

1988

# Hugh Schurtz v. BMW Of NORTH AMERICA, INC-, CLARK BUICK-DOBSON-GMC-BMW, INC-, BMW of MURRAY, and JOHN DOES I through X : Brief of Respondent

Utah Supreme Court

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Lewis T. Stevens; Craig W. Andersen; VanWagoner & Stevens; attorney for defendants-respondents. David A. McPhie; Blakesley, Palmer & McPhie; attorney for plaintiff-appellant.

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BRIEF

IN THE SUPREME COURT OF THE STATE OF UTAH

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HUGH SCHURTZ	)	
	)	
Plaintiff-Appellant,	)	Case No. 880399
	)	
v.	)	
	)	
BMW of NORTH AMERICA, INC.,	)	Priority No. 14(b)
CLARK BUICK-DOBSON-GMC-BMW, INC.,	)	
BMW of MURRAY,	)	
and JOHN DOES I through X,	)	
	)	
Defendants-Respondents.	)	

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BRIEF OF RESPONDENT

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Appeal from a Judgment of the Third District Court  
in and for Salt Lake County, State of Utah  
Honorable Frank G. Noel

---

Lewis T. Stevens  
Craig W. Anderson  
VAN WAGONER & STEVENS  
215 South State Street, #500  
Salt Lake City, Utah 84111

Attorneys for Defendants-Respondents

David A. McPhie  
BLAKESLEY, PALMER & MCPHIE  
3450 S. Highland Drive, #301  
Salt Lake City, Utah 84106

Attorney for Plaintiff-Appellant

**CL**  
**191253**  
ms Court 103

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### JURISDICTION

As a basis for his appeal, plaintiff relies on Utah Code Ann., §78-2-2(3) (amended 1988), and Rule 3 of the Utah Rules of the Utah Supreme Court.

### PROCEEDINGS IN THE DISTRICT COURT

Plaintiff-Appellant, Hugh Schurtz ("Schurtz"), has appealed from a final order and judgment rendered by the Honorable Frank G. Noel, Judge of the Third Judicial District Court in and for Salt Lake County. On appeal, Schurtz claims that the trial court's grant of partial summary judgment against him on the issue of incidental and consequential damages was a clear error of law. Schurtz further claims that the trial court erred or abused its discretion by failing to award all of his costs of court and attorney's fees.

### ISSUES PRESENTED FOR REVIEW

In his brief on appeal, Schurtz identifies three issues for decision by the Supreme Court:

### Issue I

Did the trial court err in granting BMW's motion for partial summary judgment on Schurtz's claim for incidental and consequential damages?

### Issue II

Did the trial court make findings sufficient to support its decision to award Schurtz less than his full claim for attorney's fees?

### Issue III

Did the preponderance of credible evidence presented at trial support the court's decision to discount the attorney's fees award?

### CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND RULES

Plaintiff claims in his brief that this appeal involves matters of first impression for the court.

A. United States Code. Plaintiff requests the court to interpret 15 U.S.C. §2301 et seq., commonly known as the Magnusson-Moss Warranty Act. (A complete copy is included in the Appendix).

B. Utah Code Annotated. Plaintiff requests the court to interpret Utah Code Ann., §70A-2-719 as it affects new car limited warranties under the Magnusson-Moss Act.

1. 70A-2-316(4)

Remedies for breach of warranty can be limited in accordance with the provisions of this chapter on liquidation or limitation of damages and on contractual modification of remedy.

2. 70A-2-719. Contractual modification or limitation of remedy.

(1) Subject to the provisions of subsections (2) and (3) of this section and of the preceding section on liquidation and limitation of damages,

(a) the agreement may provide for remedies in addition to or in substitution for those provided in this chapter and may limit or alter the measure of damages recoverable under this chapter, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts; and

(b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

(2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this act.

- (3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

C. The following provision of the Utah Rules of Civil Procedure is determinative of the issues on appeal:

1. Rule 52(a)

In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately in its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A; in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. The trial court need not enter findings of fact and conclusions of law in rulings on motions, except as provided in Rule 41(b). The court shall, however, issue a brief written statement of the ground for its decision on all motions granted under Rules 12(b), 50(a) and (b), 56, and 59 when the motion is based on more than one ground.

D. The following provision of the Utah Code of Judicial Administration is determinative of the issues on appeal:

1. Rule 4-501(5)

The points and authorities in opposition to a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which the party contends a genuine issue exists. Each disputed fact shall be stated in separate numbered sentences and shall refer with particularity to those portions of the record upon which the opposing party relies, and, if applicable, shall state the numbered sentence or sentences of the movant's facts that are disputed. All material facts set forth in the movant's statement shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the opposing party's statement.

STATEMENT OF THE CASE

A. Nature Of The Case.

This action arose out of Schurtz's purchase of a BMW model 320i Automobile ("Automobile"). The complaint alleged various causes of action under a limited warranty against BMW as the manufacturer of the Automobile and the BMW dealers. In his complaint, Schurtz alleged that the Automobile was defective when sold. He further claimed that BMW and the BMW dealers failed to correct certain purported defects under the terms of the warranty issued by BMW, notwithstanding his refusal to allow the BMW dealers to complete certain repairs and after several offers by BMW to replace the Automobile. (Record at 1-3). The complaint

alleged six separate and distinct causes of action (Record at 3-10) all arising out of the same basic facts:

1. The Automobile was sold with a limited warranty against defects in materials and workmanship;

2. Schurtz brought the Automobile in for repairs numerous times over a period of a year and a half and had extensive contacts with BMW and the BMW dealers during that period in efforts to correct the claimed defects; and

3. BMW and the BMW dealers allegedly failed to correct the alleged defects.

The complaint was based on legal theories of breach of express and implied warranties under the Magnusson-Moss Warranty Act ("Magnusson-Moss"), the Utah Uniform Commercial Code ("U.C.C.") and negligent and/or intentional misrepresentation, in violation of the Utah Consumer Sales Practices Act. (Record at 3-10). Schurtz claimed damages, including the purchase price of the Automobile, incidental and consequential damages for costs and expenses allegedly incurred in his efforts to have the defects corrected, attorney's fees, costs and punitive damages. (Record at 10 and 11).

B. Disposition In The District Court.

Based on a motion for partial summary judgment filed by BMW, the trial court granted judgment in favor of the defendants before trial, dismissing Schurtz's claims for negligent and intentional misrepresentation, (Fourth Cause of Action) breach of the Utah Consumer Sales Practices Act (Fifth Cause of Action) and for punitive damages on all claims. (Record at 423-425). After the first day of trial and following Schurtz's testimony, the trial court granted partial summary judgment in favor of BMW on the issue of incidental and consequential damages. (Record at 1182). The parties later stipulated that BMW would allow Schurtz to return the Automobile and refund the purchase price minus a credit to BMW for actual use. (Record at 1182). It was also stipulated that for purposes of the claim for attorney's fees, that Schurtz would be deemed to be the prevailing party. (Record at 1183; Transcript at 110).

The trial court received testimony and other evidence on the amount of the attorney's fees claimed by Schurtz and took the matter under advisement. In a minute entry dated August 9, 1988, Judge Noel awarded Schurtz the sum of \$10,000 as attorney's fees, on the basis that the evidence established that "... this case could have and probably should have been settled very early in the proceedings for an amount roughly equal to the ultimate outcome." (Record at 1141). The Findings of Fact and Conclusions

of Law state that the trial court was not persuaded to award Schurtz the full amount of attorney's fees he claimed and made a substantial discount to an amount determined to be reasonable under the circumstances. (Record at 1179).

**FACTS RELEVANT TO THE ISSUES**  
**PRESENTED FOR REVIEW.**

1. The claims raised in the trial court proceeding were first made in a complaint (Civil No. C84-0073W) filed by Schurtz in the United States District Court for the District of Utah. That action was dismissed on June 15, 1984, after a motion to dismiss was filed by BMW challenging the court's jurisdiction on the basis that the complaint did not allege damages sufficient to meet the jurisdictional threshold, excluding punitive damages. (Transcript at 128).

2. Following the dismissal of the action filed in the United States District Court, a complaint (Civil No. C84-7463) was filed in the Third Judicial District Court for Salt Lake County on or about December 18, 1984. (Record at 2).

3. An order to show cause was subsequently issued by the trial court requiring the parties to appear and show cause why the case should not be dismissed for failure to prosecute. (Record at 50). An order of dismissal was entered on July 21, 1986 due to the plaintiff's failure to appear. (Record at 51,

Transcript at 144). The order of dismissal was subsequently set aside on the basis of excusable neglect following a hearing on October 6, 1986. (Record at 58).

4. John Baird, Mr. Schurtz's counsel, incurred time in setting aside the order of dismissal. (Transcript at 144).

5. Sometime after the dismissal of the federal court action or immediately following the filing of the complaint in state court, but prior to the filing of an answer, counsel for BMW contacted Schurtz's counsel to discuss settlement. (Transcript at 128).

6. The settlement discussions included Schurtz's claims for expenses associated with purchasing the Automobile, the costs incurred following the purchase, his attorney's fees and costs. (Transcript at 130).

7. BMW made a specific offer of settlement based on rescission. (Transcript at 130). The offer was confirmed in correspondence dated August 22, 1986, but rescission may have been discussed earlier. (Transcript at 131).

8. John Baird's billing records disclosed that settlement was discussed by the parties on the following dates: January 23, 1985, January 24, 1985 (Transcript at 131); March 3, 1986, July

29, 1986, August 18, 1986, (Transcript at 132); September 9, 1986, February 18, 1987 (Transcript at 133).

9. In a letter dated February 18, 1987, the specific terms and conditions of a settlement were outlined by Mr. Baird. (Transcript at 137). The letter contained a signature line for acknowledgment by counsel for the named defendants. (Transcript at 140). The letter later became the subject of a motion to enforce settlement. (Transcript at 140). The motion was denied following a hearing on April 23, 1987.

10. Mr. Baird continued to log time after the February, 1987 settlement letter. (Transcript at 140).

11. Mr. Baird withdrew as Schurtz's counsel of record following the failure of the settlement and subsequently filed an attorney's lien in the sum of \$23,273.04. (Transcript at 161). Mr. McPhie, Schurtz's present counsel of record, entered his appearance on April 3, 1987. (Transcript at 163; Record at 496).

12. The complaint filed in state court alleged six separate causes of action, including: (1) Breach of the Magnusson-Moss Act, (2) Breach of written warranty, (3) Breach of implied warranty, (4) Negligent representation, (5) Breach of Utah Consumer Sales Law, (6) Breach of warranty under the U.C.C.

(Record at 3-10). The complaint claimed punitive damages as well as general, incidental and consequential damages. (Record at 10 and 11).

13. Several causes of action were based on legal theories of fraud and misrepresentation. (Transcript at 141). Based upon a motion for partial summary judgment filed by BMW, the trial court entered an order dated February 17, 1987, dismissing the fourth cause of action (negligent misrepresentation); The fifth cause of action (claim under the Utah Consumer Sales Practices Act) and all of Schurtz's claims for punitive damages. (Record at 423-425; Transcript at 142).

14. Notwithstanding the dismissal of the claims for punitive damage, Schurtz continued to demand payment for damage claims that had not survived the motion for partial summary judgment and refused to settle. (Transcript at 142 and 143).

15. During the time Mr. Baird represented Mr. Schurtz, several associates were reassigned to the case resulting in an overlap of efforts and supervision. (Transcript at 146). Mr. Schurtz's second attorney, David McPhie, was substituted for Mr. Baird, after the hearing on the Motion to Compel Settlement but prior to trial resulting in a duplication of efforts in reviewing files, pleadings and work that had transpired. Mr. Schurtz was

billed for the time incurred by Mr. McPhie to acquaint himself with the facts of the case. (Transcript at 166).

16. Mr. McPhie's billing statements disclosed settlement negotiations with BMW on the following dates: September 2, 1987, October 16, 1987, March 10, 1988 (Transcript at 167), and July 7, 1988 (Transcript at 169).

17. In all of the negotiations between the parties after Mr. McPhie entered his appearance, Mr. Schurtz attempted to solicit an offer from BMW in an amount substantially in excess of a settlement based on rescission. (Transcript at 170). In order to "come out on the case", Schurtz claimed entitlement to a refund in the purchase price of the Automobile minus a credit for mileage (revocation), incidental and consequential damages, costs and attorney's fees. (Transcript at 173). The total amount claimed by Schurtz was "several multiples" of the rescission figure. (Transcript at 174).

18. The only express warranty at issue in this case is BMW's written Limited Warranty ("Warranty") which was given to Schurtz when he purchased the Automobile. The warranty specifically provides:

BMW OF NORTH AMERICA, INC., HEREBY EXCLUDES INCIDENTAL AND CONSEQUENTIAL DAMAGES, INCLUDING LOSS OF TIME, INCONVENIENCE OR LOSS OF USE OF THE VEHICLE, FOR ANY BREACH OF ANY EXPRESS OR IMPLIED WARRANTY, INCLUDING THE IMPLIED WARRANTY OF MERCHANTABILITY, APPLICABLE TO THIS PRODUCT. (Warranty at 1; Plaintiff's Exhibit P3).

19. The Warranty is a limited "repair or replace" type warranty which provides in part: "the dealer will, without charge for parts or labor either repair or replace said part(s) being wholly the responsibility of BMW of North America, Inc." (Warranty at 1; Plaintiff's Exhibit P-3).

20. Schurtz received the Warranty and read it before he purchased the Automobile. (Transcript at 8). He understood that the Warranty was limited to repair or replacement. (Transcript at 9).

21. A BMW representative told Schurtz that BMW would repair the Automobile, refund his money or replace the Automobile if it could not be repaired. (Transcript at 47). BMW made repeated efforts to repair the Automobile but, Schurtz gave up, believing that BMW could not make the necessary repairs. (Transcript at 23).

22. Following the first day of trial and after hearing Schurtz's testimony regarding the Warranty and repairs made to the Automobile, the trial court granted BMW's motion for partial summary judgment on the claim for incidental and consequential damages. (Transcript at 95). The trial court found that Magnusson-Moss and the U.C.C. allowed the parties to contract and limit the remedies available under the Warranty. (Transcript at 94).

23. The parties stipulated at trial that for the limited purpose of determining the issue of attorneys fees, Schurtz would be deemed to be the prevailing party. (Transcript at 110; Record at 1183). The trial court received testimony and evidence on the amount claimed by Schurtz as attorneys fees. In a minute entry dated August 9, 1988, Judge Noel awarded Schurtz the sum of \$10,000 as attorney's fees on the basis that ". . . this case could have and probably should have been settled very early in the proceedings for an amount roughly equal to the ultimate outcome." (Record at 1141). The minute entry on the issue of attorney's fees was included in finding number four of the trial court's Findings of Fact and Conclusions of Law. (Record at 1176).

#### SUMMARY OF ARGUMENT

##### Issue I

Schurtz was provided with a Warranty at the time he purchased the Automobile. The Warranty specifically excluded incidental and consequential damages in bold type on its face. The exclusion of incidental and consequential damages is a separate and independent part of the Warranty and must be viewed apart from the limited Warranty to repair or replace. The trial court did not err in dismissing Schurtz's claim for incidental and consequential damages.

## Issue II

The issue of the amount of attorney's fees is discretionary with the trial court and is subject to certain conditions and limitations. The trial court received testimony and evidence regarding the amount of the attorney's fees claimed by Schurtz. In his brief, Schurtz challenges the adequacy of the Findings of Fact and Conclusions of Law claiming they are insufficient and lacking in detail. Schurtz's challenge of the court's Findings and Conclusions is insubstantial, however, for the reason that his counsel prepared them and any alleged inadequacy should be construed against Schurtz. The evidence in the record supports the trial court's decision on the amount of attorney's fees.

## Issue III

Testimony and evidence was introduced in the trial court establishing a duplication of efforts and an overall inefficiency in the prosecution of the case. Schurtz's claim for attorney's fees included the actual amount of time spent on the case by both of his attorneys, including:

1. Charges associated with the filing of an action in federal court which was voluntarily dismissed due to a failure to plead claims in an amount sufficient to meet the jurisdictional threshold;
2. Fees associated with reinstating the state court action which was dismissed for failure to prosecute;

3. Fees incurred in prosecuting claims which were dismissed at various stages of the proceedings by the trial court.

4. Fees arising out of a dispute over a failed settlement agreement.

5. Fees incurred by the substitution of counsel resulting in the duplication of efforts.

6. Fees incurred in attempting to negotiate an amount exceeding a rescission based settlement.

The record contains ample testimony and evidence to support the trial court's ruling that the case could have and should have been settled in an amount roughly equal to the ultimate outcome. The record does not contain any evidence of an abuse of discretion in the trial court's award of attorney's fees in an amount less than that claimed by Schurtz.

### ARGUMENT

#### Issue I

THE TRIAL COURT DID NOT ERR IN GRANTING BMW'S MOTION FOR PARTIAL SUMMARY JUDGMENT DENYING SCHURTZ'S CLAIM FOR INCIDENTAL AND CONSEQUENTIAL DAMAGES.

At trial, Schurtz testified that his major dissatisfaction with the Automobile was that, following its purchase, he discovered several problems which were not corrected to his

satisfaction after several visits to the BMW Dealers. Based on his own testimony, his Complaint was simply one for breach of warranty.

A. The Record Supports The Trial Court's Ruling.

Following the first day of trial and after hearing Schurtz's testimony, Judge Noel granted BMW's motion for partial summary judgment on the issue of incidental and consequential damages. Judge Noel ruled, as a matter of law, that Magnusson-Moss and the U.C.C. allowed the parties to enter into a contract limiting the remedies available under the Warranty. (Transcript at 94). Schurtz did not controvert the statement of facts set out in BMW's Memorandum in Support of its Motion for Summary Judgment, (Record at 970 and 1142) as required by Rule 4-501(5) of the Utah Code of Judicial Administration and the material facts contained in BMW's Memorandum of Points and Authorities in Support of the Motion (Record at 778) were deemed to be admitted. Furthermore, the undisputed facts in the record were supported by Schurtz's testimony at trial.

Schurtz testified that he was provided with a copy of the Warranty before he purchased the Automobile, that he read the Warranty and understood that it was a repair or replace type Warranty. (Transcript at 9). The Warranty states in large capital letters: "BMW OF NORTH AMERICA, INC., HEREBY EXCLUDES

INCIDENTAL AND CONSEQUENTIAL DAMAGES, INCLUDING LOSS OF TIME, INCONVENIENCE OR LOSS OF USE OF THE VEHICLE, FOR ANY BREACH OF ANY EXPRESS OR IMPLIED WARRANTY, INCLUDING THE IMPLIED WARRANTY OF MERCHANTABILITY, APPLICABLE TO THIS PRODUCT." The exclusion is readily apparent on the face of the Warranty and is not "buried" in small type-faced boiler plate language.

Judge Noel explained the basis for his ruling dismissing the claim for incidental and consequential damages as follows:

The parties in this case contracted. The court feels that it would not include consequential or incidental damages. Counsel, you've made the argument that the limited warranties provide for recovery of these in their original purpose, that consequential and incidental damages are allowed to come into play under the U.C.C. Act. The court disagrees. The purpose of that provision is to provide a fair modicum of relief in a breach of warranty claim, when the remedy provided under the lemon law fails in its essential purpose. And under the facts and circumstances of this case, there would be a fair relief provided. (Transcript at 94).

Judge Noel reasoned that the parties contracted to limit the remedies provided under the Warranty to the repair or replacement of the Automobile. He found that the Warranty provided a fair modicum of relief for the damages sustained and that it had not failed in its essential purpose. Furthermore, Schurtz failed to introduce any evidence to substantiate his claim that the Warranty failed in its essential purpose. To the contrary, Schurtz testified that prior to filing his complaint, Mr. Stansbury, a BMW representative, told him that BMW would refund

his money or replace the Automobile if it could not be repaired.  
(Transcript at 47).

The cases cited in Schurtz's brief on the issue of incidental and consequential damages are distinguishable on the facts because most, if not all of the cases, contain specific findings of a failure in purpose. Furthermore, several of the cases are based on factual circumstances where dealers refused to make repairs. The authorities relied on by Schurtz do not apply under the facts before this Court on appeal.

**B. The Law Supports The Trial Court's Ruling.**

The right of contracting parties to determine and fix the only obligations in warranties by which they are bound has been held, in the absence of express statutory authority, to authorize contractual stipulations negating those warranties which would arise by implication of law. Annot., 54 ALR 3d 1219, 1220. Furthermore, disclaimer of warranty clauses are authorized under Article 2 of the U.C.C. The Utah Legislature's adoption of the U.C.C incorporated the ability to exclude or modify coverage under warranties.

Utah Code Ann., § 70A-2-316(4) states "remedies for breach of warranty can be limited in accordance with the provisions of

this chapter on liquidation or limitation of damages and on contractual modification of remedy." An agreement may provide for remedies in addition to or in substitution for those provided by the U.C.C. and may limit or alter the measure of damages recoverable by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts. Utah Code Ann., § 70A-2-719 (3) specifically allows for the limitation or exclusion of consequential damages unless the exclusion is unconscionable. Even Magnusson-Moss allows a warrantor to exclude or limit consequential damages for breach of any written or implied warranty so long as the exclusion or limitation is conspicuous on the face of the warranty. 15 USC § 2304 (a) (3).

Schurtz did not claim at trial that the warranty limitation was unconscionable. Rather, he argued that the Warranty failed of its essential purpose and, that he is entitled to consequential damages.

In his brief on appeal Schurtz relies on the Magnusson-Moss Act and Utah Code Ann., § 70A-2-719(2). The purpose of § 70A-2-719(2), as reflected in the Official Comments to the Uniform Commercial Code, is to make available to an aggrieved party all remedies provided for in our statutory scheme when the limited remedy provided for in the contract fails of its essential purpose. Even assuming, arguendo, that the warranty failed its essential purpose, he is not entitled to consequential damages.

Subsection (2) of § 70A-2-719 does provide that upon such a failure, a plaintiff may have the other remedies as provided in the U.C.C. The exclusion of consequential damages, however, is a separate and independent part of the warranty and is governed by Subsection (3), not Subsection (2) of § 70A-2-719. In his brief Schurtz requests this Court to interpret the provisions of the Magnusson-Moss Act. In interpreting the Act, however, this Court must be guided by the federal court's interpretations of the Act. In Chatlos Sys., Inc. v. National Cash Register Corp., 635 F. 2d 1081, 1086-87 (3rd Cir. 1980), the Third Circuit Court of Appeals analyzed the issue of consequential damages as follows:

"It appears to us that the better reasoned approach is to treat the consequential damage disclaimer as an independent provision, valid unless unconscionable. This poses no logical difficulties. A breach of contract may well contain no limitation on breach of warranty damages but specifically exclude consequential damages. Conversely, it is quite conceivable that some limitation might be placed on a breach of warranty award, but consequential damages would expressly be permitted.

The limited remedy of repair and consequential damages exclusion are two discrete ways of attempting to limit recovery for breach of warranty. . . .

The Code, moreover, tests each by a different standard. The former survives unless it fails of its essential purpose, while the latter is valid unless it is unconscionable. We therefore see no reason to hold, as a general proposition, that the failure of the limited remedy provided in the contract without more, invalidates a wholly distinct term in the agreement excluding consequential damages. The two are not mutually exclusive.

The testimony and evidence propounded in the trial court and Judge Noel's ruling establish that the Warranty did not fail in its essential purpose. In Murray v. Holiday Rambler, Inc. 265 N.W.2d 513 (Wis. 1978) and Goddard v. General Motors Corporation, 396 N.W.2d 761 (Ohio 1979), the principal cases relied on by Schurtz on the issue of incidental and consequential damages, the warranties were found to have failed in their purpose and only then were the plaintiffs allowed to invoke remedies under the Uniform Commercial Code. Here, BMW made repairs to the Automobile when it was delivered to one of the defendant dealerships. Schurtz believed, however that BMW could not repair the Automobile despite its repeated offers. (Transcript at 23). In Pratt v. Winnebago Industries, Inc. 463 F.Supp. 709 (W.D.Penn., 1979), a case specifically dealing with a warranty for a motor vehicle under Magnusson-Moss, the court found that the purchasers of a mobile home were not entitled to rescission under Magnusson-Moss because the dealer did not have the opportunity to make a reasonable number of attempts to repair the vehicle.

At trial, Schurtz did not dispute the limited remedy provided by the Warranty nor did he allege that the limitation was unconscionable. Furthermore, he failed to introduce any evidence sufficient to prove that the Warranty failed in its essential purpose. The authorities cited above establish that the exclusion of incidental and consequential damages must be

viewed independently from the limited warranty of repair or replacement and Schurtz's claim of a failure of essential purpose is irrelevant and immaterial as a matter of law. The trial court did not, therefore, err in denying Schultz's claim for incidental and consequential damages.

## Issue II

**THE TRIAL COURT'S FINDINGS ARE SUFFICIENT TO SUPPORT ITS DECISION TO AWARD SCHURTZ LESS THAN HIS FULL CLAIM FOR ATTORNEY'S FEES.**

In his brief on appeal, Schurtz challenges the sufficiency of the Findings of Fact entered by Judge Noel in support of his decision to award attorney's fees in an amount less than that claimed by Schurtz. It must be noted that the parties stipulated that Schurtz was the prevailing party only for the limited purpose of deciding the issue of attorney's fees. (Transcript at 110; Record at 1183). As the prevailing party, Mr. McPhie, Schurtz's counsel prepared the Findings of Fact and Conclusions of Law. It is within the trial court's discretion to adopt the Findings as submitted by the prevailing party, as long as the Findings are not clearly contrary to the evidence. Boyer Co. v. Lignell 567 P.2d 1112 (Utah 1977).

Rule 52(a) of the Utah Rules of Civil Procedure sets a high standard of review for a challenge to Findings of Fact. The Rule

provides that Findings of Fact shall not be set aside unless "clearly erroneous." Under this standard of review, an appellate court can set aside the factual findings of a trial court only if they are clearly erroneous. Barker v. Francis 741 P.2d 548 (Utah App. 1987).

The evidence and testimony elicited at trial on the amount of attorney's fees established an inefficiency in the prosecution of the case, a duplication of efforts, and the continued assertion of claims previously dismissed. Judge Noel's Finding number four that ". . . this case could have and probably should have been settled very early in the proceedings for an amount roughly equal to the outcome" (Record at 1141) is entirely consistent with the evidence. Findings of Fact will be set aside only if they are clearly erroneous. They cannot be set aside if there is a reasonable basis in evidence. Gillmor v. Gillmor 745 P.2d 461 (Utah App., 1987).

Here the evidence consistently supports Finding number four. The testimony on the attorney's fee issue covers eighty seven pages (transcript at 113) of the two hundred page transcript. A full seventeen pages of Schurtz's brief (pp. 23-40) are devoted to a paraphrased summary of the testimony. The trial court heard the testimony of his attorneys and had the ability to assess their credibility. The trial court fulfilled its responsibility to make a full inquiry into the amount of the

fees. Assoc. Indus. Developments v. Jewkes, 701 P.2d 486 (Utah 1984). On appeal, this Court should not substitute its judgment for the trial court's assessment of the testimony. Monroc, Inc. v. Sidwell 104 Utah Adv. Rep. 26 (1989). Schurtz's testimony (Transcript at 47) and the testimony of John Baird (Transcript at 129 and 130) support Judge Noel's Finding of Fact number four (Record at 1179) that the case ". . . could have been, and probably should have been, settled very early in the proceedings, for an amount roughly equal to the ultimate outcome." Although Findings should be made on all material subordinate and ultimate factual issues, it is not necessary for the trial court to resolve all conflicting evidentiary issues and the court is not required to negate allegations in its Findings of Fact. Sorenson v. Beers 614 P.2d 159 (Utah, 1980).

In essence, Schurtz argues that the trial court should have believed his evidence rather than BMW's. Rule 52(a) imposes a substantial burden on the party challenging a trial court's Findings of Fact. Schurtz has the burden to cite all the evidence in the record that would support Judge Noel's determination and then demonstrate why, even when viewed in the light most favorable to the trial court, it is insufficient to support the Finding under attack. Harker v. Condominiums Forest Glen, Inc. 740 P.2d 1361, 1362 (Utah App., 1987). Only then can this Court consider whether those Finds are clearly erroneous

under Rule 52(a). General Glass Corp. v. Mast Const. Co. 766 P.2d 429, 433 (Utah App. 1988).

Schurtz has not met his burden of proof because he has failed to demonstrate that Judge Noel's Findings are clearly erroneous based on the documentary evidence and testimony at trial. The clear weight of the evidence supports the trial court's Findings on the attorneys fees issue and this Court should defer to the trial court's advantaged position in evaluating the witnesses' demeanor and credibility. The trial court's Findings should not be disturbed in the light of Schurtz's failure to meet his burden on appeal.

### Issue III

**A PREPONDERANCE OF THE EVIDENCE SUPPORTS THE TRIAL COURT'S DECISION TO DISCOUNT THE CLAIM FOR ATTORNEY'S FEES.**

Schurtz claimed attorney's fees for Mr. Baird, his prior counsel, together with the fees of Mr. McPhie, his present counsel of record. The total amount claimed for attorney's fees (\$44,069.15 at the time of trial) substantially exceeded the purchase price of the Automobile, (\$14,500.00) plus taxes and license fees. The disproportionate amount of the claim for fees compared to the value of the Automobile, was a major impediment to a settlement prior to the trial.

The issue of the amount of attorneys fees awarded is discretionary with the trial court and is subject to certain conditions and limitations. Trayner v. Cushing, 688 P.2d 856 (Utah 1984). Among the factors to be considered by the trial court in evaluating a claim for attorneys fees are: the relationship of the fee to the amount recovered, the novelty and difficulty of the issues involved; the overall result achieved; and, the necessity of initiating a lawsuit to vindicate the rights of the contract. Turtle Management, Inc. v. Haggis Management, 645 P.2d 667, at 671 (Utah 1982). In Cabrera v. Cottrell 694 P.2d 622, (Utah 1985) this court's most recent statement on the issue of the amount of attorneys fees, it relied on the elements contained in the Code of Professional Responsibility:

In determining the reasonableness of attorneys fees, a trial judge may take into account the provision in the Code of Professional Responsibility which specifies the elements that should be considered in setting reasonable attorneys fees. Utah Code of Professional Responsibility DR 2-106. A Court may consider among other factors, the difficulty of the litigation, the efficiency of the attorneys in presenting the case, the reasonableness of the number of hours spent on the case, the fee customarily charged in the locality for similar services, the amount involved in the case and the result attained, and the expertise and experience of the attorneys involved. At 624-625.

The trial court received evidence regarding the attorneys fees claimed by Schurtz, including the testimony of his counsel, John Baird and David McPhie. Other evidence was introduced

including time summaries and statements for fees and costs. The evidence, taken as a whole, established a duplication of efforts and an overall inefficiency in the prosecution of the case. Schurtz's claim for fees included the actual amount of time spent on all aspects of the case including:

- (1) charges associated with the filing of an action in Federal Court which was voluntarily dismissed due to a failure to plead claims in an amount sufficient to meet the jurisdictional threshold;
- (2) fees associated with a state court action which was dismissed for failure to prosecute;
- (3) fees arising out of a dispute over settlement.
- (4) fees tied to claims which were ultimately dismissed by the trial court:
  - a. Claim under Utah Consumer Sales Practices Act. (Fifth Cause of Action).
  - b. Claim for negligent and intentional misrepresentation. (Fourth Cause of Action).
  - c. Claim for punitive damages.
  - d. Claim for incidental and consequential damages.

The limited relief granted by the trial court was based on the stipulation of the parties to a rescission whereby Schurtz agreed to return the automobile and BMW agreed to refund the purchase price minus a credit to BMW for actual use. All of the other claims alleged in the complaint were disposed of by pre-

trial motions as outlined above. The testimony and evidence show that Schurtz continued to claim attorney's fees for the time spent in pursuing all of his alleged claims even after most of those claims were dismissed.

An award of attorney's fees is generally limited to the prevailing issues. In Barnes v. Wood 750 P.2d 1226 (Utah, 1988) the Court of Appeals ruled that contractual liability for the payment of attorneys fees extends only to the amount necessary to enforce the contract. The award of attorneys fees based on a statute, was addressed in Graco Fishing v. Ironwood Exploration 766 P.2d 1074 (Utah 1988). In Graco, this Court ruled that an award of attorney's fees under the mechanic's lien statute must be based on evidence which differentiates between the time spent on successful claims and the time spent on unsuccessful claims. The trial court's award of attorney's fees in an amount less than the total claimed by Schurtz is consistent with a reduction in fees to an amount consistent with the rescission based judgment.

In support of his claim for attorneys fees, Schurtz relies on the case of Universal Motors, Inc. v. Waldock, 719 P.2d 254 (Alaska 1986). A careful reading of that case reveals, however, that it can be distinguished on the facts. First and foremost, the dealer and manufacturer (also BMW), refused to authorize any repairs on a car under warranty. Furthermore, the defendants in that case refused to discuss settlement, despite several offers

made by the plaintiff. The Waldock case is distinguishable from this case for the reasons that:

1. BMW and the defendant dealers honored the warranty and made repairs to the Automobile.
2. BMW and the defendant dealers never refused to negotiate settlement and, in fact, made several offers to Schurtz.
3. Schurtz never made an independent offer to settle the case in a fixed dollar amount or on specific terms and conditions.

Schurtz also cites Duval v. Midwest Auto City, Inc., 578 F.2d 721 (1978) in support of his claim for the full amount of his fees notwithstanding the disproportionate relationship of the fees to the value of the Automobile. The Duval case is distinguishable, however, for the reasons that it arose out of a claim of odometer fraud and was brought under a federal statute prohibiting the disconnection of odometers. The case did not arise under Magnusson-Moss or the Uniform Commercial Code.

Pre-trial settlement negotiations may be considered in evaluating the claim for attorney's fees since Schurtz elected to pay his attorneys to prosecute the case, including the punitive damages claim which was subsequently dismissed, rather than negotiate a mutually acceptable settlement. In the Waldock case, the court considered the defendants refusal to attempt to settle the case in evaluating an award of attorneys fees for the actual amount of time spent on the case.

Because the amount of attorneys fees awarded is discretionary, the standard of review is limited to whether the award of attorneys fees is supported by evidence in the record. Associated Indus. Developments v. Jewkes, 701 P.2d 486, 488 (Utah 1984). The Findings of Fact and Conclusions of Law prepared after the date of the Minute Entry are supported by extensive evidence and testimony substantiating the trial court's determination that the case should have been settled in an amount roughly equal to the ultimate outcome. In Dixie State Bank v. Bracken 94 Utah Adv. Rep.3 (1988) the Court of Appeals deferred to the discretion of the trial court and found that a trial court is allowed to reduce the amount asserted by one party in determining a reasonable fee. The record does not contain any evidence of an abuse of discretion in the trial court's award of attorneys fees in an amount less than that claimed by Schurtz.

#### CONCLUSION

The final Order and Judgment rendered by Judge Noel are proper and should be affirmed. The trial court did not err in granting BMW's motion for partial summary judgment on the claim for incidental and consequential damages. The order granting the motion is supported by substantial credible evidence and testimony in the record and the law supports the ruling. The trial court's Findings are adequate and sufficient to support the decision to award Schurtz less than the full amount of his claim

for attorney's fees. The clear weight of the testimony and evidence in the record supports the Findings and they should not be disturbed on appeal. Finally, a preponderance of the credible testimony and evidence in the record supports the trial court's decision to discount the claim for attorney's fees.

For the reasons set forth herein, BMW respectfully requests this Court to affirm the judgment rendered by Judge Noel in the District Court.

DATED this 19 day of May, 1989.

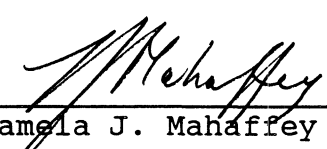
By: 

VAN WAGONER & STEVENS

#### CERTIFICATE OF SERVICE

I hereby certify that four true and correct copies of the foregoing Respondent's Brief were served by mailing, U.S. Mails, postage prepaid, on this 19 day of May, 1989 to the following:

David A. McPhie, Esq.,  
BLAKESLEY, PALMER & MCPHIE  
3450 Highland Drive, #301  
Salt Lake City, Utah 84106

  
Pamela J. Mahaffey

## APPENDIX

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15 U.S.C. § 2301

§ 2301. Definitions

For the purposes of this chapter:

(1) The term "consumer product" means any tangible personal property which is distributed in commerce and which is normally used for personal, family, or household purposes (including any such property intended to be attached to or installed in any real property without regard to whether it is so attached or installed.)

(2) The term "Commission" means the Federal Trade Commission.

(3) The term "consumer" means a buyer (other than for purposes of resale) of any consumer product, any person to whom such product is transferred during the duration of an implied or written warranty (or service contract) applicable to the product, and any other person who is entitled by the terms of such warranty (or service contract) or under applicable State law to enforce against the warrantor (or service contractor) the obligations of the warranty (or service contract).

(4) The term "supplier" means any person engaged in the business of making a consumer product directly or indirectly available to consumers.

(5) The term "warrantor" means any supplier or other person who gives or offers to give a written warranty or who is or may be obligated under an implied warranty.

(6) The term "written warranty" means-

sale of a consumer product by a supplier to a buyer which relates to the nature of the material or workmanship and affirms or promises that such material or workmanship is defect free or will meet a specified level of performance over a specified period of time, or

(B) any undertaking in writing in connection with the sale by a supplier of a consumer product to refund, repair, replace, or take other remedial action with respect to such product in the event that such product fails to meet the specifications set forth in the undertaking,

which written affirmation, promise, or undertaking becomes part of the basis of the bargain between a supplier and a buyer for purposes other than resale of such product.

(7) The term "implied warranty" means an implied warranty arising under State law (as modified by sections 2308 and 2304(a) of this title) in connection with the sale of a supplier of a consumer product.

(8) The term "service contract" means a contract in writing to perform, over a fixed period of time or for a specified duration, services relating to the maintenance or repair (or both) of a consumer product.

(9) The term "reasonable and necessary maintenance" consists of those operations (A) which the consumer reasonably can be expected to perform or have performed and (B) which are necessary to keep any consumer product performing its intended function and operating at a reasonable level of performance.

(10) The term "remedy" means whichever of the following actions the warrantor elects:

(A) repair,

(B) replacement, or

(C) refund;

except that the warrantor may not elect refund unless (i) the warrantor is unable to provide replacement and repair is not commercially practicable or cannot be timely made, or (ii) the consumer is willing to accept such refund.

(11) The term "replacement" means furnishing a new consumer product which is identical or reasonably equivalent to the warranted

(12) The term "refund" means refunding the actual purchase price (less reasonable depreciation based on actual use where permitted by rules of the Commission).

(13) The term "distributed in commerce" means sold in commerce, introduced or delivered for introduction into commerce, or held for sale or distribution after introduction into commerce.

(14) The term "commerce" means trade, traffic, commerce, or transportation -

(A) between a place in a State and any place outside thereof, or

(B) which affects trade, traffic, commerce, or transportation described in subparagraph (A).

(15) The term "State" means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the Canal Zone, or American Samoa. The term "State of law" includes a law of the United States applicable only to the District of Columbia or only to a territory or possession of the United States; and the term "Federal law" excludes any State law.

15 U.S.C. § 2304(a)(3)

§ 2304(a). In order for a warrantor warranting a consumer product by means of a written warranty to meet the Federal minimum standards for warranty -

(3) such warrantor may not exclude or limit consequential damages for breach of any written or implied warranty on such product, unless such exclusion or limitation conspicuously appears on the face of the warranty . . . ;

**Rule 4-501      CODE OF JUDICIAL ADMINISTRATION**

(5) The points and authorities in opposition to a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which the party contends a genuine issue exists. Each disputed fact shall be stated in separate numbered sentences and shall refer with particularity to those portions of the record upon which the opposing party relies, and, if applicable, shall state the numbered sentence or sentences of the movant's facts that are disputed. All material facts set forth in the movant's statement shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the opposing party's statement.

Utah Rules of Civil Procedure    Rule 52

**Rule 52. Findings by the court.**

(a) **Effect.** In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A; in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. The trial court need not enter findings of fact and conclusions of law in rulings on motions, except as provided in Rule 41(b). The court shall, however, issue a brief written statement of the ground for its decision on all motions granted under Rules 12(b), 50(a) and (b), 56, and 59 when the motion is based on more than one ground.

(b) **Amendment.** Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made either a motion to amend them, a motion for judgment, or a motion for a new trial.

(c) **Waiver of findings of fact and conclusions of law.** Except in actions for divorce, findings of fact and conclusions of law may be waived by the parties to an issue of fact:

- (1) by default or by failing to appear at the trial;
- (2) by consent in writing, filed in the cause;
- (3) by oral consent in open court, entered in the minutes.

(Amended, effective Jan. 1, 1987.)

Uniform Commercial Code § 70A-2-316

**70A-2-316. Exclusion or modification of warranties —  
Livestock.**

(1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this chapter on parol or extrinsic evidence (section 70A-2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.

(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

(3) Notwithstanding subsection (2)

(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is," "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and

(b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and

(c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.

(4) Remedies for breach of warranty can be limited in accordance with the provisions of this chapter on liquidation or limitation of damages and on contractual modification of remedy (sections 70A-2-718 and 70A-2-719).

(5) If a contract for the sale of livestock, which may include cattle, hogs, sheep, and horses, does not contain a written statement as to warranty of merchantability or fitness for a particular purpose, there shall be no implied warranty that the livestock are free from disease and sickness at the time of the sale and the seller shall not be liable for damages arising from the lack of merchantability or fitness for a particular purpose.

ity" clauses. This Article treats the limitation or avoidance of consequential damages as a matter of limiting remedies for breach, separate from the matter of creation of liability under a warranty. If no warranty exists, there is of course no problem of limiting remedies for breach of warranty. Under subsection (4) the question of limitation of remedy is governed by the sections referred to rather than by this section.

3. Disclaimer of the implied warranty of merchantability is permitted under subsection (2), but with the safeguard that such disclaimers must mention merchantability and in case of a writing must be conspicuous.

4. Unlike the implied warranty of merchantability, implied warranties of fitness for a particular purpose may be excluded by general language, but only if it is in writing and conspicuous.

5. Subsection (2) presupposes that the implied warranty in question exists unless excluded or modified. Whether or not language of disclaimer satisfies the requirements of this section, such language may be relevant under other sections to the question whether the warranty was ever in fact created. Thus, unless the provisions of this Article on parol and extrinsic evidence prevent, oral language of disclaimer may raise issues of fact as to whether reliance by the buyer occurred and whether the seller had "reason to know" under the section on implied warranty of fitness for a particular purpose.

6. The exceptions to the general rule set forth in paragraphs

(a), (b) and (c) of subsection (3) are common factual situations in which the circumstances surrounding the transaction are in themselves sufficient to call the buyer's attention to the fact that no implied warranties are made or that a certain implied warranty is being excluded.

7. Paragraph (a) of subsection (3) deals with general terms such as "as is," "as they stand," "with all faults," and the like. Such terms in ordinary commercial usage are understood to mean that the buyer takes the entire risk as to the quality of the goods involved. The terms covered by paragraph (a) are in fact merely a particularization of paragraph (c) which provides for exclusion or modification of implied warranties by usage of trade.

8. Under paragraph (b) of subsection (3) warranties may be excluded or modified by the circumstances where the buyer examines the goods or a sample or model of them before entering into the contract. "Examination", as used in this paragraph, is not synonymous with inspection before acceptance or at any other time after the contract has been made. It goes rather to the nature of the responsibility assumed by the seller at the time of the making of the contract. Of course if the buyer discovers the defect and uses the goods anyway, or if he unreasonably fails to examine the goods before he uses them, resulting injuries may be found to result from his own action rather than proximately from a breach of warranty. See Sections 2—314 and 2—715 and comments thereto.

Uniform Commercial Code § 70A-2-719

UNIFORM COMMERCIAL CODE

**70A-2-719. Contractual modification or limitation of remedy.**

- (1) Subject to the provisions of subsections (2) and (3) of this section and of the preceding section on liquidation and limitation of damages,
  - (a) the agreement may provide for remedies in addition to or in substitution for those provided in this chapter and may limit or alter the measure of damages recoverable under this chapter, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts; and
  - (b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.
- (2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this act.
- (3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

## Official Comment

**Prior Uniform Statutory Provision:** None.

**Purposes:**

1. Under this section parties are left free to shape their remedies to their particular requirements and reasonable agreements limiting or modifying remedies are to be given effect.

However, it is of the very essence of a sales contract that at least minimum adequate remedies be available. If the parties intend to conclude a contract for sale within this Article they must accept the legal consequence that there be at least a fair quantum of remedy for breach of the obligations or duties outlined in the contract. Thus any clause purporting to modify or limit the remedial provisions of this Article in an unconscionable manner is subject to deletion and in that event the remedies made available by this Article are applicable as if the stricken clause had never existed. Similarly, under subsection (2), where an apparently fair and reasonable clause because of circumstances fails in its purpose or operates to deprive either party of the substantial value of the bargain, it must

give way to the general remedy provisions of this Article.

2. Subsection (1) (b) creates a presumption that clauses prescribing remedies are cumulative rather than exclusive. If the parties intend the term to describe the sole remedy under the contract, this must be clearly expressed.

3. Subsection (3) recognizes the validity of clauses limiting or excluding consequential damages but makes it clear that they may not operate in an unconscionable manner. Actually such terms are merely an allocation of unknown or undeterminable risks. The seller in all cases is free to disclaim warranties in the manner provided in Section 2—316.

**Cross References:**

Point 1: Section 2—302.

Point 3: Section 2—316.

**Definitional Cross References:**

"Agreement". Section 1—201.

"Buyer". Section 2—103.

"Conforming". Section 2—106.

"Contract". Section 1—201.

"Goods". Section 2—105.

"Remedy". Section 1—201.

"Seller". Section 2—103.