

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 : Brief of Appellee

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

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

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BRIEF OF APPELLEE

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APPEAL FROM THE JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT  
OF SALT LAKE COUNTY, UTAH  
THE HONORABLE SCOTT DANIELS, DISTRICT JUDGE

---

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ATTORNEYS FOR APPELLANT

FILED

SEP 10 1992

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#### **LIST OF PARTIES**

An additional defendant not shown on the case caption was David Gray, dba Metal Craft Auto Repair. Mr. Gray appeared pro se. The complaint against him was dismissed following the trial.

In addition to the attorneys listed on the cover page, Defendants were represented at the initial stages of this litigation by Robert C. Miner, Salt Lake City (R. 46, 129.)

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BRIEF OF APPELLEE

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**JURISDICTION**

This is an appeal from a final judgment of the district court and was within the original appellate jurisdiction of the Supreme Court conferred by Utah Code Ann. § 78-2-2(3)(j) (Supp. 1992). The case was transferred by the Supreme Court to this court, and jurisdiction is conferred on this court by Utah Code Ann. § 78-2a-3(2)(j) (Supp. 1992).

**ISSUES PRESENTED**

1. Does the evidence support the trial court's finding that defendant Kim Conover made false statements to plaintiff with intent to deceive? Appellate review is under a "clearly erroneous" standard. Mountain States Broadcasting Co. v. Neale, 783 P.2d 551, 553 (Utah Ct. App. 1989).



2. Is trial court's finding that plaintiff suffered a loss, and that the vehicle was defective and unsafe at the time she purchased it, supported by the evidence? Appellate review is under a "clearly erroneous" standard. Id.

3. Did the trial court abuse its discretion in ordering rescission of the transaction, even though the statute contemplates and the parties requested an award of damages? The judgment should be affirmed unless the trial court abused its discretion. See Dugan v. Jones, 615 P.2d 1239 (Utah 1980).

4. In ordering rescission, did the trial court abuse its discretion in failing to give defendants a specific credit for the use plaintiff had made of the vehicle? The judgment should be affirmed unless the trial court abused its discretion. Dugan v. Jones, 724 P.2d 955, 957 (Utah 1986).

5. Did the trial court abuse its discretion in awarding Plaintiff her attorney fees without requiring allocation to each alleged theory plead in the complaint? The judgment should be affirmed unless Defendants have shown an abuse of discretion. Dixie State Bank v. Bracken, 764 P.2d 985 (Utah 1988)

6. Is Plaintiff entitled to recover her attorney fees on appeal. This is an original request addressed to the sound discretion of this Court. See Management Services Corp. v. Development Associates, 617 P.2d 406 (Utah 1980).

### **DETERMINATIVE STATUTES**

Utah Code Ann. § 13-11-4 (Supp. 1992) and § 13-11-19 (1986) are reproduced in the appendix.

### **STATEMENT OF THE CASE**

A. Nature Of The Case. This is a civil action brought in the district court, seeking relief for damages relating to the sale of a used automobile.

B. Course Of Proceedings And Disposition Below.

Plaintiff filed her action on November 3, 1989 (R. 2-11.) Plaintiff filed a Second Amended Complaint on March 10, 1991. (R. 110-21.) Defendants answered on April 29, 1991 (R. 122-23.), and amended their answer on July 1, 1991. (R. 134.)

The case was tried to the court on September 3 and 4, 1991. (R. 136-38.) By direction of the trial court and stipulation of Defendants (R. 509-10), Plaintiff submitted evidence of her attorney fees by affidavit. (R. 140-72, 197-202.)

On September 12, 1992, Defendants filed a "Motion for More Definite Statement Re Attorneys Fees and Order of Court to Require Plaintiff, Insofar as Possible to Restore Defendant to Status Quo." (R. 173-76.) Plaintiff responded to the motion. (R. 225-31.)

On October 1, 1992, Plaintiff served a form of Findings of Fact and Conclusions of Law (R. 232-29) and a form of Judgment (R. 240-42) on Defendants. Defendants objected to the proposals (R. 203-07) and Plaintiff responded to the objections. (R. 219-22.) On

November 4, the trial court signed and entered the findings and judgment submitted by Plaintiff. (R. 232-29, 240-42.)

On December 20, 1992, Defendants filed a second document (R. 243-45) containing objections to Plaintiff's proposed findings and judgment, even though the findings and judgment had already been entered by the trial court.<sup>1</sup> This second round of objections was argued orally to the trial court on December 31, 1991. The court modified some of its findings, and ordered that any appeal could run from the date of the modified findings and conclusions. (R. 267.) An order formally vacating the findings and conclusions and judgment was entered March 4, 1992 (R. 316-18), after the Notice of Appeal had been filed. (R. 296-97.)

Amended Findings of Fact and Conclusions of Law (R. 268-75) and an Amended Judgment (R. 276-79) were entered January 23, 1992.<sup>2</sup> Defendants filed their Notice of Appeal on February 19, 1992. (R. 296-97.) Defendants have posted a bond to stay enforcement of the judgment pending this appeal. (R. 329-30.)

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<sup>1</sup>Rule 4-504(2), Utah Code of Judicial Administration, requires that objections to proposed findings be submitted within five days after service. The proper method to object to a document which has already been entered is to serve a motion under either Utah R. Civ. P. 52(b) or 59. Such motions must be served within 10 days of entry of judgment, and in this case should have been served no later than November 14, 1991.

<sup>2</sup>A second version of the Amended Judgment, which contained blanks for the judgments for attorney fees and costs, was entered on March 4, 1992. (R. 312-15.) It is evident that this later document was entered in error, as the earlier document (R. 276-79) is in the same form but has the blanks filled in.

C. Statement of Facts.

Plaintiff purchased a 1986 Nissan Sentra automobile from Kim Conover on April 19, 1988. Mr. Conover, a licensed automobile dealer, together with his wife, operated a business known as K & K Sales, and had purchased the vehicle from Western Affiliated Salvage. (R. 407.) The business engaged in the purchase, repair, and sale of used automobiles, and Mr. Conover had regularly purchased automobiles from the salvage yard. (R. 408.) The vehicle sold to Plaintiff had been wrecked and declared a total loss by the insurance company. (R. 408.)

Mr. Conover employed David Gray to perform some specific repairs to the vehicle, using used parts acquired by Mr. Conover. Mr. Gray recommended that the apron be replaced because it had been seriously damaged, and such frame parts lose their strength after being damaged that severely. (R. 490.) Mr. Conover instructed against making the necessary repair, and instead instructed Mr. Gray to simply square the apron as best he could. (R. 488.) Mr. Conover performed additional repairs himself on the vehicle's suspension. (Id.)

Consistent with his past practice (R. 409), Mr. Conover advertised the car for sale in the newspaper. The advertisement did not disclose that Mr. Conover was a dealer. (R. 383.) Plaintiff answered the advertisement in early April, 1988, and went, with her husband, to Mr. Conover's residence to look at the car. (R. 373.) Plaintiff asked Mr. Conover why he was selling the

car, and he answered that "they had several vehicles, and that his wife was pregnant and they needed another car." (R. 374.) Mr. Conover mentioned that he might be interested in purchasing Plaintiff's Ford Escort, stating that the reason for his interest was that "it would attach to the motor home and he could use it to tow it, use it for an extra vehicle." (R. 375.) He did not disclose that he was a car dealer nor that he was in the business of repairing wrecked automobiles and selling them. (R. 375.)

Plaintiff looked around for about two weeks, and ultimately notified Mr. Conover that she wanted to buy the car. (R. 374-75.) On April 19, 1988, she gave him a check for \$6,375.00, representing the difference between the value of the Escort and the asking price of the Nissan, and another check for \$30.00 for the taxes on the Escort. (R. 375-76.) During the transaction, Mr. Conover stated that he was an RV dealer and could thus facilitate the transfer of title and related paper work. (R. 379.) He "never did mention that he was a [car] dealer, as such." (Id.)

Following the payment, Mr. Conover for the first time partially disclosed the prior damage to the car, but stated only that "the car had, at one point, the right front fender bent and he had replaced that and the right front headlight." (R. 377-78.) Mr. Conover did not disclose that the car had been totaled in a wreck. (R. 378.)

About six months after the purchase, Plaintiff and her husband took the Nissan on a trip to Flagstaff, Arizona, for a family

wedding on October 22, 1988. Plaintiff's husband did some of the driving during the trip, and told Plaintiff the car badly need a wheel alignment. (R. 382.) Plaintiff also began to notice that as she "would go to either accelerate or decelerate, it would tug just slightly to one side . . . ." (Id.)

Within a week of returning from Flagstaff, Plaintiff took the car to a tire store to have the wheels aligned. (R. 382.) It worked better for a day or two, but then the same problem returned, so she returned to the tire store and had the car realigned. (Id.) The problem still wasn't fixed, so she took the car to another tire store, but with no greater success. She purchased and installed a total of six new tires in an effort to correct the problem and because of the abnormal wear on the tires. (R. 384.) Plaintiff paid \$491.88 to the tire store for the repairs and tires. (R. 388, exhibits P-3, P-4, P-5.)

During one the visits, the tire store determined that one of the ball joints had been installed incorrectly, and replaced it. (R. 466.) While replacing the ball joint, the mechanic discovered the frame was cracked. (R. 467.) Plaintiff then took her car to a Nissan dealer, who advised her the vehicle was unsafe to drive. (R. 386-87, exhibit P-7.) Plaintiff ultimately took the car to Les Jensen's Collision Repair. The mechanic, Ed Jensen, determined the vehicle had been subjected to a "fairly decent" side impact to the right front wheel (R. 475), and had been improperly repaired:

Q [Mr. Martineau] Now, let me ask you this: Was the part or parts of this vehicle

that were damaged in the collision part of or units of the unibody construction?

A [Ed Jensen] Critical units.

Q What were they, which were they?

A The right front side member--there are numerous pieces of a car that the manufacturer will build and sell to auto body facilities to replace. The right front frame member, there are things like baffles, reinforcements, isolated pieces that go on that, so you weld these together in a puzzle type situation. The front side member of the vehicle that holds the fender and actually holds to the cowl and welds to the frame, all of these pieces, in my opinion, should have been replaced.

Q Were they?

A They had never been replaced.

Q They had not been replaced?

A No.

Q What had been done with them?

A Well, they had been pulled, and I guess to some degree aligned to fit back in the rough configuration with the way the car should have been. There had been welds made. There had also been holes cut in some of the members that wouldn't have been there before. More or less, weakening the structure.

(R. 477.)

Mr. Jensen concluded the car was unsafe to drive (R. 484) and advised Plaintiff not to drive it. (R. 473.) Plaintiff commenced this action soon after to obtain appropriate relief for the defective and dangerous condition of the car.

### **SUMMARY OF ARGUMENT**

This appeal predominately challenges the trial court's factual findings, but Defendants' brief does not properly marshal the evidence in support of the findings. The evidence supports the findings that Kim Conover, a car dealer, purchased a wrecked automobile with the intent of repairing and reselling it, but that he sold it to Plaintiff under the pretence of being a private individual selling a family car. The evidence further shows that Mr. Conover took Plaintiff's car as a trade under the pretence that he would use it personally, although his real intent was to try to resell it to a university student. Mr. Conover failed to disclose that he was a dealer, and affirmatively tried to create the opposite impression, and failed to disclose that the car had been wrecked and improperly repaired. The evidence supports the finding of violations of the Utah Consumer Sales Practices Act.

The evidence further supports the finding that the damage to Plaintiff's car existed from the time she purchased it from Defendants. Plaintiff suffered a loss.

Although not requested by the parties, the restitution order made by the trial court was fair and was within the court's discretion. The court was not required, under the facts of this case, to use mathematical precision in returning the parties to the status quo.

The trial court properly awarded Plaintiff her attorney fees because Plaintiff was the prevailing party. The fact that



Plaintiff did not prevail on each alternative theory she had pleaded is irrelevant.

Plaintiff was awarded attorney fees below, and is entitled to an award of fees on this appeal.

## ARGUMENT

### POINT I

#### THE COURT'S FINDINGS OF A VIOLATION OF TWO SECTIONS OF THE DECEPTIVE PRACTICES ACT ARE AMPLY SUPPORTED BY EVIDENCE PRODUCED AT TRIAL.

Defendants claim the evidence did not support the trial court's finding that Kim Conover made false statements to Plaintiff with intent to deceive. The proper procedure for presenting such a claim, and the standard of appellate review, are set forth in Mountain States Broadcasting Co. v. Neale, 783 P.2d 551 (Utah Ct. App. 1989):

In order to challenge a trial court's findings of fact, a party "must marshal the evidence in support of the findings and then demonstrate that despite this evidence, the trial court's findings are so lacking in support as to be 'against the clear weight of the evidence,' thus making them 'clearly erroneous.'"

Id. at 553 (citations omitted, emphasis in original).

Defendants have not marshalled the evidence in support of the findings. The Mountain States court continued: "Appellants often overlook or disregard this heavy burden. When the duty to marshal is not properly discharged, we refuse to consider the merits of challenges to the findings and accept the findings as valid." Id.

(citations omitted). Besides failing to marshall the evidence, Defendants have also failed to present a "statement of the issues presented for review and the standard of appellate review for each issue with supporting authority for each issue." Utah R. App. P. 24(a)(5) (emphasis added). Because Defendants have not complied with these rules, this Court should decline to consider Defendants' arguments. Utah R. App. P. 24(k); Mountain States, supra, 783 P.2d at 553.

While is it not appellee's burden to marshall and discuss the evidence, a review of the court's findings and the supporting evidence demonstrates that the court's decision was not clearly erroneous under Utah Rule of Civil Procedure 52, and is fully supported by the evidence.

Defendants first challenge the finding that Defendants violated Utah Code Ann. § 13-11-4(c) (Supp. 1992), which states that a supplier commits a deceptive act or practice if the supplier, with intent to deceive, "indicates that the subject of a consumer transaction is new, or unused, if it is not, or has been used to an extent that is materially different from the fact." (emphasis supplied). The court stated from the bench:

I am finding there is a violation of Section 13-11-4(c) making it unlawful for a seller [sic] or supplier to indicate that the subject of the consumer transaction is new, or unused, if it is not, or has been used to an extent that is materially different from the fact.

I think the fact that the car was totally demolished almost, or was at least totalled out by the insurance company, is a material

fact that was different from the way that it had be [sic] represented to the plaintiff, and I think that that section was violated.

(R. 588.) The Court further clarified its ruling in written form in the Amended Findings of Fact and Conclusions of Law dated January 23, 1992. A somewhat lengthy citation to those written findings makes the trial court's decision regarding § 13-11-4(c) (Supp. 1992) clear.

9. . . . K & K Sales became fully aware, and was charged with full notice, of the fact that the subject vehicle had been severely damaged in an automobile accident to such an extent that the subject vehicle had been affiliated as a salvage vehicle.

10. Subsequent to October 12, 1987, K & K Sales made or caused to be made, certain repairs to the subject vehicle.

11. On or about April 19, 1988, K & K Sales, acting through Conover as its duly authorized agent, sold and conveyed the subject vehicle to plaintiff and in connection therewith, K & K Sales and Conover, with intent to deceive plaintiff, represented to plaintiff that the subject vehicle was a low mileage vehicle, that it had been repaired following an accident in which it had been involved, whereby it had only sustained damage to one of its front fenders, that the subject vehicle was in good condition and state of repair, that it could be operated safely, and that it was reasonable fit and fully operable for its intended use.

12. At the time K & K Sales and Conover sold the subject vehicle to plaintiff, K & K Sales and Conover knew and were charged with full knowledge (a) that the subject vehicle had sustained severe structural damage in the aforementioned accident, (b) that unless such damage had been properly and professionally repaired, the subject vehicle could not be operated safely and without the same consti-

tuting a severe hazard to its operator and the public at large, and (c) that the value of the subject vehicle, if not properly so repaired, would be but a fraction of the value of the subject vehicle had the aforementioned representations been true.

13. Plaintiff, in reasonably [sic] and foreseeable reliance upon the aforementioned representations and without knowledge of their falsity, purchased the subject vehicle.

14. Subsequent to plaintiff's purchase of the subject vehicle, plaintiff learned and became aware of the fact that K & K Sales and Conover had made or caused to be made certain repairs to the subject vehicle.

15. The aforementioned acts and breaches of duty on the part of K & K Sales and Conover constituted deceptive and unconscionable acts and practices under § 13-11-4 and 13-11-5 of the Sales Practices Act.

R. 306-08.

Each of these findings is supported by the evidence. Defendants do not challenge any finding specifically, but instead level a general charge that there was no evidence that Kim Conover misrepresented the condition of the automobile, nor that he had an intent to deceive.

Mr. Conover's testimony indicates that he was aware that the subject vehicle had been totalled. "Q. Did you understand it had been totalled by the insurance company?" A. "Yes, I understood the insurance company paid off a claim against this particular vehicle." (R. 408.) Marilyn Bloomer testified that at no time before the sale was there any mention of the fact that the car had been in any type of an accident, but that after the transaction had

been finished and as she was leaving, Mr. Conover indicated that the right front fender had been bent and replaced and the headlight had also been replaced. No indication was made that the car had been totalled, that it had had any major repair work done or any other indication of its diminished value. (R. 377-78.) This testimony regarding Mr. Conover's failure to mention in any way before the sale the extensive damage and repairs made to the vehicle, coupled with his later misrepresentation as to the extent of that damage, is more than sufficient to uphold the trial court's ruling that Mr. Conover made misrepresentations as to the value of the vehicle and represented it had been "used to an extent that is materially different from the fact."<sup>3</sup>

Further evidence on the question of disclosure also supports the trial court's finding of non-disclosure. Mr. Conover testified that he had never met Joseph Bloomer, Marilyn Bloomer's husband.

Q Who was in the car when she took the test drive?

A We had Ann Prosenice with us, I believe. Yeah.

Q Ann Prosenice. And who drove it?

A Marilyn drove the car.

Q And which seat were you in?

A I think I was setting in the back seat, but I can't recall, it has been over three years ago.

Q Could it have been her husband in the front seat?

A No. Never met her husband.

Q Was the condition with [sic] the Nissan discussed by you?

---

<sup>3</sup> This is particularly true in light of Rule 52(a)'s requirement that "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

A Yes, it was.

(R. 414.) Yet, this testimony is directly contradicted by that of Joseph Bloomer where he indicated:

Q Are you acquainted with Kim Conover?

A Yes.

Q Could you relate the circumstances under which you became acquainted with Mr. Conover?

A When my wife and I went to look at cars, we went to his home. I drove the little Escort we had up to the home, and we was looking for the address. And when we got there, Marilyn went to the door, and he came out, and we looked at the car. And so he wanted to know if we wanted to take a ride in it, and Marilyn got in the driver's side, I got in the right hand front seat, and Mr. Conover got in the back seat.

Q So you rode in the Nissan on that occasion?

A Yes, sir.

Q Was this before or on the date that Marilyn bought the vehicle?

A Before.

Q How long before?

A Couple days, probably.

Q Would it have been a couple of weeks?

A It might have. I'm not real positive on that exactly when she got the car.

Q Do you remember having been a party to any discussion with Mr. Conover on that occasion?

A Other than it was a family car. They wanted to get rid of it. He said his wife was pregnant and they needed something larger.

Q Was anything said about the vehicle having been damaged?

A No.

Q Was anything said about the price?

A Not then. No.

Q Not at that time?

A No.

(R. 498.) He then further testified that he would have wanted to look inside and out of the car if he had been told it had been hit.

(R. 499.) It is apparent that the trial court chose to credit Marilyn and Joseph Bloomer's testimony over that of Kim Conover. Such a decision was an appropriate use of the trial court's discretion as the ultimate factfinder, and gives no cause on appeal for a reversal or modification.

Defendants' next assertion on appeal is that defendant made no statement with the "intent to deceive," and that "the evidence was that he had every right to believe the subject vehicle was in safe condition." Brief of Appellant at 7. This claim is untenable. Extensive and consistent testimony at trial indicated that the repairs were done in slip shod fashion and that Kim Conover knew that additional repairs were needed. David Grey, the mechanic who did the original repairs on the vehicle, stated that he did only \$930.00 worth of repairs. (R. 489.) The repairs were specifically dictated by Mr. Conover, rather than by what the vehicle needed. (R. 486-87, 489.) For example, Mr. Gray believed that the apron panel should be replaced, and so informed Mr. Conover. (R. 488-89.) Mr. Conover was apparently unable to locate a used apron panel, and requested that Mr. Gray "just go ahead and square it up, you know, the best as possible." (R. 488.)

Mr. Gray further testified that if the vehicle had been intended for his own personal use, he would have "replaced a lot more parts." He explained that the frame parts, such as the apron

panel, "lose their strength after they have been damaged that severe." (R. 490. See also R. 493.)

Ed Jensen, a man who has spent his entire life in the autobody industry, testified even more forcefully as to the poor quality of the repairs. He first testified that he would consider the repairs to be "marginal." (R. 472.) He further testified that "it was obvious that something was wrong, had been repaired improperly. And if she was having that much trouble as they had described to me, I suggested they didn't drive it any further . . . ." Id. He then testified that "I moved the wheel back and forth, which indicated there were major problems, either something lost or one thing or another." And that if there had been nothing wrong the wheel would not have moved freely in that fashion.<sup>4</sup> (R. 474.) He then testified "And then, of course, we noted that there were improper repairs done to the car. Repairs that were very obviously not -- oh, wouldn't be kosher with manufacturing processing of returning the car to its pre-collision condition." (R. 475.) Then, discussing trial exhibit P-6, he expressed his opinion that that list of repairs should have been made to make the car safe. (R. 478.) He finished his testimony by stating that "there were no signs of damage to the vehicle other than that what had been repaired" (R. 482), thereby rebutting the defense inference that the damage had occurred after the sale. Examining this extensive

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<sup>4</sup> Mervin Brown, a front-end mechanic for Big-O Tire in Centerville, testified that a ball joint had been installed incorrectly. (R. 466.)



testimony in light of the fact that appellant did much of the work himself, and the fact that a safety inspection does not check for these kinds of latent defects, it is clear the trial court had ample evidence in the record to support its decision.

Defendants also challenges the finding that Defendants violated Section 13-11-4(d), which states that "a supplier commits a deceptive act or practice, if the supplier, with intent to deceive:

(d) indicates that the subject of a consumer transaction is available to the consumer for a reason that does not exist[.]

Defendants' sparse argument (slightly less than a full page) makes no serious attempt to marshall the evidence and merely asserts that Mrs. Bloomer was aware that appellant was a dealer. Appellants' Brief at 8-9. Appellant fails to address both the court's actual ruling and the underlying rationale supporting that ruling. The court's oral ruling indicates that the court found a violation of Section 13-11-4(d) because Mr. Conover represented he wished to sell the car because of a family decision, when in fact he was selling it as a dealer. The more specific language is thus:

Also Section D, making it unlawful for the supplier to indicate that the subject of the consumer transaction is available to the consumer for a reason that does not exist, I believe the evidence in this case, as I say, it would indicate that Mr. Conover indicated that the reason that he wanted to sell it was because it was a family car. His wife was pregnant. He needed to get rid of it. For that reasons, all those things were technically true. The fact he is a dealer in automobiles, was in the business of repairing them

and selling them, that was not disclosed to plaintiff, I think that is a violation of section D.

(R. 588. See also R. 597.) Careful reading of this language indicates that while the facts Mr. Conover stated were "technically true," the court felt that the actual reason for which Mr. Conover was letting the car out for sale was that he was a dealer in those automobiles and was simply seeking to make a profit.

Contrary to Defendants' assertion, Mr. Conover never told Marilyn Bloomer that he was a dealer in used automobiles, only that he dealt in recreational vehicles.

Q Up to this time, were you aware that he was a licensed motor vehicle dealer?

A No.

(R. 375.) She later testified

. . . and at the point that I went to give him the check for \$6,375.00, he let me know that he was an RV dealer, never did mention that he was a dealer, as such.

Q What did he say about being an RV dealer?

A He said that because he was an RV dealer, he could process it more cheaply and that would save me on the taxes or license fees.

(R. 379 (emphasis supplied).) A reading of the entire context of Mrs. Bloomer's comments provides more than adequate support for the explicit finding that Kim Conover failed to disclose he was in the business of repairing and selling automobiles.

Mr. Conover failed to disclose his intention to sell the Ford Escort which he accepted as part of the purchase price, and instead

told Plaintiff a story that he intended to use it for personal use. Marilyn Bloomer testified that she was given trade in value for the Escort because appellant indicated to her that it would attach to the back of his motorhome and he could use it as an extra vehicle. (R. 375.) Yet Mr. Conover testified that he wanted the Escort because university students would be prone to buy it. (R. 412.)

Mr. Conover also testified that his intent to sell the Nissan existed from the time he acquired it, which was contrary to his statement to Plaintiff that he formed that intent later:

Q After you acquired this vehicle, did you put it up for sale?

A No. I had to get this vehicle repaired before I could sell it. It had been damaged on the right side of the vehicle.

Q But upon completion of those repairs, you did put it for sale; did you not?

A Yeah. A couple of months afterwards, I had been driving -- my wife had been using it for errands around town.

He then further indicated that he advertised vehicles in the paper 30-40% of the time.

Q Is there a practice that you had followed in your business in selling vehicles?

A Yeah. Probably, oh 30, 40% of them. A lot of time I have them pre-sold. This particular vehicle, yes, I had advertised it in the paper.

Q It wasn't uncommon at this time for you to discuss in the paper and sell them by that means; isn't that true?

A No. It is not uncommon.

Q What telephone number did you use in the advertisement?

A I used my home telephone number, 943-1114, area code 801.

A careful reading of this testimony, coupled with the trial court's discretion in crediting testimony, leaves one with the definite impression and fair inference that Mr. Conover sold this vehicle in the same manner as he sold other vehicles out of his office. His wife may have used the vehicle, but it is common for dealers to make personal use of vehicles in their possession while they are waiting to be sold. Therefore, the trial court's decision, that Mr. Conover was selling the vehicle as part of his used car business, is supported by the evidence and not subject to reversal.

#### **POINT II**

#### **PLAINTIFF SUFFERED A LOSS BY REASON OF DEFENDANTS' FRAUDULENT FAILURE TO DISCLOSE THE DEFECTIVE AND UNSAFE NATURE OF THE VEHICLE.**

Defendants claim that plaintiff is precluded from recovering under the Utah Consumer Sales Practices Act, because she did not suffer a loss. In support of their claim, defendants cite only the evidence supporting defendants and contend that the vehicle had passed two safety inspections, and that the damage could have been caused by a "curb, gutter, chuckhole, any number of things." (Defendants' Brief at p. 11.) Defendants fail to acknowledge the compelling contrary evidence, which amply supports the finding of loss.

Defendants rely principally upon the testimony that the damage could have been caused by hitting a curb, chuckhole, etc. An

initial failing of this claim is that Marilyn Bloomer testified that she never hit any curb, chuckhole, or other similar obstruction. (R. 551.) A second infirmity with the argument is that the problems became apparent only a few months after purchase. Mrs. Bloomer testified that about six months after purchasing the vehicle, it began to tug slightly to one side. Her husband drove it briefly at this time and told her that it badly needed a wheel alignment. (R. 381-82.) Finally, Ed Jensen, an auto body expert, testified that there was no evidence that the vehicle had ever struck a curb or other obstruction with sufficient force to do any damage, and further testified that there were no signs of any damage to the vehicle other than the initial frame repairs performed at the request of Kim Conover. (R. 481-82.) This testimony was corroborated by David Gray, who was responsible for performing the initial repairs. He testified that hitting a curb or chuckhole would likely have caused additional damage to the frame because the frame had lost its strength in the initial collision and had not been properly repaired. (R. 490.)

Defendants also claim that the fact the vehicle passed two safety inspections shows that it was safe when Mrs. Bloomer purchased it and that the problems did not arise until after the second inspection. Defendants did not present any evidence, however, concerning the competency of the persons who performed the inspections. (R. 521.) The testimony to the effect that the vehicle would not have passed an inspection in the damaged

condition was contingent upon the inspection being performed properly by a competent inspector. (R. 528-29, 534-35, 544.)

The trial court specifically found that the structural damage to the vehicle was caused prior to the time Mrs. Bloomer purchased it, and that the damage existed at the time of her purchase. (R. 306-08.) This finding is supported by the evidence and must therefore be affirmed.

### POINT III

#### THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN CRAFTING A FAIR AND EQUITABLE DECREE.

Plaintiff's Second Amended Complaint sought an award of damages, or "such other and further relief as may appear just and equitable in the premises." (R. 120.) 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. Defendants do not challenge that rescission is an appropriate remedy for fraud, but claim instead that rescission is not a permissible remedy under the Utah Consumer Sales Practices Act, and further, that the decree of rescission did not give proper credit for the use plaintiff had made of the vehicle. Both claims should be rejected by this court.

The Utah Consumer Sales Practices Act does, as argued by defendants, provide that a consumer who suffers damage from a violation of the Act may be awarded damages. Utah Code Ann. § 13-11-19(2) (1986). The Act also provides, however, that "[t]he

remedies of this Act are in addition to remedies otherwise available for the same conduct under state or local law . . . ." Utah Code Ann. § 13-11-23 (1986). Rescission is an appropriate remedy for fraud under Utah law. Dugan v. Jones, 615 P.2d 1239, 1247 (Utah 1980) ("Dugan I"). Although rescission was not the primary relief plaintiff requested, plaintiff had requested that the court order such other relief as was appropriate. The court did not abuse its discretion in determining that rescission was the appropriate remedy in this case.

Defendants also claim that the decree of rescission improperly failed to return the parties to the status quo ante. Specifically, defendants claim that they were entitled to an offset for the use plaintiff made of the vehicle.

Plaintiff does not quarrel with the general proposition that "[t]o rescind a partially executed contract, the party seeking rescission usually must be able to place the other party in the same position that existed before the execution of the contract." 50 West Broadway Associates v. Redevelopment Agency of Salt Lake City, 784 P.2d 1162, 1170 (Utah 1989) (emphasis added). The Utah Supreme Court has also observed, however, as follows:

The rule that the rescinding party must restore the opposing party to the status quo

is not a technical rule, but rather it is equitable, and requires practicality in adjusting the rights of the parties. How this is to be accomplished, or indeed whether it can, is a matter which is within the discretion of the trial court under

the facts as found to exist by the  
trier of fact.

Dugan v. Jones, 724 P.2d 955, 957 (Utah 1986) ("Dugan II") (quoting Smith v. Huber, 666 P.2d 1122 (Colo. App. 1983)).

In Dugan II, the buyers claimed fraud in the sale of real property and stopped making payments. The sellers sued to foreclose the note and mortgage executed by the buyers, and the buyers counterclaimed for fraud. The buyers ultimately abandoned the premises, and the sellers retook possession. The trial court awarded the buyers judgment for the payments they had made on the contract, but did not award any interest. The court denied the sellers' request for an offset for the reasonable rental value of the property while the buyers were in possession. The sellers appealed asserting, among other things, that the trial court erred in failing to award sellers the reasonable rental value of the property. The Utah Supreme Court held:

While assigning error to the trial court's failure to award them rent, plaintiffs fail to acknowledge that the court also disallowed defendants interest on payments made on the purchase price for the period before rescission on the expressly stated ground that defendants had the use and possession of the property, although plaintiffs had the use of defendants' money. That finding itself implies that the trial court did in fact compensate plaintiffs for the loss of use and possession of their property. Since it was difficult to arrive at a fair rental value, given the limited use value of the store and the sparsely populated area where the store was located, that financial adjustment seems eminently fair and equitable.

Dugan II, 724 P.2d at 957.



Of similar effect is the case of Forsythe v. Elkins, 216 Mont. 108, 700 P.2d 596 (1985). This case was cited approvingly by the Utah Supreme Court in Dugan II, 724 P.2d at 957, as an example of an exception to the general rule that the parties be restored to the status quo. The plaintiffs in that action entered into an oral agreement to jointly purchase property with the defendants. Part of the agreement was that each would be able to occupy trailer residences on the property. The defendants later breached the agreement, and the plaintiffs sued for rescission. The trial court rejected the rescission claim because the plaintiffs had not tendered their return of their interest in the property and had remained in occupancy of the property, but held that plaintiffs were entitled to recover the principal portion of payments they had made towards the property, subject to an offset to defendants for the reasonable rental value of the plaintiffs' occupancy of the property.

The Montana Supreme Court reversed and held the plaintiffs were entitled to rescission. The court held that although restoration to the status quo was generally required, "absolute and literal restoration is not required, it being sufficient if restoration is such as is reasonably possible or as may be demanded by the equities of the case." 700 P.2d at 601. The court held that under the equities of that case, the defendants should refund all payments, both the principal and interest portions, made by the plaintiffs, together with interest on those payments from the time

of rescission, and further held that the defendants were not entitled to any credit for the plaintiffs' occupancy of the premises up to the time of rescission. Id.

The trial court's decision in the instant case was likewise fair under the particular equities of this case. The trial court awarded plaintiff judgment against defendants for all payments plaintiff had made for the purchase of the automobile and ordered plaintiff to return the automobile to defendants in its present condition. Although the court did not make any adjustment for the use plaintiff had made of the automobile, the court likewise did not require defendants to compensate plaintiff for the many dollars she spent in attempting to repair the vehicle and for the six new tires she put on the vehicle. Plaintiff testified that problems with the vehicle started about six months after she purchased it, and continued for the remainder of the time she had the vehicle. It was well within the trial court's discretion to conclude that any benefit plaintiff received from use of the defective and troublesome vehicle was offset by the money she paid in attempting to have the vehicle repaired. It cannot be said that the trial court abused its discretion under the equities of this case.

#### **POINT IV**

#### **THE ATTORNEY FEE AWARD WAS WITHIN THE COURT'S DISCRETION.**

Plaintiff's Complaint sets forth several alternative theories under which plaintiff was entitled to relief and sought an award of

damages under each claim. The trial court rejected some of the theories but awarded damages for the violation of the Utah Consumer Sales Practices Act. Defendants now make the novel argument that because some of the alternative theories were not successful, plaintiff was required to allocate her attorney fees to each individual claim for relief.

Defendants have set forth no law nor meaningful argument in support of their claim. The Utah appellate courts have consistently held that an appellate court will not reach the merits of a claim which is not supported by adequate legal analysis and case citations. The courts have declined to rule on issues where the party's brief "wholly lacks legal analysis and authority to support [the] argument," stating that "Rule 24(a)(9) of the Rules of the Utah Supreme Court requires that the argument section of a brief 'contain the contentions of the [party] with respect to the issues presented and the reasons therefor, with citations . . . . A brief must contain some support for each contention." State v. Wareham, 772 P.2d 960, 966 (Utah 1989)<sup>5</sup> (quoting State v. Amicone, 689 P.2d 1341, 1344 (Utah 1984) (citations omitted, emphasis in original). See also State v. Ortiz, 782 P.2d 959, 962 (Utah Ct. App. 1989) (where defendant provided no analysis, citation to the record, or citation to case authority, the court would not reach substantive claim). As in Marchant v. Park City, 771 P.2d 677, 682 (Utah Ct.

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<sup>5</sup>Wareham relies on a previous version of Rule 24(a)(9) which is substantially the same as the current version of the Rule.)

App. 1989), aff'd, 788 P.2d 520 (Utah 1990), this Court should not "consider conclusory arguments without citation to either the record or cases involving pivotal issues."

If the court does decide to address the merits of defendants' claim, the claim should nonetheless be rejected. Utah Code Ann. § 13-11-19 authorizes an award of reasonable attorney fees to the prevailing party if "an action under this section has been terminated by a judgment or required by the court to be settled under Section 13-11-21(1)(a) [relating to class actions]." Plaintiff brought an action under § 13-11-19 and prevailed in that action, and the action was terminated by a judgment. Plaintiff is accordingly entitled to her reasonable attorney fees reasonably incurred in pursuing the action.

Plaintiff's counsel would have been derelict in his representation of plaintiff if he had not alleged all possible theories under which plaintiff could recover. Pursuing each of those theories was part of the "work reasonably performed" in pursuit of the action under the Consumer Sales Practices Act. Defendants have failed to show where the trial court abused its discretion in making the award.

#### **POINT V**

#### **PLAINTIFF IS ENTITLED TO HER ATTORNEY FEES INCURRED ON APPEAL.**

Plaintiff was awarded attorney fees below pursuant to Utah Code Ann. § 13-11-19(5) (1986). Where attorney fees were awarded

below, they should similarly be awarded on appeal. Management Services Corp. v. Development Associates, 617 P.2d 406 (Utah 1980). The burden is on defendants to show a reason to depart from this general rule. Watson v. Watson, Case No. 910223-CA, 1992 WL 207682 (Utah Ct. App. Aug 24, 1992). Defendants have not shown any reason for departing from this general rule, and plaintiff is not aware of any.

#### CONCLUSION

The evidence amply supports the trial court's findings. The equitable award crafted by the trial court was fair under the circumstances of this case and within the court's discretion. The Judgment and Decree should be affirmed in all respects, and plaintiff should be awarded her attorney fees and costs on appeal.

DATED this 8<sup>th</sup> day of September, 1992.

RAY G. MARTINEAU

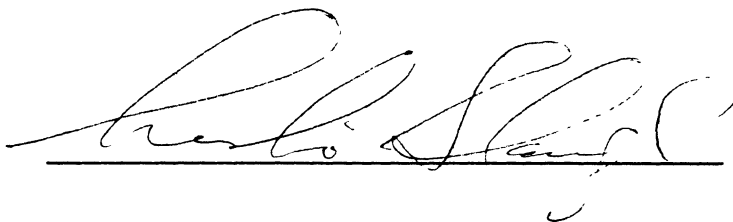
A handwritten signature in black ink, appearing to read "Leslie W. Slauch", is written over a horizontal line.

LESLIE W. SLAUGH, for:  
HOWARD, LEWIS & PETERSEN  
Attorneys for Plaintiff

**MAILING CERTIFICATE**

I hereby certify that four true and correct copies of the foregoing were mailed to the following, postage prepaid, this 8<sup>th</sup> day of September, 1992.

James L. Barker, Esq.  
2452 Emerson Avenue  
Salt Lake City, Utah 84108

A handwritten signature in cursive script, appearing to read "James L. Barker", is written over a horizontal line.

s:bloomer.bf

## APPENDIX "A"

Amended Findings of Fact and Conclusions of Law

RAY G. MARTINEAU (#2105)  
3098 Highland Drive, Suite 450  
Salt Lake City, Utah 84106  
Telephone: (801) 486-0200

**FILED DISTRICT COURT**  
Third Judicial District

JAN 23 1992

Attorney for Plaintiff

By [Signature] CLERK  
GALT LAKE COUNTY  
Deputy Clerk

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

MARILYN J. BLOOMER,	)	
	)	
Plaintiff,	)	AMENDED
	)	FINDINGS OF FACT AND
	)	CONCLUSIONS OF LAW
vs.	)	
	)	
KIM EDWARD CONOVER; KIM	)	
EDWARD CONOVER and KAREN JANE	)	
CONOVER, a Utah General	)	
Partnership dba K & K SALES;	)	
and WESTERN SURETY COMPANY,	)	
a Corporation; and DAVID GRAY,	)	Civil No. 890906666 CV
dba METAL CRAFT AUTO REPAIR,	)	
	)	(Judge Scott Daniels)
Defendants.	)	

The above entitled cause came on regularly for trial before the court sitting without a jury on September 3, 1991 at 9:00 o'clock a.m. the plaintiff appearing in person and by and through her attorney Ray G. Martineau, the defendant Kim Edward Conover appearing in person and said defendant and the defendants Karen Jane Conover, K & K Sales and Western Surety Company appearing by and through their attorney James L. Barker Jr. and the defendant David Gray appearing in person pro se, and the Court having heard the testimony of witnesses and



having considered a number of written exhibits that were introduced into evidence and the Court having received the Affidavit and Supplemental Affidavit of plaintiff's attorney regarding his attorney's fees and costs expended on behalf of plaintiff, and the defendants having filed their Motion For More Definite Statement Re Attorneys Fees And Order Of Court To Require Plaintiff, Insofar As Possible To Restore Defendant To Status Quo, and plaintiff having filed her response thereto and the defendant Kim Edward Conover having filed Defendant Kim Edward Conover's Objection To Plaintiff's Findings Of Fact And Conclusions Of Law And Judgment And Reply To Plaintiff's Response To Defendant's Motion Re Attorney's Fees And Returning Parties To Status Quo and the Court having heretofore made and entered its Order Vacating Findings Of Fact And Conclusions Of Law And Judgment herein and the Court having heard and considered the arguments, statements and stipulations of counsel and being fully advised in the premises and good cause appearing therefor hereby makes and enters the following Amended Findings of Fact and Conclusions of Law.

AMENDED FINDINGS OF FACT

1. Plaintiff is now and at all material times herein has been a resident of Salt Lake County, State of Utah.
2. Defendant Kim Edward Conover ("Conover") is now and at all material times herein has been a "supplier" under

the Utah Consumer Sales Practices Act ("Sales Practices Act") and a resident of Salt Lake County, State of Utah.

3. Defendant K & K Sales ("K & K Sales") is a Utah General Partnership, consisting of Kim Edward Conover and Karen Jane Conover as its general partners, that was at all material times herein a duly licensed Motor Vehicle Dealer under and pursuant to the Utah Motor Vehicle Act ("Motor Vehicle Act"), Title 41, Utah Code Ann., and a "supplier" under the Utah Consumer Sales Practices Act ("Sales Practices Act"), Title 13, Chapter 11, Utah Code Ann. (1987), whose principal office and place of business in now and at all material times herein has been located in Salt Lake County, State of Utah.

4. Defendant Western Surety Company ("Western") is a corporation organized and existing under and by virtue of the laws of the State of South Dakota who at all material times herein has been duly authorized to transact, and who has in fact at all material times herein transacted, business as a surety company in the State of Utah.

5. Defendant David Gray ("Gray") is now and at all material times herein has been a resident of Salt Lake County, State of Utah who at all material times herein transacted business under the assumed, fictitious and unregistered name of Metalcraft Auto Repair.

6. Jurisdiction over the subject matter of and par-

ties to this action is properly vested and exists in this Court pursuant to the provisions of Title 78, Chapter 3, Utah Code Ann. (1986).

7. Venue of this action properly rests in this Court pursuant to the provisions of Title 78, Chapter 13, Utah Code Ann. (1953).

8. As a material and essential requirement for the issuance and continued validity of the license of K & K Sales to act as a Motor Vehicle Dealer under and pursuant to the Motor Vehicle Act, K & K Sales was required, pursuant to the provision of Section 41-3-16 of the Motor Vehicle Act, to post a certain Bond of Motor Vehicle Dealer (Bond No. 58270937) issued by Western in the penal sum of \$20,000.00, which bond was in full force and effect at all material times herein.

9. On or about October 12, 1987 K & K Sales acquired that certain 1986 Nissan Stanza motor vehicle, VIN JN8HM05Y5GX005738 ("Subject Vehicle"), from Western Affiliated Salvage ("Affiliated") and in connection therewith Affiliated advised K & K Sales, and K & K Sales became fully aware, and was charged with full notice, of the fact that the Subject Vehicle had been severely damaged in an automobile accident to such an extent that ~~the~~<sup>it</sup> Subject Vehicle had been acquired by Affiliated as a salvage vehicle.

10. Subsequent to October 12, 1987 K & K Sales made

or caused to be made certain repairs to the Subject Vehicle.

11. On or about April 19, 1988 K & K Sales, acting through Conover as its duly authorized agent, sold and conveyed the Subject Vehicle to plaintiff and in connection therewith K & K Sales and Conover, with intent to deceive plaintiff, represented to plaintiff that the Subject Vehicle was a low mileage vehicle, that it had been repaired following an accident in which it had been involved whereby it had only sustained damage to one of its front fenders, that the Subject Vehicle was in good condition and state of repair, that it could be operated safely and that it was reasonably fit and fully operable for its intended use.

12. At the time K & K Sales and Conover sold the Subject Vehicle to plaintiff, K & K Sales and Conover knew and were charged with full knowledge (a) that the Subject Vehicle had sustained severe structural damage in the aforementioned accident, (b) that unless such damage had been properly and professionally repaired the Subject Vehicle could not be operated safely and without the same constituting a severe hazard to its operator and the public at large, and (c) that the value of the Subject Vehicle, if not properly so repaired, would be but a fraction of the value the Subject Vehicle had the aforementioned representations been true.

13. Plaintiff, in reasonably and foreseeable reliance

upon the aforementioned representations and without knowledge of their falsity, purchased the Subject Vehicle.

14. Subsequent to plaintiff's purchase of the Subject Vehicle, plaintiff learned and became aware of the fact that K & K Sales and Conover had made or caused to be made certain repairs to the Subject Vehicle.

15. The aforementioned acts and breaches of duty on the part of K & K Sales and Conover constituted deceptive and unconscionable acts and practices under Section 13-11-4 and 13-11-5 of the Sales Practices Act.

16. As a proximate and foreseeable consequence of the aforementioned acts and breaches of duty on the part of K & K Sales and Conover, plaintiff has suffered and will continue to suffer recoverable actual damages in the amount of \$7,175.00 which plaintiff is entitled to recover from K & K Sales and Conover, and each of them, in this proceeding, together with plaintiff's costs in the amount of \$ 450.00 and attorney's fees in the amount of \$ 9,500.00, which plaintiff is entitled to recover from K & K Sales and Conover, and each of them, in this proceeding.

17. Western is liable to plaintiff under and pursuant to the provisions of the Motor Vehicle Act, the Sales Practices Act and the aforementioned Bond for any and all sums for which plaintiff is awarded judgment herein against K & K Sales and

Conover, or any of them, including costs and attorney's fees.

18. The defendants Kim Edward Conover and K & K Sales did not violate the Federal Act.

19. The defendant David Gray did not violate the provisions of the Federal Act, the Motor Vehicle Act or the Sales Practices Act.

From the foregoing Findings of Fact the Court makes and enters the following:

#### CONCLUSIONS OF LAW

1. Jurisdiction over the parties to and subject matter of these proceedings is properly vested in this Court and the venue of this action properly rests in this Court.

2. In connection with the sale of the Subject Vehicle to plaintiff, defendants Kim Edward Conover and K & K Sales, violated the provisions of the Sales Practices Act with the "intent to deceive" plaintiff.

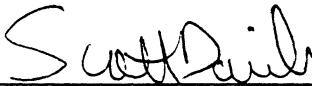
3. The most appropriate remedy in these proceedings is in the equitable nature of rescission whereby plaintiff should be awarded judgment against the defendants, and each of them, for the sum of \$7,175.00 together with plaintiff costs in the amount of \$ 450.00 and attorney's fees in the amount of \$ 9,500.00, and whereby the plaintiff should be ordered to deliver the Subject Vehicle in its present condition, together with the title thereto to K & K Sales upon the payment and

satisfaction of the sums that are due to her as hereinabove stated.

4. Plaintiff is not entitled to recover punitive damages as against the defendants.

5. Defendant David Gray is entitled to a dismissal with prejudice of all claims that have been asserted against him in this proceeding.

DATED this 23 day of January, 1992.



District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Findings Of Fact And Conclusions Of Law was served upon the following named individuals by hand delivering a copy thereof, at the address shown below this 31 day of December, 1991:

James L. Barker, Jr.  
2452 Emerson Avenue  
Salt Lake City, Utah 84108



APPENDIX "B"

Amended Judgment



RAY G. MARTINEAU (#2105)  
3098 Highland Drive, Suite 450  
Salt Lake City, Utah 84106  
Telephone: (801) 486-0200

Attorney for Plaintiff

FILED DISTRICT COURT  
Third Judicial District

JAN 23 1992

By S. Daniels  
SALT LAKE COUNTY  
Deputy Clerk

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

---

MARILYN J. BLOOMER,

Plaintiff,

vs.

KIM EDWARD CONOVER; KIM  
EDWARD CONOVER and KAREN JANE  
CONOVER, a Utah General  
Partnership dba K & K SALES;  
and WESTERN SURETY COMPANY,  
a Corporation; and DAVID GRAY,  
dba METAL CRAFT AUTO REPAIR,

Defendants.

AMENDED JUDGMENT

2169744

Civil No. 890906666 CV

(Judge Scott Daniels)

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The above entitled cause came on regularly for trial before the court sitting without a jury on September 3, 1991 at 9:00 o'clock a.m. the plaintiff appearing in person and by and through her attorney Ray G. Martineau, the defendant Kim Edward Conover appearing in person and said defendant and the defendants Karen Jane Conover, K & K Sales and Western Surety Company appearing by and through their attorney James L. Barker Jr. and the defendant David Gray appearing in person pro se, and the Court having heard the testimony of witnesses and

having considered a number of written exhibits that were introduced into evidence and the Court having received the Affidavit and Supplemental Affidavit of plaintiff's attorney regarding his attorney's fees and costs rendered and incurred on behalf of plaintiff, and the defendants having filed their Motion For More Definite Statement Re Attorneys Fees And Order Of Court To Require Plaintiff, Insofar As Possible To Restore Defendant To Status Quo and Defendant Kim Edward Conovers Objection To Plaintiff's Findings Of Fact And Conclusions Of Law And Judgment, and Reply to Plaintiff's Response To Defendant's Motion Re Attorney's Fees And Returning Parties To Status Quo and the Court having heretofore made and entered its Order Vacating Findings Of Fact And Conclusions Of Law and Judgment herein, and the Court having heard and considered the arguments, statements and stipulations of counsel and being fully advised in the premises and good cause appearing therefor and the Court having heretofore entered its Amended Findings of Fact and Conclusions of Law herein.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff be and she is hereby granted judgment against the defendants Kim Edward Conover, Kim Edward Conover and Karen Jane Conover a Utah General Partnership dba K & K Sales, and Western Surety Company, and each of them, for the sum of \$7,175.00 together with costs in the amount of \$ 450.00 and attorney's

fees in the amount of \$ 9,500.00.

IT IS HEREBY FURTHER ORDER, ADJUDGED AND DECREED that upon the payment and satisfaction in full of the sums due plaintiff as above provided, plaintiff shall deliver the motor vehicle that is the subject of these proceedings in its present condition together with the title thereto to the defendant K & K Sales.

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that all claims asserted against the defendant David Gray in the above entitled proceedings may be and the same are hereby dismissed with prejudice.

"AND IT IS FURTHER ORDERED THAT THIS JUDGMENT SHALL BE AUGMENTED IN THE AMOUNT OF REASONABLE COSTS AND ATTORNEY'S FEES EXPENDED IN COLLECTING SAID JUDGMENT BY EXECUTION OR OTHERWISE AS SHALL BE ESTABLISHED BY AFFIDAVIT."

DATED this 23 day of January, 1992.



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District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Amended Judgment was served upon the following named individual by hand delivering a copy thereof, at the address shown below this 31 day of December, 1991:

James L. Barker, Jr.  
2452 Emerson Avenue  
Salt Lake City, Utah 84108

*Ray S. Martinian*

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APPENDIX "C"

Utah Code Ann. § 13-11-4 (Supp. 1992)

#### 13-11-4. Deceptive act or practice by supplier.

(1) A deceptive act or practice by a supplier in connection with a consumer transaction violates this chapter whether it occurs before, during, or after the transaction.

(2) Without limiting the scope of Subsection (1), a supplier commits a deceptive act or practice if the supplier, with intent to deceive.

(a) indicates that the subject of a consumer transaction has sponsorship, approval, performance characteristics, accessories, uses, or benefits, if it has not,

(b) indicates that the subject of a consumer transaction is of a particular standard, quality, grade, style, or model, if it is not,

(c) indicates that the subject of a consumer transaction is new, or unused, if it is not, or has been used to an extent that is materially different from the fact;

(d) indicates that the subject of a consumer transaction is available to the consumer for a reason that does not exist,

(e) indicates that the subject of a consumer transaction has been supplied in accordance with a previous representation, if it has not;

(f) indicates that the subject of a consumer transaction will be supplied in greater quantity than the supplier intends;

(g) indicates that replacement or repair is needed, if it is not;

(h) indicates that a specific price advantage exists, if it does not;

(i) indicates that the supplier has a sponsorship, approval, or affiliation he does not have,

(j) indicates that a consumer transaction involves or does not involve a warranty, a disclaimer of warranties, particular warranty terms, or other rights, remedies, or obligations, if the representation is false;

(k) indicates that the consumer will receive a rebate, discount, or other benefit as an inducement for entering into a consumer transaction in return for giving the supplier the names of prospective consumers or otherwise helping the supplier to enter into other consumer transactions, if receipt of the benefit is contingent on an event occurring after the consumer enters into the transaction,

(l) after receipt of payment for goods or services, fails to ship the goods or furnish the services within the time advertised or otherwise represented or, if no specific time is advertised or represented, fails to ship the goods or furnish the services within 30 days, unless within the applicable time period the supplier provides the buyer with the option to either cancel the sales agreement and receive a refund of all previous payments to the supplier or to extend the shipping date to a specific date proposed by the supplier, but any refund shall be mailed or delivered to the buyer within ten business days after the seller receives written notification from the buyer of the buyer's right to cancel the sales agreement and receive the refund,

(m) fails to furnish a notice of the purchaser's right to cancel a direct solicitation sale within three business days at the time of purchase if the sale is made other than at the supplier's established place of business pursuant to the supplier's mail, telephone, or personal contact and if the sale price exceeds \$25, which notice shall be a conspicuous statement written in bold type, in immediate proximity to the space reserved for the signature of the buyer, as follows: "YOU, THE BUYER, MAY CANCEL THIS CONTRACT AT ANY TIME PRIOR TO MIDNIGHT OF THE THIRD BUSINESS DAY AFTER THE DATE OF THE TRANSACTION",

(n) promotes, offers, or grants participation in a pyramid scheme as defined under Title 76, Chapter 6a; or

(o) represents that the funds or property conveyed in response to a charitable solicitation will be donated or used for a particular purpose or will be donated to or used by a particular organization, if the representation is false

APPENDIX "D"

Utah Code Ann. § 13-11-19 (1986)

### **13-11-19. Actions by consumer.**

(1) Whether he seeks or is entitled to damages or otherwise has an adequate remedy at law, a consumer may bring an action to:

(a) obtain a declaratory judgment that an act or practice violates this chapter; and

(b) enjoin, in accordance with the principles of equity, a supplier who has violated, is violating, or is likely to violate this chapter.

(2) A consumer who suffers loss as a result of a violation of this chapter may recover, but not in a class action, actual damages or \$2,000, whichever is greater, plus court costs.

(3) Whether a consumer seeks or is entitled to recover damages or has an adequate remedy at law, he may bring a class action for declaratory judgment, an injunction, and appropriate ancillary relief against an act or practice that violates this chapter.

(4) (a) A consumer who suffers loss as a result of a violation of this chapter may bring a class action for the actual damages caused by an act or practice specified as violating this chapter by a rule adopted by the enforcing authority under Section [Subsection] 13-11-8(2) before the consumer transactions on which the action is based, or declared to violate § 13-11-4 or 13-11-5 by a final judgment of the appropriate court or courts of general jurisdiction and appellate courts of this state that was either officially reported or made available for public dissemination under Section [Subsection] 13-11-7(1)(c) by the enforcing authority ten days before the consumer transactions on which the action is based, or with respect to a supplier who agreed to it, was prohibited specifically by the terms of a consent judgment which became final before the consumer transactions on which the action is based.

(b) If an act or practice that violates this chapter unjustly enriches a supplier and the damages can be computed with reasonable certainty, damages recoverable on behalf of consumers who cannot be located with due diligence shall be transferred to the state treasurer pursuant to the Uniform Disposition of Unclaimed Property Act.

(c) If a supplier shows by a preponderance of the evidence that a violation of this chapter resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid the error, recovery under this section is limited to the amount, if any, in which the supplier was unjustly enriched by the violation.

(5) Except for services performed by the enforcing authority, the court may award to the prevailing party a reasonable attorney's fee limited to the work reasonably performed if:

(a) the consumer complaining of the act or practice that violates this chapter has brought or maintained an action he knew to be groundless; or a supplier has committed an act or practice that violates this chapter; and

(b) an action under this section has been terminated by a judgment or required by the court to be settled under Section [Subsection] 13-11-21(1)(a).

(6) Except for consent judgment entered before testimony is taken, a final judgment in favor of the enforcing authority under § 13-11-17 is admissible as prima facie evidence of the facts on which it is based in later proceedings under this section against the same person or a person in privity with him.

(7) When a judgment under this section becomes final, the prevailing party shall mail a copy to the enforcing authority for inclusion in the public file maintained under Section [Subsection] 13-11-7(1)(e).

(8) An action under this section must be brought within two years after occurrence of a violation of this chapter, or within one year after the termination of proceedings by the enforcing authority with respect to a violation of this chapter, whichever is later. When a supplier sues a consumer, he may assert as a counterclaim any claim under this chapter arising out of the