2009

J.D. Stutesman v. Darrell Long : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

J.D. STUTESMAN Appellant, v. DARRELL LONG Appellee.	)	Appellate Case No. 20090974 - CA

BRIEF OF THE APPELLANT

Appeal from a Final Order of the Third Judicial District Court
Salt Lake County, State of Utah
Honorable Robert Faust

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IN THE UTAH COURT OF APPEALS

J.D. STUTESMAN	)	
	)	
Appellant,	)	
	)	
v.	)	Appellate Case No. 20090974 - CA
	)	
DARRELL LONG	)	
	)	
Appellee.	)	

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PARTIES

The case in the trial court below consisted of Darrell Long suing J.D. Stutesman and Allan Hatz. Only J.D. Stutesman appeals the trial court's decision. Accordingly, J.D. Stutesman is listed as the sole appellant and Darrell Long is listed as the sole appellee.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Treatises

JURISDICTIONAL STATEMENT

This Court has jurisdiction over this matter under Utah Code Ann. § 78A-4-2(j).

ISSUES PRESENTED

1. Whether an owner of an airplane meets the first element for fraudulent misrepresentation concerning the making of a representation by merely providing a potential buyer with the airplane's logbook, which logbook states that an annual inspection occurred and that a third party, not the owner, entered all such statements in the logbook relating to any annual inspection.

Preservation of Issue: R. 271-73, 289-91.

Standard of Review: *Correctness* (Armed Forces Insurance Exchange v. Harrison, 70 P.3d 35, 47 (Utah 2003)(concluding that a trial court's conclusion that a party is liable for fraud is reviewed for correctness).

2. Whether a party who purchases an aircraft can properly establish a claim of fraud based upon the assertion that the buyer relied upon information contained in the aircraft's logbooks as mandated by the Federal Aviation Administration where controlling federal law specifically excludes potential buyers from asserting any claim of reliance upon such logbooks for the purpose of making a decision on purchasing an aircraft.

Preservation of Issue: R. 292.

Standard of Review: *Correctness* (Armed Forces Insurance Exchange v. Harrison, 70 P.3d 35, 47 (Utah 2003)(concluding that a trial court's conclusion that a party is liable for fraud is reviewed for correctness).

3. Whether a party selling an airplane can be liable for fraudulent misrepresentation based upon representations in advertisements wherein such party does not make representations regarding a presently existing fact, but merely promises to ensure that certain inspections for the aircraft are accomplished at a later date prior to sale.

Preservation of Issue: R. 270, 289.

Standard of Review: *Correctness* (Armed Forces Insurance Exchange v. Harrison, 70 P.3d 35, 47 (Utah 2003)(concluding that a trial court's conclusion that a party is liable for fraud is reviewed for correctness).

4. Whether a party can establish the reasonable reliance element of a claim for fraud where the facts show that well before purchasing the airplane, such party discovered that the inspection initially believed to have occurred in July 2006 did not take place until September of 2006.

Preservation of Issue: R. 548 – 87: 13, 21-25; 88:1-2

Standard of Review: *Correctness* (Armed Forces Insurance Exchange v. Harrison, 70 P.3d 35, 47 (Utah 2003)(concluding that a trial court's conclusion that a party is liable for fraud is reviewed for correctness).

5. Whether a party selling an airplane can be liable for making a false representation where such party represents that an annual inspection took place and where the stipulated facts entered by the trial court prior to trial clearly show that an annual inspection did in fact take place.

Preservation of Issue: R. 271-72, 290-91.

Standard of Review: *Correctness* (Armed Forces Insurance Exchange v. Harrison,

70 P.3d 35, 47 (Utah 2003)(concluding that a trial court's conclusion that a party is liable for fraud is reviewed for correctness).

6. Whether a party selling an airplane can properly make representations to a potential purchaser that an annual inspection has occurred where the selling party relies upon a signed certificate of annual inspection and where the selling party, as part of the same representations, fully discloses all defects discovered during the annual inspection that had not been corrected.

Preservation of Issue: R. 270-72, 289-91.

Standard of Review: *Correctness* (Armed Forces Insurance Exchange v. Harrison, 70 P.3d 35, 47 (Utah 2003)(concluding that a trial court's conclusion that a party is liable for fraud is reviewed for correctness).

7. Whether a party purchasing an aircraft can reasonably rely upon representations made by the seller of the aircraft where, prior to purchase, the purchaser is informed of several items affecting the condition of the aircraft, the purchaser is encouraged to obtain an independent mechanic to inspect the aircraft at a cost of less than $200.00, the purchaser is allowed to inspect the airplane for several hours, and where the purchaser discovers that his understanding of the advertisements concerning the sale of the airplane are incorrect.

Preservation of Issue: R. 269-78; 281-92; 548 – 155:12-24.

Standard of Review: *Correctness* (Armed Forces Insurance Exchange v. Harrison, 70 P.3d 35, 47 (Utah 2003)(concluding that a trial court's conclusion that a party is liable for fraud is reviewed for correctness).

8. Whether a decision finding liability for fraudulent misrepresentation can be upheld where the trial court made absolutely no findings concerning a required element for such action, or, more specifically, where the trial court did not make any finding that the complaining party acted reasonably and in ignorance of the falsity of the alleged misrepresentations.

Preservation of Issue: R. 269-78; 281-92.

Standard of Review: *Correctness* (Armed Forces Insurance Exchange v. Harrison, 70 P.3d 35, 47 (Utah 2003)(concluding that a trial court's conclusion that a party is liable for fraud is reviewed for correctness).

9. Whether the trial court committed reversible error when it awarded damages for fraud based upon the entire value of the airplane rather than damaged based upon the difference in value between an airplane that had a proper annual inspection and an airplane that did not have a proper annual inspection.

Preservation of Issue: R. 548 – 327:11-21.

Standard of Review: *Correctness* (Armed Forces Insurance Exchange v. Harrison, 70 P.3d 35, 47 (Utah 2003)(concluding that a trial court's legal conclusions are reviewed for correctness).

10. Whether the trial court committed reversible error when it grant an award for costs that exceeded the costs allowed by law.

Preservation of Issue: R. 473-474.

Standard of Review: *Correctness* (Armed Forces Insurance Exchange v. Harrison, 70 P.3d 35, 47 (Utah 2003)(concluding that a trial court's legal conclusions are reviewed

for correctness).

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, AND RULES

Utah Rules of Civil Procedure, Rule 54(d)

> (d) Costs.
>
> (d)(1) To whom awarded. Except when express provision therefor is made either in a statute of this state or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; provided, however, where an appeal or other proceeding for review is taken, costs of the action, other than costs in connection with such appeal or other proceeding for review, shall abide the final determination of the cause. Costs against the state of Utah, its officers and agencies shall be imposed only to the extent permitted by law.
>
> (d)(2) How assessed. The party who claims his costs must within five days after the entry of judgment serve upon the adverse party against whom costs are claimed, a copy of a memorandum of the items of his costs and necessary disbursements in the action, and file with the court a like memorandum thereof duly verified stating that to affiant's knowledge the items are correct, and that the disbursements have been necessarily incurred in the action or proceeding. A party dissatisfied with the costs claimed may, within seven days after service of the memorandum of costs, file a motion to have the bill of costs taxed by the court.
>
> A memorandum of costs served and filed after the verdict, or at the time of or subsequent to the service and filing of the findings of fact and conclusions of law, but before the entry of judgment, shall nevertheless be considered as served and filed on the date judgment is entered.

STATEMENT OF THE CASE

Nature of the Case. Jim Stutesman owned a 1960 Bellanca airplane that he desired to sell. Jim Stutesman placed advertisements in Trade-a-Plane, Barnstormer, and the

Bellanca Club to sell the airplane. The advertisements for the airplane all stated that the airplane would be sold with a "fresh annual" inspection. On August 21, 2006, Darrell Long contacted Jim Stutesman via telephone. Darrell Long agreed to purchase the airplane for $28,000.00. Darrell Long then sent Jim Stutesman a deposit equal to ten percent (10%) of the purchase price ($2,800.00) in the form of a personal check.

Approximately one month later, Darrell Long flew out to North Dakota to inspect the airplane and meet with Jim Stutesman. The airplane had recently passed an annual inspection. Allan Hatz conducted the annual inspection and signed the logbook stating that the airplane had passed the inspection. However, at the time the certification was issued, a cracked windshield was pointed out to Jim Stutesman by the inspector. When Jim Stutesman met with Darrell Long, Jim Stutesman disclosed this defect. Jim Stutesman provided the name and phone numbers of three inspectors who were nearby the aircraft and who could perform an independent inspection. Jim Stutesman ignored this proffer. Jim Stutesman also left Darrell Long alone with the aircraft for a number of hours and offered to take him and the airplane to the Bellanca factory to have it further inspected. Darrell Long rejected this offer.

Jim Stutesman and Darrell Long entered into an as-is purchase agreement for the reduced purchase price of $27,700.00 because of the defects that were pointed out to Darrell Long. Darrell Long paid the balance of the amount owed under the purchase agreement (deducting the initial $2,800.00 deposit) and proceeded to fly the airplane to California. While transporting the airplane, Darrell Long was unable to get the landing gear to fully extend and lock. This resulted in an emergency landing in Provo, Utah. Significant

damage to the airplane occurred due to this emergency landing.

Procedural History. After the completion of discovery, mediation, and the dismissal of several of Plaintiff's initial causes of action on Summary Judgment, the District Court set the matter for trial. The trial was upon Plaintiff's causes of action for fraud against Jim Stutesman and the inspector who certified the airplane as airworthy, Allan Hatz.

Disposition at Trial Court. After trial, the District Court granted Plaintiff's cause of action for fraud against Stutesman and denied all other claims against either Stutesman or Hatz. The District Court entered its final judgment in the instant matter granting a judgment in that amount of $32,468.35 against Jim Stutesman for fraud. Specifically, the District Court found that Jim Stutesman wanted potential buyers to rely upon the representation that the aircraft had a "fresh annual," and that he wanted Darrell Long to rely upon information and representations set forth in the logbooks that Darrell Long requested. The District Court further found that Defendant Stutesman testified that the aircraft was not airworthy when sold because it had a car battery, a cracked windshield, and a missing oil cover. Importantly the District Court found that "had a fresh annual inspection occurred it would have disclosed the problem with the landing gear after the aircraft was purchased." Accordingly, the District Court concluded that "the advertised and oral representations by [Jim] Stutesman and the information in the logbooks regarding the aircraft were false. There was not a fresh annual inspection, the logbook information was false, and the aircraft was not airworthy."

This appeal seeks to overturn a ruling that Jim Stutesman committed fraud through

the sale of the 1960 Bellanca airplane. The judgment for fraud against Stutesman is due to the district's court's flawed reasoning and flawed understanding of critical airplane terminology and application of law.

STATEMENT OF FACTS

General Background Information

1. Jim Stutesman ("Stutesman") has almost 50 years of flying experience. (R. 548 – 188:18-19.)

2. In approximately December, 2004, Stutesman purchased a 1960 Bellanca 14-19-3 aircraft, tail number N8857R. (R. 548 – 189:2-7.)

3. After owning the aircraft for approximately 2.5 years, Stutesman decided to sell it as his 91-year old mother had trouble climbing in and out of the aircraft. (R. 548 – 189:13-22.)

4. Stutesman is an AMP mechanic, which gives him the ability to perform some repairs on his aircraft. Importantly, he does **not** have the ability to perform annual inspections. (R. 548 – 174:13-17; 224:15.)

5. In the summer of 2006, Darrell Long ("Long") saw an ad Stutesman placed in Trade-a-Plan magazine for the purchase of the aircraft. (R. 288; R. 548 – 29:12-13.)

6. Long called Stutesman about the aircraft. Long was told that the aircraft would be sold with a fresh annual. (R. 289; R. 276-77; R. 548 – 81:12-14.)

7. An annual inspection is an FAA required inspection that all aircraft must undergo on an annual basis. (R. 289.)

8. Long understood Stutesman to mean that the aircraft had a fresh annual in

July or August of 2006. (R. 548 – 81:12-24.)

9. Long understood that an annual inspection means that everything is certified as airworthy and is the best buyer's protection that the aircraft is certified by someone else other than the owner. (R. 548 – 30:14-21.)

10. Long believed that as long as an aircraft was annualed, it should be fit to fly. (R. 548 – 39:1-2.)

11. However, Long's own expert witness notes that an annual inspection is not a guarantee of airworthiness for a year and notes that many items commonly arise that need repair between annual inspections. (R. 548 – 138:16-24.)

12. In fact, an annual inspection only means that the airplane meets the airworthiness requirements on the date of the inspection. It is not a warranty that it will remain airworthy for the next 12 months or even 12 days. (R. 548 – 239:21-240:2.)

13. Long also understood that "one little thing" is sufficient for an aircraft to not pass an annual inspection. In fact, Long has had an aircraft not pass an annual inspection because a bell that could not be heard while the engine was running was inoperable. (R. 548 – 91:13-17.)

14. Long agreed to purchase the aircraft for $28,000.00 and mailed Stutesman a $2,800.00 deposit. (R. 289.)

The September 13, 2006 Annual Inspection of the Aircraft

15. On September 13, 2006, Allan Hatz ("Hatz"), a certified airplane mechanic, performed an annual inspection on the aircraft and certified in the logbook that he had performed an annual inspection. (R. 290; R. 548 – 165:8-12.)

16. The annual inspection was conducted in two separate phases over a period of three months and was completed on September 13, 2006. (R. 290.)

17. During the annual inspection, Hatz noted that the aircraft had a crack in the windshield. This crack made the aircraft not technically airworthy. Hatz signed the logbook despite the crack because Stutesman assured him that it would be corrected. (R. 548 – 168:1-15.)

18. By signing the annual inspection in this manner, Hatz violated FAA regulations. (R. 291; R. 548 – 168:18-25; 169:1-5.)

19. However, Hatz also noted that the aircraft had a proper airplane battery in it at the time of inspection.(R. 548 – 171:25-172:1.)

20. Hatz also checked the hydraulic system and did not find any leaks. (R. 548 – 187:7-10.)

Pre-Purchase Inspection

21. On September 29, 2006, Long flew to North Dakota to inspect the aircraft. (R. 548 – 35:7-18.)

22. In discussing airplane experience, Long indicated that he had been in the Air Force, that he had flown a Hercules 130 – a four engine cargo plane, and that he had restored a Bellanca 14-13-2. (R. 548 – 215:16-17.)

23. Before Long flew to North Dakota, Stutesman had sent the names of three independent and licensed mechanics in the vicinity who could assist Long inspect the aircraft. (R. 548 – 200:14-19.)

24. Stutesman had also offered to take the Long and the aircraft about 125 miles

north to the factory where the aircraft was built. (R. 548 – 202:8-9.)

25. Stutesman gave Long all of the records that he had for the aircraft because Long wanted to go over all of them. (R. 548 – 35:16-17.)

26. Stutesman expected Long to see that the annual inspection was not completed until September 13, 2006 when he gave the logbook to Long. (R. 548 – 217:23-218:1.)

27. Long studied the records at his own leisure without Stutesman being present. (R. 548 – 36:10-16.)

28. Long noted that the annual inspection was not completed until September 13, 2006, not in July or August as Long originally believed. (R. 548 – 85:3-6.)

29. Long believed at that time that the advertisement "was a fraud" and that Stutesman "shouldn't have put fresh annual in his advertisement." (R. 548 – 87:13-14.)

30. Long did not question Stutesman about the advertisement despite having ample opportunity to do so. (R. 548 – 87:19-21.)

31. On September 30, 2006, Long physically inspected the aircraft. (R. 548 – 35:7-9.)

32. Long saw a crack in the windshield and was told by Stutesman that the windshield had a crack. (R. 289; R. 548 – 39:23-25; 40:2-6.)

33. Long was also informed that a cover for the oil check on top of the cowling was missing. (R. 289; R. 548 – 41:4-7.)

34. Long was adamant that this be replaced because he was knew that he should not be flying without the cap. (R. 548 – 41:4-8.)

35. Long was also informed that Stutesman had recently replaced the airplane battery with a car battery. (R. 277; R. 548 – 203:25-204:1.)

36. Instead of having a qualified inspector evaluate the plane, Long borrowed a creeper so he could get underneath the aircraft and check the fuselage and wings. (R. 275; R. 548 – 47:1-10.)

37. Long also had access to tools, a compression gauge, air compressor, lights, drills, and anything else that he wanted. (R. 548 – 207:16-19.)

38. Long pulled off panels and inspected the wings. (R. 548 – 208:5-8.)

39. Long spent about an hour and a half inspecting the aircraft. Most of this time he was alone with the aircraft. (R. 548 – 208:20-22.)

40. Because of Long's assertions of his experience, Stutesman thought that Long was qualified to perform the inspection. (R. 548 – 212:13-15.)

41. Long's expert witness – despite the annual inspection being completed – would have had the aircraft inspected, including the hydraulic fluid in the landing geaR. (R. 548 – 145:11-14.)

42. Having an airplane inspected by an independent inspector before purchase is something that Long's expert witness would have recommended, despite the "fresh annual." (R. 548 – 156:15-25.)

43. Such an inspection would be common in the industry. (R. 548 – 201:18-21; 242:10-19.)

44. Stutesman then allowed Long to take the aircraft on a trial flight. (R. 548 – 210:1-5.)

45. During the trial flight, the aircraft performed perfectly. (R. 548 – 53:19-20.)

46. After the flight and his inspection, Long was so impressed that he wanted to purchase the aircraft. (R. 548 – 211:10-12.)

47. However, Long was in a hurry to consummate the purchase and agreed to purchase the aircraft despite the defects noted above that make the aircraft not airworthy, despite the annual inspection that was not completed as originally professed, and despite not having a qualified and independent third party verify the airworthiness of the aircraft at the time of purchase. (R. 275; R. 548 – 53:19-20.)

48. Because of these three deficiencies mentioned above, Stutesman agreed to lower the price of the aircraft by $300.00. (R. 548 – 50:17-24.)

Post-Purchase Flight

49. Long flew the aircraft from North Dakota to Wyoming. The airstrip at Wyoming had been repaved and was still wet. This caused Long's aircraft to slide. (R. 548 – 56:13-25.)

50. Long refueled in Wyoming and flew to Provo, Utah. (R. 548 – 63:1.)

51. When Long attempted to deploy the landing gear, the nose gear did not lock. (R. 548 – 64:5-20.)

52. Long attempted to override the landing gear with a hand pump, but this was not successful. (R. 548 – 65:20-21.)

53. Long opted to land the aircraft despite not knowing whether the nose gear had locked into place. Long did not turn off the engine. (R. 548 – 66:18-25; 66:1-12.)

54. Long landed the aircraft without physical harm; however, the nose gear had

in fact not locked into place and therefore retracted upon hitting the ground causing substantial damage to the aircraft. (R. 548 – 69:1-2.)

Post-Landing Inspections

55. After the landing, both parties had expert witnesses inspect the aircraft. (R. 548 – 97; 237.)

56. It was determined that the landing gear failed because a fitting underneath the floor, below the seats, had come loose. This caused all the oil to drain out of the hydraulic system. (R. 548 – 99:17-21.)

57. When new fluid was introduced into the hydraulic system, however, the nose gear functioned appropriately. (R. 548 – 101:1-8.)

58. After observing the system overnight one "slight" drop of hydraulic fluid was observed. (R. 548 – 311:14-19.)

59. At a later date, another test was performed and no leaks were discovered. (R. 548 – 264:6-9; 265:12-16.)

60. Because the leak was so slow and because it was also noted that there was no oil or hydraulic fluid pooling in the aircraft, one expert concluded that the aircraft probably did not have enough fluid in it in the beginning. (R. 548 – 101:15-20.)

61. A preflight inspection of an unfamiliar aircraft would have included checking the hydraulic system to ensure that it was full. (R. 548 – 267:6-268:2.)

62. Based on the defects noted above, the expert determined that the annual inspection probably was not correctly performed. (R. 548 – 108:15-16.)

63. Even after the slight leak was repaired, however, a year and a half later the

hydraulic system had unexpectedly and without explanation gone empty. (R. 548 – 312:16-313:5.)

64. Some post-landing inspection also revealed that four of the six cylinders on the aircraft were not functioning, but if this were the case on September 30, 2006, the aircraft would not have been able to have taken off. (R. 548 – 277:2-7.)

SUMMARY OF THE ARGUMENT

This Court should overturn the trial court's order that Stutesman defrauded Long. Stutesman is alleged to have made one representation multiple times and in multiple ways: that the aircraft Long was purchasing had a fresh annual. The simple fact is this is true. Stutesman had hired Hatz to perform an annual inspection, and Hatz signed off on the annual inspection in the logbooks.

Stutesman made no guarantees that the aircraft was airworthy. Quite the contrary. Stutesman informed Long about every defect in the aircraft of which he was aware. Stutesman told Long that Long should have the aircraft inspected and sent him the names of three inspectors who could perform this inspection. Stutesman even offered to fly Long to the Bellanca factory to have the aircraft inspected. Stutesman left Long alone with the aircraft so that Long could perform his inspection. These are not the actions of a man who is trying to defraud the purchaser. Only after Long inspected the aircraft did he purchase it "as is."

Unfortunately Long crashed the aircraft shortly after purchasing it. The cause of the crash was apparently a "slight drip" in the hydraulic system. Long should not now be allowed to claim that his reliance on the fresh annual as some guarantee of perpetual

airworthiness was reasonable in light of statutory limitations and his own statements in court.

Finally, the trial court's award of damage of the entire unsalvageable aircraft is not consistent with prevailing Utah law. Therefore, even if the trial court was correct in finding fraud, its award of damages is inappropriate.

ARGUMENT

This Court should overturn the trial court's holding that Stutesman is liable to Long for fraudulent misrepresentation.[1] To demonstrate fraud, a plaintiff must establish (1) that a representation was made (2) concerning a presently existing material fact (3) which was false and (4) which the representor either (a) knew to be false or (b) made recklessly, knowing that there was insufficient knowledge upon which to base such a representation, (5) for the purpose of inducing the other party to act upon it and (6) that the other party, acting reasonably and in ignorance of its falsity, (7) did in fact rely upon it (8) and was thereby induced to act (9) to that party's injury and damage. Armed Forces Insurance Exchange v. Harrison, 70 P.3d 35, 40 (Utah 2003) (internal citations omitted). Each of

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[1] Although the trial court does not specifically designate the fraud as fraudulent misrepresentation, the nine elements listed by the trial court in its decision are the elements for fraudulent misrepresentation. Neither the parties nor the trial court addressed the elements or requirements for fraudulent nondisclosure or fraudulent concealment, which elements are separate and independent of the elements for fraudulent misrepresentation. See Maack v. Res. Design & Constr., Inc., 875 P.2d 570, 575 (Utah Ct. App. 1994)()(referencing Kaye v. Buehrle, 457 N.E.2d 373, 376 (Ohio Ct. App. 1983).). Where an issue is not properly preserved by the parties and is not addressed by the trial court, such issue will not be considered on appeal. See Tindley v. Salt Lake City Sch. Dist., 116 P.3d 295, 298 (Utah 2005).). Accordingly, Stutesman discusses only the type of fraud discussed by the trial court and therefore refers to findings of fraud by the trial court as findings of fraudulent misrepresentation.

these elements must be established by clear and convincing evidence. Id. at 43. Unfortunately, the trial court's determination below falls short of these requirements.

The trial court found that Stutesman made but one relevant representation to Long. This representation was the representation that the aircraft had a "fresh annual." (R. 276-77.) The trial court found that Stutesman made representations concerning the "fresh annual" in three different ways. First, the trial court found that Stutesman made a representation to Long that the aircraft had a fresh annual when Long requested the logbooks and Stutesman provided the logbooks to Long. (R. 272, 276-77.) Second, the trial court found that Stutesman made representations to Long through certain advertisements that included the words "fresh annual." (R. 272, 276-77.) Finally, the trial court found that Stutesman made oral representations to Long that the aircraft had a "fresh annual" and that such "fresh annual" was completed on two different dates over a period of several weeks. (R. 273, 290.)

Each of the three representations set forth above fail to provide sufficient grounds to support an affirmation of the trial court's decision in the instant matter. As discussed in more detail below, the first representations made via the advertisements cannot support a finding of fraudulent misrepresentation because the advertisements were not false, because the representations in the advertisements concerning a fresh annual did not relate to a presently existing material fact, and because at the time of the purchase, Long knew such advertisements were not accurate in regards to the existence of a fresh annual in July of 2006.

Further, the second set of representations identified by the trial court does not

support a finding of fraud largely because these oral representations were not false. Stutesman orally informed Long that the airplane had a certificate of inspection and that a "fresh annual" took place on two different dates, but that there were issues concerning a missing oil hatch cover and a cracked windshield. (R. 271, 289.) The airplane did have a certificate of an annual inspection and an inspection did take place on two separate dates. (R. 271, 289-90.)

Finally, any representations in the logbook concerning a "fresh annual" cannot support a finding of fraud against Stutesman because Hatz, not Stutesman, made all such representations.

In addition to the trial court's error in finding fraud, the trial court also fails to make any factual findings or legal conclusions that Long's reliance was reasonable.

Finally, the trial court's inability to distinguish a causal connection between the alleged misstatement and the harm, and the trial court's wrongful application of damages constitute reversible error. This Court should reverse the trial court's decision and rule that Stutesman is not liable to Long for fraudulent misrepresentation. Each of the shortcomings identified above are discussed in more detail below.

I. THIS COURT SHOULD OVERTURN THE TRIAL COURT'S DETERMINATION THAT STUTESMAN COMMITTED FRAUD AGAINST LONG BY PROVIDING LONG WITH THE LOGBOOK BECAUSE (1) ALL REPRESENTATIONS IN THE LOGBOOK RELATING TO AN ANNUAL INSPECTION WERE MADE BY HATZ, NOT STUTESMAN, AND (2) AS A PROSPECTIVE PURCHASER, LONG IS STATUTORILY PRECLUDED FROM RELYING UPON THE LOGBOOKS FOR THE PURPOSES OF ESTABLISHING HIS FRAUD CLAIM.

The representations made to Long in the logbook cannot support a claim for

fraudulent misrepresentation because such representations fail to meet the first and seventh prongs of the elements for fraudulent representation.

A. All the representations in the logbook relating to an annual inspection were made by Hatz, not Stutesman.

The first element to prove fraudulent misrepresentation is that the defendant must make a representation. Armed Forces, 70 P.3d at 40 (Utah 2003). In the instant matter, any representations made to Long through the logbook fail to meet this first prong.

The trial court's finding that Stutesman made a representation regarding a "fresh annual" by providing the logbooks to Long cannot support a finding of fraudulent misrepresentation. All of the representations in the logbooks concerning a "fresh annual" were made by Hatz, not Stutesman. In fact, the trial court's own findings state that Stutesman did not make any representations in the logbooks concerning the "fresh annual." Specifically, the trial court determined that:

> ***Defendant Hatz, who performed and signed off on the annual inspection***, testified he knew of the problems with the aircraft and he did not fix all of them, including not fixing a crack in the windshield. ***Defendant Hatz*** testified ***he*** signed the certificate of airworthiness…Defendant Hatz admitted that by placing ***his*** stamp in the logbook, ***he*** was certifying the aircraft as being airworthy.

(R. 272-73.)

The record lacks any evidence whatsoever that would indicate that Stutesman wrote any information in the logbook relating to the annual inspection. Every reference in the record where a person actually made representations concerning the annual inspection in the logbook indicates that such recordings were made by Hatz, not Stutesman. (R. 271-73)

Further, in the stipulated facts set forth in the Pretrial Order, it is uncontroverted that

Hatz, not Stutesman made the certification concerning the annual inspection. (R. 289-91.)

For the foregoing reasons, the facts in the record clearly show that Stutesman did not make any representations in the logbooks relating to a "fresh annual." Any such representations were made by Hatz, not Stutesman. Therefore, any liability against Stutesman based upon representations set forth in the logbooks must be reversed.

B. Long may not, by established law, rely upon the logbooks as an indication or guarantee of airworthiness.

To succeed upon a claim of fraudulent misrepresentation, a plaintiff must show reliance upon the representations made by the defendant. Armed Forces, 70 P.3d at 40. However, in the case at hand and as a matter of law, Long may not rely upon the logbooks and the certifications therein to garner any indication or guarantee of the condition of the aircraft. Accordingly, Long cannot rely upon representations made in the airplane's logbooks to establish his claims for fraud.

Pursuant to the Federal Aviation Regulations ("FAR"), all airplanes must undergo an annual inspection as designated under 14 CFR 91.409(a)[2]. Such an inspection must be performed by a qualified individual pursuant to 14 CFR 43.7[3] whose privileges and limitations are set forth in 14 CFR 65.95[4]. Importantly, the FAR does not statutorily

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[2] 14 CFR 91.409(a) reads, in pertinent part: "(a) Except as provided in paragraph (c) of this section, no person may operate an aircraft unless, within the preceding 12 calendar months, it has had-- (1) An annual inspection in accordance with part 43 of this chapter and has been approved for return to service by a person authorized by Sec. 43.7 of this chapter . . ."

[3] 14 CFR 43.7 reads, in pertinent part: "(b) The holder of a mechanic certificate or an inspection authorization may approve an aircraft, airframe, aircraft engine, propeller, appliance, or component part for return to service as provided in Part 65 of this chapter."

[4] 14 CFR 65.95 reads, in pertinent part: "(a) The holder of an inspection authorization

establish any duty owed by such authorized inspectors to the subsequent owners of inspected aircraft. Rocky Mountain Helicopters, Inc. v. Bell Helicopter Textron, Inc., 24 F.3d 125 (10th Cir. 1994). Multiple jurisdictions have held that a representation in a logbook is a representation that only the FAA may rely upon, not prospective purchasers. For instance, in Rocky Mountain, the Tenth Circuit Court of Appeals determined that,

> The scope of the defendant's duty to others in these cases will depend upon the *purpose for which the information is required to be furnished* . . . [T]he purpose of the FAA certification procedure is not to protect future buyers... the FAA has effectively eliminated the owner from the limited class of persons the type certificate information is designed to protect.

Id. at 32-133 (internal citations omitted) (italicized emphasis in original). The Tenth Circuit Court has further stated that "[t]he purpose of FAA type certification is to ensure safety. Ensuring safety means taking precautions that the [airplane] will not break down in flight; it does not mean that it will not break down at all." Id. at 133 (citing 49 U.S.C. § 1423(a); and Arney v. United States, 479 F.2d 653, 658 (9th Cir. 1973)). Accordingly, the Tenth Circuit upheld the denial of a claim by a purchaser of a helicopter because the purchaser could not rely upon the manufacturer's representations to the FAA.

The Minnesota Court of Appeals adopted this reasoning in Schroeder v. White, 624 N.W.2d 810, 811 (Minn.Ct.App. 2001). In Schroeder, a purchaser of an airplane sought to rescind the purchase through a negligent representation theory because the seller had failed to advise him that the aircraft was defective and not airworthy. Id. The purchaser purported to have relied upon the logbook certifications in deciding to purchase the plane.

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may--(2) Perform an annual, or perform or supervise a progressive inspection according to Secs. 43.13 and 43.15 of this chapter.

Id. These logbooks showed no defects and certified the aircraft as airworthy. Id. The purchaser discovered shortly after the purchase, however, that the airplane's tail was defective and a wing was warped. Id. These defects lead the FAA to ground the airplane. Id. The mechanic who had performed the certifications in the logbook that the purchaser had reviewed had his license suspended because the logbooks were inaccurate. Id. The Minnesota Court of Appeals, however, held that "the purpose of the FAA certification procedure is to ensure air-travel safety and protect against personal injury, **not to protect owners or future buyers from pecuniary loss**." Id. at 811-12 (emphasis added). The court further held that "a statutory duty does not give rise to common law tort liability unless the injured party falls within the class of persons the statue is designed to protect or an underlying common law cause of action pre-existed enactment of the statute." Id. at 813. Because no authority states that FAA inspections and certifications are intended to protect potential purchasers from pecuniary loss, and because no common law cause of action pre-existed enactment of the FAA regulations requiring certifications, the purchaser's claims failed. Id.

Like the purchasers in Rocky Mountain and in Schoeder, Long is also a purchaser and is therefore not within a class of persons that the FAA statutes and CFR rules are intended to protect. Any notations and certifications in logbooks are representations that are made to the FAA. Long was in a position to protect himself from suffering a pecuniary loss by having the aircraft inspected. Because he was in a hurry, however, Long did not do so. Further, because the notations and certifications in the logbooks are representations made to the FAA and not to Long, Long may not rely upon those statements as any

indication that the aircraft is airworthy. Further, because Long as a purchaser of an aircraft is not an individual who is in the protected class under the FAA statutes, he may not rely upon those statements. There is no statute, case, or other secondary legal treatise that exists that allows a purchaser of an airplane to be part of the protected class that may rely upon logbooks and certifications therein to the detriment of the seller. In fact, such a rule of law would lead to a nonsensical conclusion that the owner of the airplane would have to personally have the aptitude to re-perform an annual inspection before the owner could sell the airplane as having a fresh annual. Accordingly, it is wholly unreasonably for Long to rely upon the logbook certifications as an indication of airworthiness.

Utah has adopted similar legal reasoning in various circumstances. See e.g., Lignell v. Berg, 593 P.2d 800 (Utah 1979) (not applying Utah statute requiring contractors to be licensed because the defendant was not within the protected class); Utah Code Ann. § 53-8-205 (requiring motor vehicles to be inspected for safety but providing no mechanism for a purchaser of a vehicle with a current safety inspection certificate to recover against the seller of the vehicle if the safety inspection was improper).

Finally, it would be unreasonable for Long to be allowed to rely upon the logbooks and certifications and not allow Stutesman the same right. As discussed above, both Long and Stutesman have the exact same knowledge regarding the deficiencies of the aircraft. Both know or should know that those deficiencies technically make the aircraft not airworthy. However, the trial court inexplicitly penalizes Stutesman for relying on a statement made by Allan Hatz while rewarding Long for relying upon the same statement. This logical inconsistency simply cannot be reconciled. Again, it is unreasonable for Long

to rely upon the logbooks as a guarantee of airworthiness.

II. THIS COURT SHOULD OVERTURN THE TRIAL COURT'S DETERMINATION THAT STUTESMAN COMMITTED FRAUD AGAINST LONG BY PLACING ADVERTISEMENTS THAT STATED THE AIRCRAFT *WOULD BE* SOLD WITH A "FRESH ANNUAL" BECAUSE (1) THE ADVERTISEMENTS DID NOT CONCERN A PRESENTLY EXISTING FACT, (2) THE ADVERTISEMENTS WERE NOT FALSE AT THE TIME THEY WERE PUBLISHED, AND (3) LONG KNEW THE ADVERTISEMENTS WERE NOT FULLY CORRECT BEFORE HE PURCHASED THE AIRCRAFT.

A. The advertisements did not constitute a presently existing material fact.

None of Stutesman's representations concerning the printed advertisements qualify as fraud because these representations do not satisfy the second prong of fraudulent misrepresentation requiring that a representation be regarding a presently existing fact. Armed Forces, 70 P.3d at 40.

The advertisements put together by Stutesman did not involve a presently existing fact. Pursuant to a well-established rule of law in Utah, "a misrepresentation of intended future performance is not a representation concerning a "presently existing fact" upon which a claim for fraud can be based..." Republic Group, Inc. v. Won-Door Corp., 883 P.2d 285, 292 (Utah Ct. App. 1994).[5]

In the instant matter, it is undisputed that when Stutesman made the representations included in the printed advertisements, any reference to a "fresh annual" did not represent that the aircraft already had a "fresh annual." Rather, as admitted by Long, such references

[5] The cited referenced from Republic Group, Inc. continues by stating that future performance can be a basis for a claim of fraud if the plaintiff can prove that, "at the time of the representation, [Defendant][defendant] did not intend to perform the promise and made the representation for the purpose of deceiving [plaintiff]." Id. Why this contingency is not applicable to the matter at hand is not addressed here, but is addressed in the following subsection "B."

merely "stated that the aircraft ***would be*** sold with a "fresh annual" inspection." (R. 289, referencing the facts in the Pretrial Order as stipulated to by the parties before trial)(emphasis added). This stipulation clearly shows that including the words "fresh annual" in the advertisements was not a statement that a "fresh annual" had already occurred, but merely communicated to a potential buyer that in the future, such an inspection "***would be***" undertaken prior to a sale.

Applying the principle endorsed by this Court in Republic Group, Inc. to the case at hand, a representation concerning "intended future performance is not a representation concerning a "presently existing fact" upon which a claim for fraud can be based." Therefore, when Stutesman communicated through the advertisements that if someone desired to purchase the aircraft a "fresh annual" ***would be*** obtained prior to sale, Stutesman merely made a representation relating to an intended future performance. Accordingly, such a representation does not and cannot satisfy the second prong for fraud requiring reference to a presently existing fact. Importantly, other than the one reference where the trial court recited the elements for fraud, the trial court made absolutely no other references or findings to determine whether any representation, including the representations in the advertisements concerned presently existing facts. (R. 269-79.)

Accordingly, based upon the rule set forth in Republic Group, Inc., any representations Stutesman made in any advertisements concerning a "fresh annual" do not and cannot support a finding of fraud. Therefore the Court should overturn the trial court's decision that the representations in the advertisements constituted fraud on Stutesman's part.

B. The advertisements sent out by Stutesman were not false.

A plaintiff may seek to overcome the lack of a representation concerning a presently existing fact by showing that, "at the time of the representation, [the defendant] did not intend to perform the promise and made the representation for the purpose of deceiving [the plaintiff]." Republic Group, Inc., 883 P.2d at 292. Such a showing would not only assist the plaintiff in overcoming the second element of fraud discussed in the previous section, it would also help the plaintiff meet the following element requiring that the representation be false. However, in the instant matter, Long did not and cannot show that at the time of the advertisements, Stutesman did not truly intend to obtain a "fresh annual" and that Stutesman made the representation for the purpose of deceiving Long.

As discussed above, the stipulation set forth in the Pretrial Order clearly shows that including the words "fresh annual" in the advertisements was not a statement that a "fresh annual" had already occurred, but merely communicated to a potential buyer that in the future, such an inspection "***would be***" undertaken prior to a sale. At trial, no party presented evidence or even alleged that at the time Long saw the advertisements, Stutesman had any intention of not obtaining an annual inspection. (R. 548-1-330). No evidence was presented to show that at the time Long viewed the advertisements, Stutesman included the words "fresh annual" in his advertisements for the purpose of deceiving Long. (R. 548-1-330). To the contrary, the record shows that Stutesman's own actions demonstrate an intention to obtain an annual inspection prior to the sale of the aircraft. Indeed, the facts state that Stutesman intended on paying an authorized individual for the purpose of performing an annual inspection and did in fact engage such an

individual for such purposes. (R. 289-91.) The record further reflects that an inspection did in fact take place on two different dates. (R. 271, 290)

Accordingly, no evidence exists to show that Stutesman intended to not obtain an annual inspection or to deceive Long. Therefore, any representations made by Stutesman through the advertisements do not meet the third prong required to show fraud and this Court should overturn the trial court's decisions finding otherwise.

C. Long knew that the advertisement was incorrect before he purchased the aircraft.

To meet the sixth element required to prove fraud, a plaintiff must show that in responding to the representations made by the defendant, he acted reasonably and in ignorance of the falsity of the defendant's misrepresentations. Armed Forces, 70 P.3d at 40. However, in the instant case, Long cannot meet this particular element of fraud because Long himself admitted that prior to purchasing the aircraft, Long was fully aware that a fresh annual was not completed prior to the printing of the July 2006 advertisements. Specifically, Long testified that prior to purchasing the aircraft, Long knew that, "the advertisement was a fraud." (R. 548 – 87:13.) Long further testified to the following when he found out that a "fresh annual" was actually completed in September 2006 and not in July 2006:

> I was probably happy, you know, that it really is a fresh annual now that I'm buying the aircraft. I mean, it's as fresh as can be. September 13 is better than July 13 and better than August 13. September 13 tells me that this aircraft was finished annual a couple, 10 days or whatever, you know days before I picked up the aircraft. So this was good.

(R. 548 – 87: 21-25, 88:1-2.)

Given the above testimony, it is clear that before the purchase of the aircraft, Long was fully aware that the aircraft did not have a completed annual inspection until well after July 2006.

Importantly, the Court should note that the memorandum decision issued by the trial court is completely void of any application of the sixth prong for fraud to the facts at hand. In fact, the trial court only mentions this prong once in the entire decision when the trial court is reciting the elements of fraud. (R. 269-78.) The trial court does not make a single finding stating that Long's actions pursuant to the advertisements were taken in ignorance of any alleged misstatements stated in such advertisements. (R. 269-78.)

Accordingly, the Court should overturn the trial court's decision finding that Stutesman's representations through the advertisements were fraudulent because such representations fail to meet an essential element of fraud.

III. THIS COURT SHOULD OVERTURN THE TRIAL COURT'S DETERMINATION THAT STUTESMAN COMMITTED FRAUD AGAINST LONG THROUGH ORAL REPRESENTATIONS THAT THE AIRCRAFT HAD UNDERGONE AN ANNUAL INSPECTION BECAUSE (1) THE AIRCRAFT HAD UNDERGONE AN ANNUAL INSPECTION AND THUS SUCH REPRESENTATION WAS NOT FALSE, (2) EVEN IF THE REPRESENTATION WAS FALSE, STUTESMAN DID NOT KNOW THAT IT WAS FALSE AND DID NOT MAKE THE REPRESENTATION RECKLESSLY KNOWING THAT HE HAD INSUFFICIENT INFORMATION TO SUPPORT HIS REPRESENATION, AND (3) EVEN IF THE REPRESENTATIONS WERE FALSE AND EVEN IF STUTESMAN KNEW THE REPRESENTATIONS WERE FALSE, LONG FAILED TO BE REASONABLE IN HIS RELIANCE UPON SUCH REPRESENTATIONS.

Any oral representations made by Stutesman concerning the annual inspection were not fraudulent because such representations fail to meet the third, fourth, and sixth

elements for fraudulent misrepresentation.

A. The aircraft did undergo an annual inspection and thus Stutesman's oral representation to that effect was not false.

The third prong to prove fraud requires that the alleged representation be false. Armed Forces, 70 P.3d at 40. To satisfy this particular prong, the trial court found that Stutesman made an oral representation to Long that the airplane had an annual inspection and that this particular representation was false because no annual inspection took place. (R. 273-74, 277-78.)

Despite the trial court's conclusion to the contrary, Stutesman's oral representation that the airplane had an annual inspection was not false. The controlling facts of the instant matter, as stipulated to by the parties and as entered by the trial court, clearly state that, "[t]he annual inspection was conducted in two separate phases over a period of three months and was completed on September 13, 2006." (R. 290). So, any oral representation made by Stutesman claiming that an annual inspection was conducted and completed on September 13, 2006, cannot be false because an inspection was actually inspected on that date.

While such annual inspection may not have been fully and completely in compliance with several regulations, there can be no question that an inspection was made and that certifications were rendered. Importantly, a finding that an annual inspection did not take place is not the same as finding that an annual inspection was not performed perfectly. The trial court had sufficient grounds to find that the inspection was not performed perfectly, but the trial court had absolutely no evidence upon which it could

base its finding that no inspection ever took place.

For the foregoing reasons, the Court should overturn the trial court's decision by ruling that an inspection did take place and was completed on September 13, 2006, and that Stutesman's representations to that effect were not false, thereby defeating Long's claims of fraud.

B. Stutesman's oral representation that the aircraft had a fresh annual was not made with the knowledge that it was false, nor was such representation made recklessly.

In order to be fraudulent, a representation must either be made with the knowledge that the representation was false, or it must be made recklessly, with the knowledge that there was insufficient information available upon which to base the representation. Armed Forces Insurance Exchange v. Harrison, 70 P.3d 35, 40.

As discussed above, the oral representations made by Stutesman were not false. It then logically follows that where the representations were not false, Stutesman could not have known that his representations were false. A review of the trial court's findings reveals that the trial court never made any finding that Stutesman knew that the inspection was not done. The decision also fails to find that Stutesman made representations recklessly, knowing that he did not have sufficient information upon which to base such representations. These failures alone are sufficient to support a reversal of the trial court's decision.

Additionally, the record plainly shows that Stutesman made his representations based upon his knowledge that on two different dates, he delivered the airplane to Hatz for the purpose of obtaining an inspection and also based upon the certification Hatz presented

to him in the form of an annual inspection certification set forth in the logbook.

Pursuant to Stutesman's personal knowledge that he delivered the airplane to Hatz for inspection and Stutesman's personal review of the annual inspection certificate and the logbook, the trial court did not make the requisite finding because it could not. Stutesman knew that the airplane was inspected and had a certificate upon which he could rely. Long was in the exact same position as Stutesman in that Long knew as much about the inspection as Stutesman did. Specifically, Long knew that an inspection took place on September 13, but that the airplane still had a few details to be repaired, such as the missing oil cover and the cracked windshield.

Accordingly, the Court should rule that the trial court's failure to make necessary findings to support the conclusion of liability was reversible error and that even without such error, the record clearly reflects that Stutesman did not know his representations were false and did not make any reckless representations with the knowledge that he had insufficient information upon which to base such representation.

C. Long's reliance upon Stutesman's statement that the aircraft had a fresh annual is not reasonable insofar as Long knew that the airplane had a missing oil cover and a cracked windshield and that the annual inspection was not conducted at the time initially represented, thereby obligating Long with a duty to investigate and perform due diligence regarding the condition of the airplane and the quality or thoroughness of the annual inspection that was conducted.

Long's alleged reliance on Stutesman's statements, including his advertisement of a "fresh annual" is not reasonable. "In a fraud action, a plaintiff must demonstrate that he or she, acting reasonably and in ignorance of the statement's falsity, did in fact rely upon the misrepresentation." Conder v. A.L. Williams & Associates, Inc., 739 P.2d 634, 638 (Utah

App. 1987) (internal citations omitted). "Thus, not only must there be reliance, but the reliance must be justifiable under the circumstances." Id. In other words, the plaintiff must use "reasonable care and diligence" in relying on statements. Pace v. Parrish, 247 P.2d 273, 274 (Utah 1952). Once sufficient facts are revealed that should make it apparent to the plaintiff that he or she is being deceived, the plaintiff's reasonable care and diligence requires the plaintiff to make his or her own investigation. Conder, 739 P.2d at 638 (citations omitted). As such, even if all of Long's allegations regarding Stutesman's representations were correct, Long's reliance on the statements was not reasonable as Long failed to use reasonable care and diligence in investigating claims that were or should have been obviously suspicious.

The Utah Supreme Court has provided guidance as to when reliance is reasonable. In Pace v. Parrish, the Supreme Court overruled a jury's finding that a buyer of farm land had relied upon the representations of the seller regarding whether property was cultivable. Pace, 247 P.2d at 274. In Pace, the seller of property told the buyer that a portion of land sold, which had not been cultivated, was similar to adjacent cultivated land. Id. Although this was not true, the Utah Supreme Court held that the fact that this flat land was adjacent to other lands that have been cultivated should have been enough to put the buyer on inquiry as to why this land had not been cultivated. Id. Additionally, the Supreme Court noted that the uncultivated land was covered with rocks, and if the buyer had simply taken the time to walk over the land, the buyer would have known that the land was not good for cultivation. Id. The Supreme Court finally noted that the seller did nothing to prevent such an inspection from happening. Id. Accordingly, the Supreme Court overturned the jury's

finding of fraud because the buyer did not use "reasonable care and diligence" and therefore was not entitled to rely upon seller's representations.

The instant case is directly on point with the Supreme Court's decision in Pace. Plaintiff's sole point of contention is that Stutesman told him that the aircraft had a "fresh annual." As pointed out above, a "fresh annual" is distinct from a guarantee of "airworthiness." However, even if Long, an experienced pilot, was confused as to this point, his reliance on Stutesman's statement that the airplane had a "fresh annual" and therefore was "airworthy" cannot be reasonable. Initially, Long testified that he was concerned about the misstatement that Stutesman made regarding the fresh annual before he decided to purchase the aircraft. He believed, before purchasing the aircraft, that this was fraudulent as Stutesman had advertised the aircraft as having a fresh annual only to discover that the annual inspection had been conducted only a few weeks before the purchase. Based on Long's own testimony, this fact put him on notice that the aircraft may not be in the condition advertised.

Further, Stutesman informed Long that the airplane had defects of at least the cracked windshield and the oil cap. Both of these issues caused great consternation with Long because he knew or should have known that these defects would bring into question the quality of the inspection that took place. Like the buyers in Pace, as soon as Long was notified of these inconsistencies, he had an affirmative duty to inspect the airplane and verify that the fresh annual was properly issued and that his understanding regarding the fresh annual and airworthiness was accurate. Long testified that he knew if any part of an aircraft – no matter how insignificant – was not completely in order, that the aircraft should

not receive the fresh annual. Long was told and could see with his own eyes that the airplane's windshield had a crack. Long also was told and could see with his own eyes that the airplane's oil cap was missing. Finally, Long also was told, although he denied it at trial, that the airplane was using a car battery, not a battery specifically designed for aircraft. Each of these statements put Long on notice that the airplane may have improperly received a fresh annual certification. Accordingly, Long had an affirmative duty to investigate these statements by Stutesman. Like the buyer in Pace, Long does not get to rely upon statements that he knows or should know are inaccurate and then get to recover for fraud.

Finally, like the buyer in Pace, Long had adequate opportunity to inspect the aircraft. Stutesman left Long with the airplane for a number of hours and allowed Long access to any and all tools that Long might need or desire to ensure a proper inspection. Stutesman gave Long the names of certified aircraft mechanics in the area who were able to help him perform this inspection. Stutesman offered to take Long and the aircraft to the manufacturer's factory for a detailed inspection by the manufacturer. Long opted not to use these many opportunities to verify any claims made by Stutesman. The trial court determined that only after Long had every opportunity to inspect the aircraft did Long actually purchase the aircraft. (R. 275.) In short, Stutesman gave Long every opportunity to discover any and all flaws in the airplane that would have materially affected the condition of the aircraft. Long, despite having notice that the airplane may have not properly received the annual inspection, did not avail himself these opportunities. Instead, Long relied upon his own inspection of the airplane to confirm that the fresh annual was properly issued.

Importantly, according to Long's own expert, it would have cost Long no more than $150.00 to determine that the annual inspection was not performed properly. (R. 548 – 100:17-20, 155:12-24.) Like the buyer in Pace, because Long had the opportunity to inspect the airplane after he knew that the fresh annual may have been performed improperly, Long's reliance on Stutesman's assertion that the airplane had a fresh annual was not reasonable. Long did not use reasonable care or diligence and therefore may not recover for fraud.

IV. THIS COURT SHOULD OVERTURN THE TRIAL COURT'S DECISION TO THE EXTENT THAT IT DOES NOT MAKE ANY FINDING THAT LONG'S RELIANCE IS REASONABLE.

Further, the trial court's failure to make any factual findings or orders regarding or related to reliance renders the judgment below invalid. In an action for fraud, the burden is on the plaintiff to prove all the necessary elements. Pace v. Parrish, 247 P.2d 273, 274 (Utah 1952). This includes that the plaintiff reasonably relied upon statements made. Armed Forces Insurance Exchange v. Harrison, 70 P.3d 35 ¶16 (Utah 2003). It is long standing Utah law that "[w]here a cause of action or a right to recover in a civil action depends upon a number of elements, then, unless there is some substantial evidence in support of every one of those elements, the general verdict or conclusion which assumes such elements to exist must fail." Cobb v. Hartenstein, 152 P. 424, 430 (Utah 1915).

In the instant case, the trial court fails to make any factual finding or legal conclusion that Long's professed reliance on Stutesman's representations concerning a "fresh annual" was reasonable. As discussed above, the lack of any specific finding of reasonable reliance is likely because Long's reliance was not reasonable.

Accordingly, this Court should reverse the trial court's faulty decision.

V. THIS COURT SHOULD REVERSE THE TRIAL COURT'S DECISION BECAUSE THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT AWARDED THE PURCHASER DAMAGES IN AN AMOUNT EQUAL TO THE ENTIRE VALUE OF THE AIRPLANE INSTEAD OF DAMAGES IN AN AMOUNT EQUAL TO THE DIFFERENCE IN VALUE BETWEEN AN AIRPLANE WITH A PROPER ANNUAL INSPECTION AND AN AIRPLANE WITHOUT A PROPER ANNUAL INSPECTION.

A. The trial court's damage calculation was in error.

Even if the trial court's determination that Stutesman committed fraud was correct, its calculation of damages in this case was in error. Under prevailing Utah law, the damages in a fraud action are calculated as the difference between the value of property purchased and the value it would have had if the fraudulent representations were true. Pace v. Parrish, 247 P.2d 273, 277 (Utah 1952). The Second Restatement of Torts identifies this as the benefit-of-the-bargain rule. Restatement (Second) of Torts § 549(g); see also Dilworth v. Lauritzen, 424 P.2d 136 (Utah 1967) (rejecting the "out-of-pocket" rule and adopting the benefit of the bargain rule).

Under the benefit-of-the-bargain rule, the victim in a fraud action may be compensated in one of two ways. First, the defendant may simply pay the difference in value between the property in its actual as opposed to its represented condition. Second, the victim "may be fully and fairly compensated if he is given the cost of making [the property] as represented." Restatement (Second) of Torts § 549 cmt. (l).

Because this is an action for fraud, the proper calculation of damages is the difference in value between the purchased property as represented and the property in its actual condition at the time of sale. Pace, 274 P.2d at 277. The proper calculation of

damages, therefore, is the difference between the aircraft with a fresh annual and the aircraft without a fresh annual. Long presented no evidence, however, that would demonstrate what the value of the aircraft without a fresh annual would have been. The only reason why the aircraft did not receive a fresh annual properly from Hatz is because the aircraft had a cracked window. After the inspection, an oil cap went missing and the battery was temporarily replaced. However, after all the defects known to Stutesman were disclosed to Long, Long negotiated the price down $300.00. Accordingly, Long actually received the benefit of his bargain. Thus, the proper damage amount would be $0.00. In other words, because there are no damages, there can be no fraud.

In the alternative, the damages would be the cost to bring the aircraft to its represented condition, namely the condition of being freshly certified. Again, however, Long actually received the benefit of his bargain. Again, there are no damages. Accordingly, this Court should reverse the decision of the trial court.

B. The trial court erred in awarding damages in this case because there is no causal connection between the fraudulent representation of a fresh annual and the subsequent crash.

Additionally, there is no causal connection between the alleged representations and the alleged damage in this case. Utah law holds that even where a duty exists and is breached, there can be no recovery if discharge of the duty would not have prevented the harm. Beach v. University of Utah, 726 P.2d 413, 417 (Utah 1986). Long claims he is entitled to a fraud because (1) Stutesman represented that the aircraft had a fresh annual, (2) that the September 13, 2006 annual had not been properly performed, (3) that the landing gear failed, (4) that the landing gear would not have failed if the annual had been

performed, and (5) the damage the aircraft is a result of the landing gear malfunctioning. However, this logic does not give rise to fraud because the damage to the aircraft caused by Long's crash landing has no causal connection to the alleged fraud.

An annual inspection is not an ongoing guarantee or warrantee of airworthiness. 14 CFR 91.409. Importantly, the FAA has designated a type of inspection that would be a guarantee of ongoing airworthiness called a progressive inspection. 14 CFR 91.409. Even Long's expert testified that an annual inspection is not a guarantee that nothing will go awry with the airplane even within hours of the inspection. It is undisputed that the annual inspection was not properly undertaken. However, the only documented issue with the annual inspection is a crack on the windshield that should have been repaired. There is no evidence that the crack on the windshield caused the landing gear to not properly deploy. Such argument would be ludicrous. Accordingly, there is a huge disconnect between the landing gear not locking and the annual inspection being improperly undertaken. Accordingly, as there is no causal connection between the misstatement and the harm, there can be no fraud.

VI. THIS COURT SHOULD REVERSE THE TRIAL COURT'S DECISION CONCERNING THE COSTS AWARDED TO LONG BECAUSE SUCH COSTS ARE NOT ALLOWED BY RULE OR BY STATUTES.

Long received an award of $4,768.35 for costs and disbursements under Rule 54. However, the majority of the amounts claimed by Long are not recoverable. Utah law has long established the general rule that costs recoverable under Rule 54 of the Utah Rules of Civil Procedure include costs that the prevailing party was required to pay under rule or statute. Frampton v. Wilson, 605 P2d 771, 773 (Utah 1980) (stating that, "[c]osts were

generally not recoverable at common law; and are therefore only allowable in the amounts and in the manner provided by statute.") Costs above and beyond these matters are not taxable under Rule 54. Id. at 774 (stating that, concerning allowable costs, "[t]he generally accepted rule is that it means those fees which are required to be paid to the court and to witnesses and for which the statutes authorize to be included in the judgment"); see also Stratford v. Wood, 358 P.2d 80, 81 (Utah 1961) (ruling that expert fees such as employing the services of a land surveyor who testified in a land boundary dispute are part of normal expenses of litigation and are thus not recoverable as costs as they are "not in the nature of costs or damages.")

Pursuant to the foregoing rule concerning taxable costs that Long may recover, allowable costs are limited to costs relating to court filing fees, service of process fees (if service involved Stutesman only or service of a subpoena upon a witness that appeared at trial), witness fees not to exceed the amount established by rule for witnesses, and any other expense Long was required to pay by rule or by law.

The one possible exception to the foregoing rule is an allowable cost for depositions that were essential to the prevailing party's successful action. Id. Under this application of the law, Long may only recover $661.46 for the deposition of Stutesman, plus the applicable court filing fee and the applicable witness fees established by rule. All other fees, including expert fees, tie-down expenses, removal expenses, mail expenses and travel expenses, are not properly taxable as costs.

Accordingly, unless the Court overturns the entire judgment as requested by Stutesman, the Court should reverse the trial court's award of costs and amend such award

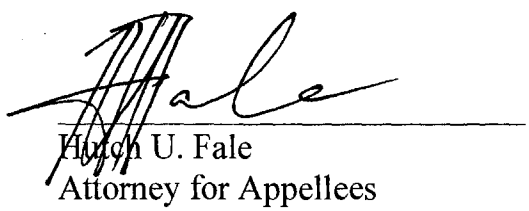
to a total of $661.46.

CONCLUSION

For the foregoing reasons, this Court should overturn the trial court's determination that Stutesman is liable for fraud against Long and the trial court's award of damages.

RESPECTFULLY SUBMITTED this 14th day of May, 2010.

AVERY BURDSAL & FALE, PC



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CERTIFICATE OF SERVICE

I, Hutch U. Fale, certify that on the 14th of May, 2010, I served two copies of the foregoing Brief of Appellees upon, counsel for the appellant in this matter by mailing to him by first class mail, postage prepaid to the following:

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**IN THE UTAH COURT OF APPEALS,
STATE OF UTAH**

DARRELL LONG,

Plaintiff/Appellee,

v.

J. D. STUTESMAN,

Defendant/Appellant.

ADDENDUM TO APPELLANT'S BRIEF

Case #20090974-CA

COMES NOW Appellant J.D. Stutesman, by and through counsel undersigned of the law firm Avery Burdsal & Fale, PC, and hereby submits the instant Addendum to Appellant's Brief. The instant addendum includes a single document, attached Addendum "A", which document is the Memorandum Decision entered by the Honorable Judge Robert Faust in the court below on March 12, 2009.

RESPECTFULLY SUBMITTED this 26th day of May, 2010.

Hutch U. Fale,
Attorney for Appellant JD Stutesman

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of May, 2010, I did mail a true and correct copy of the foregoing **Addendum to Appellant's Brief** via First Class US Mail, postage prepaid, to the following:

Denver Snuffer
Nelson Snuffer Dahle & Poulsen, PC
10885 South State Street
Sandy, UT 84070

Legal Assistant

Tab A

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

DARRELL LONG,	:	MEMORANDUM DECISION
Plaintiff,	:	CASE NO. 060919388
vs.	:	
J. D. STUTESMAN and ALLAN HATZ,	:	
Defendants.	:	

This matter came before the Court for a two-day trial on February 25 and 26, 2009. Plaintiff was present and was represented by Denver Snuffer and Timothy Willardson. Defendants were present and were represented by Robert Avery. At the conclusion of the trial, the Court took the matter under advisement to further consider the evidence adduced at trial, counsel's oral argument and the relevant legal authority. Being now fully informed, the Court rules as stated herein.

As procedural background, the Court notes that it previously determined that the Plaintiff's claims for breach of contract and conversion against Defendant Hatz failed as a matter of law and, accordingly, entered summary judgment on these claims. The Court denied Defendant Hatz's Motion regarding the Plaintiff's claims for fraud and fraudulent misrepresentation. The Court determined that there existed genuine issues of material fact, including on the core element of whether

the Plaintiff relied on Defendant Hatz's inspection of the plane which is the subject of this action and his various logbook entries.

The parties stipulated to the following facts in this case: This dispute arises from the crash of a 1960 Bellanca airplane, model number 14-19-3, tail number N8857R. The crash occurred on Saturday, September 30, 2006 at the Provo Airport, Provo, Utah, on the same day that the Plaintiff purchased the airplane from Defendant Stutesman. The airplane crashed on the second landing after it was purchased. The cause of the crash was a malfunction in the landing gear of the aircraft, which failed to fully extend and lock in the extended position.

Prior to September 30, 2006, Defendant Stutesman placed ads in Trade-a-Plane, Barnstormer, and the Bellanca Club with the intent of offering the aircraft for sale to the general public. The advertisements for the aircraft all stated that the aircraft would be sold with a "fresh annual" inspection. The annual inspection referred to the annual airworthiness inspection required by the Federal Aviation Administration ("FAA") for civil aircraft.

On August 21, 2006 Plaintiff and Defendant Stutesman reached an agreement whereby Plaintiff would purchase the Aircraft from Defendant Stutesman for $28,000.00. Plaintiff sent a deposit equal to ten (10%) of the purchase price ($2,800.00) in the form of a personal check directly to Defendant Stutesman on that date.

On September 29, 2006 Defendant Stutesman disclosed defects to Plaintiff of a cracked windshield and missing oil inspection hatch cover that were discovered during the annual inspection and which had not been properly rectified. On September 30, 2006 Plaintiff and Defendant Stutesman entered into a purchase agreement regarding the purchase and sale of the aircraft for the reduced purchase price of $27,700.00. The balance of the amount owed, taking into account the $2,800.00 deposit already remitted, was paid in certified check totaling $24,900.00.

Defendant Hatz was not a party to the contract. Defendant Hatz intended to be paid $250.00 for inspecting the aircraft, but made no attempt to collect this money. Defendant Hatz is an Airframe and Powerplant Mechanic who is certified and authorized by the FAA to conduct inspections of aircraft pursuant to 14 C.F.R. 43.7. Defendant Hatz certified that he inspected the aircraft pursuant to pertinent Federal Aviation Regulations.

The annual inspection was conducted in two separate phases over a period of three months and was completed on September 13, 2006. Defendant Hatz has never had any conversation, telephonic or otherwise, with the Plaintiff regarding the sale or condition of the aircraft or regarding any other subject. Defendant Hatz has never participated, engaged in or provided any written communication whatsoever that was directed specifically to Plaintiff.

The FAA ultimately determined that Defendant Hatz's certification of airworthiness regarding the aircraft did not meet FAA standards. Defendant Hatz agreed to a six month suspension of his authorization to inspect aircraft. Defendant Hatz's authorization to inspect aircraft was reinstated by the FAA at the termination of that six month period.

FINDINGS AND LEGAL ANALYSIS

The Plaintiff's claims at trial were a fraud claim against both Defendants and a breach of contract and theft claim against Defendant Stutesman. In addition to the undisputed facts discussed above, the following evidence was presented at trial: Defendant Stutesman testified that he wanted and intended potential buyers, including Plaintiff, to rely upon the representation he made of a "fresh annual" inspection in his advertisements. Defendant Stutesman further testified he gave Plaintiff the logbooks and wanted Plaintiff to rely upon the information and representations set forth in the logbooks for the aircraft. Defendant Stutesman testified he expected Plaintiff to see the annual certification completed in September 2006 and to rely upon it. Plaintiff testified he did in fact rely upon the fresh annual inspection, the logbooks and certification therein.

Defendant Hatz, who performed and signed off on the annual inspection, testified he knew of problems with the aircraft and he did not fix all of them, including not fixing a crack in the windshield. Defendant Hatz testified he signed the certificate of airworthiness and

knew at the time the aircraft was not airworthy and he admitted to violating FAA regulations. Defendant Hatz admitted that by placing his stamp in the logbook, he was certifying the aircraft as being airworthy. In fact, the aircraft was not airworthy.

Defendant Stutesman informed the Plaintiff that the annual inspection was being done in two parts on different dates. Defendant Stutesman further testified that the aircraft was not airworthy when he sold the aircraft to Plaintiff because it had a car battery in it. Plaintiff testified he was never told that there was a car battery in the plane at the time he purchased it. Defendant Stutesman admitted that it was either a crime or a violation of Federal regulations to fly a plane that was not airworthy.

Plaintiff's expert, John Caka, testified that the costs to repair the aircraft exceeds the value of the aircraft. Mr. Caka further testified the annual inspection was not done properly and would have disclosed defects which caused the landing gear to not function properly. This testimony is uncontroverted. Based on Mr. Caka's testimony, the Court finds that a number of issues concerning the aircraft were not corrected, fixed or maintained and that these issues would have been corrected if an accurate annual inspection had occurred. Further, only two of the many items wrong with the aircraft were made known to Plaintiff i.e. the missing oil inspection hatch and the crack in the windshield.

Defendant Stutesman made numerous representations regarding this "fresh annual" inspection both in his advertisements and in his oral representations to Plaintiff. Plaintiff relied upon the Defendants' representations in making his decision to purchase the aircraft.

After Plaintiff had an opportunity to review the logbooks and obtain an inspection of the aircraft by his own mechanic, the parties agreed to the sale and purchase of the aircraft and entered into a purchase agreement. The purchase agreement was signed by both parties. The Court finds that the Defendants should have known, being approved aircraft mechanics, the condition of the aircraft when sold and whether or not the annual inspection was done properly.

The Court finds that buyers of airplanes do rely upon an aircraft's logbooks and information therein.

With respect to the Plaintiff's breach of contract claim, the Court determines that Defendant Stutesman did not breach the breach the parties' contract. The Court finds that the contract is not ambiguous and therefore, parol evidence concerning what the parties may have really intended is not permitted to alter its terms and conditions. The contract clearly provides the Plaintiff with the option to inspect the aircraft, its logbooks and records. The agreement provides that the purchase was contingent upon the pre-purchase inspection. The Court determines that the Plaintiff was not obligated to purchase the aircraft

if, during the pre-purchase inspection, he found something that was not to his satisfaction.

However, the Plaintiff agreed in writing that if he accepted the aircraft after the pre-purchase inspection, he was buying the aircraft **"as is"** with no warranties expressed or implied by the seller. This language is clear and unambiguous. Specifically, there were no warranties either express or implied associated with the sale of this aircraft and it was sold "as is." The Plaintiff had the full opportunity to inspect the aircraft. Further, the Plaintiff had an opportunity to hire a mechanic to inspect the aircraft for him, which he chose not to do. Under these circumstances, the Plaintiff took the risk of not hiring an independent mechanic to inspect the airplane and cannot now complain about the express waiver of warranties in the contract.

After hearing the testimony and reviewing the exhibits, the Court determines Defendant Stutesman did not breach the contract between the parties when he did not provide an aircraft with a "fresh annual" inspection or a proper annual inspection. The express written terms of the purchase agreement overrides and removes any previous representations made by the seller regarding the airplane. Plaintiff could have negotiated into the purchase agreement the representations which had been made in the advertisements and certifications and other information contained in the logbooks that he testified he was relying upon to purchase the aircraft, but he failed to do so.

In regards to the fraud claims against Defendants, under Utah law, to bring a claim sounding in fraud, a party must allege (1) that a representation was made (2) concerning a presently existing material fact (3) which was false and (4) which the representor either (a) knew to be false or (b) made recklessly, knowing that there was insufficient knowledge upon which to base such a representation, (5) for the purpose of inducing the other party to act upon it and (6) that the other party, acting reasonably and in ignorance of its falsity, (7) did in fact rely upon it (8) and was thereby induced to act (9) to that party's injury and damage.

The Court rules that the Plaintiff has not presented sufficient evidence to establish a fraud claim against Defendant Hatz. Specifically, there is no evidence that Defendant Hatz's representations were intended or put forth for the purpose of inducing Plaintiff to act upon them.

As to Defendant Stutesman, the Court rules that the Plaintiff has proven his fraud claim. Defendant Stutesman testified that he wanted and intended potential buyers, including Plaintiff, to rely upon the representation he made of a "fresh annual" inspection in his advertisements. Defendant Stutesman further testified that he gave Plaintiff the logbooks and wanted Plaintiff to rely upon the information and representations set forth in the logbooks for the aircraft. Defendant Stutesman testified he expected Plaintiff to see the annual

certification completed in September 2006 and to rely upon it. Plaintiff, in turn, testified he did in fact rely upon the fresh annual inspection, the logbooks and certification therein.

Defendant Stutesman further testified the aircraft was not airworthy when he sold the aircraft to Plaintiff. Two days prior to the sale, Defendant Stutesman replaced the airplane battery with a car battery and failed to disclose this fact to the Plaintiff. The Plaintiff testified that he was never told there was a car battery in the plane at the time he purchased it.

Defendant Stutesman also knew about a crack in the windshield and a missing oil inspection cover, both of which would make the aircraft not airworthy. In addition, had a fresh annual inspection occurred it would have disclosed the problem which caused the landing gear not to lock and to collapse upon the second landing after the aircraft was purchased.

The sale of the airplane occurred within six operational hours of the alleged annual inspection. The advertised and oral representations by Defendant Stutesman and the information in the logbooks regarding the aircraft were false. There was not a fresh annual inspection, the logbook information was false and the aircraft was not airworthy.

Overall, the Court finds that through various representations and omissions, Defendant Stutesman defrauded the Plaintiff. He intended that the Plaintiff rely on his representations in order to induce him to purchase an airplane which he knew full-well to not be airworthy. The

Plaintiff did in fact rely on Defendant Stutesman's false representations to his detriment. The Court rules in favor of the Plaintiff on his fraud claim.

Dated this 11 day of March, 2009.

/S/

ROBERT P. FAUST
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision to the following, this 12 day of March, 2009:

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