

1980

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

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2

 Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

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

Recommended Citation

Reply Brief, *Miller Pontiac v. Osborne*, No. 16847 (Utah Supreme Court, 1980).
https://digitalcommons.law.byu.edu/uofu_sc2/2084

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

SUPREME COURT OF UTAH

STATE OF UTAH

* * * * *

MILLER PONTIAC, INC.,
a Utah corporation, d/b/a
LAURY MILLER PONTIAC,

Plaintiff and
Respondent,

VS.

JANET S. OSBORNE,

Defendant and
Appellant.

REPLY BRIEF

Case No. 16847

* * * * *

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

DAVID S. DOLOWITZ
of and for
PARSONS, BEHLE & LATIMER
79 South State Street
P. O. Box 11898
Salt Lake City, Utah 84147
Telephone: (801) 532-1234
Attorneys for Appellant

CARMEN E. KIPP
THOMAS N. ARNETT, JR.
of and for
KIPP & CHRISTIAN
32 Exchange Place, Suite 600
Salt Lake City, Utah 84111
Telephone: (801) 521-3773
Attorneys for Respondent

TABLE OF CONTENTS

	<u>Page</u>
POINT I - 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	1
POINT II - RESPONDENT WAS AWARDED EXCESSIVE DAMAGES TO WHICH IT WAS NOT ENTITLED	4

TABLE OF AUTHORITIES

Cases

American States Insurance Company v. Miller, Adams and Crawford, 557 P.2d 756 (Utah 1976)	2
Chrysler Credit Corp. v. Burns, 562 P.2d 233 (Utah 1977)	3
FMA Financial Corporation v. PRO-Printers, 590 P.2d 803 (Utah 1979)	3
Zions First National Bank v. Hearst, 570 P.2d 1031 (Utah 1977)	3

State Statutes

Section 70A-9-501, Utah Code Annotated 1953	1,2,3
Section 70A-9-504, Utah Code Annotated 1953	1,2,3

SUPREME COURT OF UTAH

STATE OF UTAH

* * * * *

MILLER PONTIAC, INC.,
a Utah corporation, d/b/a
LAURY MILLER PONTIAC,

Plaintiff and
Respondent,

VS.

JANET S. OSBORNE,

Defendant and
Appellant.

REPLY BRIEF

Case No. 16847

* * * * *

Appellant in the above-entitled matter, hereby submits the following Reply Brief as to Points II and III of the Brief of Respondent, believing there are assertions therein which require this response.

POINT I

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

Respondent concedes as appellant asserted in her Brief that the respondent failed to comply with the provisions of Section 70A-9-501 and 504, Utah Code Annotated, 1953, as amended, in the repossession and resale of the automobile in issue in this matter. However, respondent represents to this Court that its failure to comply with the law cannot be con-

sidered for the first time on appeal and that this failure is immaterial because no injury to appellant was caused by its action. Neither of these propositions is correct.

Appellant raised this issue to the trial court as soon as she learned it existed. The action of the trial court in forcing her counsel to go to trial in her absence (R. 92-93) combined with pretrial settlement negotiations and the delay of the respondent in producing requested discovery materials; they were requested August 14, 1978 (R. 15-19) and were supplied May 21, 1979 (R. 23-47) resulted in a non-discovery of respondent's failure to comply with the governing law before trial. As soon as respondent's violation of Sections 70A-9-501 and 504, Utah Code Annotated, 1953, was discovered, it was raised to the trial court (R. 61-62, 68-69) which erroneously rejected it (R. 78). If appellant were raising this case for the first time on appeal respondent would be correct, American States Insurance Company v. Miller Adams and Crawford, 557 P.2d 756 (Utah 1976), but that is not the case. Appellant raised this point to the trial court as soon as she knew of the existence of this issue and did so before the judgment was final (R. 61-62, 68-69).

The respondent fails to acknowledge that its failure to comply with the law caused damage to the appellant, that is, that damages were recovered against her. Had proper notice been given to her, she could have repurchased the automobile or

taken other appropriate action to prevent what is in essence a deficiency judgment being entered against her. That is precisely the purpose of Sections 70A-9-501 and 504, Utah Code Annotated, 1953, and it is precisely this failure which should, as a matter of law, prevent judgment from having been entered against appellant by the trial court. FMA Financial Corporation v. PRO-Printers, 590 P.2d 803 (Utah 1979); Chrysler Credit Corp. v. Burns, 562 P.2d 233 (Utah 1977).

This is not a case where such notice would have been meaningless. Zions First National Bank v. Hearst, 570 P.2d 1031 (Utah 1977). The damages awarded were not substantially in excess of the value of the car and had appellant been informed of the sale, she could have acted to protect herself.

The judgment recovered by the respondent is the measure of the damages suffered by her as a result of respondent's failure to comply with the provisions of Section 70A-9-501 and 504, Utah Code Annotated, 1953. Appellant could not properly present this to the trial court because of the erroneous ruling of the court requiring her counsel to go to trial in her absence.

Finally, it should be noted that respondent asserts that appellant did not make any allegation that the vehicle was not resold in a commercially reasonable manner and no showing of damages resulted from the resale of the automobile. (Respondent's Brief, p. 13). However, respondent asserts on the next

page of its brief that it would have earned a profit of \$829.00 as a result of the sale to appellant and earned only \$150.00 (if this is true) because of the actions of the appellant.* This is a clear example of a damage award to which appellant objects. The trial court did award a deficiency judgment against her because of a claimed loss for which respondent was not entitled to redress as a matter of law.

POINT II

RESPONDENT WAS AWARDED EXCESSIVE DAMAGES TO WHICH IT WAS NOT ENTITLED

Respondent made a series of assertions in replying to appellant's brief which appellant believes are not correct or supported by the record.

The first is the assertion that respondent made only a profit of \$150.00 on the resale of the automobile in issue which was offset by storage costs, interest fees, advertising and other charges. This assertion fails to reflect the testimony of Mark Miller to the effect that part of the profit realized on the resale of the automobile came from taking a van as trade-in and reselling the van. (R. 157-160). Mark Miller testified that he did not know if it had been sold for additional profit. (R. 158). In fact, he testified that the whole loss claim of the respondent resulted from bookkeeping entries

*This is, in fact, not true (R. 157-160) as is pointed out infra.

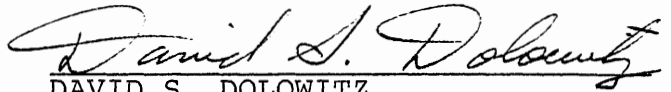
and that this transaction had not been tracked all the way through the books. (R. 157-160). The amounts were arbitrarily set by Mr. Miller and the sales manager. (R. 157-160). However, Mr. Miller did know there had been a resale for a profit (R. 157-160). Accordingly, there was no loss of profit on this transaction.

Respondent also asserts that appellant errs in urging this Court to reverse the award of a commission in the sum of \$88.00 because it was never paid. (Respondent's Brief, p. 15). In so urging respondent requests this Court to affirm the award of an item of damage even though it was not suffered. It is appellant's assertion that if it was not paid, no loss was incurred and the court cannot award damages therefor.

Throughout the respondent's discussion of appellant's Point III regarding damages, respondent never at any point discusses or faces the point made by appellant that respondent had a duty to mitigate its damages. Neither respondent nor the trial court took into effect that rule of law when damages were set. Thus, rather than determining the actual damages, if any, suffered by respondent and then applying the requirement that respondent mitigate its damages, respondent simply asserts that it was entitled to full retail value on all transactions whether in fact those costs were actually or appropriately incurred. It is appellant's position that such ruling does not

accurately reflect the governing law which requires respondent to mitigate its damages. The trial court erred in refusing to require it to do so.

RESPECTFULLY SUBMITTED this 18th day of September,
1980.



DAVID S. DOLOWITZ

of and for

PARSONS, BEHLE & LATIMER

79 South State Street

P. O. Box 11898

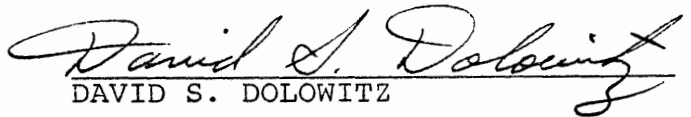
Salt Lake City, Utah 84147

Telephone: (801) 532-1234

Attorney for Appellant

CERTIFICATE OF MAILING

I hereby declare that I caused to be mailed a true and correct copy of the foregoing Reply Brief in Case No. 16847, postage prepaid, this 18th day of September, 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