

1999

James Gordon Holmes v. American States Insurance Company, Economy Auto Inc, and Clarendon National Insurance Company : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JAMES GORDON HOLMES,

Plaintiff/Appellant,

vs.

AMERICAN STATES INSURANCE
COMPANY, a Corporation, ECONOMY)
AUTO INC., a Corporation, and
CLARENDON NATIONAL
INSURANCE COMPANY, a
Corporation,

Defendants/Appellees.

Case No. 990168 CA

**ARGUMENT
PRIORITY 15**

REPLY BRIEF OF APPELLANT

APPEAL FROM
ORDER OF PARTIAL SUMMARY JUDGMENT, DATED JUNE 10, 1998; AND
ORDER OF SUMMARY JUDGMENT, DATED JANUARY 22, 1999

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FILED

Utah Court of Appeals

DEC 30 1999

Julia D'Alesandro
Clerk of the Court

ORAL ARGUMENT AND PUBLISHED DECISION IS REQUESTED

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STATEMENT OF NEW MATTERS PRESENTED IN OPPOSING BRIEFS

1. Appellee, American States Insurance Company (“American”), did not, or could not, address, brief or argue the primary issue presented to the Court in this appeal. The issue in this appeal is whether Judge Wilkinson erred in dismissing plaintiff’s complaint, claims and causes of action where the defendants admit having committed multiple civil and criminal violations of the laws respecting commerce in motor vehicles. Appellees breach of statutory duties should have been treated as proof of defendants’ negligence without argument or proof. Judge Wilkinson erred when he disregarded appellant’s prima facie evidence of appellees’ negligence and refused to afford appellant any relief for appellees’ violation of their statutory duties. (R. 465-86, 506-17, 536-51.)

2. Appellant disputes American’s statement that violations of one’s statutory duties falls within Judge Wilkinson’s discretion to determine whether violations of statutes are actionable. A review of American’s stated position reveals that it is without factual, legal or statutory support and is without merit.

3. Appellees, Economy Auto Inc., (“Economy”) and Clarendon National Insurance Company (“Clarendon”), likewise did not, or could not, address, brief or argue the primary issue presented in this appeal. Instead Economy and Clarendon assert that notwithstanding their multiple admitted civil and criminal violations of the Utah Motor Vehicle Act and other laws, such violations do not constitute actionable claims under Utah law.

4. Appellant disputes Economy's and Clarendon's statement of the issues on appeal. There is simply no support for Economy's and Clarendon's flawed analysis: a) that Economy did not know that the vehicle that is the subject of these proceedings was a salvage and therefore had no duty to comply with the salvage notification requirements of U.C.A § 41-1a-1005(1), b) that appellant sustained no damages, or c) that the Utah Uniform Commercial Code ("Commercial Code") and Utah Consumer Sales Practices Act ("Sales Practice Act") do not apply to plaintiff's claims. A review of Economy's and Clarendon's position reveals the same lack factual and legal support and are in like manner without merit. (R. 92-3, 98-121, 461-62, 446-50, 503-04, 519-20, 567-68.)

5. Appellant disputes the contention that the record before Judge Wilkinson and this Court does not fully reflect defendants' multiple admissions of civil/criminal violations of laws respecting commerce in motor vehicles. Appellant pled, set forth, substantiated, argued, re-argued and reasserted his prima facie claims of appellees' negligence based on appellees' admission that they breached their statutory duties when they obtained, sold, transferred and concealed the subject vehicle's salvage in violation of Utah laws. (R. 465-86, 506-17, 536-51.)

6. The material facts and issues set forth in appellant's brief are not contested. The law is clear and not debated by appellees. Appellant pled, briefed, argued, re-briefed and re-argued his prima facie claims based on appellees' negligence for violations of their statutory duties. Appellant is entitled to have a jury, not Judge Wilkinson, determine the facts pertaining to appellees' breaches of

statutes. Appellees assertions are without factual or legal support, and are without merit and are contrary to Utah law. (R. 465-86, 506-17, 536-51.)

7. Utah imposes tort liability premised on the following criteria:

- a) One's duty;
- b) Breach of duty;
- c) Causation; and
- d) Damages.

8. Appellees' duties in this case are defined by statutes that establish and impose obligations on insurance companies and motor vehicle dealers, when they obtain, purchase, sell, distribute, supply or introduce motor vehicles into the stream of commerce. (U.C.A. sections 41-1a-1005(2) & 1008, 41-3-701 & 702.)

9. Appellees breached their statutory duties in the following material respects, in addition to others:

a) Appellees failed to comply with their affirmative duties to disclose the salvage nature of the subject vehicle as required by U.C.A. §§ 41-1a-1001 through 41-1a-1008. (R. 465-86, 506-17, 536-51.)

b) Appellees' civil/criminal violations of their affirmative statutory duties is prima facie evidence of appellees negligence, deceptive and/or unconscionable acts and practices as defined in the Sales Practices Act U.C.A. §§ 13-11-3 , 13-11-5, & 13-11-19. (R. 98-114, 119, 157, 233-56, 308, 317, 489-99.)

c) Appellees' statutory violation breached the express and implied warranties given by them to and for the benefit of all subsequent purchasers of the

subject vehicle that the same was not, and had not been, determined a salvage motor vehicle as defined under U.C.A. §§ 41-1a-1001(6), 70A-2-313, 70A-2-314, and 70A-2-315. (R. 92-3, 98-121, 119, 157, 233-56, 308, 317, 461-62, 503-04.)

d) Appellees' statutory violation breached the third-party beneficiary provisions of U.C.A. § 70A-2-318, which extend:

“ . . . to any person who may reasonably be expected to use, consume, or be affected by the goods and who is injured by breach of the warranty. A seller may not exclude or limit the operation of [section 70A-2-318] with respect to injury to the person of an individual to whom the warranty extends.”

e) Appellees' violation of their statutory duties deprived appellant of the benefit of his bargain as well as the use and benefit of the manufacturer's warranty in that appellees acts, errors and omissions caused the notation “scraped” “warranty void” to appear on the manufacturer's computer records and print-outs when appellant sought to obtain repairs that would otherwise have been covered by the manufacturer's warranty. Appellees conduct violated U.C.A. §§ 70A-2-313, 70A-2-314, and 70A-2-315. (R.472, 500-02, 717-21, 722-24, 725-27.)

f) Appellees' liability for intentional breach of their statutory duties are set forth in U.C.A. § 41-3-702(3 & 5), which liability is imposed on “any person” regardless of privity of contract, not limited by the doctrine of Caveat Emptor or comparative negligence. *State v. McBride*, 940 P.2d 539 (Utah App. 1997).

10. Appellant disputes appellees assertions that Judge Wilkinson acted within his discretion in dismissing appellant's claims and causes of action. An application of the statutes to the facts of this case warrants a reversal of Judge

Wilkinson's rulings. Judge Wilkinson's refusal to follow or apply the statutes to the facts of this case are reviewed by this Court for correctness and are afforded no deference. *Woodhaven Apt v. Washington*, 942 P.2d 918 (Utah 1997); *Diversified Equities v. American Sav. & Loan*, 739 P.2d 1133 (Utah App. 1987) and *Reed v. Alvey*, 610 P.2d 1374 (Utah 1980). (R. 6-8, 45-50, 54-59, 60-65, 478- 88, 510-53.)

11. Appellant disputes that Judge Wilkinson's statutory construction does not raise questions of law to be reviewed by this Court under a correction of error standard. *Brown & Root Inds. Service v. Industrial Com'n of Utah*, 947 P.2d 641 (Utah 1997). Where Judge Wilkinson's rulings are based on a misapplication of the law, where a correct one would have produced a different result, the party adversely affected is entitled to have the error rectified in a proper adjudication under correct principles of law. *Reed v. Alvey*, 610 P.2d 1374 (Utah 1980); *Farris v. Jennings*, 595 P.2d 857 (Utah 1979) and *Cummings v. Nielson*, 42 Utah 157, 129 Pac. 619 (1912). (R. 6-8, 45-50, 54-59, 60-65, 478- 88, 510-53.)

12. Appellant denies that American or Economy are entitled to explain, justify or excuse in any manner their knowing and intentional failure to comply with the provisions of U.C.A. Section 41-1a-1005. Any such excuses are strictly within the Jury's providence, not Judge Wilkinson's, and certainly not an appellate court's. Pertinent parts of section 41-1a-1005 are:

a) U.C.A. § 41-1a-1005(1)(a)(i).

"If an insurance company declares a vehicle a salvage vehicle and takes possession of the vehicle for disposal, or an insurance company pay off the owner of a vehicle that is stolen and not recovered, the insurance company

shall within ten days from the settlement of the loss surrender to the division the outstanding certificate of title, properly endorsed, or other evidence of ownership acceptable to the division.” (Emphasis added.)

b) U.C.A. § 41-1a-1005(1)(d)(i & ii).

“(i) *If a dealer licensed under Title 41, Chapter 3, Part 2, Licensing, takes possession of any salvage vehicle for which there is not already issued branded title or salvage certificate from the division or another jurisdiction, the dealer shall within ten days surrender to the division the certificate of title or other evidence of ownership acceptable to the division.*”

(ii) *The division shall then issue a salvage certificate in the applicant’s name.* (Emphasis added.)

c) U.C.A. § 41-1a-1005(2) criminalizes defendants misconduct herein.

“Any person, insurance company, or dealer licensed under Title 41, Chapter 3, Part 2 Licensing, who fails to obtain a salvage certificate of title as required in this section or who sells a salvage vehicle without first obtaining a salvage certificate is guilty of a class B misdemeanor.

U.C.A. section 41-1a-1008 further reaffirms the criminal penalties when §§ 41-1a-1001 through 41-1a-1007 are violated. (R. 6-8, 45-59, 60-65, 478- 88, 510-53.)

13. Appellant contests American’s and Economy’s assertions that the Sales Practices Act does not apply to his claims, or that if it applies, appellees are not a “supplier” as that term is contemplated in § 13-11-3(6). Section 13-11-3(6) defines a “supplier” as:

“Supplier” means a seller, lessor, assignor, offeror, broker, or other person who regularly solicits, engages in or enforces consumer transactions, whether or not he deals directly with the consumer.

The Sales Practices Act states that it is to be “construed liberally” in protecting consumers from those who commit deceptive and unconscionable sales practices.

(U.C.A. § 13-11-2) There cannot be any serious debate that appellees are

“suppliers” as that term is defined by Utah law in that neither appellee could conduct or continue business if they did not sell, offer or regularly solicit, engage in or enforce consumer transactions. (R. 115-6, 156-63, 457, 461-88, 539, 541-43.)

14. Appellant denies American’s and Economy’s contention that privity of contract is required as a condition precedent to appellant’s right to recover damages for their breaches of statutory duties. Appellees misstate or overlook the following statutory provisions in creating their argument:

a) U.C.A. §§ 13-11-3(6) and 13-11-5(1) definitions of “supplier” and “unconscionable acts” refutes appellees arguments that privity of contract is required for one to assert claims under the Sales Practices Act.

i) A “supplier” includes all entities “whether or not he deals directly with the consumer” and applies “before, during or after the transaction.”

ii) The Sales Practices Act does not premise liability on one’s status as a “seller,” “dealer,” or “merchant” as claimed by American.

iii) The Sales Practices Act imposes liability based on one’s committing deceptive and/or unconscionable sales practices that injure consumers.

b) The Commercial Code, U.C.A. § 70A-2-318, unambiguously states that privity of contract need not exist in that a seller’s warranty “extends to any person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of warranty.”

i) Appellees warranted that the subject vehicle was not salvage when they sold the same in violation of U.C.A. § 41-1a-1005. (U.C.A. 70A-2-313, 314.)

ii) Appellees breached their express and implied warranties that are defined under U.C.A. §§ 70A-2-313, 314, 315, and 318.

c) Nowhere in the Commercial Code is liability for breach of contract /warranty premised on privity of contract or one's status as a "seller," "dealer," or "supplier" as claimed by appellees. (R. 115-16, 161-63, 308-87, 457-70, 539-43.)

i) The Commercial Code does, however, exact higher standards from those who are "merchants" such as American and Economy as that term is defined in section 70A-2-104. (R. 457, 470, 539, 542, 543.)

ii) The Commercial Code also imposes liability on those who breach the Code's obligations of honesty in fact, good faith and fair dealing as defined in §§ 70A-1-201(19) & 70A-1-203. (R. 92-121, 446-62, 500-04, 722-27.)

d) The Motor Vehicle Act imposes joint and several liability on "any person, insurance company or dealer who fails to obtain a salvage certificate...or sells a salvage vehicle without first obtaining a salvage certificate." (R. 500-04)

i) Liability under section 41-1a-1005(2) is based on the non-disclosure of a salvage vehicle when the person, insurance company or dealer fails to obtain the mandatory salvage certificate. (R. 500-04, 567-68, 722-27.)

ii) U.C.A. sections 41-1a-1005(1)(a)(i), (1)(d)(i), (2) and 41-1a-1008 clearly identifies the liability of "any person" regardless of privity of contract or their status as a "seller," "dealer," or "supplier" if such person breaches the provisions of sections 41-1-1005 or 1008. The plain language of sections 41-1a-1005 and 1008 destroy American's and Economy's contrary arguments. (R. 503-4)

e) The Motor Vehicle Act further defines the liability appellant seeks in this action in U.C.A. sections 41-3-701 and 41-3-702. Section 41-3-701(1) unquestionably applies to “. . . any person who violates this chapter or any rule made by the administrator is guilty of a class B misdemeanor.” Contrary to American’s assertions, the plain language of this section applies to any person, including insurance companies, and is not limited to just motor vehicle dealers, such as Economy. (R. 461-69, 509, 541-2, 697.)

f) U.C.A. § 41-3-702(3) and (5) state:

(3) The following are civil violations in addition to criminal violations under Section 41-1a-1008:

(a) knowingly selling a salvage vehicle, as defined in Section 41-1a-1001, without disclosing that the salvage vehicle has been repaired or rebuilt;

(b) knowingly making a false statement on a vehicle damage disclosure statement, as defined in Section 41-1a-1001; or

(c) fraudulently certifying that a damaged motor vehicle is entitled to an unbranded title, as defined in Section 41-1a-1001 when it is not.

. . .

(5) A civil action may be maintained by a purchaser . . .

Nowhere under sections 41-3-701, 41-3-702, 41-1a-1001 through 1008 is liability premised on privity of contract, one’s status as a “dealer” “seller” or “supplier” as appellees claim. (R. 461-69, 5003-04, 509, 519-20, 541, 567-68, 697, 722-27.)

15. Appellant disagrees with appellees’ contention that the subject vehicle is not a “consumer transaction” as that term is defined under U.C.A. § 13-11-3(2). Section 13-11-3(4) qualifies appellant’s purchase of the subject vehicle as a consumer transaction in that it was purchased “. . .for purposes that relate to a

business opportunity that required both his expenditure of money or property and his personal services on a continuing basis....” Appellant provides specialized vehicles for motion picture/television productions. Appellant has no use for “salvage” motor vehicles because such vehicles cannot be used in his business due to the inherent and un-quantifiable risk salvage vehicles have. (R. 585)

16. Appellant denies appellees’ assertions that they are not “sellers” because they did not sell or transfer the subject vehicle directly to him. Appellees argue that because they sold the subject vehicle to intermediate third parties, there is no privity of contract and therefore no liability for their negligence in not complying with their statutory duties. The statutes requirements simply contain no such loopholes or exceptions and cannot be so easily evaded. (R. 500-04, 722-27.)

17. Appellant disputes appellees’ assertions that Utah law prevents negligence actions against tortfeasors where there is no privity of contract between the victim and the tortfeasors. If privity of contract were required before a tort victim could recover from tortfeasors, injured plaintiffs would seldom, if ever, be allowed to recover for injuries suffered by tortfeasors misconduct. (R. 510-515.)

18. Appellant denies American’s assertion that because it is not a “dealer” under the Motor Vehicle Act it is not subject to the motor vehicle act’s requirements or liabilities. American’s argument ignores the Motor Vehicle Act’s plain language that imposes duties and obligations on “any person, insurance company or dealer” who sells a salvage vehicle without first obtaining the mandatory salvage certificate. American admits it failed to comply with U.C.A.

§§ 41-1a-1005(1)(a)(i) and (2) when it declared the subject vehicle a salvage, took possession thereof and disposed of the same without obtaining the salvage certificate. It is significant that the only ones that knew the subject vehicle was salvage are American and Economy. No one else possessed the information or knowledge that appellees' had but failed to disclose, and no one but appellees' could have fulfilled appellees statutory duties. (R. 500-04, 567-68, 722-27.)

19. Appellant disputes appellees' interpretation that the various acts cited herein do not contemplate their misconduct as actionable. The statutes say what they say and do not contain the limitations or qualifications appellees' claim. American and Economy knowingly acquired, sold and transferred a salvage motor vehicle and undertook steps to hide and conceal the salvage by engaging in the following acts, in addition to others:

a) American determined that the cost of repairing the subject vehicle to safe operation exceeded its fair market value and declared the same a "total loss." (R. 98-114, 233-56, 460-61, 468-69, 489-99, 509, 541-42, 697).

b) Appellees failed to obtain the mandatory salvage certificate of title notwithstanding their knowledge that the same was a total loss/salvage. (R. 92, 93, 98-121, 461-62, 446-50, 472, 500-04, 519, 520, 567-68, 722-24, 725-27).

c) Appellees conducted a private, invitation only, sale of the subject vehicle in order to avoid the public disclosure of the salvage status of the subject vehicle. (R. 92-93, 98-121, 446-50, 461-62, 472, 500-04, 519, 520, 567-68, 722-24, 725-27.)

d) Upon selling of the subject vehicle to Economy, American assisted Economy in illegally selling the subject vehicle to itself through the Western Affiliated Salvage Pool auction whereby Economy could then sell the subject vehicle as non-salvage motor vehicle at the Utah Auto Auction. (R. 383, 395-97, 473, 512, 545, 569-71, 718).

e) While the subject vehicle was in appellees' possession and control, appellant contacted American and Economy and attempted to purchase the subject vehicle. During appellant's conversations with American and Economy both American and Economy knowingly misrepresented the subject vehicle as a damaged but non-salvage motor vehicle in order that they might obtain a higher value for the same. (R. 5-8, 157-58, 409-38, 446-50, 471-72, 500-512, 506-07, 518-22, 717-21.)

f) American misstates the facts and record when it claims that appellant admitted knowing the subject vehicle was being sold in its damaged condition for salvage. Appellant knew the vehicle was damaged, but would not have purchased a salvage motor vehicle, as a salvage, because he could not use a salvage motor vehicle in his business. (R. 157-58, 162-63, 166, 717-21).

g) Appellees likewise misstate the facts and the record when they say that appellant purchased the subject vehicle "as accepted" with no "guarantee" in that the contract language quoted applied only to appellant's immediate seller and not to the appellees. The language cited does not relieve appellees of the

responsibility and liability they assumed when they breached their statutory duties as set forth in this appeal. (R. 162, 647, 741, 762.)

20. Appellant denies that the statutes in question eliminate or prevent knowledgeable or sophisticated buyers from pursuing claims based another's civil or criminal violation of the statutes in questions on this appeal. If a motor vehicle dealer and a consumer were unable to recover for the same violation of statute simply because one is more experienced than the other, as appellees claim, there would be no question that due process and equal protection violations would exist. Likewise if sophisticated/experienced buyers were denied the statutes' protections, the stream of commerce would be polluted in salvage vehicles and the injured buyer would be left without any recourse whatsoever. The statutes in question simply do not differentiate or discriminate, as appellees would have the Court do.

21. Appellant denies American's statement that he was allowed to conduct discovery for 9 months. Appellant served his Interrogatories and Requests for Production Of Documents with his complaint but granted American's request for an extension within which to respond. American then failed to respond to appellant's formal discovery for nearly 6 months. It was not until after several letters were sent to American's counsel concerning appellant's discovery requests and American's inexcusable failure to respond that American filed its first motion for summary judgment. A review of the record confirms that American never fully, fairly or accurately responded to appellant's discovery requests and that appellant was required to respond to American's summary judgment without the

aid or benefit of American's responses. It is beyond appellant's belief that such conduct constitutes any kind of fairness or allowed Judge Wilkinson to conduct an impartial hearing in deciding the facts and applying the law applicable to appellant's claims.

22. Appellant denies appellees' assertions that Judge Wilkinson was entitled to find "buyer's remorse" and other facts in applying the law to his claims. A fundamental principle of Rule 56, U.R.Civ.P., that Judge Wilkinson was required to follow but did not, is that all facts and inferences are to be viewed in the light most favorable or the non-moving party. The record contains many instances of Judge Wilkinson going out of his way to find facts, which findings were totally inappropriate and strictly for the jury and was clearly contrary to the requirements of Rule 56. (R. 633-641, 868-69.)

23. Appellant disputes appellees' allegations that warranties were not breached. Appellees breached the express and implied warranties set forth under sections 70A-2-313 through 318, that the subject vehicle was not salvage. Appellees' acts, errors and omissions caused the notation "scrapped" "warranty void" to appear on the manufacturer's computer system. And appellees acts, errors and omissions prevented appellant from obtaining warranty services at the Salt Lake Hummer dealership as well as at Teton Motor's in Jackson, Wyoming. (R. 472, 500-02, 662, 717-21, 725-27, 730-32, 7789-79, 895).

24 Appellant contests appellees' statement that he should have leveled his complaint against entities other than appellees. The facts make appellees'

arguments utter nonsense in that the appellees are the only ones that knew the subject vehicle was a total loss/salvage. There are several facts that contradict appellees contentions and show their conduct was intentional, not the least of which are:

- a) The fact that a private, invitation only, sale was conducted. (R. 161.)
- b) The fact that only those who participated in the invitation only sale knew the subject vehicle was a total loss – salvage motor vehicle. (R. 161.)
- c) The fact that appellees were able to obtain a higher than normal value because their private sale did not publicize the vehicle as salvage. (R. 161.)
- d) The fact that American was able to assist Economy in illegally selling the subject vehicle through Western Affiliated Salvage Pool's auction to itself so that Economy could then in turn sell the subject vehicle through the Utah Auto Auction without disclosing the salvage. (R. 383-97, 473, 512, 569-71, 718.)
- e) The fact that Economy illegally appears as both a transferor and transferee in the same transfer/transactions in violation of 49 C.F.R. §580.5(f).
- f) The fact that appellees never at any time informed anyone that the subject vehicle was a salvage motor vehicle. (R. 461, 468-69, 509, 541-42, 697.)
- g) The fact that appellees hid and concealed their non-disclosure of a salvage motor vehicle. (R. 383, 395-97, 473, 512, 545, 569-71, 718.)
- h) The fact that American's employees are quite familiar with the Motor Vehicle Act's salvage requirements in that salvage operations are a regular part of American's business. (Brief of Appellant, Addendum B, pages 7-8.)

i) The fact that American provided Economy with a clean title so that Economy could do the very thing the statutes prohibit and market a salvage motor vehicle without a salvage certificate of title. (R. 461-69, 509, 541-42, 697.)

j) The fact that appellees polluted the stream of commerce through their illicit marketing and omissions that essentially insured that a salvage motor vehicle would end up in the hands of an unwitting consumer. (R 500-04)

25. Appellant disputes appellees' contention that had unidentified third parties acted properly, plaintiff would have had no complaint. Appellant contends that had appellees complied with their statutory duties, the scheme that evolved would have been prevented, if not been impossible to accomplish. (R. 1-9.)

ARGUMENT

POINT I

THE DEFENDANTS' ADMISSIONS OF MULTIPLE CIVIL AND CRIMINAL VIOLATIONS OF THE LAWS RESPECTING COMMERCE IN MOTOR VEHICLES ESTABLISHES PLAINTIFF'S PRIMA FACIE CLAIMS OF NEGLIGENCE

A. The Motor Vehicle Act

The pertinent portions of the Motor Vehicle Act have been cited and quoted above. U.C.A. § 41-1a-1005 clearly and unambiguously establishes the duties imposed on each person, insurance company and motor vehicle dealer when a salvage motor vehicle is involved. The Motor Vehicle Act itself does not differentiate the liability imposed on individuals or dealers any differently than it

does for insurance companies. American's assertions that it is not liable for violating the Motor Vehicle Act are contrary to the plain language of the statutes.

If a tortfeasor's liability cannot be premised on his/her breach of statutory duties, then Utah decisional law concerning prima facie evidence of negligence needs to be reversed, overturned and abandoned. As recently as December 28, 1999 *Child v. Gonda*, 972 P.2d 425 (Utah 1998) and those cases that it follows were still good law. The statutes in question defined the duties that were imposed on appellees. Appellees' breaches of their statutory duties were the essential part of the causal chain that led to appellant's unwitting purchase of a non-disclosed salvage motor vehicle. Appellant's damages are defined by statutes, and include the difference in value in what he bargained for versus what he actually received.

American requests that this Court hold that violation of the duties imposed upon insurance companies are not actionable. American's request requires that this Court ignore U.C.A. § 41-1a-1005(1)(a)(i), (2), 41-1a-1008, 41-3-701 and 41-3-701(3) and (5). American's request is based on American's argument that the Motor Vehicle Act is divided into two sections. One section, American states, only covers dealers' commerce in motor vehicles. The second section, American asserts, pertains only to the regulation of a motor vehicle dealer's business activities. American brashly states that because it is an insurance company it is not regulated under the motor vehicle act and appellant has no claim that can be pursued against it.

American's argument is without merit. The legislature intended to make insurance companies responsible for assuring that the stream of commerce in motor vehicles is not polluted with salvage vehicles, whose titles do not reflect their salvage nature. The legislature identified, defined and established the liability of those who feed the stream of commerce with vehicles when they fail to disclose salvage as required under the Motor Vehicle Act. American's argues, as an excuse of its own misconduct, that a tort victim's claims against one who breaks a law and causes injury (i.e., running a red light/causing an accident) is not entitled to a remedy because the tortfeasor's misconduct is regulated by other laws. This specious argument is wholly unsupportable.

B. The Sales Practices Act

A review of those jurisdictions that have adopted the Sales Practices Act reaffirms appellant's reading of it that nothing in it requires privity of contract as a prerequisite to recovering damages. Rather the Sales Practices Act covers those who engage in business effecting consumer transactions, regardless of whether they deal with the consumer directly. *Garner v. Borcharding Buick, Inc.*, 616 N.E.2d 283, 284 (Ohio App. 1992). All the Sales Practices Act requires is that the defendants have some connection to the consumer transaction in question in order to be liable as a supplier or for deceptive practices that violate the Act. *Id.*

In *Moore v. Florida Bank of Comm.*, 654 F.Supp. 38 (S.D. Ohio 1986), affirmed 833 F.2d 1013 (6th Cir. 1987) the court recognized that while Ohio had not determined the level of business activity required for finding that one is

engaged in the business of soliciting consumer transactions, that phrase implied more than one isolated occurrence. Generally, soliciting means continuous or regular activity. *Id.* A significant portion of American's regular business is to dispose of the salvage motor vehicles it acquires on account of its insureds. American simply could not conduct business as a motor vehicle insurance company if it did not regularly engage in continuous solicitation of motor vehicle related business and settlement of claims on behalf of those it insures. Neither could American conduct business as a motor vehicle insurer if its employees were not completely familiar with the salvage requirements of Utah law as part of their daily business activities.

O'Brian v. B.L.C. Insurance Company, 768 S.W.2d 64 (MO 1989) is nearly identical to the facts of this case and is an example of how one court construed its consumer protection and salvage laws in a single proceeding. In *O'Brian* an insurance company was found to be liable to a consumer when the insurance company failed to comply with Missouri's salvage requirements and thereby allowed an unknown salvage vehicle into the stream of commerce. American's omissions in this case are just as essential a part of chain of events leading up to appellant's unknowing purchase of salvage as the defendant was in *O'Brian*. American's conduct knowingly violated Utah's salvage statutes in like manner.

O'Brian is consistent with *Haynes v. Manning*, 917 F.2d 450, 453 (10th Cir. 1990) wherein the Tenth Circuit has held 1) that privity of contract is not required in order to maintain a cause of action under federal odometer fraud statutes, 2)

that in a typical suit for money damages, the plaintiff must prove his or her case by a preponderance of the evidence, 3) that cases based on fraud under the federal odometer statutes are governed by a preponderance of the evidence standards, 4) that federal law imposes affirmative duties on dealers to discover defects, 5) that a transferor may be found to have intended to defraud if he had reason to know of a discrepancy and nevertheless failed to take reasonable steps to accurately disclose what was known, and 6) that liability is joint and several under the federal odometer law in that subsequent wrongdoers cannot recover from previous transferors in the chain of violations.

B. Uniform Commercial Code

Utah adopted section 2-318(c) of the Uniform Commercial Code, which is presently set forth as 70A-2-318. Official comment No. 2 to Section 2-318 states:

The purpose of this section is to give certain beneficiaries the benefit of the same warranty which the buyer received in the contract of sale, thereby freeing any such beneficiary from any technical rules as to “privity.” It seeks to accomplish this purpose without any derogation of any right or remedy resting on negligence. It rests primarily on the merchant-seller’s warranty under this Article that the goods sold are merchantable and fit for the ordinary purpose for which such goods are used. . . . Implicit in the section is that any beneficiary of a warranty may bring a direct action for breach of warranty against the seller whose warranty extends to him.

American’s contentions that privity is required under the Commercial Code are effectively eliminated where Utah adopted alternative C as found in U.C.A. § 70A-2-318. It makes little sense to do as American asks and limit the ultimate purchaser’s remedy to his/her immediate seller. Where the defective goods may have passed through literally dozens of hands and the ultimate responsible parties

are known based on their intentional concealment and pollution of the stream of commerce with their non-disclosure of a salvage motor vehicle, it defies common sense to require that parties who did no wrong be joined in order to reach the parties ultimately responsible for the pollution.

This Court, in *State v. McBride*, P.2d at 545 (Utah App. 1997) affirmed the fact that the general principles of comparative fault do not apply in intentional tort cases. This Court then quoted with approval the Louisiana courts view that the principles of contributory negligence or comparative fault do not apply in the context of an intentional tort setting. The case law of most jurisdictions does not allow either contributory negligence or comparative fault in intentional torts.

The public policy behind this rule is that comparative negligence never has been considered a defense to an intentional tort and would appear contrary to sound policy to reduce a plaintiff's damages under comparative fault when encountering defendants that deliberately inflicted the harm complained of. *Id.*, citing *Berkeley Bank for Cooperatives v. Meibos*, 607 P.2d 798, 804 (Utah 1980); *Ferguson v. Jongsma*, 350 P.2d 404, 408 (Utah 1983) and *Cruz v. Montoya*, 660 P.2d 723, 728 (Utah 1983) *superseded on other grounds as discussed in National Serv. Inds. Inc. v. B.W. Norton Mfg. Co., Inc.*, 937 P.2d 551, 553-56 (Utah App. 1997). These cases all reaffirm the principal set forth in the Restatement of Torts, which states: "responsibility for harmful consequences should be carried further in the case of one who does an intentionally wrongful act than in the case of one

who is merely negligent or is not at fault. *Restatement (Second) of Torts* § 435B cmt. A, at 456 (1965).

POINT II

JUDGE WILKINSON ERRED IN IGNORING STATE LAW WHEN HE IMPROPERLY DISMISSED PLAINTIFF’S CLAIMS

A. Claims Against American

The Motor Vehicle Act, the Sales Practices Act and the Commercial Code all identify and define American’s duties and obligations when it comes to American’s disclosure that a motor vehicle is a salvage. The statement of new issues presented above more than adequately identifies American’s duties, its breach of those duties, the causation by American’s civil and criminal violations of the damages appellant has sustained. The statutes cited impose liability on “any person” regardless of their status as “dealers,” “suppliers,” “sellers” or “insurance companies.” American’s argument that the statutes do not contemplate American’s misconduct leave one wondering what statutes American refers to.

B. Claims Against Economy and Clarendon

In order for Economy to conduct business as a motor vehicle dealer under the Motor Vehicle Act, Economy is required to post a bond. The purpose of Economy’s bond posted by Clarendon is to indemnify those who suffer loss by reason of Economy’s violation of laws respecting commerce in motor vehicles. Pertinent portions of Economy’s bond state:

“...if the above bounded principal . . . shall well and truly observe and comply with all requirements and provisions of THE ACT PROVIDING FOR

THE REGULATION AND CONTROL OF THE BUSINESS OF DEALING IN MOTOR VEHICLES, as provided by Chapter 3, Title 41, Utah Code Ann. (1953, as amended), and indemnify persons, firms and corporations in accordance with Chapter 3, Title 41, Utah Code Ann. (1953, as amended), for loss suffered by reason of the fraud or fraudulent representations made or through *the violation of any of the provisions of Chapter 3, Title 41, Utah Code Ann. (1953, as amended), or any law respecting commerce in motor vehicles or rule respecting commerce in motor vehicles promulgated by a licensing or regulating authority* so that the total aggregate annual liability on the bond to all persons making claims may not exceed \$20,000.00 -----, as set forth in Chapter 3, Title 41, Utah Code Ann. (1953, as amended) *on account of fraud or fraudulent representations or for any violation or violations of said laws or rules during the time of said license and all renewals thereof, then the above obligation shall be null and void*, otherwise to remain in full force and effect. Said bonded Principal shall also pay reasonable attorney's fees in cases successfully prosecuted or settled against the Surety or Principle if the bond has not been depleted." (Emphasis added)

(R. 487-488, 534-535, 552-553) (Addendum B of Brief Of Appellant, dated September 8, 1999.)

Given Economy's admitted civil and criminal violations of the laws respecting commerce in motor vehicles, it was plain error for the trial court to grant Economy and Clarendon summary judgment. It was error to ignore the laws he is sworn to enforce and uphold and the provisions of the bond designated to protect those who do business with motor vehicle dealers and to dismiss appellant's claims premised on Economy's admitted violations of the statutes cited and relied on by appellant in this appeal.

Economy and Clarendon take the untenable and patently false position that the subject vehicle was not salvage. Notwithstanding the facts Economy and Clarendon claim that the subject vehicle was not a salvage motor vehicle.

1. American declared the subject vehicle a “total loss.” (R. 98-114, 233-56, 489-99.)

2. American paid over \$48,000.00 for a \$45,000.00 vehicle. (R. 98-114, 233-56, 489-99.)

3. American determined that it would cost in excess of \$33,855.00 to properly repair the subject vehicle for safe operation. (R. 496, 530, 561.)

4. American sold the subject vehicle to Economy for \$12,000.00. (R. 98-114, 233-56, 489-99.)

5. American and Economy illegally sold the subject vehicle through Western Affiliated Salvage Pool’s auction to Economy. (R. 383, 395-97, 473, 512, 545, 569-71).

6. Only salvage motor vehicles are sold at Western Affiliated Salvage Pool’s auction. (R. 383, 395-97, 473, 512, 545, 569-71).

7. Economy undertook to hide and conceal the total loss/salvage where Economy illegally appears as both a transferor and transferee in the same transfers/transactions in violation of 49 C.F.R. §580.5(f).

8. Only American and those it invited to participate in its invitation only sale of the subject vehicle knew that American salvaged the subject vehicle. (R. 115-16, 161, 163, 251, 308, 332, 385-97.)

The record below and before this Court clearly establishes that the subject vehicle was a salvage motor vehicle. American’s own documents, letters and admissions state that the subject vehicle was salvage, that Economy knew of the

salvage and that American relied upon Economy to obtain the salvage certificate of title. (R. 503-04.)

Appellant is entitled to the damages set forth in U.C.A. §§ 41-1a-1005, 41-1a-1008, 41-3-701 and 41-3-702. Appellant is likewise entitled to the statutory damages specified in 13-11-19(2) and (5). Finally, appellant was entitled to present to the jury the facts that show what he bargained for versus what he received were of materially different value, quality, and had been used to an extent that was materially different from the facts. (U.C.A. 13-11-4(2)(c).) Economy's and Clarendon's claims that appellant cannot prove damages is spurious at best and without merit in that it ignores the facts, the law and the evidence.

Economy's and Clarendon's final argument is that their conduct was not unconscionable because it was not "oppressive" or an "unfair surprise" to the appellant. The Sales Practices Act imposes liability on more grounds than unconscionability that are set forth in U.C.A. § 13-11-5. Economy and Clarendon argue that this Court should only find a violation of the Sales Practices Act under U.C.A. § 13-11-5. Such a ruling would ignore or judicially repeal the list of prohibited acts set forth in U.C.A. § 13-11-4 and remedies found on 13-11-19. Economy's assertions that the Sales Practices Act and Commercial Code do not apply to appellant's claims and causes of action lack factual and legal support and are without question meritless as any fair or plain reading of the Sales Practices Act will confirm.

POINT III

PLAINTIFF INTRODUCED SUFFICIENT EVIDENCE TO SUSTAIN HIS PRIMA FACIE CLAIMS OF DEFENDANTS' NEGLIGENCE BASED ON DEFENDANTS' BREACHES OF STATUTES

The Motor Vehicle Act, Sales Practices Act and Commercial Code are to be liberally construed to protect persons doing business with those who possess superior knowledge, such as the appellees. U.C.A. §§ 13-11-3(6), 41-3-210, 70A-2-104(1) (R. 465-504, 505-535, 536-572). Dealer's Bonds are likewise liberally construed to protect those doing business with dealers such as Economy. *Western Sur. Co. v. Redding*, 626 P.2d 437 (Utah 1981).

The Motor Vehicle Act's civil and criminal penalties apply to "any person, insurance company or dealer" who violate U.C.A. §§ 41-1a-1005(2), 41-1a-1008, 41-3-701 and 41-3-702. (R. 468- 470, 509-510, 541-542, 697). Appellees breaches of their statutory duties were conduct, of act or omission, which should have treated as negligence without any argument or proof. Appellees statutory violations should have been regarded as prima facie evidence of appellees negligence. Judge Wilkinson erred when he usurped the role and function of the jury and justified, then excuses, appellees statutory violations, which appellees never denied, rebutted, justified or attempted to excuse on their own. *Child v. Gonda*, 972 P.2d 425, 432 (Utah 1998) (R. 465-504, 505-535, 536-571, 578-596, 602-611.)

The Supreme Court in *Child* was called upon to clarify the difference between "per se" and "prima facie" evidence of negligence. *Id.* In *Child*

negligence per se was recognized as negligence “which usually results from the violation of a statute, [and was] defined as conduct, whether of action or omission, which may be declared and treated as negligence without argument or proof as to the particular surrounding circumstances.”

Child contrasts “per se” negligence with “prima facie” evidence of negligence and quotes *Black’s Law Dictionary* 1190 (6th ed. 1990). Prima facie evidence of negligence is “[t]hat quantum of evidence that suffices for proof of a particular fact until the fact is contradicted by other evidence; once a trier of fact is faced with conflicting evidence, it must weigh the prima facie evidence with all of the other probative evidence presented.” *Id.* The *Child* court illustrates its point with an example of one who increases his/her speed on a canyon road to avoid being rear-ended. The fact that someone violated a speed limit to avoid an accident may be prima facie evidence of negligence, but whether or not speeding under such circumstances is negligent is for the jury to determine. *Id.*

Appellant set forth his prima facie negligence against the appellees by citing their violations of statutes. Under *Child* “the violation of a statute does not necessarily constitute negligence per se and *may be* considered only as evidence of negligence ... [The violation] *may be* regarded as ‘prima facie evidence of negligence, but is subject to justification or excuse if the evidence is such that it reasonably could be found.’” citing *Intermountain Farmers Ass’n. v. Fitzgerald*, 574 P.2d 1162, 1164-65 (Utah 1987)(emphasis as quoted)(quoting *Thompson v.*

Ford Motor Co., 395 P.2d 62, 64 (Utah 1964); and *Dixon v. Stewart*, 658 P.2d 591 (Utah 1982).

In this case the trial court should have allowed the jury to decide whether appellees violations of their statutory duties was negligent. Under *Child* the trial court should have instructed the jury that if it determined that American and Economy had violated the salvage motor vehicle statutes, it could find that they were negligent. *Id.*, at 442-43. Such determinations cannot properly be determined on summary judgment grounds as was done in this case.

The Sales Practices Act, covers transactions involving commerce in motor vehicles. *Wilkinson v. B. & H. Auto*, 701 F.Supp. 201 (D. Utah 1989). It was error to both decide the facts and dismiss appellant's claims based upon appellees violations of U.C.A. § 13-11-4, and in ignoring appellees criminal misconduct under U.C.A. §§ 13-11-5, 41-1a-1005 and 41-1a-1008. It was error for the trial court to have found that appellees were "honest in fact in the conduct or transaction concerned." U.C.A. § 70A-1-201(19). It was likewise error to have found that appellant knew that he was buying salvage, that appellant was not misled, that appellees did not misrepresent to appellant and that appellant had buyer's remorse. (R. 633-41, 868-69.) (Addendum B. page 33 of Brief of Appellant, dated September 8, 1999.)

Appellees ask this Court to hold that an injured tort victim be allowed no remedy where the victim has no contractual relationship with his/her tortfeasor. Privity of contract is not and never has been a condition to a tort victim's recovery

of damages. (R. 159-160, 456-463, 480-481, 515-516, 546-550, 603, 606, 609-610). This appeal does not present any reason or justification for deviating from *Child* as appellees argue.

Appellees civil and criminal violations of the motor vehicle act must constitute prima facie evidence of negligence, of Sales Practices Act violations and the duties imposed under Economy's dealer bond. Appellees violations of statutes are sufficient proof of the facts that constitute appellees negligence and was more than enough to go to the jury where appellees never contradicted, denied or made any effort to justify or excuse their statutory violations. *Id.*

POINT IV

JUDGE WILKINSON ERRED IN DISALLOWING PLAINTIFF TO OBTAIN COMPLETE DISCOVERY RESPONSES

Plaintiff was not provided with adequate, full or responsive answers to his discovery requests at any time prior to appellees filing their summary judgment motions. Appellant was required to contest appellees statements of purported fact without knowing who appellees fact witnesses were, without deposing their fact witnesses and without the use or benefit of appellees discovery responses. Appellant was denied the minimum in fair play that is required by the Utah Rules Of Civil Procedure.

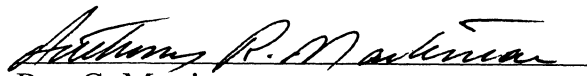
Where Judge Wilkinson denied appellant the right to discovery appellees facts concerning the issues raised in his pleadings, appellant was precluded from having material facts and issues decided by the jury as the fact finder. Judge

Wilkinson improperly acted as finder of the facts and Judge Wilkinson improperly found facts in granting appellees summary judgment. Where summary judgment by definition does not resolve factual issues it was error for Judge Wilkinson to find that appellant knew that he was buying salvage, that he was not misled, that appellees did not make any misrepresentation to him and that he had buyer's remorse. (R. 633-41, 868-69.) (Addendum B. page 33 of Brief of Appellant, dated September 8, 1999.)

CONCLUSION

A fair and impartial reading of the statutes cited herein will demonstrate the erroneous twist appellees have placed on them. This appeal presents issues that should affect every insurance company, dealer, consumer and person or entity that deals with motor vehicles. The injuries appellant has sustained due to appellees misconduct exceed \$50,000.00 and made it impossible for appellant to retain and use the salvage Hummer vehicle that he had planned to use in his business. Based on the trial court's findings of fact and obvious disregard of the statutes, appellant requests that his claims be reinstated and that he be allowed to proceed with the ordinary course of litigation so that all relevant facts are fully disclosed for consideration by the Jury so that appellant's claims can be decided on their merits.

RESPECTFULLY SUBMITTED this 29th day of December, 1999.


Ray G. Martineau
Anthony R. Martineau

Attorneys for Plaintiffs/Appellants

Certificate of Service

I hereby certify that a true and correct copy of the foregoing Reply Brief Of Appellants was served upon the following individual by mailing a copy thereof, postage prepaid, to said individuals at the following addresses this 29th day of December, 1999.

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ADDENDUM A

STATUTES DETERMINATIVE AND OF CENTRAL IMPORTANCE TO THE APPEAL:

Utah Consumer Sales Practices Act:

13-11-2. Construction and purposes of act.

This act shall be construed liberally to promote the following policies:

- sales practices;
 - (1) to simplify, clarify, and modernize the law governing consumer sales practices;
 - (2) to protect consumers from suppliers who commit deceptive and unconscionable sales practices;
 - (3) to encourage the development of fair consumer sales practices;
 - (4) to make state regulation of consumer sales practices not inconsistent with the policies of the Federal Trade Commission Act relating to consumer protection;
 - (5) to make uniform the law, including the administrative rules, with respect to the subject of this act among those states which enact similar laws; and
 - (6) to recognize and protect suppliers who in good faith comply with the provisions of this act.

13-11-3. Definitions.

(2) "Consumer transaction" means a sale, lease, assignment, award by chance, or other written or oral transfer or disposition of goods, services, or other property, both tangible and intangible (except securities and insurance), to a person for primarily personal, family, or household purposes, or for purposes that relate to a business opportunity that requires both his expenditure of money or property and his personal services on a continuing basis and in which he has not been previously engaged, or a solicitation or offer by a supplier with respect to any of these transfers or dispositions. It includes any offer or solicitation, any agreement, any performance of an agreement with respect to any of these transfers or dispositions, and any charitable solicitation as defined in this section.

(5) "Person" means an individual, corporation, government, governmental subdivision or agency, business trust, estate, trust, partnership, association, cooperative, or any other legal entity.

(6) "Supplier" means a seller, lessor, assignor, offeror, broker, or other person who regularly solicits, engages in, or enforces consumer transactions, whether or not he deals directly with the consumer.

13-11-4. Deceptive act or practice by supplier.

(1) A deceptive act or practice by a supplier in connection with a consumer transaction violates this chapter whether it occurs before, during, or after the transaction.

(2) Without limiting the scope of Subsection (1), a supplier commits a deceptive act or practice if the supplier knowingly or intentionally:

(a) indicates that the subject of a consumer transaction has sponsorship, approval, performance characteristics, accessories, uses, or benefits, if it has not;

(b) indicates that the subject of a consumer transaction is of a particular standard, quality, grade, style, or model, if it is not;

(c) indicates that the subject of a consumer transaction is new, or unused, if it is not, or has been used to an extent that is materially different from the fact;

(e) indicates that the subject of a consumer transaction has been supplied in accordance with a previous representation, if it has not;

(j) indicates that a consumer transaction involves or does not involve a warranty, a disclaimer of warranties, particular warranty terms, or other rights, remedies, or obligations, if the representation is false;

13-11-5. Unconscionable act or practice by supplier.

(1) An unconscionable act or practice by a supplier in connection with a consumer transaction violates this act whether it occurs before, during, or after the transaction.

(2) The unconscionability of an act or practice is a question of law for the court. If it is claimed or appears to the court that an act or practice may be unconscionable, the parties shall be given a reasonable opportunity to present evidence as to its setting, purpose, and effect to aid the court in making its determination.

(3) In determining whether an act or practice is unconscionable, the court shall consider circumstances which the supplier knew or had reason to know.

13-11-19. Actions by consumer.

(1) Whether he seeks or is entitled to damages or otherwise has an adequate remedy at law, a consumer may bring an action to:

(a) obtain a declaratory judgment that an act or practice violates this chapter; and

(b) enjoin, in accordance with the principles of equity, a supplier who has violated, is violating, or is likely to violate this chapter.

(2) A consumer who suffers loss as a result of a violation of this chapter may recover, but not in a class action, actual damage or \$2,000, whichever is greater, plus court costs.

(5) Except for services performed by the enforcing authority, the court may award to the prevailing party a reasonable attorney's fee limited to the work reasonably performed if:

(a) the consumer complaining of the act or practice that violates this chapter has brought or maintained an action he knew to be groundless; or a supplier has committed an act or practice that violates this chapter; and

(b) an action under this section has been terminated by a judgment or required by the court to be settled under Subsection 13-11-21(1)(a).

Utah Motor Vehicle Dealer Act:

41-1a-1001. Definitions

(6) "Salvage vehicle" means any vehicle:

(a) damaged by collision, flood, or other occurrence to the extent that the cost of repairing the vehicle for safe operation exceeds its fair market value; or

41-1a-1004. Certificate of title – Salvage vehicles

(2) Before the sale of a vehicle for which a salvage certificate or branded title has been issued, the seller shall provide the prospective purchaser with written notification that a salvage certificate or a branded title has been issued for the vehicle.

41-1a-1005. Salvage vehicle – Declaration by insurance company – Surrender of title – Salvage certificate of title.

(1) (a) (i) If an insurance company declares a vehicle a salvage vehicle and takes possession of the vehicle for disposal, or an insurance company pays off the owner of a vehicle that is stolen and not recovered, the insurance company shall within ten days from the settlement of the loss surrender to the division the outstanding certificate of title, properly endorsed, or other evidence of ownership acceptable to the division.

(d) (i) If a dealer licensed under Title 41, Chapter 3, Part 2, Licensing, takes possession of any salvage vehicle for which there is not already issued a branded title or salvage certificate from the division or another jurisdiction, the dealer shall within ten days

surrender to the division the certificate of title or other evidence of ownership acceptable to the division.

(ii) The division shall then issue a salvage certificate in the applicant's name.

(2) Any person, insurance company, or dealer licensed under Title 41, Chapter 3, Part 2, Licensing, who fails to obtain a salvage certificate as required in this section or who sells a salvage vehicle without first obtaining a salvage certificate is guilty of a class B misdemeanor.

41-1a-1008. Criminal penalty for violation.

It is a class A misdemeanor to knowingly violate Sections 41-1a-1001 through 41-1a-1007, unless another penalty is specifically provided.

41-3-701. Violations as misdemeanors.

(1) Except as otherwise provided in this chapter any person who violates this chapter or any rule made by the administrator is guilty of a class B misdemeanor.

(2) A person who violates Section 41-3-201 is guilty of a class A misdemeanor.

(3) A person who violates Section 41-3-301 is guilty of a class A misdemeanor unless the selling dealer complies with the requirements of Section 41-3-403.

41-3-702. Civil penalty for violation.

(3) The following are civil violations in addition to criminal violations under Section 41-1a-1008:

(a) knowingly selling a salvage vehicle, as defined in Section 41-1a-1001, without disclosing that the salvage vehicle has been repaired or rebuilt;

(b) knowingly making a false statement on a vehicle damage disclosure statement, as defined in Section 41-1a-1001; or

(c) fraudulently certifying that a damaged motor vehicle is entitled to an unbranded title, as defined in Section 41-1a-1001, when it is not.

(4) The civil penalty for a violation under Subsection (1) is:

(a) not less than \$1,000, or treble the actual damages caused by the person, whichever is greater; and

(b) reasonable attorneys' fees and costs of the action.

(5) A civil action may be maintained by a purchaser or by the administrator.

Utah Uniform Commercial Code:

70A-1-201. General definitions.

(3) “Agreement” means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in Sections 70A-1-205 and 70A-2-208. Whether an agreement has legal consequences is determined by the provisions of this title, if applicable; otherwise by the law of contracts as provided in Section 70A-1-103. Compare the definition of “contract” in Subsection (11).

(11) “Contract” means the total legal obligation which results from the parties’ agreement as affected by this title and any other applicable rules of law. Compare the definition of “agreement” in Subsection (3).

(15) “Document of title” includes bill of lading, dock warrant, dock receipt, warehouse receipt, or order for the delivery of goods, and also any other document which in the regular course of business or financing is treated as adequately representing that the person in possession of it is entitled to receive, hold and dispose of the document and the goods it covers. To be a document of title, a document must purport to be issued by or addressed to a bailee and purport to cover goods in the bailee’s possession which are either identified or are fungible portions of an identified mass.

(19) “Good faith” means honesty in fact in the conduct or transaction concerned.

70A-1-203. Obligation of good faith.

Every contract or duty within this act imposes an obligation of good faith in its performance or enforcement.

70A-2-103. Definitions and index of definitions.

(1) In this chapter unless the context otherwise requires

- (a) “Buyer” means a person who buys or contracts to buy goods.
- (b) “Good faith” in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.
- (d) “Seller” means a person who sells or contracts to sell goods.

70A-2-104. Definitions—“Merchant”- “Between merchants”- “Financing agency.”

(1) “Merchant” means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

(2) “Financing agency” means a bank, finance company or other person who in the ordinary course of business makes advances against goods or documents of title or who by arrangement with either the seller or the buyer intervenes in ordinary course to make or collect payment due or claimed under the contract for sale, as by purchasing or paying the seller’s draft or making advances against it or by merely taking it for collection whether or not documents of title accompany the draft. “Financing agency” includes also a bank or other person who similarly intervenes between persons who are in the position of seller and buyer in respect to the goods (Section 701-2-707).

(3) “Between merchants” means in any transaction with respect to which both parties are chargeable with the knowledge or skill of merchants.

70A-2-312. Warranty of title and against infringement – Buyer’s obligation against infringement.

(2) A warranty under Subsection (1) will be excluded or modified only by specific language or by circumstances which give the buyer reason to know that the person selling does not claim title in himself or that he is purporting to sell only such right or title as he or a third person may have.

70A-2-313. Express warranties by affirmation, promise, description, sample.

(1) Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as “warrant” or “guarantee” or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller’s opinion or commendation of the goods does not create a warranty.

70A-2-314 Implied warranty -- Merchantability -- Usage of trade.

(1) Unless excluded or modified (Section 70A-2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(2) Goods to be merchantable must be at least such as

- (a) pass without objection in the trade under the contract description; and
- (b) in the case of fungible goods, are of fair average quality within the description; and
- (c) are fit for the ordinary purposes for which such goods are used; and
- (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
- (e) are adequately contained, packaged, and labeled as the agreement may require; and
- (f) conform to the promises or affirmations of fact made on the container or label if any.

(3) Unless excluded or modified (Section 70A-2-316) other implied warranties may arise from course of dealing or usage of trade.

70A-2-315 Implied warranty -- Fitness for particular purpose.

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

70A-2-318 Third-party beneficiaries of warranties express or implied.

A seller's warranty whether express or implied extends to any person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty. A seller may not exclude or limit the operation of this section with respect to injury to the person of an individual to whom the warranty extends.