

1992

Guy Barco Zewadski v. Ford Motor Credit Company and Rick Warner Lincoln-Mercury : Brief of Appellee

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Guy B. Zewadski; Appearing Pro-Se; Appellant.

Kim R. Wilson; Thomas F. Taylor; Snow, Christensen and Martineau; Attorneys for Appellee.

Recommended Citation

Brief of Appellee, *Zewadski v. Ford Motor Credit Company*, No. 920226 (Utah Court of Appeals, 1992).
https://digitalcommons.law.byu.edu/byu_ca1/3155

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

BRIEF

UTAH
DOCUMENT
KFU

50

.A10

DOCKET NO. 920226 IN THE COURT OF APPEALS

STATE OF UTAH

GUY BARCO ZEWADSKI,

Plaintiff/Appellant

Case No. 920226-CA
~~920054~~
890901423CN

vs.

FORD MOTOR CREDIT COMPANY and
AND RICK WARNER LINCOLN-
MERCURY,

Priority No. 10

Defendant/Appellee.

BRIEF OF APPELLEE FORD MOTOR CREDIT COMPANY

ON APPEAL FROM THE DECISION OF THE THIRD
JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY,
STATE OF UTAH, HONORABLE PAT B. BRIAN,
DISTRICT COURT JUDGE

KIM R. WILSON (A3512)
THOMAS F. TAYLOR (A5804)
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, 11th Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000
Attorneys for Appellee Ford
Motor Credit Company

GUY BARCO ZEWADSKI
Pro Se
P.O. Box 1232
Salt Lake City, Utah 84110
Telephone (801) 355-8180,
Appellant

FILED

AUG 4 1992

T. Noonan
of the Court
of Appeals

IN THE COURT OF APPEALS

STATE OF UTAH

GUY BARCO ZEWADESKI,

Plaintiff/Appellant

Case No. 920054
890901423CN

vs.

FORD MOTOR CREDIT COMPANY and
AND RICK WARNER LINCOLN-
MERCURY,

Defendant/Appellee.

BRIEF OF APPELLEE FORD MOTOR CREDIT COMPANY

ON APPEAL FROM THE DECISION OF THE THIRD
JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY,
STATE OF UTAH, HONORABLE PAT B. BRIAN,
DISTRICT COURT JUDGE

KIM R. WILSON (A3512)
THOMAS F. TAYLOR (A5804)
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, 11th Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000
Attorneys for Appellee Ford
Motor Credit Company

GUY BARCO ZEWADESKI

Pro Se

P.O. Box 1232

Salt Lake City, Utah 84110

Telephone (801) 355-8180,

Appellant

Table of Contents

	<u>Page</u>
JURISDICTION	1
STATEMENT OF ISSUES	1
STATEMENT OF THE CASE	2
STATEMENT OF FACTS	4
SUMMARY OF ARGUMENTS	5
POINT I	5
POINT II	6
POINT III	7
ARGUMENT	7
POINT I	
THE DISTRICT COURT PROPERLY GRANTED FMCC'S MOTION FOR SUMMARY JUDGMENT ON ZEWADSKI'S CLAIMS.	8
POINT II	
ALL ISSUES OF WARRANTIES WERE PROPERLY CONSIDERED BY THE DISTRICT COURT AND WERE DENIED, BECAUSE THE VEHICLE NEVER FAILED TO PERFORM OTHER THAN AS REPRESENTED OR WARRANTED	12
POINT III	
THE DISTRICT COURT PROPERLY GRANTED FMCC SUMMARY JUDGMENT ON ITS COUNTERCLAIM AGAINST ZEWADSKI FOR AMOUNTS DUE UNDER THE LEASE AND FOR EXPENSES INCURRED	14
CONCLUSION	17
ADDENDUM A	
ADDENDUM B	
ADDENDUM C	

Table of Authorities

Cases

<u>Bonham v. Morgan</u> , 788 P.2d, 497 (Utah 1989)	1
<u>Gaw v. State</u> , 798 P.2d 1130 (Utah Ct. App. 1990)	9
<u>Kelly v. Utah Power & Light</u> , 746 P.2d 1189 (Utah Ct. App. 1987)	13
<u>Webster v. Sill</u> , 675 P.2d 1170 (Utah 1983)	9
<u>West Valley City v. Majestic Inv. Co.</u> , 818 P.2d 1311 (Utah Ct. App. 1991)	7

Statutes

Utah Code Ann. § 78-2a-3(2)(j)	1
--	---

Rules

Rule 32, Utah Rules of Civil Procedure	5, 8
--	------

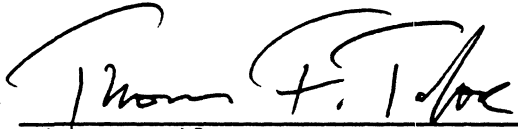
Case No. 920054
890901423 CN

DETERMINATIVE CONSTITUTIONAL AND STATUTORY AUTHORITY

The appeal issues regarding the summary judgments of the district court in this case are governed by Rules 56 and 32 of the Utah Rules of Civil Procedure. Copies of those rules are attached hereto for the Court's convenience. Any other appeal issues are governed by case law authority.

DATED this 4th day of August, 1992.

SNOW, CHRISTENSEN & MARTINEAU

By 

Kim R. Wilson
Thomas F. Taylor
Attorneys for Appellee Ford
Motor Credit Company

Rule 56. Summary judgment.

(a) **For claimant.** A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) **For defending party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) **Motion and proceedings thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) **Case not fully adjudicated on motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the

action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **Form of affidavits; further testimony; defense required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) **When affidavits are unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) **Affidavits made in bad faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and may make such other order as is just.

Rule 32. Use of depositions in court proceedings.

(a) **Use of depositions.** At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of [a] deponent as a witness or for any other purpose permitted by the Utah Rules of Evidence.

(2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds:

(A) that the witness is dead; or

(B) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or

(C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or

(D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or

(E) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts.

Substitution of parties pursuant to Rule 25 does not affect the right to use depositions previously taken; and when an action has been brought in any court of the United States or of any state and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor. A deposition previously taken may also be used as permitted by the Utah Rules of Evidence.

(b) **Objections to admissibility.** Subject to the provisions of Rule 28(b) and Subdivision (d)(3) [(c)(3)] of this rule, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(c) **Effect of errors and irregularities.**

(1) **As to notice.** All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(2) **As to disqualification of officer.** Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(3) **As to taking of deposition.**

(A) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(B) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented are waived unless seasonable objection thereto is made at the taking of the deposition.

(C) Objections to the form of written questions submitted under Rule 31 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within 5 days after service of the last questions authorized.

(4) **As to completion and return of deposition.** Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, endorsed, transmitted, filed, or otherwise dealt with by the officer under Rules 30 and 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

(d) **Publication of deposition.** Use of a deposition under Subsection (a) of this rule shall have the effect of publishing the deposition unless the court orders otherwise in response to objections.

(Amended effective Jan. 1, 1987.)

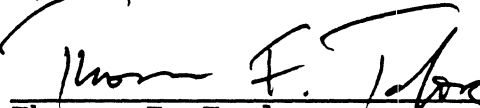
CERTIFICATE OF SERVICE

Pursuant to the Utah Rules of Appellate Procedure, Thomas F. Taylor of Snow, Christensen & Martineau, attorneys for Appellee, Ford Motor Credit Company, hereby certifies that on the 4th day of August, 1992, he caused to be served upon Guy B. Zewadski, by first class mail, postage prepaid, four copies of DETERMINATIVE CONSTITUTIONAL AND STATUTORY AUTHORITY to be included with the appellate brief filed August 3, 1992.

DATED this 4th day of August, 1992.

SNOW, CHRISTENSEN & MARTINEAU

By


Thomas F. Taylor
Attorneys for Appellee Ford
Motor Credit Company

JURISDICTION

The jurisdiction for this appeal is conferred upon this Court by Utah Code Ann. § 78-2a-3(2)(j).

STATEMENT OF ISSUES

1. Did the trial court properly grant summary judgment in favor of Ford Motor Credit Company ("FMCC"), dismissing Plaintiff Guy Barco Zewadski's ("Zewadski") Complaint for Rescission of Contract, Recovery of Damages, Deceit, Fraud and Plaintiff's First Amended Complaint for Rescission of Contract, recovery of damages, deceit, fraud and unconscionability? Inasmuch as a challenge to summary judgment presents for review conclusions of law only, the appellate court reviews those conclusions for correctness, without according deference to the trial court's legal conclusion. Bonham v. Morgan, 788 P.2d, 497, 499 (Utah 1989).

2. Did the district court properly grant FMCC summary judgment on its counterclaim against Zewadski for amounts due pursuant to the Lease, attorney's fees for litigation expenses in these proceedings, cost of suit, and post-judgment interest? The appellate court reviews the district court's conclusions for correctness, without according deference to the trial court's legal conclusion. Bonham v. Morgan, 788 P.2d, 497, 499 (Utah 1989).

STATEMENT OF THE CASE

This action brought by Zewadski involves an alleged rescission of contract and claims for deceit, fraud, and alleged unconscionability of contract. Zewadski leased a 1988 Ford Merkur (the "Vehicle") from Rick Warner Lincoln-Mercury ("Rick Warner"). The lease (the "Lease") was assigned to FMCC. (R. at 244.) Zewadski filed this action, claiming that, contrary to alleged representations by Rick Warner, the Vehicle was defective because it slid on snow and ice. (R. at 2-19.) On that basis, and sometime prior to filing his Complaint in April 1989, Zewadski ceased making payments on the Lease, and allowed the car to be repossessed and sold by FMCC. (R. at 252-254.) Based upon Zewadski's default under the terms of the Lease, FMCC counterclaimed against Zewadski for amounts due under the Lease after sale of the Vehicle and for attorney's fees and other costs incurred in this litigation. (R. at 26-27.)

On January 2, 1990, the court granted FMCC summary judgment, dismissing Zewadski's claims in his Complaint and First Amended Complaint against FMCC. (R. at 228-231, Addendum A.) On August 30, 1991, the district court denied Zewadski's Motion for Leave to Supplement his Complaint and First Amended Complaint. (R. at 500, Addendum B.) On September 20, 1991, the district court granted FMCC summary judgment on its counterclaim, awarding FMCC its claim for damages, attorney's fees and all costs related to this suit. (R. at 573-575, Addendum C.) In that summary

judgment, the district court determined that the undisputed facts revealed that all events had occurred which entitled FMCC to recover a judgment from Zewadski pursuant to the terms of the Lease with Zewadski. (R. at 574.) The district court also determined that the Lease was a true lease. (R. at 574.) Finally, the district court provided Zewadski with the opportunity to challenge the reasonableness of FMCC's stated attorney's fees. (R. at 575.)

Thereafter, Zewadski filed an Objection to Form of Summary Judgment Order dated September 20, 1991 and filed various motions to strike the affidavits for attorney's fees of FMCC's counsel. (R. at 586, 590.) Zewadski also filed a Motion for a New Trial (R. at 594-595) and an Affidavit for Disqualification of Judge Pat B. Brian from the case. (R. at 648-651.)

Zewadski's Affidavit for Disqualification of Judge Brian was denied by District Court Judge Michael R. Murphy. (R. at 675.) Also, Zewadski's Objection to Form of Summary Judgment Order dated September 20, 1991 on FMCC's counterclaims, Motion for a New Trial, and Motion to Strike the Affidavits of FMCC's counsel were all denied. (R. at 679-680.)

Zewadski appeals the January 2, 1990 and the September 20, 1991 orders granting summary judgment.

STATEMENT OF FACTS

On January 6, 1989, Zewadski entered into a Lease with Rick Warner for the lease of the Vehicle. (R. at 135.) The Lease was duly executed by Zewadski (Depo. of Zewadski at p. 67, R. at 135.) On January 6, 1989, the Lease was assigned to FMCC. (R. at 244.)

Rick Warner did not make any representation to Zewadski that the Vehicle was equipped with all-season tires. (Depo. of Zewadski at pp. 70-72, R. at 135.) The only information on which Zewadski relied that all-season tires were equipment of the 1988 Ford Merkur XR4Ti was a Reno, Nevada newspaper advertisement from a dealership other than Rick Warner, which obviously related to a vehicle other than the one Mr. Zewadski leased. (Depo. of Zewadski at p. 70, R. at 135.)

By letter dated February 24, 1989, from Zewadski to FMCC and Rick Warner, Zewadski purported to rescind the Lease. (Depo. Ex. No. 2, R. at 244.) By letter dated March 3, 1989, from Zewadski to FMCC, Zewadski again purported to rescind the Lease. (Depo. Ex. No. 3, R. at 244.) On March 9, 1989, Zewadski voluntarily surrendered the Vehicle to FMCC and failed to abide by the voluntary early termination provisions of the contract (Depo. of Zewadski at pp. 57-58, Depo. Ex. No. 4, R. at 244.)

On April 3, 1989, Zewadski filed his First Amended Complaint for Rescission of the contract, recovery of damages, deceit and fraud. Zewadski alleged that the Vehicle did not drive well in

snowy conditions, contrary to the representations of Rick Warner. (R. at 244-245.) [Zewadski made other assertions that he did not pursue in the trial court and has not argued on appeal.]

FMCC conducted a sale of the Vehicle, recovering \$10,400.00, which, along with other amounts to which Zewadski was entitled, were properly credited to Zewadski's account. The sale left a deficiency amount of \$5,692.44 as of August 28, 1989 under the terms of the Lease. (R. at 245.) FMCC incurred total expenses of \$10,654.90 in attorney's fees, court costs and other expenses to enforce FMCC's rights under the Lease, not including costs and fees in this appeal. (R. at 504-506.)

SUMMARY OF ARGUMENTS

POINT I

The trial court's granting of summary judgment to FMCC, denying the claims of Zewadski's Complaint and First Amended Complaint against FMCC, was proper and should be affirmed. The undisputed facts in this case, particularly Mr. Zewadski's admissions in his deposition (which deposition was properly used by FMCC, pursuant to Rule 32 of the Utah Rules of Civil Procedure), establish that neither Rick Warner nor FMCC made any representation that the Vehicle would not slide on snow or ice. Zewadski's deposition revealed that he obtained that information from a Reno, Nevada newspaper advertisement by a dealership other than Rick Warner, and related to a vehicle other than the one he

leased. The district court correctly reasoned that if no such representations were made by the defendants, then defendants neither defrauded Zewadski nor did they unconscionably disclaim any warranties to which Mr. Zewadski was entitled.

POINT II

The district court properly considered and denied all issues of warranties and alleged unconscionability in this case, because the Vehicle never failed to perform other than as represented or warranted. Zewadski mistakenly argues that summary judgment was wrongfully granted to FMCC, because certain warranties under the Lease were improperly disclaimed. In actuality, the district court disregarded Zewadski's claims of improper disclaimers and unconscionability pursuant to a denial of Zewadski's Motion to Supplement his Complaint and First Amended Complaint, which raised those claims. Because it had already been determined that the undisputed facts revealed no credible showing that the Vehicle had failed to perform within standards represented by Rick Warner, the district court reasonably refused to permit Zewadski to supplement his Complaint or First Amended Complaint with those issues.

Further, neither Rick Warner nor FMCC have ever argued that they disclaimed any warranties, which they were not entitled to disclaim under federal or state law. Instead, FMCC's argument is simply that neither Rick Warner nor FMCC ever warranted that the

Vehicle would not slide on snow or ice. Therefore, Zewadski's appellate arguments regarding representations or warranties were properly decided by the district court, and his appeal on those issues should be denied.

POINT III

The district court properly granted FMCC summary judgment on its counterclaim for amounts due under the Lease, including reasonable attorney's fees and costs for this litigation, because the undisputed facts established Zewadski's default, the amount of damages, and the absence of defenses asserted by Zewadski. Further, despite Zewadski's claims in his appellate brief to the contrary, FMCC submitted appropriate evidence establishing its entitlement to summary judgment, which evidence verified that all events had occurred in order for FMCC to properly exercise its rights under the "Default" section of the Lease, and thereby collect amounts due and owing, including attorney's fees and costs incurred for this litigation.

ARGUMENT

This Court has held that extensive quotations from numerous case authorities and treatises, while helpful, cannot substitute for the development of appellate arguments explicitly tied to the record. West Valley City v. Majestic Inv. Co., 818 P.2d 1311 (Utah Ct. App. 1991). Zewadski's brief is a confusing discussion of his view of the law of contracts, tied together with extensive

quotations from case authorities, treatises and statutes, but lacking any application of the law to the facts of this case. In short, Zewadski fails to identify the windmills at which he is tilting.

POINT I

THE DISTRICT COURT PROPERLY GRANTED FMCC'S MOTION FOR SUMMARY JUDGMENT ON ZEWADSKI'S CLAIMS.

Mr. Zewadski's Complaint and First Amended Complaint accuse defendants Rick Warner and FMCC of deceit and fraud, claiming that the defendants represented that the Vehicle would not slide on snow or ice, but that the car in fact did so. (R. at 3-4, and 10-11.) Part of Mr. Zewadski's argument was that Rick Warner allegedly represented that the tires that came with the vehicle were all-season tires.

The problem with Mr. Zewadski's entire argument is that Mr. Zewadski admitted, in his deposition, that Rick Warner did not make any representation that the Vehicle was equipped with all-season tires or that it would not slide in snowy conditions.¹

¹Zewadski's repeated assertion in his brief that FMCC did not submit evidence in support of its Motions for Summary Judgment opposing Zewadski fails. FMCC relied upon Zewadski's deposition, which FMCC correctly referenced in its lower court pleadings, pursuant to Rule 32. (See e.g., R. at 135-136, 244-245.) Zewadski made no timely objection to FMCC's use of Zewadski's deposition, pursuant to Rule 32, Utah Rules of Civil Procedure. Indeed, even Zewadski used the deposition pursuant to Rule 32, to which FMCC offered no timely objection. (See, e.g., R. at 145.) FMCC also relied upon affidavits by FMCC employee, Nancy Rollins, in support of its Motions for Summary Judgment.

Zewadski's deposition further revealed that he obtained that information from a Reno, Nevada newspaper advertisement by a dealership other than Rick Warner relating to a vehicle other than the one he leased. (R. at 135-136.)²

Q Now, isn't it true, Mr. Zewadski, that the only place that you learned that all-season tires was part of a purchase was from the Reno advertisement?

A That's correct. The Reno newspaper advertisement mentioned that it was equipped with all-season radial tires, and I was under the impression that when I showed that advertisement to Vic Field [a Rick Warner official] that--which I showed him the advertisement from the Reno paper to Vic Field, and when I inquired about the tires and the driveability in the snow, even though they didn't answer me directly that it had all-season tires, they didn't tell me that it didn't. And they indicated--Paul Smith [a Rick Warner official]

(R. at 252-55; and 459-61.)

Despite the claims in Zewadski's brief that FMCC was required to publish Zewadski's deposition, all of the cases which Zewadski cited are outdated and have been overruled by the drafting of Utah Rule of Civil Procedure 32(d) which became effective January 1, 1987. This Court has even recently held that subdivision (d) of Rule 32, Utah Rules of Civil Procedure, now makes "publication" of a deposition unnecessary. Salt Lake City Corp v. James Construction, Inc., 761 P.2d 42 (Utah Ct. App. 1988).

²Mr. Zewadski's brief refers, at times, to numerous affidavits which he submitted to the district court in support of his many motions, objections, etc. Ford Motor Credit Company is uncertain what point Zewadski intends to support by these references to these affidavits. However, in Gaw v. State, 798 P.2d 1130 (Utah Ct. App. 1990), this Court stated that a party may not rely on a subsequent affidavit that contradicts his deposition to create an issue of fact on a motion for summary judgment, unless the deposition was in error or the party-deponent is able to explain the contradiction in his affidavit. See also, Webster v. Sill, 675 P.2d 1170 (Utah 1983).

indicated that it would drive fine in the snow with the story that he related to me.³

Q You acknowledged earlier today that in the advertisement that you reviewed on behalf of Rick Warner Ford, that there was no mention of the type of tire.

A No, no mention of the tire in Rick Warner's advertisement. . . . (Depo. of Zewadski, pp. 70-71; R. at 135.)

The above text reveals, as did other testimony, that neither Rick Warner nor FMCC made the kind of representations to Zewadski that Zewadski claims were made. Thus, the district court correctly reasoned that if no such representations were made by either defendant, then defendants could not, under any circumstances, have defrauded Zewadski nor could they have unconscionably disclaimed any warranties to which Mr. Zewadski was entitled.

Even in light of the undisputed facts and the extensive district court review of those facts as applied to the law, Zewadski has relentlessly reiterated claims of alleged warranty or service contract problems allegedly caused by defendants. It is evident from the record that Mr. Zewadski's contentions are based, not on the undisputed facts, but upon his own legal conclusions quite apart from the facts in this case. A portion

³The "story" to which Mr. Zewadski referred, was later explained in his deposition as follows: " . . . what he [Paul Smith] did was tell me, apparently, an evasive story about a client that had traded in a Lincoln Mark VII that drove in the snow all the time and said it was the best car he'd ever had." (Depo. Zewadski p. 78.)

of the transcript of the proceedings of the district court from August 30, 1991, is illustrative of the confusion that Zewadski has had on the issues.

The Court: The court will ask you this question another time, and require that you give a specific response. Is there any contention by the Plaintiff that there is a service warranty in issue in this case?

Mr. Zewadski: Your honor, the only thing at issue is a contract.

The Court: Did you understand the question? Please read the question back, Mr. Reporter (the question was read back by the court reporter).

Mr. Zewadski: I am not familiar with there being any service warranty whatsoever in this case, your honor. There is a service contract . . . (R. at 710.)

The Court: Was there ever any allegation by the Plaintiff that Rick Warner failed to repair the vehicle.

Mr. Zewadski: No, your honor.

The Court: Then why is a service warranty in issue?

Mr. Zewadski: Because it is invalid, your honor.

The Court: Whether it even exists is immaterial if it is not in issue.

Mr. Zewadski: I believe it makes the contract an enforceable and unconscionable contract.

The Court: Anything further? Both sides submit? (R. at 711.)

Mr. Zewadski conceded in open court that there was no failure by the dealer to repair the vehicle. The court correctly held, based upon the undisputed facts and admissions by Zewadski himself, "that there was no credible evidence showing that the

Vehicle failed to perform within acceptable standards." (R. at 229.) Because the undisputed facts reveal that neither Rick Warner nor FMCC ever represented that the Vehicle would not slide on snow or ice, and there is no credible evidence that the Vehicle failed to perform within acceptable standards, Zewadski's claims below and on appeal are mere legal conclusions based upon Zewadski's opinion, and should be dismissed accordingly.

POINT II

ALL ISSUES OF WARRANTIES WERE PROPERLY
CONSIDERED BY THE DISTRICT COURT AND WERE
DENIED, BECAUSE THE VEHICLE NEVER FAILED TO
PERFORM OTHER THAN AS REPRESENTED OR
WARRANTED.

Zewadski argues on appeal that summary judgment was wrongfully granted to FMCC, because certain warranties under the Lease were improperly disclaimed. (Appellant's Brief, pp. 16-17.) Because of the improper disclaimers, Zewadski argues the entire lease contract is unconscionable and the Lease is void. (Appellant's Brief, p. 40.)

Actually, Zewadski is mistaken regarding the district court procedure. The district court's decision to disregard issues of improper disclaimers or unconscionability were based, not on a summary judgment decision, but on the court's denial of Zewadski's Motion to Supplement his Complaint and First Amended Complaint. That motion, which first raised the wrongful disclaimer and unconscionability issues, was denied by the court

on August 30, 1991, and the court's discussion on the denial of that motion is instructive for the present appeal.

Regarding Zewadski's Motion for Leave to Supplement his Complaint and First Amended Complaint, the court has heard extensive oral argument by Zewadski lasting approximately 40-45 minutes as to why the court should grant Zewadski's Motion for Leave to Supplement his Complaint and First Amended Complaint with new evidence allegedly relating to the existence of warranties on the subject vehicle of this lawsuit. The court finds that Zewadski offered no new factual or legal arguments beyond those which have been voluminously briefed and argued at length in a prior hearing on a Motion for Summary Judgment, and upon which the court issued an order in FMCC's favor dated January 2, 1991, stating that no material issues of fact or law remain as to any fraud allegedly perpetrated by Rick Warner or as to any warranty issues relevant to this case. On that basis, Zewadski's Motion for Leave to Supplement his Complaint and First Amended Complaint is denied. (R. at 500-501.)

The district court's ruling on a motion to amend is within the discretion of the trial court, and that absent a clear abuse of that discretion, the appellate court will not disturb a trial court's ruling on a motion to amend. Kelly v. Utah Power & Light, 746 P.2d 1189, 1190 (Utah Ct. App. 1987).

The district court clearly determined that the undisputed facts in this case reveal no credible showing that the Vehicle failed to perform within the standards represented by Rick Warner. On that basis, the court reasonably refused to permit Zewadski to supplement his Complaint or First Amended Complaint with those issues.

Further, neither Rick Warner nor FMCC have at any time argued that they were entitled to or did disclaim any warranties,

express or implied, which they were not entitled to disclaim under federal or state law. FMCC's argument is, and has always been, simply that neither Rick Warner nor FMCC ever warranted that the Vehicle would not slide on snow or ice. Because the undisputed facts establish that neither Rick Warner nor FMCC warranted that the Vehicle would perform in any way other than how it performed, all of Zewadski's appellate arguments regarding representations or warranty issues, which comprise most of his brief, were properly decided by the court, and his appeal on those issues should be denied.

POINT III

THE DISTRICT COURT PROPERLY GRANTED FMCC
SUMMARY JUDGMENT ON ITS COUNTERCLAIM AGAINST
ZEWADSKI FOR AMOUNTS DUE UNDER THE LEASE AND
FOR EXPENSES INCURRED.

The Lease states, at paragraph 24, as follows:

Default: If the lessee fails to make any payment under this lease when it is due, or if the lessee fails to keep any other agreement in this lease, the lessor may terminate this lease and take back the vehicle. . . . Even if the lessor retakes the vehicle, the lessee must still pay at once the sum of (a) the difference, if any, between the adjusted balance subject to lease charges . . . and that amount received by Ford Credit upon the sale of the vehicle at wholesale and (b) all other amounts then due under the lease. The lessee must also pay expenses paid by the lessor to enforce the lessor's rights under the lease, including reasonable attorneys' fees as permitted by law, and damages caused to lessor because of the lessee's default. The lessor may sell the vehicle at public or private sale with or without notice to the lessee.
(R. at 246-247.)

The undisputed facts in this case reveal that Zewadski purported to rescind the lease by two letters dated February 24 and March 3, 1989 (R. at 244.). On March 9, 1989, Zewadski voluntarily surrendered the Vehicle to FMCC and failed to abide by the voluntary early termination provisions of the contract (R. at 244). The affidavit of FMCC employee Nancy Rollins proves that after Zewadski surrendered the Vehicle to FMCC, FMCC sold the Vehicle at an auction for \$10,400.00. (R. at 252-55.) After subtracting credits to which Zewadski was entitled, the sales proceeds were immediately applied to Zewadski's debt due and owing to FMCC, leaving a remaining obligation of \$5,692.44. (R. at 254.) Zewadski has not made payments on the lease since surrendering the Vehicle to FMCC. (R. at 254.)

Based upon the foregoing information, the district court went to extreme lengths, at numerous hearings, to give Zewadski an opportunity to fully and fairly state any cause of action which he may legitimately have had and which may afford him a defense to FMCC's counterclaim. An excerpt from the transcript of the proceedings of September 20, 1991 illustrates the extent to which the district court went to accommodate and understand Zewadski's claims and defenses.

The Court: As a courtesy to the pro se Plaintiff, the Court has extended privileges in this lawsuit which would not be extended if you were represented by counsel. And the Court has stated repeatedly on the record that, in an effort to be fair in every aspect of this litigation, the Court has extended pleading privileges and argument privileges and other privileges that

relate to the rules of the Court, simply because you are pro se. Those privileges would not have been extended to you were you not represented by counsel.

The Court has gone the extra mile repeatedly to understand the basis of your lawsuit, to give you ample opportunity to argue it, and to plead it, and to rule upon it. The Court did consider your proposed amended answer. The Court found that, legally and factually, it was inappropriate, denied your motion to amend your answer, and the Court so ruled in our August hearing. And the Court so rules this morning. . . . (R. at 700-701.)

As to the specific issues raised in FMCC's Summary Judgment Motion on its Counterclaim against Zewadski, and the issues Zewadski raised in opposition to FMCC, and which the district court heard and ruled upon, and which issues Zewadski now brings again before this Court, the same transcript from September 20, 1991 reflects that District Court Judge Brian correctly stated as follows:

The Court: The Court finds as follows: the contextual agreement entered into between the Plaintiff and the lessor was, in fact, a legal lease. It was not a security agreement.

The Court further finds that, consistent with the Plaintiff's own acknowledgment, there has never been, from the date the vehicle was delivered to the Plaintiff until the date it was returned to the lessor, an assertion by the Plaintiff that mechanical problems, electrical problems, suspension problems, or any other defective problem existed with the vehicle which was the subject of the lease.

The Court further finds that the sale of the vehicle by the defendant was commercially reasonable, that it was conducted appropriately to obtain the maximum money from the subject vehicle.

The Court further finds that the allegations by the Plaintiff relating to the service contract are neither

factually nor legally persuasive. Service has never been an issue in the lawsuit before the court.

The Court further finds that for whatever reasons, the lessee developed lessee remorse. The lease was valid on its face, it was enforceable, and the returning of the leased vehicle by the lessee after 60 days and 4,000 miles had intervened, did not exonerate the lessee of his responsibilities, pursuant to the terms and conditions of the lease.

The Court finds that there are no genuine issues of material fact, relating to the dispute. Therefore, as a matter of law, the defendant is entitled to Summary Judgment and the relief prayed for is granted. . . .
(R. at 692-693.)

The transcript reflects that the district court meticulously and competently reviewed any possible claim which Zewadski may have had in defense of FMCC's counterclaim. The court correctly held that all events had occurred which entitle FMCC to summary judgment on its counterclaim, as a matter of law. (See also, R. at 574.) Zewadski has failed to even challenge this, let alone to successfully argue in his brief that there is any evidence to support a reversal of the district court's decision in this FMCC is entitled to expenses which it incurred in this lawsuit and in pursuing Zewadski for amounts owed under the Lease.

CONCLUSION

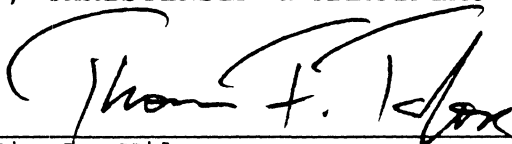
The undisputed fact, particularly proved by Zewadski's own acknowledgments, is that neither Rick Warner Ford nor FMCC represented that the Vehicle would not slide when driven on snow and ice. Therefore, any and all claims, issues, or defenses that Zewadski now argues regarding deceit, fraud, service contracts,

unconscionability of contract, disclaimers of warranties, whether implied or expressed, and any other such issues, are merely Zewadski's own legal conclusions, not supported by any facts. The trial court's decision granting summary judgment in favor of FMCC and its decision denying Zewadski's claims against defendants should be affirmed, and the matter should be remanded for an award of FMCC's attorney's fees and costs on appeal.

DATED this 3rd day of August, 1992.

SNOW, CHRISTENSEN & MARTINEAU

By

A handwritten signature in black ink, appearing to read "Thomas F. Taylor", is written over a horizontal line.

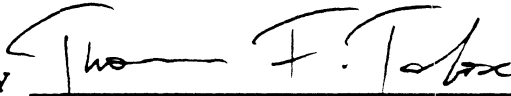
Kim R. Wilson
Thomas F. Taylor
Attorneys for Appellee Ford
Motor Credit Company

CERTIFICATE OF SERVICE

Pursuant to the Utah Rules of Appellate Procedure, Thomas F. Taylor of Snow, Christensen & Martineau, attorneys for Appellee, Ford Motor Credit Company, hereby certifies that on the 3rd day of August, 1992, he caused to be served upon Guy B. Zewadski, by first class mail, postage prepaid, four copies of Brief of Appellee Ford Motor Company.

DATED this 3rd day of August, 1992.

SNOW, CHRISTENSEN & MARTINEAU

By 
Thomas F. Taylor
Attorneys for Appellee Ford
Motor Credit Company

Tab A

11/2/91

KIM R. WILSON
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Defendant
Ford Motor Credit Company
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

GUY BARCO ZEWADESKI,
Plaintiff,

vs.

SUMMARY JUDGMENT

RICK WARNER LINCOLN-MERCURY
and FORD MOTOR CREDIT COMPANY,
Defendants.

FORD MOTOR CREDIT COMPANY,
Counterplaintiff,

Civil No. 89-0901423CN
Judge Pat B. Brian

vs.

GUY BARCO ZEWADESKI,
Counterdefendant.

Defendant Ford Motor Credit Company's Motion for Summary Judgment on the First Amended Complaint came on for hearing, pursuant to notice, before the above entitled Court, the Honorable Pat B. Brian presiding, on December 14, 1990, at 8:30 a.m. and Ford Motor Credit Company being represented by Kim R.

Wilson, and plaintiff being present and appearing on his own behalf, and the Court having reviewed the files and records herein, including the motion, affidavits and extensive memoranda of the parties in support and opposition to the motion, and having heard argument of the parties, and it appearing from the record (1) that statements of Rick Warner Lincoln-Mercury or its employees were not false, fraudulent nor material misrepresentations or omissions relating to capabilities of the vehicle; (2) that all warranties, if any, as to merchantability or fitness for purpose were excluded; (3) that there is no credible showing that the vehicle failed to perform within acceptable standards; (4) that there was no misrepresentation or omission regarding income tax issues; (5) that there was no alteration of the lease contract; (6) that there is no genuine issue as to any material fact; (7) and that Ford Motor Credit Company is entitled to judgment as a matter of law, and the Court being fully advised in the premises, and good cause appearing therefore, it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

1. Ford Motor Credit Company's Motion for Summary Judgment be, and the same hereby is, granted.

2. Plaintiff's Complaint for Recision of Contract, Recovery of Damages, Deceit, Fraud, and Plaintiff's First Amended Complaint For Recision of Contract, Recovery of Damages, Deceit,

Fraud, be, and the same hereby are, dismissed with prejudice and on the merits.

3. Costs and attorney's fees are awarded to Ford Motor Credit Company in an amount to be determined in further proceedings.

4. Ford Motor Credit Company's Counterclaim against plaintiff be, and the same hereby is, unaffected by this order and remains pending.

DATED this 2 day of ^{Jan. 1991}~~December, 1990.~~

BY THE COURT:

By Pat B. Brian
Pat B. Brian
District Court Judge

09\bjd\08958.252\summary.jud

AFFIDAVIT OF SERVICE

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

Harvi Lynn Chiles, being duly sworn, says that she is employed by the law offices of Snow, Christensen & Martineau, attorneys for Ford Motor Credit Company herein; that she served the attached [PROPOSED] SUMMARY JUDGMENT (Case Number 89-0901423CN, in the Third Judicial District Court of Salt Lake County, State of Utah) upon the parties listed below by placing a true and correct copy thereof in an envelope addressed to:

Brian C. Harrison
Harris, Carter & Harrison
3325 North University Avenue #200
Provo, Utah 84604

Guy B. Zewadski	Guy B. Zewadski
P. O. Box 1232	512 Merritt Avenue
Salt Lake City, Utah 84110	Oakland, CA 94610

and causing the same to be mailed first class, postage prepaid, on the 17th day of December, 1990.

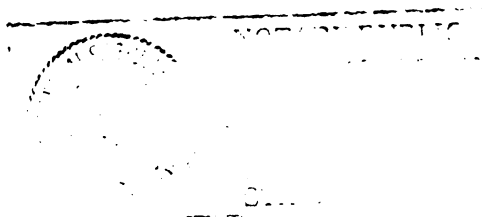
Harvi Lynn Chiles

SUBSCRIBED AND SWORN to before me this 17th day of December, 1990.

Ann S. Patterson
NOTARY PUBLIC
Residing in the State of Utah

My Commission Expires:

3/1/93



Tab B

FILED DISTRICT COURT
Third Judicial District

AUG 30 1991

KIM R. WILSON (A3512)
THOMAS F. TAYLOR (A5804)
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Counter-Plaintiff FMCC
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000

By *Pat B. Brian* SALT LAKE COUNTY
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

GUY BARCO ZEWADSKI,
Plaintiff,

vs.

ORDER

FORD MOTOR CREDIT COMPANY and
RICK WARNER LINCOLN-MERCURY,
Defendants.

Civil No. 89-0901423CN
Judge Pat B. Brian

FORD MOTOR CREDIT COMPANY
Counter-Plaintiff,

vs.

GUY BARCO ZEWADSKI,
Counter-Defendant.

On August 2, 1991, at 8:30 a.m., a hearing was held before
the Honorable Pat B. Brian, District Court Judge, on the
following pleadings:

1. Plaintiff Zewadski's Order to Show Cause;

2. Plaintiff Zewadski's Motion to Strike the hearing on FMCC's Motion for Summary Judgment;
3. Plaintiff Zewadski's Motion for Leave to Supplement Zewadski's Complaint and First Amended Complaint;
4. Plaintiff Zewadski's Motion to Reconsider Order and Vacate Summary Judgment; and
5. Counter-claimant Ford Motor Credit Company's Motion for Summary Judgment.

Ford Motor Credit Company ("FMCC") was represented by counsel of record, Thomas F. Taylor, and Guy Barco Zewadski ("Zewadski") appeared pro se. The Court, having considered the arguments of the parties at length, and good cause appearing, it is hereby

ORDERED as follows:

1. Zewadski's Order to Show Cause was not warranted in fact or law, was not brought or interposed for a proper purpose, and was not filed in good faith. Therefore, Zedawski's Order to Show Cause is hereby stricken. The Court further finds that the Order to Show Cause was filed to harass and cause delay in violation of Rule 11, Utah Rules of Civil Procedure.

Accordingly, the Court finds Zewadski in contempt and sanctions Zewadski in the sum of \$200 to be paid to the Court no later than August 9, 1991 at 12:00 noon. In addition, the Court awards to FMCC its reasonable legal fees and costs of \$160.00 which is supported by an affidavit dated August 5, 1991, and which was

incurred by FMCC in its defense of the Order to Show Cause, which award shall be set forth by separate order.

2. Regarding Zewadski's Motion to Strike the Hearing on FMCC's Motion for Summary Judgment, based upon Zewadski's contention that FMCC did not file a Notice to Submit for Decision, the Court denies Zewadski's Motion, and finds that FMCC had properly filed a Notice of Hearing with the Court on July 9, 1991, that Zewadski had been properly served with that Notice on July 9, 1991, and that Zewadski conceded to the Court that he was in no way prejudiced after having received that Notice of Hearing.

3. Regarding Zewadski's Motion for Leave to Supplement his Complaint and First Amended Complaint, the Court heard extensive oral argument by Zewadski lasting approximately 40-45 minutes as to why the Court should grant Zewadski's Motion for Leave to Supplement his Complaint and First Amended Complaint with new evidence allegedly relating to the existence of warranties on the subject vehicle in this lawsuit. The Court finds that Zewadski offered no new factual or legal arguments beyond those which had been voluminously briefed and argued at length in a prior hearing on a Motion for Summary Judgment, and upon which the Court issued an Order in FMCC's favor dated January 2, 1991, stating that no material issues of fact or law remained as to any fraud allegedly perpetrated by Rick Warner Ford or as to any warranty issues

relevant to this case. On that basis, Zewadski's Motion for Leave to Supplement his Complaint and First Amended Complaint is denied.

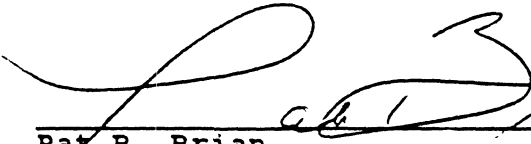
4. For the same grounds stated in paragraph 3 of this Order, the Court denies Zewadski's Motion for the Court to reconsider its January 2, 1991 Order and to vacate that Summary Judgment.

5. The Court, taking extraordinary steps to give Zewadski the benefit of explaining and arguing all his claims, grants Zewadski an additional ten (10) days to supplement his response to FMCC's Motion for Summary Judgment on FMCC's counterclaim. Zewadski must complete and file said supplemental response by August 12, 1991 at 12:00 noon.

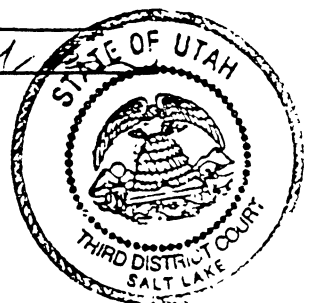
6. The Court, taking extraordinary steps to allow Zewadski a full and fair opportunity to be heard on FMCC's Counterclaim against him for a deficiency and for attorneys' fees under the terms of the subject contract, continues the hearing date for FMCC's Motion for Summary Judgment on FMCC's Counterclaim until August 30, 1991, at 8:30 a.m.

DATED this 30 day of August, 1991.

BY THE COURT:


Pat B. Brian
District Judge

003\tft\8958.252\order.pld



AFFIDAVIT OF SERVICE

STATE OF UTAH)
 :ss.
COUNTY OF SALT LAKE)

Angie White, being duly sworn, says that she is employed by the law offices of Snow, Christensen & Martineau, attorneys for Counter-Plaintiff, Ford Motor Credit Company herein; that she served the attached ORDER (Case Number 89-0901423CN, Third Judicial District Court, Salt Lake County) upon the parties listed below by placing a true and correct copy thereof in an envelope addressed to:

Brian C. Harrison, Esq.
HARRIS, CARTER & HARRISON
3325 North University Avenue, #200
Provo, UT 84604

Guy B. Zewadski
P.O. Box 1232
Salt Lake City, UT 84110

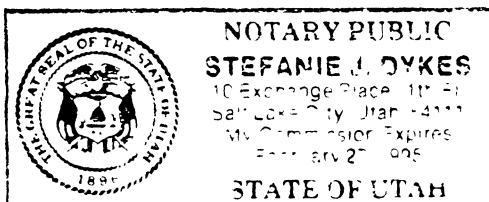
and causing the same to be mailed first class, postage prepaid, on the 5th day of August, 1991.

Angie White
Angie White

SUBSCRIBED AND SWORN to before me this 5th day of August, 1991.

[Signature]
NOTARY PUBLIC
Residing in the State of Utah

My Commission Expires:



Tab C

KIM R. WILSON [A3512]
THOMAS F. TAYLOR [A5804]
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Ford Motor Credit Company
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000

FILED IN CASE NO. 89-0901423CN
THIRD JUDICIAL DISTRICT

SEP 20 1991

By Pat B. Brian
Clerk of Court

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

GUY BARCO ZEWADSKI,

SUMMARY JUDGMENT ORDER

Plaintiff,

v.

RICK WARNER LINCOLN-MERCURY
and FORD MOTOR CREDIT COMPANY,

Defendants.

FORD MOTOR CREDIT COMPANY,

Counterplaintiff,

Civil No. 89-0901423CN

Judge Pat B. Brian

v.

GUY BARCO ZEWADSKI,

Counterdefendant.

Defendant, Ford Motor Credit Company's ("FMCC"), Motion for Summary Judgment on its Counterclaim came on for hearing, pursuant to Notice, before the above-entitled Court, the Honorable Pat B. Brian presiding, on September 20, 1991, at

9:30 a.m., and FMCC being represented by Thomas F. Taylor, and Plaintiff being present and appearing on his own behalf, and the Court having reviewed the files and records herein, including the Motion, Affidavits and extensive Memoranda of the parties in support of and in opposition to the Motion, and having heard the argument of the parties, and it appearing from the record (1) that any and all other pending motions, objections and other pleadings had been reviewed and heard by the Court, (2) that there is no remaining issue as to any material fact in this case, including but not limited to, such issues regarding service contracts or warranties, (3) that all events have occurred which entitle FMCC to recover a judgment from Plaintiff pursuant to the terms of the Lease, which is the subject of this case, (4) that the Lease, which is the subject of this lawsuit, is a true lease, and (5) that FMCC is entitled to judgment on its Counterclaim against Plaintiff as a matter of law, and the Court being fully advised in the premises, and good cause appearing therefore, it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

1. That Plaintiff's Objection to Form of the Order prepared by FMCC dated 9-20-, 1991, is hereby denied.

2. FMCC's Motion for Summary Judgment is granted.


3. FMCC is hereby granted judgment in the amount of \$5,692.44 plus interest at the rate of 10% per annum from and after August 28, 1989 to the date hereof.

4. FMCC is awarded attorneys' fees in the amount of \$9,267.50 for all litigation expenses in these proceedings.

5. FMCC is awarded costs of suit, and post-judgment interest on the whole award at the rate of 10% per annum.

APPROVED this 20 day of September, 1991.

BY THE COURT:



Judge Pat B. Brian

*Pl. of ma
Challenge
reasonable
of said
P.B.*