

1992

Marilyn J. Bloomer v. Kim Edward, Kim Edward Conover and Karen Jane Conover, a Utah General Partnership dba K and K Sales; and Western Surety Company, a corporation : Reply Brief

Utah Court of Appeals

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BRIEF

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DOCKET NO. 920400

IN THE COURT OF APPEALS

OF THE STATE OF UTAH

MARILYN J. BLOOMER,

:

Plaintiff-Appellee,

:

Case No. 920400-CA

vs.

:

Priority 16

KIM EDWARD, KIM EDWARD CONOVER
and KAREN JANE CONOVER, a Utah
General Partnership dba K & K
SALES; and WESTERN SURETY
COMPANY, a corporation,

:

:

:

Defendants-Appellants. :

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OCT 7 1992

Mary T. Hooten
Clerk of the Court
Utah Court of Appeals

IN THE COURT OF APPEALS

OF THE STATE OF UTAH

MARILYN J. BLOOMER,	:	
	:	
Plaintiff-Appellee,	:	Case No. 920400-CA
	:	
vs.	:	
	:	Priority 16
KIM EDWARD, KIM EDWARD CONOVER	:	
and KAREN JANE CONOVER, a Utah	:	
General Partnership dba K & K	:	
SALES; and WESTERN SURETY	:	
COMPANY, a corporation,	:	
	:	
Defendants-Appellants.	:	

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JURISDICTION

Appellants file this reply brief pursuant to rule 24(c) of the Utah Rules of Appellate Procedure.

STATEMENT OF THE CASE

Appellee's statement of the case and argument is inaccurate in the following respects:

1. Appellee's refer to fraud on the part of Appellants. (Pages 21, 23 and 24 of Appellee's brief.) In fact, the trial court specifically ruled there was no fraud.
2. Appellee's refer to a marshaling of the evidence. The issue presented by Appellant is whether or not Appellee is bound by her own contradictory statements.
3. An inspection performed by a duly licensed Utah State Safety Inspector is presumed to be proper unless evidence is presented to the contrary.
4. Appellee's brief incorrectly represents the testimony of David T. Gray, an original defendant in this case but who was called as a witness for Appellee and against whom Appellee did not take judgment.

ARGUMENT

1. On page 21 of her brief Appellee states: "Plaintiff suffered a loss by reason of Defendants' fraudulent failure to disclose the defective and unsafe nature of the vehicle."

On page 23 of her brief Appellee states: "The trial court declined to enter an award of damages, but instead held that the suit was in the nature of fraud and that the appropriate remedy was rescission."

On page 24 of her brief Appellee states: "Rescission is an appropriate remedy for fraud under Utah law.

In its ruling the trial court stated:

Now, in terms of remedy, I think this is not in the nature of fraud--- (emphasis added) (Ruling of the Court Pg. 4, R 249)

In its Amended Findings of Fact and Conclusions of Law and Amended Judgment the court makes no finding of fraud.

It is inappropriate and misleading for the Appellee to discuss the issues in this case as though there had been a finding of fraud.

2. In her testimony regarding representations made to her by Appellant, Appellee makes inconsistent statements. These are quoted in Appellants' brief on pages 7,8 and 9.

In 30 Am. Jur. 2d at page 240 the general rule is stated as follows:

It has frequently been stated in broad general terms that a party is bound or concluded by his own testimony which is favorable to the adverse party---

In Brooks v. Stewart (Mo. 1960), 335 SW2d 104, 81 A.L.P.2d 516, the court stated:

When we say that a plaintiff is entitled to a favorable view of the whole evidence we do not mean that material facts testified to by plaintiff may be ignored. A plaintiff is bound by his own testimony.

In Tracy Loan & Trust Co. v. Openshaw Inv. Co. (Utah 1942), 132 P.2d 388 at 392, the Utah Supreme Court stated:

Ordinarily when a person contradicts his prior testimony because it appears to be to his advantage to do so, the veracity of such witness may become so questionable that it may require strong and convincing corroborative evidence to induce a court or jury to believe his subsequent

declarations. ---If there is substantial competent evidence which is relevant and material, a finding of the court will not be disturbed, although the court might well have found otherwise.

In this case only two persons are fully aware of the communications between them. Plaintiff - Appellee should be bound by her statements under oath which are favorable to defendant - Appellant.

3. Defendant - Appellants' brief cites the sworn testimony (Appellants' brief pgs. 10, 11, tr. 122, 123, 166, 167, 174, 182, 183) of both witnesses for plaintiff and defendants that the subject automobile could not have passed a Utah State Safety Inspection in the condition in which it was found to be in May of 1989.

In April of 1989 (a year after the purchase of the subject automobile) plaintiff had it inspected and it passed inspection. (Exh. D-13)

No witness in any way contradicted the above-referred testimony or attempted to attack the validity of Exh D-13.

An official act done pursuant to state authority is presumed to be proper and valid. Defendant was under no obligation to show the state inspection was properly performed. On the contrary, if there was a flaw in the inspection, it was up to the plaintiff to demonstrate this to the court.

In 30 Am. Jur. 2d at page 233, the general law is stated as follows:

It is often said that uncontradicted and unimpeached evidence must be taken as true in the sense that it cannot be arbitrarily disregarded or be disregarded as against a mere suspicion of untruth or falsity.

With respect to presumptions, the Utah Supreme Court in Re Swan's Estate, 293 P.2d 682, at 688, stated:

Some opinions in this court have held that the only effect of a presumption is to place on the disfavored party the burden of producing prima facie evidence to the contrary and thereupon the presumption is eliminated, and it is firmly established that such is the effect of many presumptions. However, we have also recognized that other presumptions are not so eliminated but have the effect of placing on the disfavored party the burden of persuading the fact finder that the facts are contrary to the presumed facts;---

As stated above, plaintiff - Appellee had the subject vehicle inspected in April of 1989, a year after she purchased it. It passed inspections. All witnesses - both for plaintiff and defendant - testified that it could not have passed inspection in the condition it was found to be in in May of 1989.

4. Plaintiff - Appellee refers to the testimony of David T. Gray to ~~refute~~ ^{refute} the argument that defendant - Appellants had a right to believe the subject automobile was in safe condition when it was sold to plaintiff.

As previously stated, David T. Gray was originally named by plaintiff as a defendant in this matter. He subsequently became employed by Less Jenson Collision Repair (plaintiff's witness), became a witness for plaintiff, and plaintiff did not seek to take judgment against him.

Prior to becoming a witness for plaintiff, David T. Gray sent an answer to plaintiff's complaint to plaintiff's attorney. In that complaint David T. Gray stated (in part):

I think Less Jenson's Collision Repair has put false accusations in plaintiff's head. I also understand that the original insurance bid on the vehicle had 3.0 labor hours on the frame repair, therefore the safety factor of this vehicle is false, it had more cosmetic damage than structural damage. I also believe that the right apron panel should have been replaced and the right quarter panel, but on a vehicle with a conventional frame, it didn't place any negligent danger to plaintiff.---

So in conclusion, I ask, why was the car aligned if the repair on the structure was negligent? (The car would not be able to be aligned). (emphasis added) (Exh. D-31)

Plaintiff presented evidence that a principle reason the subject automobile was unsafe was because it was of "unibody" construction. (Tr. 113-116, 118)


In his examination concerning why he had declared the subject vehicle to be safe, David T. Gray testified:

Q. by Mr. Martineau: When you wrote on this exhibit (Exh. 31):
I believed that the right apron panel should have been placed in the right quarter panel, but on a vehicle with a conventional frame, it didn't place any negligent danger on the plaintiff---

A. I think at that time particular time that I wrote that, I thought that car had a conventional frame under it, that it wasn't a unibody.
(Tr. 132)

Mr. David T. Gray was employed by defendants to repair the subject vehicle. (Tr. 125) He did the welding and repair thinking it had a conventional frame. It had a unibody. After it was repaired he thought it was safe and didn't think differently until he discovered his mistake. Any negligence attributable to repairing the subject vehicle as a conventional construction ~~rather~~ than "unibody" is directly attributable to David T. Gray and not the Appellants.

DATED this 7th day of October, 1992.


JAMES L. BARKER
Attorney for Appellants

MAILING CERTIFICATE

I hereby certify that four true and correct copies of the foregoing were mailed to the following, postage prepaid, this 7th day of October, 1992.

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