

1980

# Miller Pontiac, Inc., A Utah Corporation, D/B/A Laury Miller Pontiac v. Janet S. Osborne : Brief of Appellant

Utah Supreme Court

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CARMAN E. KIPP, THOMAS N. ARNETT, JR.; Attorneys for Respondent; DAVID S. DOLOWITZ; Attorney for Appellant

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SUPREME COURT OF UTAH

STATE OF UTAH

MILLER PONTIAC, INC. )  
a Utah corporation, d/b/a )  
LAURY MILLER PONTIAC, )  
 )  
Plaintiff-Respondent, )  
 )  
vs. )  
 )  
JANET S. OSBORNE, )  
 )  
Defendant-Appellant. )

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BRIEF OF APPELLANT

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Case No. 16847

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Appeal from a Judgment of the Third District Court  
Salt Lake County, State of Utah  
Honorable Peter F. Leary, Presiding

---

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FILED

APR 30 1980

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Clerk, Supreme Court, Utah

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SUPREME COURT OF UTAH

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\* \* \* \* \*

MILLER PONTIAC, INC.,	)	
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Plaintiff-Respondent,	)	BRIEF OF APPELLANT
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vs.	)	
	)	
JANET S. OSBORNE,	)	Case No. 16847
	)	
Defendant-Appellant.	)	

\* \* \* \* \*

NATURE OF THE CASE

This is an action regarding a breach of contract.

DISPOSITION IN LOWER COURT

After the trial court overruled the motion of counsel for appellant for a continuance based upon the appellant's absence and lack of knowledge of the trial, he heard the case and determined that the appellant breached her contract with the respondent. The trial court then refused to modify the judgment or award a new trial when advised of both his erroneous rulings and the failure of respondent to comply with the law regarding resale after repossession.

NATURE OF RELIEF SOUGHT ON APPEAL

Appellant seeks in the alternative either judgment in her favor that respondent breached the contract with appellant or

breached its statutory duties to appellant and is thus not entitled to relief from appellant or reversal of the judgment of the trial court and remand of the case for a fair re-trial.

#### STATEMENT OF MATERIAL FACTS

The parties entered into a contract whereby the plaintiff sold the defendant an automobile. A contract was signed on March 20, 1978 and a second on or about April 10, 1978. (R. 2, 105-106, 126, 129-130) Shortly after the signing of the second contract, the car ceased operating and was returned by the appellant to the respondent. (R. 133, 214-215) Thereafter, the appellant refused to pay for the car so respondent repaired it, resold it (without notice to the appellant) and instituted the instant action against appellant for damages in the amount of \$14,287.04 plus interest and attorneys fees. (R. 2-4).

The appellant purchased the automobile for her son, Don. He drove it for three weeks and it ceased to operate (R. 217). Don testified that sometimes, because of the power of the car and injuries he had suffered, the car would "patch out", that is the clutch would pop out so fast that the rear wheels would spin before the car could go into an even starting motion (R. 207, 217) but both he and two of his friends, who frequently drove with him during the three weeks that he had the automobile in his possession testified that he drove it carefully and considerably. (R. 197-198, 200-201, 204, 207, 208, 209) Despite this caution and care, the car ceased to operate three weeks after its purchase. (R. 217)



Don Osborne testified that a few days before the car ceased to function, he heard unusual noises and took the car in for servicing. Although he left it all day at Laury Miller's, the service department did nothing with the car. (R. 207, 211-212) Since he intended to take the car on a trip to Bear Lake and was worried about the noises, he asked if it would be all right to do so without their having performed service upon it and was informed that this could be done. (R. 207, 209, 210, 211-212).

After receiving this reassurance, Mr. Osborne took the car on the trip. When the noise became worse, he pulled into a gas station at Park City, Utah for service. The car was low on oil and four quarts were added. (R. 213) When he returned to Salt Lake City, the car simply stopped running and smoke began pouring from it. (R. 214). Thereafter, Mr. Osborne called Laury Miller and told them to take the car back. (R. 214). Mr. Osborne informed respondent to keep the car if they would not put a new engine in it; respondent informed him that he should pay for repairs and keep the car. (R. 218-129).

The mechanic who repaired the car for respondent testified that he felt that the car had been run at excessive RPM, had suffered excessive clutch and rear tire wear, found the car to be full of oil and did not find damage consistent with the testimony of Mr. Osborne that he had to add the four quarts of oil. (R. 270-175).

The automobile, after repair, was resold at a profit by respondent to another purchaser without notice to appellant. (R. 68-69, 162)

Trial of this case was repeatedly reset by the court before it ultimately came to trial. The clerk of Salt Lake County originally set this matter for trial on March 28, 1979, by a notice mailed July 26, 1978. (R. 12) A pre-trial settlement conference was thereafter held on March 8, 1979, (R. 20) and the trial date of March 28, 1979, was confirmed. (R. 21) On March 23, 1979, the clerk's office, based on the fact that no judge would be available to hear the case, continued the trial to May 24, 1979. (R. 22) Thereafter, on May 24, 1979, for the convenience of the court, the trial was continued until June 13, 1979, (R. 48) On May 25, 1979, the trial was reset for June 11, 1979, (R. 49) and upon agreement of counsel for the respective parties on May 30, 1979, an amended notice of continuance was sent out confirming the trial date of June 11, 1979. (R. 50)

On June 11, 1979, counsel for the appellant appeared before the court and requested a continuance based on the fact that his client was not present and since he had not been able to confirm with his client that the trial would be on June 11, 1979, stated he did not know if she knew it would be held. He stated he felt that her case was prejudiced by going to trial without her. (R. 52, 92) This motion was denied by the trial court who compelled counsel for the appellant to go forward in her absence. (R. 52-53, 92-93)

After trial, counsel for appellant discussed the trial with appellant and learned that no notice of the resale or intent to resell the automobile was ever sent by respondent to appellant. After judgment was entered against appellant, the trial court was informed of this (R. 68-69). In oral argument of the motion for new trial or to amend judgment, counsel for the respondent admitted no evidence of compliance with Section 70A-9-504 Utah Code Annotated 1953, could be found but asserted that this was not timely raised. The trial court overruled the appellant's motions (R. 77, 78) and this appeal was taken (R. 80).

#### ARGUMENTS

##### POINT I

THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING A CONTINUANCE TO APPELLANT AND REQUIRING APPELLANT'S COUNSEL TO GO TO TRIAL WHEN APPELLANT WAS NOT AVAILABLE TO PARTICIPATE IN THE PROCEEDINGS, DID NOT HAVE NOTICE OF THE PROCEEDINGS AND THERE WAS NO PREJUDICE TO RESPONDENT WHICH WOULD HAVE RESULTED FROM A CONTINUANCE.

This court has declared that:

" . . . it is in accord with the most fundamental traditions of our legal system that a party should be afforded every reasonable opportunity to be in attendance at his trial. Jaffe v. Lilienthal, 101 Cal. 175, 35 P. 636; cf. Westfall v. Motors Ins. Corp., 36 Mont. 449, 348 P.2d 784 (1960)."

Bairas v. Johnson, 13 Utah 2d 269, 273, 373 P.2d 375 (1972). This rule was rejected by the trial court in the instant matter when

appellant's counsel was forced to go to trial in her absence. This abuse is pronounced in this case as the matter was repeatedly reset for trial by the court, not either of the parties. When the trial date was finally set and held, counsel was unable to confirm the reset trial date with his client between May 30, 1979 and June 11, 1979. As a result, despite intense efforts both by her son and her attorney to reach her she was not available for trial.\*

The respondent was ready for trial on June 11, 1979 but asserted no prejudice to the court if the trial were continued. Respondent's counsel simply asserted that he was present with his witnesses and desired to proceed. Despite all these factors the trial court required counsel for appellant to proceed in her absence.

In Bairas v. Johnson, supra, as in the instant matter, a motion for continuance was overruled by the trial court and a party was required to go to trial because the deposition of that party was available for use by the court. This Court noted regarding such a procedure that:

" . . . the superiority of oral testimony to that taken by deposition is apparent, and resort to deposition to introduce a party's testimony of trial should be done only when the circumstances will not reasonably allow a desirous party to appear in his own behalf." 13 Utah 2d at 273; 373 P.2d at \_\_\_\_.

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\*Appellant was in Texas and all efforts to inform her of the trial before it started failed.

The appellant's testimony was vital to her case. Counsel for the appellant did not learn that two contracts between the parties had been signed as far apart as March 20th and April 10th until the course of the trial. (R. 181) Nor did counsel for appellant learn that there had been no notice of the resale of the automobile by respondent until after the trial had been completed. (R. 68-69) This was in part a result of settlement negotiations between the parties which were initiated immediately after the depositions of the parties and terminated slightly before the trial but it was also a result of an inability of counsel for appellant to work with her over the discovered documents before trial. In addition, testimony regarding face-to-face negotiations between appellant and Jim Hayes, Ken Christofferson and Jeff Tebbs could not be presented. Finally, a defense which could well be decisive in this matter was not discovered until after trial. Thus, as noted by this Court in Bairas v. Johnson, 13 Utah 2d at 273, the impact on appellant's position of her non-attendance was crucial.

This is underlined by the fact that the continuance was requested not because appellant had determined not to come to court or had taken evasive or dilatory action or ignored the matter but simply did not know that the case had been set for trial. The repeated continuances in this case had resulted from the action of the court, not from either party and appellant could

not be reached by her counsel after the May 30th confirmation of the trial setting by counsel and the court.

This was not discovered until a few days before trial and once counsel for appellant learned of the problem he informed counsel for respondent that he was having trouble locating his client and might have to make a continuance request if he could not reach her. This was confirmed immediately before going to trial when counsel for appellant had definitely determined neither he nor the appellant's son had been able to reach the appellant to inform her that the trial was going to occur.

As much notice as could reasonably be prepared and transmitted was effected. Under such circumstances this court has held that:

"Whatever the rule might be when counsel have ample time within which to make a motion for continuance, when counsel are taken by surprise, as in this case, so that they do not have five days in which to serve the motion, they are not precluded from making the motion." 13 Utah 2d at 274.

In this case, counsel for the appellant learned only a few days before the trial that appellant might not know about the trial. He notified counsel for respondent of the problem and tried both personally and through appellant's son, Don Osborne, to inform her of the trial but was unable to do so. Consequently, the notice contemplated under Rule 40(b) of the Utah Rules of Civil Procedure could not be provided. However, under that rule as construed by

the Utah Supreme Court in Bairas v. Johnson, supra, proper and adequate notice for the motion for continuance was presented.

Finally, it should be noted that no showing of any unfairness or damage to respondent was asserted when counsel for appellant made this request for continuance. The appellant was not offered the option of paying costs to have the matter continued, Youngren v. John W. Lloyd Construction Co., 22 Utah 2d 207, 450 P.2d 985 (1969), her motion was simply overruled and she, to her obvious detriment, (through her counsel) was forced to go into a trial. This abuse of discretion requires this court to reverse the judgment entered against the appellant and remand the matter for a new trial. Bairas v. Johnson, supra.

#### POINT II

RESPONDENT'S FAILURE TO COMPLY WITH THE PROVISIONS OF SECTION 70A-9-501 AND 504, UTAH CODE ANNOTATED (1953) PRECLUDES THE AWARD OF DAMAGES AGAINST APPELLANT.

This Court has ruled:

"In an action for a deficiency judgment such as this the secured party has the burden of establishing that the disposition of the property was done in a commercially reasonable manner, and that reasonable notice to the debtor(s) was given." (Emphasis added) FMA Financial Corp. v. Pro-Printers, 590 P.2d 803 at 806-07 (Utah 1979).

In this case after appellant returned the car to respondent, it was resold at a profit (R. 162) but no notice of the intent to sell or of the sale was ever given to the



appellant. Accordingly, respondent has not met its burden and was not entitled to the deficiency judgment which is in reality the judgment entered by the trial court against appellant. In this case as in FMA Financial Corp. v. Pro-Printers, 590 P.2d at 807-08, no notice was given of the resale and no deficiency judgment should have been granted to respondent.

After the trial, when appellant discussed the matter with her counsel, she advised her counsel for the first time that she had never received notice of this resale or even notice that respondent intended to resell the car. Counsel for appellant raised this with the trial court as a part of appellant's motion pursuant to Rules 59 and 60 of the Utah Rules of Civil Procedure (R. 68-69). Even though counsel for respondent admitted in oral argument on these motions that no such notice was transmitted to appellant, the trial court overruled appellant's motions (R. 77, 78). In making this ruling the trial court erred as respondent's invocation of Section 70-A-9-501 and 504 Utah Code Annotated 1953 required the trial court to deny the respondent any recovery on its complaint once it was established that appellant had no notice of the sale.

Counsel for respondent asserted that the appellant's failure to raise this defense before trial precluded court consideration of this defense. Counsel for appellant responded that it had been raised in a timely fashion due to the fact



that the trial court had overruled a motion for continuance and compelled counsel for the appellant to go to trial when she was not present and that the matter was now being raised before the judgment had become final and appealable. Nonetheless, the trial court overruled these objections (R. 77-78) and this appeal followed.

Utah law is very clear that where there is a failure to comply with the provisions of Section 70A-9-504(3) Utah Code Annotated 1953, through a failure to provide notice of the proposed sale it precludes a deficiency judgment against the debtor. FMA Financial Corporation v. Pro-Printers, 590 P.2d 803 (Utah 1979); Chrysler Credit Corp. v. Burns, 562 P.2d 233 (Utah 1977). In the instant action, there is no question that the car over which this action has been maintained was resold by respondent after repossession and that the resale produced a profit to respondent. (R. 157, 158-159, 162, 166). Thus the trial court erred in overruling the appellant's motions and should either have modified the judgment or set it aside and directed a re-trial of this matter.

While respondent asserts that the failure of appellant to properly raise this in the pleadings prevents consideration of the issue, appellant asserts that she did raise it in as timely a fashion as she could in the face of the actions of the trial court. This is not a situation like that considered

by this court in Zions First National Bank v. Hurst, 570 P.2d 1031 (Utah 1977), where the obligation so far exceeded the debt that notice of the sale would have been of no effect nor produced any injustice. Nor is it like the case of American State Insurance Company v. Miller, Adams and Crawford, 557 P.2d 756 (Utah 1976) where the issue of the failure to comply with Section 70A-9-504 Utah Code Annotated 1953 was raised for the first time on appeal. The defense in the instant action was raised to the trial court, admitted by the respondent and improperly rejected by the trial court before the judgment became final. This rejection of clear legal principle by the trial court requires this court to reverse the judgment of the trial court and either enter judgment in favor of appellant or remand for trial on the question of compliance with the provisions of Section 70A-9-501 and 504, Utah Code Annotated 1953.

### POINT III

RESPONDENT WAS AWARDED EXCESSIVE DAMAGES TO WHICH IT WAS NOT ENTITLED.

It is Horbook Blackletter Law that:

"To recover substantial damages for a given claim of loss or damage, the plaintiff has the burden of proving such loss or damage did in fact result, and that it was caused by defendant's wrongdoing". Handbook on the Law of Damages, Charles T. McCormick, West Pub. Co. 1935, P. 53,

or as the rule was stated by this court:

"One is liable only for the actual damage his acts provoke." Thompson v. Jacobson, 23 Utah 2d 359, 360, 463 P.2d 801 (1970).

This principle was rejected by the trial court in the judgment entered against appellant and this court must correct that error.

The trial court itemized the damages awarded by minute entry on August 6, 1979 (R. 57) and they were incorporated in the final judgment of the court. (R. 145-148) The objections of the appellant to these awards were overruled. (R. 77-78) In these rulings, the court made several obvious errors that are inconsistent with the evidence presented by respondent.

The first and foremost error is that when the car was resold at a profit, it was clear respondent suffered no damage and the complaint should have been dismissed. The court's action allowed Laury Miller to recover everything to which it might have been entitled by the resale and yet awarded a double recovery by entering a judgment for unsustained damages as the profit earned on the resale exceeded the cost of the car and repairs and all other elements of claimed damages. (R. 26, 157-159, 162, 166)

In addition, damages for specific items which the record demonstrated were not suffered.

The trial court awarded to the plaintiff lost profit in the sum of \$829.00. (R. 57, 148-149) However, the record clearly revealed that the automobile was resold at a profit. (R. 257, 158-159, 162, 166) In awarding the respondent lost profits

when they had not been lost, the trial court erred.

The court awarded damages entitled "expense of processing" in the sum of \$100.00. (R. 57, 67) In doing so, the court erred as the testimony clearly related that this \$100.00 was recovered when the automobile was resold after repair. (R. 167)

The trial court awarded commissions in the sum of \$392.01. (R. 57, 67) This was in error. \$88.00 of the \$392.01 was never paid by respondent and that sum, having been recovered on resale, was never lost. (R. 167)

Profit from the service contract in the sum of \$260.00 was also awarded by the trial court. (R. 57, 67) The testimony was that only 35% of this would have been lost had the second purchaser not taken a service contract. (R. 146-147)

Finally, the court awarded \$1,018.56 for the repairs respondent made to the automobile (R. 57, 67) despite the fact that the testimony revealed that the cost of those repairs to Laury Miller was only \$778.91. (R. 145)

In sum, the trial court awarded, assuming that the respondent was entitled to damages, \$239.65 for the cost of repairs, \$169.00 for profit from the service contract, \$88.01 as lost commissions, \$829.00 as lost profit and \$100.00 for the expense of processing, or \$1,425.66 for damages not suffered by respondent. In addition, the court awarded \$1,512.55 in damages not suffered as the car was resold at a profit thus recouping

these costs for respondent. (R. 26, 157-59, 162, 166). This error must be corrected by this court.

#### POINT IV

APPELLANT PROPERLY REVOKED HER ACCEPTANCE UNDER THE PROVISIONS OF SECTION 70A-2-608 UTAH CODE ANNOTATED 1953, OR RESCINDED THE CONTRACT.

Utah law clearly allows a purchaser such as appellant, of goods which have a defect which is not discovered at the time of sale to either revoke her acceptance or rescind the contract. The Legislature has enacted a provision governing the revocation of acceptance:

Section 70A-2-608 Utah Code Annotated states:

Revocation of acceptance in whole or in part.  
--(1) The buyer may revoke his acceptance of a lot or commercial unit whose nonconformity substantially impairs its value to him if he has accepted it

(a) on the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured; or

(b) without discovery of such nonconformity if his acceptance was reasonably induced either by the difficulty or discovery before acceptance or by the seller's assurances.

(2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notified the seller of it.

(3) A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them.

This court enunciated the applicable standards for rescission:

"Traditionally, a person who has been fraudulently induced to enter into a contract has either of two remedies; he could rescind the transaction--tendering back what he has received and suing for what he has parted with; or, he may affirm the transaction and maintain an action in deceit. The Uniform Commercial Code makes damages available in an action for rescission, but it does not otherwise change the traditional theory of election of remedies.

In this case, Buyers' conduct is not consistent with affirmation of the transaction. They stopped making payments under the Agreement, and they permitted the home to be repossessed and sold without objection. Their conduct is only consistent with rescission. Mecham v. Benson, 590 P.2d 304 (1979).

Approximately three weeks after purchasing the automobile for which this action is maintained, it ceased to operate. Don Osborne, the person who primarily drove the automobile and two witnesses who had driven with him repeatedly throughout the three weeks that he had possessed the car, stated that he drove it carefully, considerately, did not abuse it and paid careful attention to its maintenance. (R. 197-198, 200-201, 204, 208) While there was no question that the car suffered extensive damages and required extensive repair, (R. 170-172) the mechanic who repaired the automobile, Mr. Glen Olsen, testified the damage



was inconsistent with the problem that Mr. Osborne described. Mr. Osborne stated that the car made unusual sounds (R. 209) but agents of respondent said there was no problem and it was all right to take the car to Evanston (R 207, 210, 211-12). On the trip the car used a large quantity of oil (R. 171-174, 213).

Since the damages suffered by the car were not caused by Mr. Osborne, there was apparently some other defect in the car which caused its demise so soon after being purchased. Under these circumstances, that defect justified the action of the appellant in informing the respondent that either the engine would have to be replaced or they must take the automobile back, (R. 218-219), that is, that she was withdrawing her acceptance of the defective merchandise under Section 70A-2-608 Utah Code Annotated 1953, or rescinding the transaction.

The position and action of the appellant is entirely consistent with the decision of this court in Mecham v. Benson, 590 P.2d 304 (1979). As in that case, the buyer's conduct was consistent with rescission. When a major defect in the automobile was discovered shortly after purchase (three weeks), appellant returned it to the seller and allowed seller to do as they wished with the car. Seller took possession and resold the car without providing notice of the sale to appellant. This action was in fact an acceptance of a rescission by the respondent. Under these facts, that is, a major mechanical failure occurring

within three weeks of purchase justify fully the revocation of acceptance which occurred immediately upon discovering a defect which "substantially impaired" the value of the car to the appellant, Section 70A-2-608 Utah Code Annotated 1953, or rescission of the contract by the appellant. The trial court erred in failing to rule accordingly.

This is particularly true where within three weeks of purchase, the automobile suffers such extensive damage despite the careful care given it by its driver. Such an automobile cannot possibly have been either merchantable or fit for the purpose for which it was intended and therefore the sale of such merchandise combined with the refusal of respondent to remedy the defects reveals a clear violation of the provisions of Section 70A-2-314, Utah Code Annotated 1953. When respondents refused to repair said automobile, they violated their warranty duties under this statute and if, as they have asserted, they modified in the purchase contract, the warranties required of them by Section 70A-2-314, Utah Code Annotated 1953, their position cannot be upheld.

Under the provisions of Section 70A-3-316 Utah Code Annotated 1953 and the provisions of the Magnuson-Moss Warranty Act, codified as 15 United States Code, Sections 2301, et seq., the respondent is prohibited from revoking or disclaiming this warranty. Section 2304(a) of Title 15 United States Code provides that:



"In order for a warrantor warranting a consumer product by means of a written warranty to meet the federal minimum standards for warranty-- (1) such warrantor has a minimum remedy such consumer product within a reasonable time and without charge, in the case of a defect, malfunction, or failure to conform with such written warranty;"

the statute goes on to provide in Sub-section (d):

"for purposes of this section and of Section 2302(c) of this title, the term "without charge" means that the warrantor may not assess the consumer for any costs the warrantor or his representatives incur in connection with the required remedy of a warranted consumer product".

Section 2308(a) of Title 15 declares:

"No supplier may disclaim or modify (except as provided in sub-section (b) of this section) any implied warranty to a consumer with respect to such consumer product if (1) such supplier makes any written warranty to the consumer with respect to such consumer product, or (2) at the time of sale, or within 90 days thereafter, such supplier enters into a service contract with the consumer which applies to such consumer product."

The exception clause (b) provides:

"For purposes of this chapter (other than Section 2304(a)(2) of this title), implied warranties may be limited in duration to the duration of a written warranty of reasonable duration, if such limitation is conscienable and is set forth in clear unmistakable language and prominently displayed on the face of the warranty."

Sub-section (c) of Section 2308 of Title 15 United States Code then declares: "A disclaimer, modification, or limitation made in violation of this Section shall be ineffective for purposes of this Chapter and State law." Under these provisions, it is clear that if the respondent makes any claim that there was no implied

warranty of fitness and merchantability as required by Section 70A-2-314 Utah Code Annotated 1953, the Magnuson-Moss Act provisions render that disclaimer invalid.

In the instant matter the car suffered totally disabling damage within three weeks of purchase. Prior to suffering that damage, the driver of the automobile, Don Osborne, brought it in to the service department of the defendant, stated it was making unusual noises which should be checked, (R. 155) left it with respondent's service department all day and was informed (after learning no service had been performed) that in the opinion of the service people who had listened for the noise, it would be safe to take the car on a trip to Bear Lake. (R. 207-212) While the car drove with no problems to Evanston, Wyoming, on the way back the noises began picking up and when Mr. Osborne had it checked in Park City, the engine required four quarts of oil. (R. 213) When it arrived in Bountiful, it ceased operating altogether. (R. 214)

Since the testimony of the mechanic who repaired the car for respondent established that the damages were inconsistent with the description given by Mr. Osborne, there was some type of defect in the car which by law were included within the warranties established by law and which could not be waived. Since the respondent has refused to honor the warranties imposed upon it by law and insisted that the appellant pay for any repairs done, (R. 218-219) the warranties have been disclaimed and the action of the

appellant in revoking her acceptance of defective goods, Section 70A-2-608 Utah Code Annotated 1953, or rescinding the contract, Mecham v. Benson, supra, is appropriate. The trial court erred in not permitting appellant to invoke either of these doctrines and voiding the contract between the parties.

POINT V

THE TRIAL COURT ERRED IN AWARDING ATTORNEY'S FEES  
TO THE RESPONDENT.

Appellant believed that the respondent had breached its contract by refusing to honor its warranty and by insisting that appellant pay for repairs that were properly the responsibility of the respondent. In addition, respondent did not comply with the provisions of Section 70A-9-504 Utah Code Annotated in disposing of the automobile which was the subject of the contract between the parties. Under the decisions of this Court in Fulmer v. Blood, 546 P.2d 606 (Utah 1976); Fireman's Insurance v. Brown, 529 P.2d 419 (Utah 1974) and Amos v. Bennion, 18 Utah 2d 251, 420 P.2d 47 (1966) the trial court erred in awarding respondent attorney's fees.

There is no question that the contract between the parties provided for an award of attorney's fees if there was a breach of the contract. However, as this court ruled in Fulmer v. Blood, supra, where the appellant had justification for making her claims and taking the action that she took, the trial court appropriately could refuse to award attorney's fees. 546 P.2d

610. Acord Fireman's Insurance v. Brown, supra, Amos v. Bennion. In the instant case, the trial court abused its discretion when it awarded attorney's fees in light of the fact that it had forced counsel for the appellant to go into trial without appellant, had awarded damages to the respondent to which it was not entitled and refused to allow revocation of acceptance or rescission of the contract when that action was appropriate. Accordingly, this error should be reversed by this court.

#### CONCLUSIONS

The trial court erred in requiring counsel for the appellant to go to trial in her absence. This error was compounded when the court thereafter rendered judgment against the appellant for damages to which the respondent was not entitled because of respondent's failure to comply with requirements of Section 70A-9-504 Utah Code Annotated 1953, refused to allow the revocation of acceptance or rescission of the contract between the parties as was justified by the acts of respondent and awarded excessive damages to which respondent was not entitled. This court should correct those errors and either rule as a matter of law the respondent is not entitled to judgment against the defendant, reverse the trial court and direct a dismissal of the plaintiff's complaint, or reverse the judgment of the trial court and remand this matter for a proper trial between the

parties where all issues can be fairly considered by the trial court.

RESPECTFULLY SUBMITTED this 30th day of April, 1980.

A handwritten signature in cursive script, reading "David S. Dolowitz". The signature is written in dark ink and is positioned above the printed name.

DAVID S. DOLOWITZ

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CERTIFICATE OF MAILING

I hereby declare that I caused to be mailed two copies of the foregoing Brief of Appellant in Case No. 16847, postage prepaid, this 30th day of April, 1980, to Carmen E. Kipp and Thomas N. Arnett, Jr., Attorneys for Respondent, at 32 Exchange Place, Suite 600, Salt Lake City, Utah 84111.

  
DAVID S. DOLOWITZ