to drive. The facts were exactly opposite—the van had not been properly repaired and was unsafe to drive. Judge Brian held this was insufficient to show fraudulent inducement to contract because there was no proof that Clark or the dealership knew the vehicle was inadequately repaired or was unsafe to drive. Evidence was presented, as shown below, that Clark and the dealership knew the vehicle was inadequately repaired because they limited the scope of repairs. In addition, Judge Brian's ruling ignores the mandate that the Court make all reasonable inferences in favor of the party opposing a motion for summary judgment. Higgins v. Salt Lake County, 855 P.2d 231, 233 (Utah 1993).

An owner of property is presumed to know the condition of the property. Dugan v. Jones, 615 P.2d 1239, 1246 (Utah 1980). The United States Court of Appeals for the Tenth Circuit, addressing proof of "intent to defraud" under the federal odometer fraud statutes, held that a dealer has an affirmative duty to discover defects, and the "inference of an intent to defraud is no less compelling when a person lacks actual knowledge of a false odometer statement only by closing his eyes to the truth." Haynes v. Manning, 917 F.2d 450, 453 (10th Cir. 1990) (citations and internal quotation marks omitted).

The facts in this case, viewed in light of the owner/dealer's duty to discover the truth, compel the inference that the defendants were aware that the vehicle had been improperly repaired. Plaintiffs' expert characterized the repairs as the worst he had ever seen. Defendants did not present any contrary evidence, but claimed only that they believed the repairmen they had hired were competent. Because a fact finder may choose to disregard such self-serving testimony, the Court on summary judgment should also disregard it. van der Heyde v. First Colony Life Insurance Co., 845 P.2d 275, 280 (Utah Ct. App. 1993).

In addition, the individual who performed the repairs, Jack Lambrose, testified in his deposition that "he was told only to align the unibody rail. And the other repairs to

the crush zones and collapse zones were to be completed by someone other than his shop.” (Quotation from transcript of oral arguments before Judge Iwasaki at pp. 23-24. Defendants did not object to the recitation of the deposition testimony.) Defendants did not hire anyone to repair the crush zones and collapse zones, but instead covered the defective areas up and passed it off to plaintiffs as adequately repaired. Id.

Based on this evidence, the court should have held that defendants had actively concealed the inadequacy of the repairs while misrepresenting to plaintiffs that the repairs had been properly completed. The contract was induced by fraud, and it was unreasonable to enforce the warranty exclusion under those circumstances.

This Court also focused on the fact that plaintiffs declined to have the vehicle inspected. Because the sellers represented that the vehicle had been properly repaired, the buyers had no duty to investigate to determine whether that representation was true. Dugan v. Jones, 615 P.2d 1239, 1246 (Utah 1980). Indeed, because the inadequately repaired frame had been covered, an inspection would not have disclosed the problem. Andy Anderson, plaintiff’s expert who was employed to repair the van after the second accident, testified that he was not able to discover the problem until he disassembled the vehicle. Mr. Anderson testified that he inspected the van and gave an estimate for repair of the van following the second accident, but when he started performing the repairs he discovered the previously hidden damage:

Q Did you find that there were other damages other than what was on that first estimate?

A Absolutely.

Q What other damage did you discover?

A Once we started putting panels on it and everything, we couldn’t get nothing to fit. We couldn’t figure out why. So it was at that time that we elected to completely gut the whole inside of the van. Took all the carpeting, headliner, side panels, seats, everything.

Q Why was that necessary?

A Because at that point, we didn’t know what was wrong. Then we kept seeing these little buckles. So I says to

strip it. So the floor panel rather than being flat like this desk looked like the ocean at high tide. And when we took the front seats out of it, the floor panel underneath the front seats were so buckled and so compressed, and this was not because of this last accident, okay? Because it wasn't –

Q Are you sure of that?

A It was from the front compression, not the rear compression. It appeared to me at that time that this car had bottomed out and then buckled everything back up, up and backwards like this. There were shims under the front seat to get the front seats to level, okay? . . .

(Deposition of Andy Anderson pp. 7-8 (R. 328), as attached as Exhibit C to Plaintiffs' Memorandum in Opposition to Defendants' Second Motion for Summary Judgment (R. 400).)

This testimony describes an extremely invasive “inspection” which was necessary before the defects could be observed. It confirms that the defects were hidden and known only to defendants. If plaintiffs had hired a mechanic to inspect the van, the mechanic would have found no problems unless the mechanic completely gutted the interior of the van. Such an invasive inspection should not be required of a buyer, particularly where the seller affirmatively represented that the repairs were properly performed. Summary judgment on this issue was error.

Contrary to this Court's statement, the claim that the contract had been fraudulently induced was raised in plaintiffs' opposition to the first summary judgment motion. (Plaintiff's Memorandum at p. 8 (disclaimer not valid because of "the aforementioned misrepresentations and material omissions on the part of Clark")). Judge Brian erred in granting summary judgment on the fraud issue.¹ An exclusion of warranties is not en-

¹It is important to remember that Judge Brian also ruled that there were disputed factual issues regarding the express and implied warranty claims, and that those claims should go to trial. It is inherently unfair to ignore that part of Judge Brian's ruling while enforcing his dismissal of the fraud claims. If it was proper for Judge Iwasaki to reconsider any of

forceable if it is “unreasonable,” Utah Code Ann. § 70A-2-316(1). Such an exclusion is not reasonable and is not enforceable if induced by fraud. “A contract limitation on damages or remedies is valid only in the absence of allegations or proof of fraud.” Ong Int’l (USA), Inc. v. 11th Ave. Corp., 850 P.2d 447, 452 (Utah 1993). The contract here was induced by the misrepresentation that the vehicle had been properly repaired. Summary judgment on this issue was error.

It is evident from the transcript of the hearing before Judge Iwasaki that he considered himself bound by Judge Brian's ruling on the fraud issue. (Tr. of hearing August 16, 1998, at p. 30.) This was error because Judge Iwasaki had full authority to reconsider Judge Brian's prior ruling. Utah R. Civ. P. 54(b); Ron Shepherd Ins., Inc. v. Shields, 882 P.2d 650, 654 (Utah 1994) (“It is settled law that a trial court is free to reassess its decision at any point prior to entry of a final order or judgment.”); Interlake Distributors, Inc. v. Old Mill Towne, 954 P.2d 1295, 1299-1300 (Utah Ct. App. 1998) (Where one judge replaced another on a case, the second judge had full authority to reconsider and change any non-final decision of the prior judge). Judge Iwasaki erred in refusing to reconsider the dismissal of the fraud claims. Judge Brian's dismissal of those fraud claims ignored the requirement that all inferences be taken in favor of the party opposing summary judgment.

Basic fairness demanded that Judge Iwasaki either reconsider all of Judge Brian's order, or none of it. Judge Brian ruled that the express and implied warranty claims should go to trial. Defendants' excuse for seeking reconsideration of that ruling was that depositions had been taken which shed new light on the case. The depositions had, however, also shed new light on the fraud case by establishing that the defects in the van were

Judge Brian's ruling, it was proper to reconsider all of it. The deposition testimony of Andy Anderson was obtained after Judge Brian's ruling and justified reconsidering the dismissal of the fraud claims.

hidden and that defendants had limited the scope of the repairs. Judge Iwasaki was not bound by Judge Brian's ruling on the fraud claims, and erred in so holding.

**POINT II THE CLAIMS FOR VIOLATION OF THE MOTORVEHICLE
STATUTES WERE SUPPORTED BY THE RECORD; JUDGE BRIAN'S
DISMISSAL OF THOSE CLAIMS WAS ERROR.**

Rule 56(c) of the Utah Rules of Civil Procedure permits summary judgment only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." This Court misapprehended that the affidavits on file at the time of the first motion for summary judgment raised factual issues concerning the claims for violation of the motor vehicle statutes.

Paragraphs 7 and 26 of plaintiffs' Amended Complaint (R. 95-112) gave notice that plaintiffs raised claims under the Utah Motor Vehicle Act. In their memorandum opposing summary judgment, plaintiffs argued several violations of the act. Plaintiffs explained that the sale "was not negotiated or closed at K & K Sales['] business premises and by a licensed motor vehicle salesman as required by the Utah Motor Vehicle Act"² (R. 220.) The statement of facts in the memorandum explained that Paul Clark placed a newspaper advertisement for the vehicle, giving only his name and home telephone number.³ (R. 216.) It was not until after the terms of the sale had been agreed that plain-

²Violates Utah Code Ann. § 41-3-210(1)(n) (prohibiting sale of dealer's vehicles from home or other unlicensed locations).

³Violates Utah Code Ann. § 41-3-210(1)(b) (prohibiting advertisements which do not identify the dealer).

tiffs first learned that a dealer was involved.⁴ These factual assertions were supported by the affidavits of plaintiffs as well as the affidavits of defendants.

Because defendants violated the Utah Motor Vehicle Act, plaintiffs were entitled to recover a civil penalty of \$1,000 or treble actual damages, whichever was greater, plus their attorney fees. Utah Code Ann. § 41-3-702(4).

While plaintiffs' opposing memorandum unfortunately did not separately list each violation of the Motor Vehicle Act along with the subsection violated,⁵ that failure did not make summary judgment proper. "Where a party opposed to the motion [for summary judgment] submits no documents in opposition, the moving party may be granted summary judgment only 'if appropriate,' that is, if he is entitled to judgment as a matter of law." Olwell v. Clark, 658 P.2d 585, 586 (Utah 1982) (citation omitted). The Utah Supreme Court has further stated:

Therefore, under Rule 56(c), Utah R. Civ. P., summary judgment can be granted only if the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Doubts, uncertainties or inferences concerning issues of fact must be construed in a light most favorable to the party opposing summary judgment. Litigants must be able to present their cases fully to the court before judgment can be rendered against them *unless it is obvious from the evidence before the*

⁴Violates Utah Code Ann. § 41-3-210(1)(m) (prohibiting sales by unlicensed salespersons).

⁵Plaintiffs did provide this detail in Plaintiffs' Notice of Objections to Proposed Order on Defendants' Motion for Summary Judgment (R. 275-283), which was filed over a month before Judge Brian entered the order granting summary judgment.

court that the party opposing judgment can establish no right to recovery.

Mountain States Telephone and Telegraph Co. v. Atkin, Wright & Miles, Chartered, 681 P.2d 1258, 1261 (Utah 1984) (italics added).

The evidence before Judge Brian showed the defendants violated the Motor Vehicle Act. Although the arguments were not focused at first, detailed arguments explaining the violations of the Act were submitted before entry of the order granting summary judgment. The summary judgment was improper and should be reversed.


CONCLUSION

This Court's cursory affirmance of the summary dismissal of plaintiffs' complaint failed to apprehend that the fraud claims were properly raised in response to the first motion for summary judgment. Although couched in terms of a defense to the express warranty, the claims were a valid defense to the purported disclaimer of the warranties. The transaction was induced by the fraudulent representation that the vehicle had been adequately repaired. These disputed factual issues made summary judgment improper.

Summary judgment was also improper on the violations of the Motor Vehicle Act. The facts in the record showed the violations. The issue was raised and fully briefed before the trial court entered its order. At the least, Judge Iwasaki should have reconsidered the issue at the same time he reopened and reconsidered the balance of Judge Brian's summary judgment ruling.

This Court should grant rehearing and hold that summary judgment was improper. The case should be remanded for trial.

DATED this 22nd day of July, 1999.

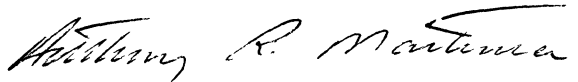

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MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was mailed to the following, postage prepaid, this 22nd day of July, 1999.

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FILED

JUN 24 1999

IN THE UTAH COURT OF APPEALS COURT OF APPEALS

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James K. Rawson, et al.,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Plaintiffs and Appellees,)	
)	Case No. 980298-CA
v.)	
)	F I L E D
Kim Edward Conover, et al.,)	(June 24, 1999)
)	
Defendants and Appellants.)	1999 UT App 209

Third District, Salt Lake Department
The Honorable Pat B. Brian
The Honorable Glenn Iwasaki

Attorneys: T. Richard Davis, Salt Lake City, for Appellants
Ray G. Martineau and Anthony R. Martineau, Salt Lake
City, for Appellees

Before Judges Greenwood, Billings, and Orme.

GREENWOOD, Associate Presiding Judge:

Plaintiffs James K. and Rebecca R. Rawson appeal from both Judge Brian's and Judge Iwasaki's grant of summary judgment in favor of defendants Kim Edward and Karen Jane Conover, K&K Sales, Paul Clark, and Old Republic Surety Company. We affirm.

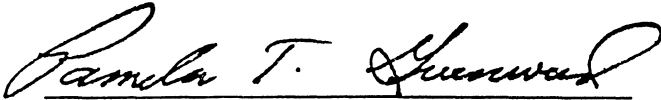
"Summary judgment is appropriate only when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law." S.W. Energy Corp. v. Continental Ins. Co., 364 Utah Adv. Rep. 61, 63 (Utah 1999) (citing Utah R. Civ. P. 56(c)). "We review the district court's grant of summary judgment for correctness, according no deference to the court's legal conclusions, Thompson v. Jess, 364 Utah Adv. Rep. 64, 65 (Utah 1999), and "'accept the facts and inferences in the light most favorable to the losing party.'" Nyman v. McDonald, 966 P.2d 1210, 1211 (Utah Ct. App. 1998) (citation omitted)).

Plaintiffs argue that Judge Brian erred in granting summary judgment in favor of defendants on all of plaintiffs' claims except breach of express and implied warranties under the Utah Commercial Code. We disagree. Although plaintiffs alleged seven causes of action in their amended complaint, they only addressed the issues of express and implied warranties in their memorandum

in opposition to defendants' motion for summary judgment. In addition, the affidavits submitted by plaintiffs in support of their memorandum failed to assert any facts to support their claims under the Utah Consumer Protection Act, the Utah Motor Vehicle Act, or their products liability claim. See Utah R. Civ. P. 56(e) ("When a motion for summary judgment is made and supported as provided in this rule," an adverse party's response, "by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial."). We therefore conclude Judge Brian properly granted summary judgment in favor of defendants.

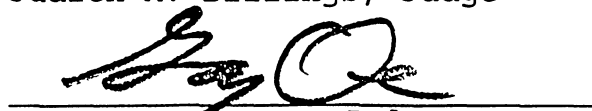
Plaintiffs also argue that Judge Iwasaki erred in granting summary judgment in favor of defendants on plaintiffs' claims of breach of express and implied warranties. Again, we disagree. Plaintiffs admitted they were aware the vehicle had been salvaged and repaired. Also, Mr. Rawson stated he did not rely on any oral representations regarding the condition of the vehicle. Therefore, the written documents, clearly stating the vehicle was being sold "AS IS" without warranty, represented the entire agreement between the parties. See Brown v. Richards, 840 P.2d 143, 148 (Utah Ct. App. 1992). By signing the contract and declining to have the vehicle inspected, plaintiffs waived all express and implied warranties under the Utah Commercial Code. See Utah Code Ann. § 70A-2-316(3)(a) (1997) ("all implied warranties are excluded by expressions like 'as is,' . . . which in common understanding calls the buyer's attention to the exclusion or warranties and makes plain that there is no implied warranty"); id. § 70A-2-316(3)(b) (1997) ("when the buyer . . . has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him").

Affirmed.


Pamela T. Greenwood,
Associate Presiding Judge

WE CONCUR:


Judith M. Billings, Judge


Gregory K. Orme, Judge

CERTIFICATE OF MAILING

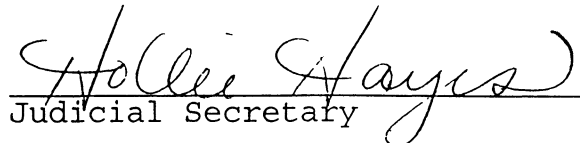
I hereby certify that on the 24th day of June, 1999, a true and correct copy of the attached MEMORANDUM DECISION was deposited in the United States mail to:

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and a true and correct copy of the attached MEMORANDUM DECISION was deposited in the United States mail to the judges listed below:

HONORABLE PAT B. BRIAN
HONORABLE GLENN IWASAKI
THIRD DISTRICT, SALT LAKE
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PO BOX 1860
SALT LAKE CITY UT 84114-1860



Judicial Secretary

TRIAL COURT: THIRD DISTRICT, SALT LAKE, 940902059CV
APPEALS CASE NO.: 980298-CA