

1999

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

Utah Court of Appeals

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Paul M. Belnap; A.W. Lauritzen; Attorneys for Appellees.

Anthony R. Martineau; Ray G. Martineau; Attorneys for Appellant.

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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,

Defendant/Appellees.

Case No. 990168 CA

ARGUMENT
PRIORITY 15

BRIEF OF APPELLEES

ECONOMY AUTO INC. & CLARENDON NATIONAL INSURANCE COMPANY

APPEAL FROM:

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

ATTORNEY FOR DEFENDANTS / APPELLEES
AMERICAN STATES INSURANCE COMPANY
STRONG & HANNI
Paul M. Belnap, Esq.
9 Exchange Place, Suite 600
Salt Lake City, Utah 84111
Telephone (801) 532-7080

ATTORNEYS FOR PLAINTIFF/
APPELLANT JAMES G. HOLMES
Ray G. Martineau, Esq
Anthony R. Martineau, Esq.
3098 Highland Drive, Suite 450
Salt Lake City, Utah 84106
Telephone (801) 486-0200

ATTORNEY FOR DEFENDANT / APPELLEES
ECONOMY AUTO INC., AND CLARENDON NATIONAL INSURANCE COMPANY
A.W. Lauritzen, Esq.
610 North Main
P.O. Box 171
Logan, Utah 84321
Telephone (435) 753-3391

Utah Court of Appeals
NOV 08 1999
Julia D'Alesandro
Clerk of the Court

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.	iii
JURISDICTIONAL STATEMENT	1
STATEMENT OF ISSUES PRESENTED FOR REVIEW	6
STANDARD OF APPELLATE REVIEW	1
STATEMENT OF THE CASE	1
PROCEEDINGS AND DISPOSITION AT THE TRIAL LEVEL	1
STATEMENT OF THE FACTS AS PRESENTED AT THE TRIAL LEVEL . .	1 - 6
SUMMARY OF ARGUMENTS	6
ARGUMENT	7

POINT I

Does Utah Law, under the facts of this case, impose upon an entity acquiring such interest as that acquired by Defendant Economy Auto and it's subsequent transferees in this case, the duty to surrender title to the Utah State Department of Motor Vehicles for the purpose of obtaining a salvage title? * * * * * 7

POINT II

May the Plaintiff, under the facts of this case, prove damages in the absence of issuance of a salvage title? * * * * * 9

POINT III

Respecting the facts and pleadings of this case, do the Consumer Sales Practices Act and the Uniform Commercial Code address the transaction in question? * 10

TABLE OF AUTHORITIES

STATUTES

UCA 13-11-4	*	*	*	*	*	*	*	*	*	10, 11
UCA 13-11-5	*	*	*	*	*	*	*	*	*	10, 11
UCA 70A-2-104	*	*	*	*	*	*	*	*	*	11
UCA 41-1a-1004 (2)		*	*	*	*	*	*	*	*	7
UCA 41-1a-1005 (4)		*	*	*	*	*	*	*	*	7
UCA 41-3-402 (1)(a)(VI)	*	*	*	*	*	*	*	*	*	7
UCA 41-3-701 (3)	*	*	*	*	*	*	*	*	*	7
UCA 41-3-702 (1)(c)(VI)	*	*	*	*	*	*	*	*	*	7
UCA 41-1a-1001	*	*	*	*	*	*	*	*	*	8
URCP 56	*	*	*	*	*	*	*	*	*	8

CASES

<u>K&T, Inc. v. Korousis</u>	888 P.2d 623, 627	*	*	*	*	*				7
<u>Themy v. Seagull Enterprises Inc.</u>	595 P.2d 526 (Utah 1979)	*	*	*						1
<u>Treloggan v. Treloggan</u>	699 P.2d 747 (Utah 1985)	*	*	*	*					9
<u>Western States Thrift and Loan Co. v. Bloomquist</u>	29 Ut 2d 58, 504 P.2d 1019 (1972)									9
<u>Woodhaven v. Washington</u> ,	907 P.2d 271 (Ut Ct App 1995)									
	RVD 942 P.2d 918 (Utah 1997)	*	*	*	*	*	*	*	*	10

JURISDICTIONAL STATEMENT

Defendant concede that this Court has jurisdiction to hear Plaintiff's Appeal.

STANDARD OF APPELLATE REVIEW

Because disposition of a case on summary judgment denies the benefit of a trial on the merits, the appellate court must review the evidence in the light most favorable to the losing party, and affirm only where it appears there is no genuine dispute as to any material issues of fact, or where, even according to the facts as contended by the losing party, the moving party is entitled to judgment as a matter of law. Themy v. Seagull Enterprises, Inc., 595 P.2d 526 (Utah 1979).

STATEMENT OF CASE

This is a case in which Plaintiff/Appellant seeks to recover damages from selected entities involved within a chain of transfers of a motor vehicle. Plaintiff/Appellant contends that the subject vehicle was a salvage vehicle and that he was not apprised of that fact and withholding of that information gave rise to statutory and common law causes of action.

PROCEEDINGS AT THE TRIAL LEVEL

After discovery and limited motion practice Defendants/Appellees brought Motions for Summary Judgment which Motions were granted by the trial court. In granting Summary Judgment the Court disposed of all issues of fact and law in favor of Defendant/Appellees.

STATEMENT OF FACTS

1. On or about the 12th day of February 1997 the Defendant Economy Auto Inc. was served with a Summons and Complaint in this action. The Defendant Economy Auto Inc. is a corporation organized and existing under the laws of the State of Utah with its principal place of business in Cache County, State of Utah.

2. Defendant American States Insurance Co., an insurance company doing business in Utah was likewise served with Summons and Complaint.

3. Sometime thereafter Defendant Clarendon National Insurance Co. Was likewise served.

4. The Defendant Clarendon National Insurance Co. Is a corporation organized and existing under and by virtue of the laws of the State of New Jersey and is qualified to transact business in the State of Utah.

5. The Defendant Economy Auto is a licensed and bonded motor vehicle dealer pursuant to The Utah Motor Vehicle Act.

6. The Defendant Economy Auto Inc. does not, as a principal part of it's business, offer automobiles to the public at retail, but concentrates on selling motor vehicles and motor vehicle parts at wholesale but routinely sells motor vehicle parts at retail as well. Occasionally Economy Auto Inc. will sell a used motor vehicle at retail but does not solicit this type of business. Economy Auto does not maintain a retail sales lot, advertise retail sales or have a staff versed in retail sale, techniques and practices.

7. The Defendant Economy Auto Inc. is party to that certain Motor Vehicle Dealers Bond # 95054257 as a principal and the Defendant Clarendon National Insurance Co. Is named therein as a surety and each is bound to the State of Utah as per their undertaking in fulfillment of applicable law.

8. At all times relevant to this proceeding the bond above referenced was in full force and effect in this jurisdiction and provided such assurances and protections as are required by Utah law.

9. This case involves a certain "Hummer" motor vehicle VIN#137YA843XRE152325 which motor vehicle was manufactured by American General Corporation of South Bend, Indiana; a domestic corporation in the business of manufacturing new automobiles.

10. The vehicle had been purchased new by South Mountain L.C., the vehicle was used sparingly by that entity and was ultimately transferred to an automobile dealer, Intermountain Volkswagen, who sold it to Christensen.

11. At some time subsequent to the sale of said motor vehicle to Christensen the same incurred damage, apparently from upset and/or collision with the ground or with the roadway. The damage was incurred while the motor vehicle was owned and titled to Christensen.

12. In this action, Plaintiff, at the trial level, alleged and assumed that the damage incurred by the motor vehicle rendered it a "salvage vehicle" as defined by Utah law an assumption which each of the Defendants denied and continue to deny.

13. Although each entity is named in Plaintiff's Complaint, title to the subject motor vehicle was never invested in American States Insurance Co., Economy Auto Inc., Western Affiliated, Utah Auto Auction or Hillcrest Service; the titled interest of Christensen having passed directly and without intervention from the said Christensen to the Plaintiff James Gordon Holmes.

14. At some point material to this proceeding American States Insurance Co.; on account of contractual liability founded on collision coverage purchased by the insured owner (Christensen), paid a certain sum of money to Christensen and perhaps to the entity who was the secured lender in privity with Christensen.

15. As a result of the payment American States succeeded to the interest that both Christensen and the lien holder had in the motor vehicle. Thereafter, through the intervention of two non-parties, Carleson Cadillac and Intermountain Towing, Defendant Economy Auto Inc. took transfer of the interest of American States and transferred that interest to a non-party Western Affiliated. Western Affiliated, subsequently, Utah Auto Auction and Hillcrest Service, for consideration, became subsequent transferees of whatever interest American States Insurance Co. may have acquired in said motor vehicle on account of the payment to and/or on behalf of Christensen.

16. Ultimately, Hillcrest Service transferred their purchased interest to Plaintiff and Plaintiff ultimately acquired the titled interest of Christensen subject to a security interest held by Zions Bank, the entity from which Plaintiff borrowed a portion of the purchase price.

17. At the time that each of these transactions occurred the subject motor vehicle was located in Salt Lake County or Davis County, and was not then nor never was registered to or in the physical possession of any of the Defendants.

18. Plaintiff personally inspected the vehicle before he purchased it while it was at Carlson Cadillac in Salt Lake County, again while it was at Utah Auto Auction in Davis County, Utah and again while it was in the possession of Hillcrest Service in Salt Lake County.

19. While the subject motor vehicle was at Carlson Cadillac in its damaged condition the Plaintiff attempted to purchase the interest of American States but was unsuccessful and upon learning of the transfer to the Defendant Economy Auto contacted one of Economy's principals, Charlie Fullmer, again attempting to purchase the subject motor vehicle. Fullmer as manager of Economy Auto, offered to sell the interest of Economy Auto Inc. to Plaintiff for about \$17,000.00 but Plaintiff did not accept the offer, but did offer to pay Economy Auto \$15,000.00.

20. In the course of various unrelated business dealings between Economy Auto Inc. and Western Affiliated¹, Western Affiliated developed a purpose to offer the subject motor vehicle for sale in it's damaged condition at a public auction conducted by Utah Auto Auction. Western Affiliated, for consideration, took transfer of the interest of Economy Auto Inc. and took physical possession of the motor vehicle from Carlson Cadillac and arranged for the transportation of said motor vehicle to the premises of Utah Auto Auction

¹ Western affiliated, a non party, is reputed to have been a dealer in used motor vehicles at all pertinent times and may well have been bonded by Defendant Clarendon National. The business has now been sold to Copart Inc, which is still dealing in motor vehicles and motor vehicle parts, the present status of Western Affiliated is unclear

in Davis County, State of Utah and upon delivery transferred its interest to Utah Auto Auction, a licensed and bonded Utah motor vehicle dealer. The transfer was for consideration.

21. The subject motor vehicle, in it's damaged condition, was struck off at said auction to the highest bidder, Hillcrest Service, with Plaintiff Holmes as a contending bidder. Hillcrest Service was, at that time, a bonded Utah motor vehicle dealer.

22. Hillcrest Service, after the auction, removed the subject motor vehicle from Davis County to it's place of business in Salt Lake County.

23. Plaintiff, at that point, contacted Hillcrest Service and as a retail customer, purchased the Hummer in its damaged condition for a price in excess of \$23,000.00 + sales tax and license.

24. Plaintiff then took possession of the vehicle and personally repaired the motor vehicle to his own satisfaction with no assistance or input or advice from any of the other parties or non-parties mentioned hereinbefore and Plaintiff did, through the auspices of Hillcrest Service, procure title and registration in his name without communication with or assistance from the parties Defendant.

25. In November of 1998 while this litigation was pending in the trial court, Plaintiff sold the subject motor vehicle, at retail, for about \$37,000.00. In the process of transfer of title Plaintiff did not obtain a salvage notation on the title and even now the motor vehicle has a "clean title".²

26. No significant repairs were made to the motor vehicle by any person until Plaintiff commenced to make repairs after taking possession of the vehicle, which vehicle was in substantially the same condition as it was when it was surrendered to American by Christensen.

² An interesting question arises from this transfer: does Plaintiff assert that the November 1998 transaction create new and separate causes of action whereby the transfer of Plaintiff's interest might proceed against American States, Economy Auto, Western Affiliated, Utah Auto Auction, Hillcrest Services and James Gordon Holmes?

27. Liability of Defendant Clarendon National must be predicated on a finding of liability on the part of Defendant Economy Auto Inc., Defendant Clarendon has never had any interest in or possession of the subject vehicle and is merely a surety for Defendant Economy Auto.

28. Defendant Economy Auto never transferred the motor vehicle in question to itself or back to itself despite Plaintiff's allegation which surfaced for the first time in Plaintiff/Appellants Brief at page 5.

ISSUES

I. Does Utah Law, under the facts of this case, impose upon an entity acquiring such interest as that acquired by Defendant Economy Auto and its subsequent transferees in this case, the duty to surrender title to the Utah State Department of Motor Vehicles for the purpose of obtaining a salvage title?

II. May the Plaintiff, under the facts of this case, prove damages in the absence of issuance of a salvage title?

III. Respecting the facts and pleadings of this case, do the Consumer Sales Practices Act and the Uniform Commercial Code address the transaction in question?

SUMMARY OF ARGUMENTS

The Plaintiff, at the trial level, presented no competent evidence that the motor vehicle in question is or was salvage and, in fact, all evidence admissible on that point at the trial level was to the contrary.

The new vehicle warranty was unimpaired throughout its intrinsic duration.

If the Plaintiff relies on statutory damages only, he neither pleaded nor proved facts that give rise to a cause of action under the statute.

The Defendant has neither pleaded nor proved actual damage.

ARGUMENT

POINT I. Does Utah Law, under the facts of this case, impose upon an entity acquiring such interest as that acquired by Defendant Economy Auto and it's subsequent transferees in this case, the duty to surrender title to the Utah State Department of Motor Vehicles for the purpose of obtaining a salvage title?

29. Under certain narrowly construed circumstances, certain classes of entities may be required to surrender a Utah Motor Vehicle title and obtain therefore a salvage title in the process of transferring their interest. The code sections relied upon by Plaintiff are UCA 41-1a-1004(2) and UCA 41-1a-1005(4).³

30. Plaintiff maintains that neither the Defendants American States nor the Defendant Economy Auto, nor the non-parties Western Affiliated, Utah Auto Auction and Hillcrest Service, in not Procuring a salvage title, did nothing to violate UCA 41-3-702 (1)(c)(VI) and 41-3-701 (3).

31. UCA 41-1a-1004 to become operative, subsumes that a salvage certificate or branded title has been issued so whether or not any of the Defendants may be or may not be sellers becomes moot in that the pleadings of Plaintiff and the deposition in this case discloses that no such title was issued or procured; (see deposition of James G. Holmes Page 93, Line 24,) In view of the clear wording of the statute relied on by Plaintiff any claim based on that statute must be denied. In K&T, Inc. v. KOROULIS 888 P2d 623, 627 (Utah 1994) the court held that each term in a statute was “used advisedly; thus the statutory words are read literally, unless such a reading is unreasonably confused or inoperable.”.

32. 41-1a-1005 provides in pertinent part that “if an insurance Co. Declares a vehicle a salvage vehicle and takes possession of the vehicle for disposal...” In this case,

³ See Addendum A for full text

neither of the Insurance Company's involved, they being Defendants American States and Clarendon National respectively, declared the 1994 Hummer to be a salvage vehicle (see affidavit of Charles Fullmer) nor did either of the Defendant insurance companies take Possession of the motor vehicle for disposal (see affidavit of Charlie Fullmer). Since neither of the two conditions precedent occurred the Plaintiff enjoys no rights under section 1005.

33. 41-1a-1001 defined salvage vehicle as “[any vehicle][that] is:

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 b) that has been declared a salvage vehicle by an insurer of other state or jurisdiction, but is not precluded from further registration and titling.

34. In this case the motor vehicle in question had not been declared a salvage vehicle by the an insurer of another State or Jurisdiction, nor had the motor vehicle been damaged to the extent that the cost of repair exceeded the fair market value; see deposition of James Gordon Holmes P.47 Line 14; the cost of repair approximating \$8,500.00 while the fair market value as repaired exceeds \$35,000.00. (See deposition of J.G. Holmes, P48, Line 5 and affidavit of Charles Fullmer). As the undisputed facts establish, Mr. Fullmer offered the vehicle to Plaintiff for \$17,000 making the cost to the Plaintiff, with repairs \$25,000.00. What Plaintiff later elected to pay becomes immaterial, it is apparent that Plaintiff having approached the Insurance company first, might well have obtained the vehicle for the initial purchase price, that being \$12,000.00. See affidavit of C. Fullmer.

35. The fact is, the motor vehicle in question was not salvage and no proof of that fact exists. All of the Statutes adopted by Plaintiff are predicated on the 1994 Hummer being a “salvage vehicle” and there being no proof of that fact Plaintiff's entire case falls in of it's own weight and is subject to summary disposition under Utah Rules of Civil Procedure Rule 56.

36. Plaintiff points to the alleged assumption of a member of the clerical staff at American States Insurance Company that someone should have surrendered the title to the

State for a salvage designation. Conclusory statements are not admissible and will not serve to establish a controverting fact. Western Thrift and Loan v. Bloomquist 29 Ut 2.d 274, 504 P2.d 1019 (1972).

37. Likewise the Affidavit of Danny Jensen relied on by Plaintiff/Appellant is not based on personal knowledge and inspection but is based on heresay reports prepared by others. Again, such assertions are not admissible as evidence upon which the court might base a finding of fact. Treloggan v. Treloggan 699 P2.d 747 (Utah 1985).

38. Plaintiff presses other points whereby Plaintiff would have the Court consider and give weight to the conclusory acts of others, such as an unknown person making a notation on an invoice or an unknown person on the telephone making a statement of fact concerning the salvage nature of the motor vehicle utilizing information gleaned from an unknown source.

The prior 3 paragraphs summarize Plaintiff's proof as to the salvage nature of the subject motor vehicle, from this perspective alone we are left with nothing to controvert the Affidavit of Charlie Fullmer the Affidavit of the employee of American General and/or the undeniable mathematical truth drawn from figures given in the depositions of Plaintiff.

II. May the Plaintiff, under the facts of this case, prove damages in the absence of issuance of a salvage title?

39. There is no cited case known to Defendant where recovery has been allowed (or even sought) for non-designation as salvage of an un-repaired vehicle unless there has been active concealment of a latent defect.

40. The fact that an insurance company pays an insured a sum of money and takes possession of an insured vehicle does not ipso facto create a salvage vehicle. Christensen was paid the cash value of his vehicle prior to the damage; this does not mean that the vehicle was salvage it just means that the Insurance company, at it's election, paid in accord

with what was deemed to be its contractual obligation. The insurer then transferred its interest in the damaged vehicle for the best price obtainable, not necessarily the salvage price. It is apparent from the prices paid by various dealers or the acts of Plaintiff that the motor vehicle was thought to have considerable worth and utility despite the damage it had sustained.

41. While it is possible that issuance of a salvage title might well decrease the value of a motor vehicle for resale, the notation on the title could not conceivably affect the intrinsic value or utility of the motor vehicle. (See affidavit of Charlie Fullmer.) Likewise if the vehicle has a “clean title” how can that fact adversely affect its worth?

42. Plaintiff admittedly purchased the vehicle with full knowledge of the damage and made the purchase for his own use and after accomplishing the contemplated repairs he did, until the sale in November of 1998, use the motor vehicle for all of the uses he originally contemplated at the time of purchase. The value of the motor vehicle to Plaintiff could not be enhanced by the act of placing a salvage notation on the title.

POINT III. Respecting the facts of this case the Consumer Sales Practices Act and the Uniform Commercial Code do not control the transaction in question?

43. Respecting the consumer sales practices act, UCA 13-11-1 et. Seq., Even if we assume Defendants are suppliers and Plaintiff is a consumer, which the defendants do not assume and do vigorously deny, these statutes have no application to the facts of the case.

44. UCA 13-11-4 and 13-11-5 define the prohibited conduct and are attached hereto as part of the Addendum A and it is thereby apparent that the claims of Plaintiff lie without the prohibitions of that legislation.

45. In the recent case of WOODHAVEN v. WASHINGTON 907 P^{2d} 271 (Ut. Ct. App. 1995) Rvsd on 22 July, 1997 the Court addressed the unconscionability provisions of the act and the Court observed, with respect to a claim for damages, that to be

unconscionable the circumstances must be such as to be oppressive and to unfairly surprise the claimant. Nothing alleged or pleaded by the Plaintiff even addresses this standard, let alone approaches the burden the standard imposes.

46. It is said that to be an actionable deceptive practice the practice must A) be a deceptive act or practice as defined by UCA 13-11-4 ; B) and must be done intentionally by the Defendant contemplating that Plaintiff will rely on the deception and C) the deception must occur in a course of conduct involving trade or commerce. In this case it cannot be denied, and the trial court so found, that the Plaintiff was, at the time he acquired title to the vehicle, better informed than any party to this transaction, at any time, as to the true condition of the motor vehicle. P.24 Line 1-18 (Deposition of Plaintiff Holmes taken on April 7, 1997).

47. Reference to UCA 70A could well complicate Plaintiff's claims further when one looks 70A-2-104⁴ as to "transactions between merchants";⁵ Other than the implications of that section it is difficult to find where the UCC creates or provides a cause of action based on failure to procure a "salvage title".

48. Contrary to assertions by Plaintiff, no named Defendant can be said to have any fiduciary relationship with Defendant, whether it be created by statute or by case law and it is further apparent that Defendant is not now nor has he ever been under any disability or nor can it be said that Plaintiff occupied a legally disadvantaged position; how then does the Plaintiff claim Defendant's have a fiduciary duty?

⁴ See Addendum for full text

⁵ See Addendum for full text

CONCLUSION

the most important single fact disclosed during the trial proceedings was that none of the transferees of the interest of Christensen treated the subject vehicle as salvage but only as a vehicle which was in need of limited repair to become fully functional. That fact coupled with the legal infirmities of the Plaintiff's position compelled a finding by the Trial Court that the subject vehicle was not a salvage vehicle.

Since there were no actual damages, any damages must be predicated on the statute and since no violation of any statute has occurred Plaintiff fails to state a claim upon which a recovery might be had.

Respectfully Submitted,

/s/

A. W. Lauritzen
Attorney for Defendants Economy Auto Inc.
& Clarendon National Insurance Company

CERTIFICATE OF SERVICE

I hereby certify that I mailed a true and correct copy of the foregoing Brief of Appellees postage prepaid, to the following listed below on this ____ Day of _____, 1999.

Paul M. Belnap
Attorney for American States Insurance Company
6th Floor Boston Building
#9 Exchange Place
Salt Lake City, Utah 84111

Ray G. Martineau
Anthony R. Martineau
Attorneys for Plaintiff James Gordon Holmes
3098 Highland Drive, Suite 450
Salt Lake City, Utah 84106

★ awl Hand Delivered
to Court of Appeals
11/8/99
★ mailed to Attorneys
11/8/99

ADDENDUM A

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:

- (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).

13-11-23. Other remedies available—Class action only as prescribed by act.

The remedies of this act are in addition to remedies otherwise available for the same conduct under state or local law, except that a class action relating to a transaction governed by this act may be brought only as prescribed by this act.

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.

41-3-205. Licenses—Bonds required—Maximum liability—Action against surety—

(1) (a) Before a dealer's, special equipment dealer's, crusher's, or body shop's license is issued the applicant shall file with the administrator a corporate surety bond in the amount of:

(i) \$20,000 for a motor vehicle dealer's license or special equipment dealer's license;

(ii) \$1,000 for a motorcycle or small trailer dealer's or crusher's license; or

(iii) \$10,000 for a body shop's license.

(b) The corporate surety shall be licensed to do business within the state.

(c) The form of the bond:

(i) shall be approved by the attorney general;

(ii) shall be conditioned upon the applicant's conducting business as a dealer without fraud or fraudulent representation and without violating this chapter; and

(iii) may be continuous in form.

(d) The total aggregate annual liability on the bond to all persons making claims may not exceed the amount of the bond.

(2) A cause of action under Subsection (1) may not be maintained against a surety unless:

(a) a claim is filed in writing with the administrator within one year after the cause of action arose; and

(b) the action is commenced within two years after the claim was filed with the administrator.

(3) A person making a claim on the bond shall be awarded attorneys' fees in cases successfully prosecuted or settled against the surety or principal if the bond has not been depleted.

41-3-210. License holders—Prohibitions.

(1) The holder of any license issued under this chapter may not:

(c) violate this chapter or the rules made by the administrator;

(d) violate any law of the state respecting commerce in motor vehicles or any rule respecting commerce in motor vehicles made by any licensing or regulating authority of the state.

41-3-404. Right of action against dealer, salesperson, crusher, body shop, or surety on bond.

(1) A person may maintain an action against a dealer, crusher, or body shop on the corporate surety bond if:

(a) the person suffers a loss or damage because of:

(i) fraud;

(ii) fraudulent representation; or

(iii) a violation of:

(A) this chapter;

(B) any law respecting commerce in motor vehicles; or

(C) a rule respecting commerce in motor vehicle made by a licensing or regulating authority; and

(b) the loss or damage results from the action of:

(i) a licensed dealer;

(ii) a licensed dealer's salesperson acting on behalf of the dealer or within the scope of the salesperson's employment;

(iii) a licensed crusher; or

(iv) a body shop.

(2) Successive recovery against a surety on a bond is permitted, but the total aggregate annual liability on the bond to all persons making claims may not exceed the amount of the bond.

(3) A cause of action may not be maintained against any surety under any bond required under this chapter except as provided in Section 41-3-205.

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 Administrative Code R873-22M-25 states:

A. The Motor Vehicle Division shall brand a vehicle's title if, at the time of initial registration or transfer or ownership, evidence exists that the vehicle is a salvage vehicle.

B. Written notification that a vehicle has been issued a salvage certificate or branded title shall be made to a prospective purchaser on a form approved by the Administrator of the Motor Vehicle Enforcement Division.

C. The form must clearly and conspicuously disclose that the vehicle has been issued a salvage certificate or branded title.

D. The form must be presented to and signed by the prospective purchaser and the prospective lien holder, if any, prior to the sale of the vehicle.

E. If the seller of the vehicle is a dealer, the form must be prominently displayed in the lower passenger-side corner of the windshield for the period of time the vehicle is on display for sale.

F. The original disclosure form shall be given to the purchaser and a copy shall be given to the new lienholder, if any. A copy shall be kept on file by the seller for a period of three years from the date of sale if the seller is a dealer..)

Utah Uniform Commercial Code:

70A-1-102. Purposes—Rules of construction—Variation by agreement.

(1) This act shall be liberally construed and applied to promote its underlying purposes and policies.

(2) Underlying purposes and policies of this act are

(a) to simplify, clarify and modernize the law governing commercial transactions;

(b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties;

(c) to make uniform the law among the various jurisdictions.

(3) The effect of provisions of this act may be varied by agreement, except as otherwise provided in this act and except that the obligations of good faith, diligence, reasonableness and care prescribed by this act may not be disclaimed by agreement but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable.

(4) The presence in certain provisions of this act of the words “unless otherwise agreed” or words of similar import does not imply that the effect of other provisions may not be varied by agreement under Subsection (3).

(5) In this act unless the context otherwise requires

(a) words in the singular number include the plural, and in the plural include the singular;

(b) words of the masculine gender include the feminine and the neuter, and when the sense so indicates words of the neuter gender may refer to any gender.

70A-1-103. Supplementary general principles of law applicable.

Unless displaced by the particular provisions of this act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.

70A-1-106. Remedies to be liberally administered.

(1) The remedies provided by this act shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed but neither consequential or special nor penal damages may be had except as specifically provided in this act or by other rule of law.

(2) Any right or obligation declared by this act is enforceable by action unless the provision declaring it specifies a different and limited effect.

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-2-105. Definitions—“Goods”

(1) “Goods” means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (chapter 8) and things in action.

(2) Goods must be both existing and identified before any interest in them can pass. Goods which are not both existing and identified are “future” goods. A purported present sale of future goods or of any interest therein operates as a contract to sell.

(3) There may be a sale of a part interest in existing identified goods.

70A-2-106. Definitions—“Contract”—“Agreement”—“Contract for sale”—“Sale”—“Present sale”—“Conforming” to contract—“Termination”- “Cancellation.”

(1) In this chapter unless the context otherwise requires “contract” and “agreement” are limited to those relating to the present or future sale of goods.

“Contract for sale” includes both a present sale of goods and a contract to sell goods at a future time. A “sale” consists in the passing of title from the seller to the buyer for a price (Section 70A-2-401). A “present sale” means a sale which is accomplished by the making of the contract.

(2) Goods or conduct including any part of a performance are “conforming” or conform to the contract when they are in accordance with the obligations under the contract.

(3) “Termination” occurs when either party pursuant to a power created by agreement or law puts an end to the contract otherwise than for its breach. On “termination” all obligations which are still executory on both sides are discharged but any right based on prior breach or performance survives.

(4) “Cancellation” occurs when either party puts an end to the contract for breach by the other and its effect is the same as that of “termination” except that the canceling party also retains any remedy for breach of the whole contract or any unperformed balance.

70A-2-302. Unconscionable contract or clause.

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

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.

ADDENDUM B

PER CURIAM:

Ibrahim L. TRELOGGAN and Joyce S. Treloggan, Plaintiffs and Respondents,
v.

Curtis L. TRELOGGAN and Julie A. Treloggan, and D & C Builders, Defendants and Appellants.

No. 19954.

Supreme Court of Utah.

April 5, 1985.

Mortgagees brought action to foreclose on mortgage, and holder of judgment lien intervened. The Second District Court, Weber County, David E. Roth, J., granted mortgagees' motion for summary judgment, and holder of judgment lien appealed. The Supreme Court held that affidavits on information and belief filed by holder of judgment lien revealed no evidentiary facts, but merely reflected affiant's unsubstantiated opinions and conclusions, and thus were insufficient to raise issue of material fact precluding summary judgment.

Affirmed.

1. Judgment \S 185.1(3)

Under summary judgment rule, an affidavit on information and belief is insufficient to provoke genuine issue of fact. Rules Civ.Proc., Rule 56(e).

2. Judgment \S 185.3(15)

In action brought by mortgagees to foreclose on mortgage, affidavits on information and belief filed by intervening holder of judgment lien revealed no evidentiary facts, but merely reflected affiant's unsubstantiated opinions and conclusions, and thus were insufficient to raise issue of material fact precluding summary judgment. Rules Civ.Proc., Rule 56(e).

Horace J. Knowlton, Salt Lake City, for defendants and appellants.

James R. Hasenyager, Ogden, for plaintiffs and respondents.

This is an appeal from an order of the district court granting respondents' motion for summary judgment and dismissing appellant's complaint in intervention and subsequent amended complaints.

Respondents are the parents of defendant Curtis Treloggan. On February 12, 1979, Curtis and Julie Treloggan, his wife, borrowed \$15,000 from respondents. A promissory note was signed which provided that the principal and interest (at 10% per annum) would be paid on or before February 2, 1980. To secure performance on the note, respondents took a mortgage on real property located in Weber County. The mortgage was recorded on February 13, 1979.

On March 1, 1979, appellant D & C Builders obtained a judgment against Curtis and Julie Treloggan for money due on an open account. Subsequently, it filed a judgment lien against the Weber County property.

When the promissory note was not paid within the time allotted, respondents filed a complaint to foreclose on the mortgage. In personal correspondence with the district court, Curtis and Julie Treloggan conceded default on the debt. D & C Builders filed an answer and counterclaim wherein it alleged that the conveyance to respondents was void, praying that it be declared the first lienholder. On June 16, 1980, the district court granted respondents summary judgment of foreclosure against Curtis and Julie Treloggan and ordered that appellant's interests be tried on its counterclaim.

Further proceedings against the property were stayed when Curtis and Julie Treloggan filed for bankruptcy and the trustee in bankruptcy assumed control of the property. When the property could not be sold for any amount greater than respondents' interest, the trustee abandoned the property in January 1984.

On February 22, 1984, respondents filed a motion for summary judgment dismissing D & C Builders' complaint in intervention

and amended complaint. Respondents asserted that they were entitled to judgment as a matter of law since there was no genuine issue as to material fact. Respondents' motion was supported by affidavits and other documents establishing that the \$15,000 was in fact paid by respondents to their son and daughter-in-law in a purely arm's length transaction. In response, D & C Builders filed affidavits of its office manager alleging, upon information and belief, that the note and mortgage had been given to defraud D & C Builders and to frustrate collection of its indebtedness.

A hearing was held, and the trial court granted respondents' motion for summary judgment. The basis of the court's order was that respondents had established by affidavit that they had made a loan to Curtis and Julie Treloggan and that D & C Builders had failed to establish "by way of rebutting affidavits or other admissible evidence" either that the loan was not made or that it was made to defraud D & C Builders. On appeal, D & C Builders challenges that decision.

[1] Under Utah R.Civ.P. 56(e), an affidavit on information and belief is insufficient to provoke a genuine issue of fact. In *Walker v. Rocky Mountain Recreation Corp.*, 29 Utah 2d 274, 508 P.2d 538 (1973), we held that an opposing affidavit under Rule 56(e):

[M]ust be made on personal knowledge of the affiant, and set forth facts that would be admissible in evidence and show that the affiant is competent to testify to the matters stated therein. Statements made merely on information and belief will be disregarded.

In *Jones v. Hinnie*, Utah, 611 P.2d 733 (1980), we cited *Walker* with approval and stated that when a motion for summary judgment is made under the Rule, "the affidavit of an adverse party must contain specific evidentiary facts showing that there is a genuine issue for trial." We held that plaintiff was entitled to judgment as a matter of law, defendants having failed to identify with specificity any material fact.

[2] Appellant's affidavits in the instant case are deficient for the same reasons. The affidavits reveal no evidentiary facts, but merely reflect the affiant's unsubstantiated opinions and conclusions in regard to the transactions concerned.

The summary judgment is therefore affirmed. Costs to respondents.

STEWART, J., does not participate herein.



WOODHAVEN APARTMENTS,
Plaintiff and Appellee,

v.

Bertha WASHINGTON, Defendant
and Appellant.

No. 940233-CA.

Court of Appeals of Utah.

Nov. 30, 1995.

Landlord sought award of liquidated damages after tenant vacated apartment six months before lease term ended. The Third Circuit, West Valley Department, William A. Thorne, J., found for landlord. Tenant appealed. The Court of Appeals, Wilkins, J., held that: (1) liquidated damages provision was enforceable, and (2) provision was not unconscionable.

Affirmed.

Orme, P.J., dissented and filed opinion.

1. Appeal and Error \S 1008.1(1)

Court of Appeals gives deference to trial court's findings of fact.

2. Appeal and Error \S 842(2)

Court of Appeals reviews trial court's conclusions of law for correctness.

3. Damages \S 78(6)

Liquidated damage clause in lease, which assessed a fee of one and one-half

months rent if tenant vacated premises prematurely but apartment was re-rented before expiration of lease, was enforceable, since it was a reasonable forecast of harm caused if tenant vacated early, and harm was difficult for parties to estimate when lease agreement was signed.

4. Damages ⇨80(3)

While reasonable correlation must exist between damages landlord actually incurs from tenant's breach of lease and liquidated damages provided for in lease, liquidated damages provision will only be declared void if any disparity between damages landlord incurred and those provided for in lease is grossly excessive and shocks the conscience.

5. Damages ⇨76

Under basic principles of freedom of contract, stipulation to liquidated damages for breach of contract is generally enforceable.

6. Contracts ⇨1

Parties may enter into contracts that later appear to be unfair or unreasonable, and may contract at arms length without intervention of courts to rescue one side from result of that bargain.

7. Consumer Protection ⇨8

Although favorable to landlord, liquidated damages clause in apartment lease was not unconscionable under Utah Consumer Sales Practices Act (UCSPA). U.C.A.1953, 13-11-1 et seq.

8. Damages ⇨78(6)

In breach of lease situation, landlord is not prohibited from collecting liquidated damages instead of itemizing actual damages.

Bruce Plenk and Eric Mittelstadt, Salt Lake City, for Appellant.

1. The lease provision reads in whole:

26. Should Resident vacate the premises prior to the expiration of the terms, Resident will be held responsible for the term of the lease. In the event that the apartment re-rents prior to the expiration of lease, Resident will be assessed a termination fee equal to one and one-half months[] rent

James H. Deans, Salt Lake City, for Appellee.

Before ORME, GREENWOOD and WILKINS, JJ.

OPINION

WILKINS, Judge:

Bertha Washington appeals the lower court's decision to grant Woodhaven Apartments liquidated damages as a part of its judgment against her. We affirm.

BACKGROUND

Woodhaven brought this action against Washington for damages pursuant to their lease agreement after Washington vacated the apartment six months before the lease term ended. Paragraph 26 of the lease agreement, which appeared immediately above the signature line, provided that if Washington vacated the premises before the lease expired, she would be assessed a "termination fee equal to one and one-half months[] rent" if the apartment was re-let before the lease expired.¹ Because Woodhaven re-let Washington's apartment only fifteen days after she vacated it, Washington appeals the lower court's finding that the liquidated damages fee was enforceable and the court's conclusion that contracting for the fee was not an unconscionable act under the Utah Consumer Sales Practices Act (UCSPA).² Washington also argues that Utah law prohibits landlords from receiving liquidated damages awards.

STANDARD OF REVIEW

[1.2] We have given deference to the trial court's findings of fact, see *Reliance Ins. Co. v. Utah Dep't of Transp.*, 858 P.2d 1363, 1367 (Utah 1993), but we have reviewed for correctness the trial court's conclusions that the liquidated damages were not unconscio-

2. On appeal, neither party disputes the trial court's determination that the contested lease provision is a liquidated damages clause or that the UCSPA applies. Consequently, we do not address these conclusions.

and that landlords may receive liquidated damages for a tenant's breach of a Utah Code Ann. § 13-11-5(2) (1992); *generally State v. Pena*, 869 P.2d 932, 936 (1994).

ANALYSIS

I.

We hold that the liquidated damages in Washington's lease with Woodhaven under Utah law. Because it was a reasonable forecast of the harm caused if Washington vacated early, and the harm was not for the parties to estimate when the lease was entered into, this liquidated damages provision is enforceable. *See Reliance Ins. Co. v. Utah Dep't of Transp.*, 858 P.2d 1363, 1367 (Utah 1993) (adopting Restatement of Contracts § 339 (1932)).

A reasonable correlation must exist between the damages Woodhaven actually incurred and those provided for in the contract. *Id.* Any disparity between the damages Woodhaven incurred and those provided for in the liquidated damages provision "must not be grossly excessive" and must "shock the conscience" of this court before we declare the liquidated damages void." *Id.* (citing *Kingdon*, 723 P.2d 394, 397 (Utah 1986) *see Young Elec. Sign Co. v. United Electric Welding Co.*, 755 P.2d 162, 164 (Utah 1988) noting that liquidated damages "are enforceable if the amount of liquidated damages agreed to is not disproportionate to the actual compensatory damages and does not constitute a forfeiture or a penalty"). The court found, and we agree, that the liquidated damages provision "does not shock the conscience as being unfair or oppressive."

In addition, the record indicates that Woodhaven incurs extra costs and expenses when a tenant terminates a lease early. For example, Woodhaven must perform administrative work such as ensuring that painting and repairs are timely done, advertising for the vacancy, showing the apartment to prospective tenants, evaluating the worthiness of prospective tenants, preparing paperwork for the prospective tenant. As the trial court found, an assessment of one and one-half months' rent is not

out of proportion to the effort and resources required to re-let the apartment. The early termination assessment agreed to by the parties was reasonable in light of the then-anticipated expenses expected to be caused by Washington's possible early termination.

The harm caused by Washington's breach was also difficult to accurately estimate when the parties contracted, so the second part of the legal test to determine the validity of liquidated damages is also met in this case. *See Reliance Ins.*, 858 P.2d at 1368-70. The parties' lease was for one year. Neither Woodhaven nor Washington could know when they entered into the lease agreement what the housing market would be like during the coming year. Particularly, they could not know how long it would take Woodhaven to re-let Washington's apartment if she vacated before the lease ended.

Therefore, since both prongs of the legal test are met, the liquidated damages provision is valid. First, the liquidated damages clause was a reasonable forecast, at the time the lease was entered into, of the damages Woodhaven would incur if Washington terminated her lease early. Second, the harm was difficult for the parties to accurately estimate when the lease agreement was signed.

[5] Furthermore, "[u]nder the basic principles of freedom of contract, a stipulation to liquidated damages for breach of contract is generally enforceable." *Allen*, 723 P.2d at 397 (quoting *Warner v. Rasmussen*, 704 P.2d 559, 561 (Utah 1985) (citations omitted)). It is reasonable that Woodhaven, which is comprised of 378 apartments, should be allowed to minimize its accounting costs of re-letting apartments that have been vacated early rather than requiring it to keep exacting accounting records of individualized costs for each breach by a tenant of a lease agreement. Using a liquidation clause also benefits tenants because they know what cost will be assessed upon early vacancy. If actual costs were the only allowed measure of damages, some tenants would be required to pay more than the liquidated damages assessment if the landlord was unable to re-let the vacated apartment for several months de-

spite significant and potentially expensive efforts to the contrary.

for a Utah landlord in a breach of lease situation.

II.

We also affirm the trial court's legal conclusion that paragraph 26 was not unconscionable despite Washington's argument that she lacked a meaningful choice regarding the liquidated damages clause. "Unconscionable," according to our supreme court, "is a term that defies precise definition. Rather, a court must assess the circumstances of each particular case in light of the twofold purpose of the doctrine, prevention of oppression and of unfair surprise." *Resource Management Co. v. Weston Ranch & Livestock Co.*, 706 P.2d 1028, 1041 (Utah 1985).

[6] Washington here claims oppression, rather than unfair surprise as the basis for finding paragraph 26 to be unconscionable. However, it is still the law in Utah that parties may contract at arms length without the intervention of the courts to rescue one side or the other from the result of that bargain. *Id.* at 1040. Parties are permitted to enter into contracts that later appear to be unfair or unreasonable. *Id.* "Although courts will not be parties to enforcing flagrantly unjust agreements, it is not for the courts to assume the paternalistic role of declaring that one who has freely bound himself need not perform because the bargain is not favorable." *Bekins Bar V Ranch v. Huth*, 664 P.2d 455, 459 (Utah 1983).

[7] Having considered all the surrounding circumstances in this case, the "trial court did not find this contract to be unconscionable, and there is no basis upon which we can say, as a matter of law, that he erred in his conclusion." *Jacobson v. Swan*, 3 Utah 2d 59, 67, 278 P.2d 294, 300 (1954).

III.

[8] Washington's argument that Utah law prohibits landlords from collecting liquidated damages awards has no merit. The trial court correctly concluded that *Reid v. Mutual of Omaha Insurance Co.*, 776 P.2d 896 (Utah 1989), does not require the itemization of actual damages as the exclusive remedy

CONCLUSION

The liquidated damages provision of paragraph 26 bore a reasonable relationship to the damage the parties anticipated Woodhaven would incur if Washington terminated her lease early, and the harm was difficult to accurately estimate at the time the lease agreement was signed. In addition, the damages were not unconscionable under the UCSPA, and they are allowed under Utah law. We affirm. Costs and attorney fees are awarded to Woodhaven.

GREENWOOD, J., concurs.

ORME, Presiding Judge (dissenting).

I dissent. In this case, the landlord received, as part of its judgment, the amount of rent that was owed but not paid by the tenant right up to the time the apartment was relet. In addition, the trial court stood ready to award additional actual damages to compensate for property damage caused by the tenant, but found no such damage was proven by the landlord. Also, the lease provides that a portion of the money paid by the tenant in advance is not refundable, but rather is earmarked for redecoration.

If the tenant remains contractually liable for actual rent unpaid up to the time of reletting, for the costs necessary to repair any property damage, and for at least some redecoration, what kind of damage is sought to be covered by over \$500 in *additional* liquidated damages? The trial court theorized that a landlord incurs other expenses like running ads and posting signs to advertise the vacancy, and that time must be spent in showing the unit to prospective tenants and processing applications. However, the landlord's employee testified the real purpose for the provision was to induce the tenant to honor the lease obligations and the landlord's attorney freely referred to it as a provision to "penalize the tenant for not keeping the lease." Significantly, the landlord suffered no demonstrated additional damage in this case.

There are a number of bases upon which a clause can invalidate liquidated damages provisions which work such unjust results. One is if the "party who would avoid a liquidated damages provision" proves "no damages were suffered or that there is no reasonable relationship between compensatory liquidated damages." *Young Elec. Sign. Co. v. United Standard West, Inc.*, 755 P.2d 64 (Utah 1988). See also *Allen v. Kingdon*, 723 P.2d 394, 397 (Utah 1986) (a \$10,800 "excessive and disproportionate" when compared to actual loss of rent and refusing to enforce liquidated damages provision); *Young Elec. Sign. Co. v. United Standard West, Inc.*, 564 P.2d 758, 760 (Utah 1977) (stating that liquidated damages are considered a penalty, therefore unenforceable, "if the damages stipulated are so excessive that they bear no reasonable relationship to the actual damages").

In the instant case, I must concede that the tenant's effort to meet her burden in this case was somewhat unfocused. Nonetheless, the import of the landlord's testimony, upon cross-examination, was that this was a relocation fee designed to induce compliance or in counsel's words, to penalize non-compliance) that was not really designed to respond to any particular range of probable relocation expenditure. Although the landlord's testimony was that it took an average of three days to re-rent an apartment (three days if it was left clean), it was conceded that there was no significant gap in occupancy and no appreciable effort was expended to find a new tenant. More importantly, there was no gap in the rents received by the landlord, i.e., the landlord's judgment included the amount of all unpaid rents owing but not paid by the tenant right up to the time of occupancy by the new tenant.

I am not prepared to say that no liquidated damages clause in a residential lease could be upheld. The provision in this case, however, simply cannot be enforced where the landlord sustained no demonstrable damages above and beyond the unpaid rent, propagation of damage, and redecoration expense it is entitled to recover. The sum of \$531 is "excessive and disproportionate"¹

Allen v. Kingdon, 723 P.2d 394, 397 (Utah

when compared to no expense actually incurred, or even if compared to some modest imputed expense attributable to administrative efforts to show a vacant unit, process an application, and fill in a few blanks on a lease form.

At least on the facts of this case, the \$531 "fee" is exactly what the landlord's counsel called it—a penalty. Accordingly, I would amend the judgment appealed from to delete the penalty and leave the landlord to recover only its actual damages.

Tim THEMY, Plaintiff and Respondent,

v.

SEAGULL ENTERPRISES, INC., a Utah Corporation, Shirley K. Watson, United Bank, a Utah Corporation, Zions First National Bank and Murray Broadcasting Company, Inc., Defendants and Appellants.

No. 15641.

Supreme Court of Utah.

April 4, 1979.

In case concerning sale of radio station, comprised of real property, broadcasting equipment and FCC broadcasting license, in which case defendants, original buyer and its assignees, admitted that they had failed to make required payments pursuant to terms of two operative agreements, the Third District Court, Salt Lake County, David B. Dee, J., granted plaintiff subsequent buyer's motion for summary judgment, declaring defendants' interests to be forfeited, and defendants appealed. The Supreme Court, Maughan, J., held that: (1) no material factual issue existed regarding subsequent buyer's right to bring instant action as successor to seller's interests in purchase agreements with original buyer; (2) no factual issue existed regarding subsequent buyer's compliance with remedial provisions of agreements, and (3) district court had power to adjudge that interests of defendants in FCC license described in and arising out of purchase agreement for sale of broadcasting equipment and license were forfeited by virtue of default of original buyer thereunder, because case at hand was not one in which court had infringed upon jurisdiction of FCC, and (4) under applicable rule, appointment of receiver was proper, where subsequent buyer's motion for appointment had been made after defendants filed their notice of appeal.

Affirmed.

1. Appeal and Error ⇐934(1), 1024.4

In reviewing a case disposed of in district court by summary judgment, Supreme Court considers evidence in light most favorable to losing party, and affirms only where it appears there is no genuine dispute as to any material issues of fact, or where, even according to facts as contended by losing party, moving party is entitled to judgment as a matter of law. Rules of Civil Procedure, rule 56(c).

2. Damages ⇐85

A forfeiture provision of a sales contract will be upheld unless amounts retained as liquidated damages are so great as to be unconscionable, or in nature of a penalty.

3. Telecommunications ⇐402

As assignees from defendant original buyer of radio station, defendants obtained only interests held by original buyer, and held those interests subject to original seller's rights retained by him and later assigned to subsequent buyer plaintiff.

4. Telecommunications ⇐402

Subsequent buyer, as successor to seller's interests, had right to bring action concerning sale of radio station, comprised of real property, broadcasting equipment and FCC broadcasting license, where subsequent buyer had been assigned all seller's interests in his two agreements with original buyer concerning sale, seller's prior assignment to bank affected only his interest in agreement concerning real estate, and was simply an assignment for security which accompanied a trust deed in favor of bank, and, although interests which seller assigned to subsequent buyer in real estate agreement were subject to security interest of bank, such did not divest seller of all interest in agreement.

5. Telecommunications ⇐402

Subsequent buyer, who, as successor to seller's interests in radio station sale agreement between seller and original buyer, brought action concerning sale, had complied with remedial provisions of agreements, where notice of default was delivered to person, who was a vice president of

original buyer and manager of radio station operated by original buyer's assignee, such notice informed original buyer of subsequent buyer's election to declare forfeiture under agreements unless delinquent payments were made current within five days, and amount necessary to remedy default was specified, but no payments were made in response thereto.

6. Appeal and Error ⇐170(1)

Where although, in case concerning sale of radio station, comprised of real property, broadcasting equipment and FCC broadcasting license, defendants made several objections to validity of notice given by subsequent buyer, they raised such claims for first time before Supreme Court, such court declined to review them.

7. Appeal and Error ⇐170(1)

In case concerning sale of radio station, simple response to defendants' contention that district court improperly decreed forfeiture of \$79,000 down payment made by original buyer defendant to seller, because forfeiture of so large a sum was unconscionable penalty, was that judgment did not address matter of down payment; moreover, subsequent buyer plaintiff's amended complaint requested no determination with respect to down payment, and fact that defendants neither raised that issue in their response to pleadings nor made any attempt before district court to have any portion of down payment returned meant that such issue was not properly before Supreme Court.

8. Telecommunications ⇐402

In case concerning sale of radio station, district court had power to adjudge that interests of defendants in FCC license described in and arising out of purchase agreement for sale of license was forfeited by virtue of default of original buyer thereunder, where case was not one in which court had infringed upon jurisdiction of FCC, because judgment simply enforced terms of agreement providing for forfeiture upon default by original buyer, and declared owner of interests in license to subsequent buyer, assignee of seller's interests in

purchase agreement with original buyer, and judgment did not require parties to take any specific action regarding a re-transfer of license. Communications Act of 1934, § 310(d), 47 U.S.C.A. § 310(d).

9. Appeal and Error ⇐448

Under rule providing that a receiver may be appointed by court after judgment to preserve property during pendency of an appeal, appointment of receiver in case concerning sale of radio station, comprised of real property, broadcasting equipment and an FCC broadcasting license, was proper, where plaintiff subsequent buyer's motion for appointment had been made after defendants filed their notice of appeal. Rules of Civil Procedure, rule 66.

Gary A. Frank, Murray, Craig T. Vincent, W. Clark Burt, Salt Lake City, for defendants and appellants.

Steven H. Gunn, of Ray, Quinney & Nebeker, Salt Lake City, for plaintiff and respondent.

MAUGHAN, Justice:

This case concerns the sale of a radio station, comprised of real property, broadcasting equipment and an FCC broadcasting license. Defendants admitted they had failed to make the required payments pursuant to the terms of the two operative agreements, and the district court granted plaintiff's motion for summary judgment, declaring the interests to be forfeited. Defendants contend factual issues prevent proper disposition by summary judgment, and the court improperly invaded the jurisdiction of the FCC by declaring defendants' interests in the license to be forfeited. We affirm, and award costs to plaintiff.

On June 26, 1974, the owner of KMOR (now KPRQ) radio station, O. J. Wilkinson, entered into two written agreements for the sale of the station to defendant Seagull Enterprises, Inc. (hereafter Seagull). Although one of the agreements concerned only the sale of the real property while the other concerned the sale of the personal

property and the FCC license, both documents were executed simultaneously, and each expressly stated that a breach of one would constitute a breach of the other. The consummation of both documents was expressly conditioned upon FCC approval of the transfer of the broadcasting license to Seagull. Both documents were closely patterned after the standard Uniform Real Estate Contract often used in this state; for example, both provided the seller with the same alternative remedies in the event of a breach by buyer: 1) seller could, after giving five days written notice, declare the interest of buyer to be forfeited and take possession of the premises; 2) seller could sue for all delinquent installments; or 3) seller could treat the contract as a note and mortgage and proceed to foreclose according to statutory provisions and have the property sold.

Upon obtaining FCC approval of the transfer of the license to Seagull in December, 1974, Seagull paid the required down payments of \$5,000 for the real property and \$74,000 for the personal property and license. No further payments were made by Seagull under the installment payment provisions of the contracts.

Because of Seagull's default under the agreements, Wilkinson notified Seagull on September 4, 1975 that Seagull's interest would be forfeited if it failed to bring all payments current within five days. Seagull tendered no payments, but Wilkinson took no further action regarding the forfeiture.

On May 26, 1976, Wilkinson entered into an installment sale contract with plaintiff Tim Themy (hereafter Themy) for the sale of the radio station, including all real and personal property and the license. Wilkinson also assigned to Themy his interest in the purchase agreements with Seagull.

On March 8, 1977, after obtaining FCC approval, Seagull transferred its interest in the license and the broadcasting equipment to defendant Shirley K. Watson, dba Murray Broadcasting Company. Thereafter, with FCC approval, Watson assigned her

interest to defendant Murray Broadcasting Company, Inc. (hereafter MBC).

Plaintiff's original complaint was filed in October, 1976. In July, 1977, plaintiff filed an amended complaint, naming, in addition to the above defendants, United Bank and Zions First National Bank; the interests of the banks, however, are not in issue on appeal. The amended complaint asked the court to adjudge the interests of defendants Seagull, Watson, United Bank, and MBC in the real property to be forfeited; alternatively, it requested judgment for \$245,000, the amount owing on the contract concerning the real property, and judgment foreclosing the agreement as a mortgage according to the contract terms. Regarding the contract to sell the personal property and the license, the amended complaint contained four alternative prayers for relief: 1) judgment declaring the license and property to be forfeited as per the contract terms; 2) judgment for \$176,000, the amount owing on the contract, and judgment foreclosing the agreement as a mortgage; 3) judgment declaring plaintiff's interests to be secured according to the UCC, and allowing a sale of the collateral under the secured transactions provisions of the UCC; 4) judgment setting aside the conveyance by Seagull to Watson as fraudulent, and appointing a receiver to protect the property involved in the litigation.

After reviewing the record, including affidavits and the depositions of Themy, Watson and an officer of Seagull, the district court heard arguments of counsel and granted Themy's motion for summary judgment. The judgment declared the interests of Seagull, Watson, United Bank and MBC in the real property, the personal property and the FCC license to be forfeited according to the terms of the agreements between Wilkinson and Seagull. The court named Themy as the owner of all interests forfeited by virtue of Wilkinson's assignment to Themy on May 26, 1976.

[1] As usual in reviewing a case disposed of in the district court by summary judgment, we consider the evidence in the

light most favorable to the losing party,¹ and affirm only where it appears there is no genuine dispute as to any material issues of fact, or where, even according to the facts as contended by the losing party, the moving party is entitled to judgment as a matter of law.²

[2, 3] We note preliminarily that defendants do not contest the validity or enforceability of the agreements between Wilkinson and Seagull, and this Court will uphold the forfeiture provisions of such contracts, unless amounts retained as liquidated damages are so great as to be unconscionable, or in the nature of a penalty.³ Nor do defendants Watson and MBC contend their interests are insulated from the forfeiture provisions by Seagull's assignment of its interests under the agreements. As assignees from the purchaser, Watson and MBC obtained only the interests held by Seagull, and clearly hold those interests subject to the original seller's rights retained by Wilkinson and later assigned to Themy.⁴

Defendants allege the existence of disputed facts concerning Themy's rights as the successor to Wilkinson's interest in the two purchase agreements which prevent summary judgment below. To support this claim, defendants assert Wilkinson assigned his interest in the agreements to Zions Bank prior to the assignment to Themy, and thus Wilkinson had no assignable interest to convey to Themy. Defendants also assert Wilkinson retained no enforceable forfeiture remedies under the contracts as they related to the FCC license, after the FCC approved the transfer of the license to Seagull. We address this issue at a later point herein.

[4] No material factual issue exists regarding Themy's right to bring this action as successor to Wilkinson's interests. The undisputed evidence from Themy's deposition and accompanying exhibits showed Wilkinson assigned all his interests in both agreements to Themy. Wilkinson's prior assignment to Zions Bank affected only his interest in the agreement concerning the real estate, and was simply an assignment for security which accompanied a Trust Deed in favor of the bank. Although the interests which Wilkinson assigned to Themy in the real estate agreement were indeed subject to the security interest of Zions Bank, this in no way divested Wilkinson of all interest in the agreement, any more than a homeowner is divested of his ownership rights by mortgaging his property.⁵

[5] Defendants next allege a factual issue exists regarding Themy's compliance with the remedial provisions of the agreements. The agreements provide:

DEFAULT OF BUYER. In the event of a failure to comply with the terms hereof by the Buyer, or upon failure of the Buyer to make any payment or payments when the same shall become due, or within 90 days or after, the Seller, at his option shall have the following alternative remedies:

A. Seller shall have the right upon failure of the Buyer to remedy the default within five days after written notice, to be released from all obligations in law and in equity to convey said property, and all payments which have been made theretofore on this contract by the Buyer shall be forfeited to the Seller as liquidated damages for the non-performance of the contract . . .

1. *Whitman v. W. T. Grant Co.*, 16 Utah 2d 81, 395 P.2d 918 (1964).
2. Utah Rules of Civil Procedure, 56(c); *Ruffinengo v. Miller*, Utah, 579 P.2d 342 (1978); *Durham v. Margetts*, Utah, 571 P.2d 1332 (1977).
3. *Johnson v. Carman*, Utah, 572 P.2d 371 (1977) and cases cited therein.

4. *Pearce v. Shurtz*, 2 Utah 2d 124, 270 P.2d 442 (1954); 77 Am.Jur.2d, Vendor and Purchaser, § 389.
5. Cf. *Murray First Thrift and Loan Co. v. Stevenson*, Utah, 534 P.2d 909 (1975). (Vendors could not refuse to convey title to assignee of purchaser because assignment from purchaser to assignee was made without vendors' approval as required by real estate contract, since assignment was given merely as security for loan.)

It is undisputed that none of defendants has made any payments under the contract subsequent to the initial down payments. In September, 1975, Wilkinson notified Seagull of its default, and of Wilkinson's intent to declare a forfeiture unless the default was remedied within five days. However, Wilkinson took no further action, and assigned his interests to Themy in May, 1976. Defendants allege that Wilkinson's right to declare a forfeiture was therefore waived; but regardless of that possibility, defendants were properly notified by Themy in September, 1977. The notice of default was delivered to Jay Gardner, a vice president of Seagull and manager of the radio station operated by MBC. The notice informed Seagull of Themy's election to declare a forfeiture under the agreements unless the delinquent payments were made current within five days, and the amount necessary to remedy the default was specified. No payments were made in response to this notice, nor have any payments been made at any time since 1974.

[6] Although defendants make several objections to the validity of the notice given by Themy, they raise these claims for the first time before us, and we therefore decline to review them.⁶

[7] Defendants also contend the district court improperly decreed a forfeiture of the \$79,000 down payment made by Seagull to Wilkinson, because the forfeiture of so large a sum is an unconscionable penalty. The simple response to this allegation is that the district court merely declared defendants' interests in the property described in the agreements to be forfeited; the judgment does not address the matter of the down payment made to Wilkinson. Moreover, plaintiff's amended complaint requests no determination by the court with respect to the down payment to Wilkinson, and defendants did not raise that issue in their responsive pleadings nor did they

make any attempt before the district court to have any portion of the down payment returned. Defendants' reliance on cases which hold that a forfeiture of substantial sums paid under a contract, ostensibly as liquidated damages, may be unconscionable,⁷ is therefore misplaced. In those cases, the issue of unconscionability was properly raised by the purchaser either by a suit to recover sums paid or by an affirmative defense to the seller's action to declare a forfeiture. Neither course has been pursued by defendants in this case, and the issue is not properly before us.

[8] We turn now to the question of whether the district court had power to adjudicate this controversy as it relates to the FCC license. The FCC has been empowered by Congress, in the public interest, with exclusive jurisdiction over radio broadcasting.⁸ Section 310(d) of the Federal Communications Act provides as follows:

"No construction permit or station license, of any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby."

Defendants contend that in view of the above section, the district court was without power to adjudge that "the interests of defendants Seagull Enterprises, Inc., Shirley K. Watson, United Bank and Murray Broadcasting Company, Inc. in the FCC license described in articles 1 and 2 of the Purchase Agreement for sale of the broadcasting equipment and license dated June 26, 1974 are forfeited by virtue of the default of the buyer thereunder." We disagree. The district court merely determined the respective rights of the parties under a private agreement, and the fact that the

6. *Hanover Limited v. Fields*, Utah, 568 P 2d 751 (1977).

7. *Johnson v. Carman*, supra note 3 and cases cited therein.

8. 47 U.S.C. §§ 151 et seq.; *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 65 S.Ct. 1475, 89 L Ed. 2092 (1945).

agreement concerns a radio station does not divest the court of jurisdiction.⁹

In *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 65 S.Ct. 1475, 89 L.Ed. 2092 (1945), an insurance society (lessor) leased a radio station to Radio Station WOW, Inc. (lessee) and applied to the FCC for a transfer of the license to the lessee. At the same time, a member of the lessor sued in a Nebraska state court to have the lease set aside for fraud. While this suit was pending the FCC consented to the assignment of the license to the lessee, and the lessor transferred it and the station properties to the lessee. The Nebraska Supreme Court thereafter set aside the lease on the grounds of fraud, and directed that "the license to operate the station be returned and that lessee be directed to do all things necessary for that purpose; that generally everything be done to restore the parties to their original position prior to entering into the lease" The U. S. Supreme Court held that the Nebraska Supreme Court "went outside its bounds when it ordered the parties 'to do all things necessary' to secure a return of the license,"¹⁰ because the order required the lessor to ask the FCC for a retransfer of the license to it and required the lessee not to oppose the transfer. The court explained that the Nebraska order, by hampering the freedom of the lessor not to continue in broadcasting and preventing the lessee from opposing the revocation of its license, imposed restrictions not only upon private rights of the parties, but also upon the licensing system which Congress had established.

But the court emphasized the power of a state court to adjudicate issues involving FCC licenses as long as the state court does not affirmatively interfere with the authority of the FCC to authorize the transfer, assignment or other disposition of licenses.

We have no doubt of the power of the Nebraska court to adjudicate, and conclusively, the claim of fraud in the transfer of the station by the Society to

WOW and upon finding fraud to direct a reconveyance of the lease to the Society. And this, even though the property consists of licensed facilities and the Society chooses not to apply for retransfer of the radio license to it, or the Commission, upon such application, refuses the retransfer. The result may well be the termination of a broadcasting station. The Communications Act does not explicitly deal with this problem, and we find nothing in its interstices that dislodges the power of the States to deal with fraud merely because licensed facilities are involved. The "public interest" with which the Commission is charged is that involved in granting licenses. Safeguarding of that interest can hardly imply that the interest of States in enforcing their laws against fraud have been nullified insofar as licensed facilities may be the instruments of fraud. [326 U.S. at 131-2, 65 S.Ct. at 1481.]

The above view was reaffirmed by the Supreme Court in *Regents of the University System of Georgia v. Carroll*, 338 U.S. 586, 70 S.Ct. 370, 94 L.Ed. 363 (1950), which involved proceedings for the renewal of a radio license. The FCC ruled that, unless a contract between the licensee and a broadcasting company for the purchase of the latter's stock were invalidated, the license would not be renewed. After the licensee accordingly repudiated the contract, the broadcasting company sued in the state courts for an accounting, obtaining a judgment in its favor. The Supreme Court affirmed, stating:

. . . the [FCC] could make a choice only within the scope of its licensing power, i. e., to grant or deny the license on the basis of the situation of the applicant. It could insist that the applicant change its situation before it granted a license, but it could not act as a bankruptcy court to change that situation for the applicant. . . . The [FCC] has said frequently

9. *Stenger v. Stenger Broadcasting Corporation*, 28 F.Supp. 407 (D.C. Pa. 1939), *Regents of University System of Georgia v. Carroll*, 338 U.S. 586, 70 S.Ct. 370, 94 L.Ed. 363 (1950)

10. 326 U.S. at 130, 65 S.Ct. at 1481

that controversies as to rights between licensees and others are outside the ambit of its powers. We do not read the Communications Act to give authority to the [FCC] to determine the validity of contracts between licensees and others. [338 U.S. at 602, 70 S.Ct. at 378.]

The case at hand is not one in which a state court has impinged upon the jurisdiction of the FCC. The judgment simply enforces the terms of the agreements providing for forfeiture upon default by the purchaser, and declares the owner of the interests in the radio station and the license to be Themy. It does not require the parties to take any specific action regarding a retransfer of the license, as in *Radio Station WOW, Inc.* Significantly, the judgment did not grant Themy's requested relief for "a mandatory injunction requiring . . . defendants to assist plaintiff in obtaining transfer of the FCC license into plaintiff's name." The judgment of the court is not beyond its authority, under the law as outlined above.¹¹

[9] Finally, we turn to defendants' allegation of error in the district court's order appointing a receiver for the interests forfeited under the agreements. Rule 66, Utah Rules of Civil Procedure, provides:

(a) Grounds for Appointment. A receiver may be appointed by the court in which an action is pending or has passed to judgment:

* * * * *

(4) After judgment, to dispose of the property according to the judgment, *or to preserve it during the pendency of an appeal*, or in proceedings in aid of execution when an execution has been returned unsatisfied, or when the judgment debtor refuses to apply his property in satisfaction of the judgment. [Emphasis added.]

The appointment of the receiver in this case was clearly proper under the rules, Themy's motion for appointment having been made after defendants filed their notice of appeal. We find no error on the part of the district court.

CROCKETT, C. J., and WILKINS, HALL and STEWART, JJ., concur.



11. See also *In Re Assignment of License of Station WVCA*, 10 FCC 241, *Big League Broadcasting Co., Inc. v. Shedd-Agard Broad-*

casting, Inc., La App. 313 So 2d 247 (1975); *Stenger v. Stenger Broadcasting Corporation*, *supra* note 9

J., entered summary judgment for transferee and appeal was taken. The Supreme Court, Zimmerman, C.J., held that: (1) statute invalidating restrictions on shares, unless legend appeared on certificate, was limited to restrictions imposed by corporation and did not extend to restriction agreed upon by shareholders, and (2) fact issue existed as to whether shareholders had waived first refusal rights.

Reversed and remanded.

1. Appeal and Error ⇨863

In reviewing entitlement to summary judgment, Supreme Court determines only whether trial court erred in applying governing law and whether trial court correctly held there were no disputed issues as to material fact. Rules Civ.Proc., Rule 56(c).

2. Statutes ⇨184, 217.4

Only when there is ambiguity in statute's plain language do courts need to seek guidance from legislative history and relevant policy considerations.

3. Corporations ⇨113

Statute providing that restriction on transfer of security "imposed" by issuer was ineffective against person without actual knowledge, unless restriction was conspicuously noted on security, did not apply to bar claim by shareholders that they had right to acquire stock pledged by another shareholder; restriction had been agreed upon by shareholders, rather than being imposed by corporation through charter, bylaws or corporate resolution. U.C.A.1953, 70A-8-204.

4. Judgment ⇨185.3(1)

Assuming that statute invalidating restrictions on shares imposed by issuer, in absence of restrictive legend on certificate or actual knowledge on part of holder, applied also to restrictions imposed by agreement among shareholders buyer of securities which did not have legend was nonetheless not entitled to summary judgment; buyer could still be bound by restrictions if it had actual knowledge of them, and affidavit by representative stating that buyer had not been informed of restriction by personnel of

INC., a Utah corporation dba Bud-
rent-A-Car of Salt Lake; Paul Tay-
individually; and Michael Taylor,
individually, Plaintiffs and Appellants,

v.

B. KOROULIS, and Montana
id Produce Co., Inc., a Utah corpo-
n, Defendants and Appellees.

No. 930506.

Supreme Court of Utah.

Dec. 16, 1994.

Rehearing Denied Feb. 8, 1995.

uer and shareholders brought suit
one shareholder and putative trans-
alleging breach of shareholder agree-
nder which transferring shareholder
quired to first offer shares to corpora-
other shareholders. The District
Salt Lake County, Richard H. Moffat,

seller did not foreclose possibility that actual knowledge had been acquired from some other source. U.C.A.1953, 70A-S-204; Rules Civ.Proc., Rule 56(e).

5. Appeal and Error \Rightarrow 854(1), 856(1)

Grant of summary judgment may be affirmed on any ground, even one not relied on by trial court.

6. Estoppel \Rightarrow 52.10(2)

Waiver requires (1) existing right, benefit or advantage, (2) knowledge of its existence, and (3) intention to relinquish right.

7. Judgment \Rightarrow 185.3(1)

Material issues of fact, precluding summary judgment, existed as to whether shareholders had waived right to insist upon having opportunity to match offer before any shareholder could transfer shares; shareholder gave affidavit that he had been requested to consent to pledge of shares and had refused to do so, and that he had not been given advance notice of transfer of shares or opportunity to meet offer, as provided for under shareholder's agreement. Rules Civ.Proc., Rule 56(e).

Donald J. Winder, Kathy A.F. Davis, Robert D. Tinney, Salt Lake City, for plaintiffs.

Kirk W. Bennett, John C. Green, Kim M. Luhn, Salt Lake City, for Korouhs.

1. Korouhs and the Taylors were the sole stockholders in K & T.
2. The Stockholders Agreement provides as follows:

1. *Restrictions During Lifetime of Stockholders.* No Stockholder shall transfer or encumber his shares of capital stock of the Corporation, whether presently owned or to be acquired, to any person or corporation without the consent of the other Stockholders unless the Stockholder desiring to make the transfer or encumbrance (hereinafter referred to as the Transferor) shall have first made the offer to sell, hereinafter described, and such offer shall not have been accepted.

(a) *Offer by Transferor.* The offer shall be given to the Corporation and to the other Stockholders and shall consist of an offer to sell all the shares of capital stock of the Corporation owned by the Transferor to which offer shall be attached a statement of intention to

John W. Call, Craig T. Vincent, Curtis C. Nessel, Salt Lake City, for Montana Brand Produce Co.

ZIMMERMAN, Chief Justice:

Plaintiffs K & T, Inc., and Paul and Michael Taylor appeal from the district court's grant of summary judgment in favor of defendant Montana Brand Produce Co. We reverse and remand.

"Before we recite the facts, we note that in reviewing a grant of summary judgment, we view the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party." *Higgins v. Salt Lake County*, 855 P.2d 231, 233 (Utah 1993). "We state the facts in this case accordingly." *Id.*

K & T is a closely held Utah corporation which owns and operates a rental-car franchise along the Wasatch Front. On June 30, 1981, K & T, the Taylors, and George Korouhs¹ entered into an agreement ("Stockholders' Agreement") governing any transfer or encumbrance of K & T stock. To prevent outsiders from gaining a right to share in the management of K & T, the stockholders agreed to restrict the transfer or encumbrance of K & T stock. This restriction took the form of a preemptive right on the part of K & T and its stockholders to purchase any K & T stock that a stockholder intended to transfer or encumber.² The Stockholders' Agreement specifically provided that all

transfer or encumbrance as the case may be, and the number of shares of capital stock involved, which shall be all of his shares.

(b) *Acceptance of the Offer.* Within thirty (30) days after receipt of such offer the Corporation may, at its option, elect to purchase all, but not less than all, of the shares of stock owned by the Transferor. If the offer is not accepted by the Corporation within that time, the other Stockholders may, within forty-five

option, purchase on a pro-rata basis all of said shares of capital stock. In the event any one or more of the individual Stockholders fails to purchase all of the shares he is entitled to purchase, such shares shall be available to the remaining Stockholders on a pro-rata basis within ten (10) days additional after such availability. The acceptance by any such Offeror shall be in writing.

certificates were to be surrendered to T and endorsed with a restrictive endorsement.³ Nevertheless, no such endorsement was ever placed upon Koroulis' stock certificates.

August 31, 1990, Bountiful Motor Sales, "BMS"), a corporation owned by Koroulis, entered into a financing agreement ("Dealership Loan") with First Security ("FSB"). At approximately the same time, FSB made a number of personal loans to Koroulis. BMS eventually defaulted on the Dealership Loan, and Koroulis defaulted on his personal obligations. After the default, Koroulis, BMS, and FSB entered into a series of forbearance, cross-collateralization and loan agreements ("the Forbearance Agreements").⁴ Pursuant to these agreements, Koroulis and BMS provided FSB with personal collateral for the Dealership Loan, and FSB extended additional credit to BMS and Koroulis, all of the loans were cross-defaulted and cross-collateralized, and certain other terms and conditions were imposed on the

part of the additional collateral provided to Koroulis and BMS to FSB under the Forbearance Agreements, Koroulis executed an agreement under which he pledged to his shares of K & T stock ("Pledge Agreement"). Richard H. Pope, a vice president of FSB, reviewed the Stockholders' Agreement and determined that the consent of K & T stockholders was necessary for the pledge of Koroulis' stock.⁵ Pope directed attorneys for FSB to prepare a consent agreement for review and execution by Paul Taylor, then vice president of K & T. After the execution of the Pledge Agreement by Koroulis, Pope met with Paul Taylor on several occasions in an attempt to obtain his consent to the pledge. Paul Taylor refused to sign the first consent agreement, a five-page document prepared by FSB's attorneys.

Paragraph 15 of the Stockholders' Agreement provides for the endorsement of the following upon the stock certificates.

"transfer of the shares of stock represented by this certificate is restricted under the terms of the Stockholders' Agreement dated June 30, 1981, a copy of which is on file in the office of the Corporation, subject to amendments.

Pope then directed attorneys for FSB to draft a "simpler" consent agreement, which Paul Taylor also refused to sign. Neither K & T nor the Taylors ever consented to the pledge of K & T stock by Koroulis to FSB.

BMS and Koroulis eventually defaulted on their obligations to FSB under the Forbearance Agreements. Sometime after the default, Koroulis and BMS contacted Montana Brand to request that Montana Brand purchase FSB's interest in the Koroulis and BMS loans. After Montana Brand tentatively agreed to such an arrangement, FSB drafted an agreement by which FSB would sell its interest in the Koroulis and BMS loans, along with the collateral securing those loans, to Montana Brand ("Loan Sale Agreement").

At the time the Loan Sale Agreement was executed, Robert G. Maxfield, secretary of Montana Brand, reviewed FSB's loan file. Although the file did contain a copy of the Pledge Agreement, Maxfield asserted in an affidavit that the file did not contain a copy of either the proposed consent agreements or the Stockholders' Agreement. Discovery conducted after the trial court dismissed FSB from the case reveals, however, that the Stockholders' Agreement and the proposed consent agreements were in the file. Maxfield also asserted via affidavit that "[n]either [he] nor, to the best of [his] knowledge, anyone at Montana Brand was informed of the existence of the Consent Agreement or the Stockholders' Agreement by personnel from First Security [Bank]."

Sometime around May 28, 1992, Montana Brand sent Paul Taylor a letter claiming that Koroulis and BMS had defaulted on their loan obligations and that Montana Brand was therefore the owner of Koroulis' stock under the terms of the Pledge Agreement. In his affidavit, Paul Taylor averred that this letter was the "first information [he received] that

4. The first agreement was dated March 28, 1991, a second was dated September 17, 1991 and a third was dated December 2, 1991.

5. Each of the individual forbearance agreements provided, as a condition of forbearance, that Koroulis deliver a consent agreement, executed by the stockholders of K & T, consenting to the pledge.

the Pledge Agreement had been executed, or that Montana Brand claimed an interest in [Koroulis'] shares." In response to the letter, Paul Taylor informed Montana Brand that K & T and the Taylors were entitled to purchase the stock for an amount set forth in the Stockholders' Agreement. When Montana Brand declined the request, K & T and the Taylors brought this action against Koroulis and Montana Brand in Utah's Third Judicial District Court.⁶

On April 30, 1992, K & T and the Taylors moved for summary judgment, asking the district court to declare that Koroulis had breached the Stockholders' Agreement and that K & T and the Taylors were entitled to purchase Koroulis' stock as set forth in the Stockholders' Agreement. In response, Montana Brand filed a cross-motion for summary judgment. In its cross-motion, Montana Brand asserted that (i) section 70A-8-204 of the Code⁷ rendered the restriction on transfer contained in the Stockholders' Agreement ineffective because the restriction was never endorsed on the stock certificates and Montana Brand took the stock without actual knowledge of the restriction; and (ii) the Taylors and K & T waived the right to enforce the restriction. In response to Montana Brand's cross-motion for summary judgment, K & T and the Taylors argued that section 70A-8-204 applied only to restric-

tions "imposed by the issuer" of the securities. Because the restriction at issue here was agreed to by all of the stockholders rather than imposed by K & T, the effectiveness of the restriction should be measured by reference to section 70A-8-302 of the Code⁸ rather than to section 70A-8-204.

At a hearing on June 21, 1993, the district court granted Montana Brand's cross-motion for summary judgment. In so doing, it concluded as a matter of law that section 70A-8-204 was applicable "[b]ecause the Stockholders' Agreement is actually between K & T and the three stockholders of K & T, [and] the restriction on transfer . . . was imposed by the issuer of the stock." Furthermore, relying on the Maxfield affidavit, the district court concluded that Montana Brand took the stock without actual knowledge of any restriction on the transfer of the stock. K & T and the Taylors appeal, claiming that (i) the trial court erred when it relied on section 70A-8-204 rather than on section 70A-8-302 to measure the effect of the restriction on transfer contained in the Stockholders' Agreement, and (ii) even if section 70A-8-204 is applicable, genuine issues of material fact exist which preclude summary judgment.

[1] We first state the applicable standard of review. Summary judgment is appropriate only when no genuine issues of material fact exist and the moving party is entitled to

6. On August 17, 1992, Montana Brand filed a third-party complaint against FSB alleging fraud and misrepresentation in connection with the Loan Sale Agreement. Montana Brand claimed that FSB had failed to disclose that the transfer of K & T stock was restricted by the Stockholders' Agreement. FSB moved to dismiss, claiming that Montana Brand had failed to perform due diligence prior to entering into the Loan Sale Agreement with FSB. The district court agreed, stating:

Montana Brand[] was perfectly free to talk to the stockholders and just as able to do so as [FSB] had been. Where there were no inhibitions placed in the path of Montana Brand[] to do any investigation it wished in regard to the transaction and it failed to make such inquiry it cannot now be heard to complain.

7. Section 70A-8-204 provides in relevant part as follows:

A restriction on transfer of a security imposed by the issuer, even though otherwise lawful, is

ineffective against any person without actual knowledge of its existence.

(1) the security is certificated and the restriction is noted conspicuously on the instrument.

Utah Code Ann. § 70A-8-204.

8. Section 70A-8-302 provides in relevant part as follows:

(1) A "bona fide purchaser" is a purchaser for value in good faith and without notice of any adverse claim.

(a) who takes delivery of a certificated security in bearer form or in registered form issued or indorsed to him or in blank;

(2) Adverse claim includes a claim that a transfer was or would be wrongful or that a particular adverse person is the owner of or has an interest in the security.

(3) A bona fide purchaser in addition to acquiring the rights of a purchaser under Section 70A-8-301, also acquires his interest in the security free of any adverse claim.

Utah Code Ann. § 70A-8-302.

Cite as 888 P.2d 623 (Utah 1994)

ent as a matter of law. Utah R.Civ.P. Higgins, 855 P.2d at 235. Because the question of summary judgment is a question of law, we accord no deference to the court's resolution of the legal issues. Higgins, 855 P.2d at 235. Ferree v. Ferree, 784 P.2d 149, 151 (Utah 1989). "We inquire only whether the trial court erred in applying the governing law and whether the court correctly held that there were disputed issues of material fact." Ferree, 784 P.2d at 151 (citing *Bushnell Real Estate, Inc. v. Nielson*, 672 P.2d 746, 749 (Utah 1982)).

The first question is whether the district court erred when it held that the restriction contained in the Stockholders' Agreement is an issuer-imposed restriction. It is critical because section 70A-8-204 states that only "[a] restriction on transfer of securities imposed by the issuer" is ineffective against any person without actual notice unless the restriction is conspicuously noted on the security. (Emphasis added.) If the restriction at issue was not "imposed by K & T but by the stockholders, section 70A-8-204 does not apply.

When faced with a question of statutory construction, we look first to the plain language of the statute. *State v. Larsen*, 865 P.2d 1355, 1357 (Utah 1993); *Schultz v. Utah National Bank of N. Am. Inc.* 814 P.2d 1108, 1112 (Utah 1991); *Brinkerhoff v. Forsyth*, 779 P.2d 85, 886 (Utah 1989); see also *Bonnam v. Bonnam*, 788 P.2d 497, 500 (Utah 1989) (unambiguous language "[a] restriction" may not be interpreted to contradict its meaning). In construing a statute, we assume that "each term in the statute was devised by the legislature; thus the statutory words are to be read literally unless such a reading is unreasonably confused or inoperable." *Savage In. v. Utah State Tax Comm'n*, 811

P.2d 664, 670 (Utah 1991). "Only when we find ambiguity in the statute's plain language do we seek guidance from the legislative history and relevant policy considerations." *World Peace Movement of Am. v. Newspaper Agency Corp.*, 879 P.2d 253, 259 (Utah 1994); see also *Schultz*, 814 P.2d at 1112 ("We first look to the statute's plain language. Only if we find some ambiguity do we look further."); *Brinkerhoff*, 779 P.2d at 686 (holding that if "statutory language is plain and unambiguous, this Court will not look beyond the same to divine legislative intent").

[3] While the Code defines the terms "issuer"⁹ and "knowledge,"¹⁰ it does not define the term "imposed." Common usage of the word, however, is quite clear from other sources. According to Webster's, to impose is "1. To enact or apply as compulsory; 2. To apply or make prevail by or as if by authority; 3. To obtrude or force (e.g., oneself) upon another or others." Webster's *II New Riverside University Dictionary* 614 (1984). These definitions contemplate a situation where one is forced to comply with the directive of another. In the context of the present case, the restriction on transfer would be issuer-imposed if it were contained in K & T's charter or bylaws or in a corporate resolution. If such were the case the stockholders of K & T would have no choice but to comply with the terms of the restriction.¹¹

In the case at hand, however, each of the stockholders voluntarily agreed to certain restrictions on their right to transfer their shares of K & T. The mere fact that K & T is a party to the agreement does not change its voluntary nature. Absent the Stockholders' Agreement, K & T would be powerless to control the disposition of any of the shares of K & T stock. Accordingly, we conclude that the restriction at issue here was not 'imposed' by K & T. See also U.C.C. § 8-

Utah Code Ann. § 70A-8-201.

Utah Code Ann. § 70A-1-201(25)(b).

For instance, K & T's board of directors issued and the stockholders of K & T approved a bylaw which mandated that no K & T holder could sell his K & T stock unless

those shares were first offered to the other stockholders; that restriction would be imposed by the corporation and would be binding even on those stockholders that voted against the bylaw. *Tu-Vu Drive-In Corp. v. Ashkin*, 61 Cal.2d 283, 38 Cal.Rptr. 348, 348-50, 391 P.2d 825, 825-30 (1964). The efficacy of such a restriction as against a third party would be measured by section 70A-8-204.

204 cmt. 6 (indicating that section 8-204 does not apply to "private agreements between stockholders containing restrictive covenants as to the sale of the security").

Montana Brand makes much of the first sentence of the Stockholders' Agreement, which states that it is an agreement "by and between George B. Koroulis, Paul F. Taylor, and P. Michael Taylor, hereinafter referred to as 'Stockholders[.]' . . . individually, and K & T Corporation—Budget—Rent—A—Car, a Utah Corporation, hereinafter referred to as 'Corporation.'" According to Montana Brand, this language indicates that the Stockholders' Agreement "was not merely among the stockholders of K & T but was actually an agreement between the stockholders of K & T on the one side and K & T, the issuer, on the other side." We think that Montana Brand's interpretation of this introductory language is untenable. This language simply indicates that there are four parties to the Stockholders' Agreement, three individual stockholders and K & T. Koroulis and the Taylors are listed together for convenience, because they are each individuals rather than corporate entities, rather than to indicate that they are on one side of the agreement and K & T is on the other.

[4] We note that even if we were to conclude that section 70A-8-204 were applicable, it would still be necessary to remand because Montana Brand failed to meet its affirmative burden, as the party moving for summary judgment, of establishing that there were no disputed material issues of fact. See *Lamb v. P. Michael Taylor & Co., Inc.*, 869 P.2d 926, 928 (Utah 1993) ("The party moving for summary judgment must establish a right to judgment based on the applicable law as applied to an undisputed material issue of fact."). Section 70A-8-204 provides that "[a] restriction on transfer of a security imposed by the issuer" is ineffective against any person without actual knowledge unless the restriction is conspicuously noted on the security. Thus, to prevail under section 70A-8-204, Montana Brand must show that there are no disputed material issues of fact regarding its lack of actual knowledge. Unless it does so, the party opposing the motion is under no obligation to demonstrate

that there is a genuine issue for trial. *Id.* at 928; Utah R.Civ.P. 56(e); cf. *Thayne v. Beneficial Utah, Inc.*, 874 P.2d 120, 124 (Utah 1994).

Here, Montana Brand presented a carefully tailored affidavit in which Maxfield testified that "[n]either [he] nor, to the best of [his] knowledge, anyone at Montana Brand was informed of the existence of the Consent Agreement or the Stockholders' Agreement by personnel from First Security [Bank]." (Emphasis added.) Montana Brand also submitted an admission on the part of Koroulis that he had never informed Montana Brand about the restriction. These two pieces of evidence do not foreclose the possibility that Montana Brand acquired actual knowledge of the restrictions from some other source. Thus, K & T and the Taylors were under no obligation to come forward with specific facts showing that there was a genuine issue for trial. Cf. Utah R.Civ.P. 56(e). Because Montana Brand did not demonstrate its entitlement to summary judgment based on an undisputed fact, summary judgment was inappropriate. *Lamb*, 869 P.2d at 928.

[5] Montana Brand argues that even if we find section 70A-8-204 inapplicable, we should still affirm on a ground not relied upon by the trial court: to wit, that K & T and the Taylors waived their right to enforce the Stockholders' Agreement. Montana Brand correctly points out that we may affirm a grant of summary judgment on any ground, even one not relied upon by the trial court. *White v. Driscoll*, 879 P.2d 1371, 1376 (Utah 1994); *West v. Thomson Newspapers*, 872 P.2d 999, 1012 n. 22 (Utah 1994); see also *Higgins*, 855 P.2d at 241. "However, any rationale for affirming a decision must find support in the record." *Hill v. Seattle First Nat'l Bank*, 827 P.2d 241, 246 (Utah 1992). We find no support in the record for a grant of summary judgment on the waiver theory.

[6] A waiver is an intentional relinquishment of a known right. *Soter's Inc. v. Deseret Fed. Sav. & Loan Ass'n*, 857 P.2d 936, 939-40 (Utah 1993). "Waiver requires three elements: (1) an existing right, benefit, or advantage; (2) knowledge of its existence;

) an intention to relinquish the right.”
940. The intention to relinquish the
may be either expressed or implied and
e implied from action or inaction. *Id.*

Here, summary judgment on the is-
waiver would have been inappropriate
e K & T and the Taylors have met
burden under rule 56(e) of the Utah
of Civil Procedure to demonstrate that
is a genuine issue of fact. Paul
testified via affidavit as follows:

at no time did any of the plaintiffs con-
to a pledge by Koroulis of his stock to
t Security Bank (“FSB”). Although I
approached in approximately March of
by Richard Pope, a representative of
b, twice in personal meetings (at loca-
s I can’t recall) and various other times
elephone, regarding plaintiffs’ consent
proposed pledge by Koroulis, plaintiffs
ach instance refused to execute the
of consent agreement submitted by
b.... Subsequent to March of 1991
tiffs had no further contacts with FSB
Koroulis (or anyone else) regarding the
ge.

fact Koroulis told me subsequently,
two separate occasions, in telephone
versations, not to worry, he didn’t need
tiffs’ consents, the first such occasion
ring a day or two after the second
posed Consent Agreement was present-
o me (approximately March 28, 1991).
n or about May 28, 1992, I received a
r from counsel for Montana Brand
luce Company, Inc.... In that letter,
tana Brand claims ownership of 15,000
es of K & T, Inc. stock previously
ed by Koroulis. Plaintiffs’ first infor-
on that the Pledge Agreement had
executed, or that Montana Brand
ned an interest in the shares at issue,
e upon plaintiffs’ receipt of said letter
counsel for Montana Brand making
rence to the Agreement.

aintiffs at no time received notice from
oulis, as required by paragraph 1 of
Stockholders’ Agreement, regarding
proposed pledge to FSB and providing
tiffs a right to exercise their purchase
on contained therein.

Accepting Taylor’s statements as true, as we
must do on appeal from a summary judg-
ment, *Winegar v. Froerer Corp.*, 813 P.2d
104, 107 (Utah 1991), we are led to the
inescapable conclusion that genuine issues of
fact exist as to whether there was a waiver.

We reverse the grant of summary judg-
ment and remand to the trial court for fur-
ther proceedings.

STEWART, A.C.J., and HOWE,
DURHAM and RUSSON, JJ., concur.

party conveying stock to plaintiff. The Third District Court, Salt Lake County, Stewart M. Hanson, J., granted plaintiff's motion for summary judgment, and defendant appealed. The Supreme Court, Callister, C. J., held, inter alia, that maker's affidavit whereby he swore that he had been informed by third party that third party had in fact settled the account, being hearsay and based on information and belief, did not conform to the requirements of rule and did not preclude entry of summary judgment.

Affirmed.

1. Judgment ⇐185.1(3)

Affidavit supporting or opposing a motion for summary judgment must be made on personal knowledge of the affiant, set forth facts that would be admissible in evidence, and show affirmatively that the affiant is competent to testify to the matters stated therein. Rules of Civil Procedure, rule 56(e).

2. Judgment ⇐185.3(16)

On motion of plaintiff for summary judgment in action to recover on a promissory note, maker's opposing affidavit wherein he stated that he was informed by third person that the third person had settled the account in full, being hearsay and based on information and belief, did not conform to the requirements of rule, and did not constitute a showing of a genuine issue for trial sufficient to preclude entry of summary judgment. Rules of Civil Procedure, rules 56, 56(e).

3. Judgment ⇐186

There was no error in entering summary judgment for plaintiff at time when interrogatories submitted to the plaintiff had not been answered, where there was no indication that the matter was brought to the attention of the trial court and where the time sequence, showing that interrogatories were submitted after filing of motion for summary judgment and long

29 Utah 2d 58

WESTERN STATES THRIFT AND LOAN
COMPANY, a corporation, Plain-
tiff and Respondent,

v.

Wayne T. BLOMQUIST, Defendant
and Appellant.

No. 12872.

Supreme Court of Utah.

Dec. 18, 1972.

Action was brought to recover on a promissory note, and maker pleaded as an affirmative defense that the obligation had been compromised and settled by a third

1. Lepasiotes v. Dinsdale, 121 Utah 359, 242 P.2d 297 (1952).

after institution of suit, indicated that interrogatories were submitted as a tactic of delay.

4. Appeal and Error ⇨1073(1)
Judgment ⇨184

Ten-day notice requirement of summary judgment rule was not jurisdictional and alleged insufficiency of notice did not result in reversible error where defendant's rights were not adversely affected. Rules of Civil Procedure, rules 6(e), 56(c).

Ronald C. Barker, Salt Lake City, for defendant-appellant.

E. H. Fankhauser, Salt Lake City, for plaintiff-respondent.

CALLISTER, Chief Justice:

Plaintiff initiated this action to recover on a promissory note, which defendant, as maker, had executed and delivered to plaintiff, as payee. Defendant as an affirmative defense, pleaded that the obligation had been paid by means of a compromise and settlement by a third party, who had conveyed and delivered to plaintiff certain corporate stock. Plaintiff submitted certain interrogatories to defendant, which were duly answered. Thereafter the court granted plaintiff's motion to produce all cancelled checks, receipts, money orders, or other evidence of payments made by defendant to plaintiff as set forth in defendant's answer to plaintiff's interrogatories. Approximately ten months later, defendant responded that after diligent search, he had been unable to locate any such papers. A few days later, plaintiff filed a motion for summary judgment, which was accompanied by an affidavit. Upon hearing, plaintiff's motion was granted, and plaintiff was awarded judgment. Defendant's motion for a new trial was denied, and he appeals.

Defendant contends that the trial court erred in granting summary judgment, since there was a disputed factual issue, specifically, whether the debt had been compromised and settled by a third party conveying stock to plaintiff.

In response to plaintiff's interrogatories, defendant claimed that one Norman Hays had settled the claim. However, defendant specifically stated that he had no knowledge of the date of the alleged compromise, name of the stock delivered, or the number of shares. He knew of no documents evidencing the compromise. In regard to a question, concerning payments and amounts, he cited dates prior to the date of the execution of the note (December 28, 1967); in fact, the latest payment claimed was May 24, 1967. Finally, defendant responded "unknown" to an interrogatory, concerning the value of the corporate stock and how and by whom such value was determined.

The affidavit accompanying plaintiff's motion, was a sworn statement by Mr. Green, plaintiff's manager, who swore to the execution and delivery of the note, and the fact that no payment had been made. He further stated that the note was a renewal for a prior existing obligation of defendant, upon which he had made payments, and for which he had been given full credit. The affiant further swore that at no time had anyone on behalf of plaintiff entered into a compromise agreement with a third party by the name of Norman Hays or any other person to settle the obligation on behalf of defendant.

Defendant filed an opposing affidavit, wherein he stated that the original loan was in his name and that of Norman Hays, and that he was informed and believed that the present manager of plaintiff was not so employed at the time of the loan and subsequent renewals; and, therefore, the manager's affidavit was hearsay and improper to support plaintiff's motion. Defendant swore that he was informed by Norman Hays that he had, in fact, settled the account in full by means of payment in stock. Defendant stated that the note was not a new loan but a renewal of other notes to which Norman Hays was a party, and there was no balance owing.

[1] An affidavit supporting or opposing a motion for summary judgment is an

ntiary affidavit, whose form and content is governed by Rule 56(e), U.R.C.P. an affidavit must be made on personal knowledge of the affiant, set forth facts would be admissible in evidence, and affirmatively that the affiant is committed to testify to the matters stated therein.¹

Affidavits containing statements made solely "on information and belief" will be disregarded. Hearsay testimony and opinion testimony that would not be admissible if testified to at the trial may not properly be set forth in an affidavit.²

[1] The assertions in defendant's affidavit, which were essential to create a genuine issue as to a material fact, were based on information and belief and hearsay, and do not conform to the requirements of Rule 56(e), U.R.C.P. Since defendant did not go beyond the allegations in his answer, set forth by affidavit or otherwise as provided in Rule 56, U.R.C.P., specific facts showing that there was a genuine issue for trial, the trial court, based on the pleadings, interrogatories, and the affidavit of plaintiff's manager properly entered judgment.

[3] Defendant further contends that at the time the summary judgment was entered, he had submitted interrogatories to plaintiff, which had not been answered, and that the answers thereto might have established his defense of accord and satisfaction.

There is nothing in the record to indicate that this matter was brought to the attention of the trial court, i.e., there is no affidavit to that effect. The interrogatories were filed after plaintiff had filed its

motion for summary judgment. The time sequence strongly indicates that the interrogatories were submitted as a tactic of delay. The complaint was filed August 19, 1970, and the answer on September 21, 1970. Plaintiff's interrogatories were filed October 1, 1970 and the response on November 12, 1970. Plaintiff filed its motion to produce documents on November 19, 1970, and the motion was granted on November 30, 1970. Thereafter, the record indicates total inactivity until September 9, 1971, when plaintiff filed a request for a trial setting. On October 1, 1971, defendant filed a response to the production of documents. On October 12, 1971, plaintiff filed its motion for summary judgment; the day after defendant filed his interrogatories. Under the circumstances of the instant case, the action of the trial court cannot be deemed inappropriate.

[4] Defendant further asserts that the trial court lacked jurisdiction to enter judgment since the notice of hearing accompanying the motion set the date of hearing on October 18, 1971, a time less than the requisite 10 day notice provided in Rule 56(c), U.R.C.P. Defendant claims an additional three day period was required, since the service was by mail, Rule 6(e), U.R.C.P.

Defendant has not cited any authority to the effect that the 10 day notice requirement is jurisdictional. Under the circumstances of the instant case, the alleged insufficiency of notice did not adversely affect defendant's rights. The judgment of the trial court is affirmed. Costs to plaintiff.

TUCKETT, ELLETT, HENRIOD, and CROCKETT, JJ., concur.

Rainford v. Rytting, 22 Utah 2d 252, 255, 451 P.2d 769 (1969), Preston v. Lamm, 20 Utah 2d 260, 263, 436 P.2d 1021 (1968).

2. 6 Moore's Federal Practice, § 56.22 [1], pp. 2806-2808