

1991

Warner Imports, Inc., dba Rick Warner Nissan v.
U.S. Capital Corporation, a dissolved Utah
corporation, and Eagle Auto Leasing, a Utah
corporation : Brief of Appellant

Utah Supreme Court

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Recommended Citation

Brief of Appellant, *Warner Imports, Inc. v. U.S. Capital Corporation*, No. 910207.00 (Utah Supreme Court, 1991).
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10207CA

IN THE SUPREME COURT OF THE STATE OF UTAH

WARNER IMPORTS, INC.,
dba RICK WARNER NISSAN,

Plaintiff-Appellee,

vs.

U.S. CAPITAL CORPORATION, a
dissolved Utah corporation,
and EAGLE AUTO LEASING,
a Utah corporation,

Defendants-Appellants.

91-0207-CA

Trial Court No. 890906750 CV

Supreme Court No. ~~999-106~~

BRIEF OF APPELLANT

On Appeal from the Judgment of the Third District Court
In and For Salt Lake County
Honorable Homer F. Wilkinson, Judge

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FILED

APR 12 1991

Clerk, Supreme Court, Utah

WARNER IMPORTS, INC.,
dba RICK WARNER NISSAN,

Plaintiff-Appellee,

U.S. CAPITAL CORPORATION, a
dissolved Utah corporation,
and EAGLE AUTO LEASING,
a Utah corporation,

Trial Court No. 890906750 CV

Supreme Court No. 900480

On Appeal from the Judgment of the Third District Court
In and For Salt Lake County
Honorable Homer F. Wilkinson, Judge

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PARTIES

The parties to this litigation are:

Appellant: U.S. Capital Corporation (hereafter "U.S. Capital").

Appellees: Warner Imports, Inc., dba Rick Warner Nissan (hereafter "Warner Nissan").

Defendant: In the original action, a default judgment was taken against co-defendant Eagle Auto Leasing by order of the Trial Court. Eagle Auto Leasing is not a party to this appeal.

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JURISDICTION

Jurisdiction is vested in the Utah Supreme Court under Article VIII, Section 3 of the Constitution of Utah and Rule 58A of the Utah Rules of Civil Procedure.

STATEMENT OF ISSUES

1. Did the lower court err in finding that U.S. Capital's August 22, 1989 check was given to Warner Nissan to "cover the cost of the vehicle." (R. at 140).

2. Did the lower court err in finding that "U.S. Capital paid for the cost of [sic] 1989 Nissan Sentra with its check." (R. at 140).

3. Did the lower court err in finding that "U.S. Capital Corp. was negotiating to acquire Eagle Auto Leasing or one of its affiliates and U.S. Capital Corp.'s interest in Eagle Auto Leasing was further consideration for the issuance of the check to plaintiff by U.S. Capital." (R. at 140).

4. Did the lower court err in finding that "plaintiff has been damaged by U.S. Capital's issuance of its bad check." (R. at 141).

5. Did the lower court err in holding that §7-15-1 of the Utah Code Annotated applies in this case. (R. at 142).

6. Did the lower court err in finding and holding that adequate consideration was given by plaintiff to U.S. Capital for its check. (R. at 142).

7. Did the lower court err in holding that U.S. Capital was liable to Warner Nissan in the amount of the dishonored check. (R. at 142).

DETERMINATIVE STATUTES

The determinative statute is §7-15-1 of the Utah Code Annotated.

STATEMENT OF THE CASE

A. NATURE OF CASE:

Plaintiff in the lower Court brought an action to collect a dishonored check given to it by U.S. Capital as a favor to a third party, Eagle Auto Leasing. Claims were asserted based on the Dishonored Instrument statute and as principles of contract law to recover the full amount of the check.

B. COURSE OF PROCEEDINGS:

This matter was tried to the Court on July 11, 1990. The Court entered its Bench Ruling upon completion of the trial, and Amended Findings of Fact and Conclusions of Law were entered on September 5, 1990. Notice of Appeal was filed October 4, 1990.

C. DISPOSITION AT TRIAL:

At the July 16, 1990 trial, the Court found in favor of the plaintiff under both the Dishonored Instrument statute and principles of contract law for the full amount of the face of the check and for costs and attorneys fees.

STATEMENT OF FACTS

This is a civil action brought by Warner Nissan for the purpose of collecting on a check which was given to it as a favor by U.S. Capital for Eagle Auto Leasing to cover an existing debt created by the sale of a car by Warner Nissan to Eagle Auto

Leasing. Critical to understanding the facts of this case is to understand that it is comprised of two distinct transactions.

A. FIRST TRANSACTION: THE SALE OF THE CAR TO EAGLE AUTO LEASING.

Eagle Auto Leasing, is a Utah corporation which in July of 1989 was involved in the retail sale and leasing of automobiles. (R. 159, at pp. 69, 81). On or about July 3, 1989, Warner Nissan sold a 1989 Nissan Sentra to Eagle Auto Leasing. (R. 159, at pp. 8, 9, 46, 55). The Vehicle Buyer's Order & Purchase Agreement was signed by Eagle Auto Leasing. (R. 159, at p. 20, see also Exhibit 4). It was understood that the sale of the 1989 Nissan Sentra to Eagle Auto Leasing was for the purpose of immediate resale to Karen Stoker, the retail consumer of the automobile. Eagle Auto Leasing did not have any special business relationship with Warner Nissan, and purchased automobiles at the same price as any other retail purchaser (R. 159 at p. 45-6). (R. 159, at p. 9). For the purposes of the sale, however, the transfer of the automobile was from Warner Nissan to Eagle Auto Leasing, no other individuals or entities were involved in that transaction. (R. 159, at p. 36, 55).

The transaction between Warner Nissan and Eagle Auto Leasing involved the delivery of the automobile (R. 159, at pp. 21, 35, 47) and the working out of arrangements for payment of the agreed upon price. (R. 159, at p. 22). The automobile was delivered on July 3, 1989, and a check in the agreed upon price of \$10,043.50, dated July 3, 1989, was given to Warner Nissan. Eagle Auto Leasing requested as part of the terms of the sale that the check be held

for seven to ten days so funds could be made available to pay the check. (R. 159, at pp. 22, 42, 48). In a separate transaction, the automobile was sold by Eagle Auto Leasing to Karen Stoker. The sale of the automobile by Warner Nissan to Eagle Auto Leasing was completed with the delivery of the vehicle and the creation of the debt obligation to be paid in the future. (R. 159, at pp. 36-7).

When the debt created proved difficult to collect, Warner Nissan never threatened to repossess the car, something they acknowledged they could not do, (R. 159, at p. 34-40) nor did it pursue any other form of collection other than requesting payment from Eagle Auto Leasing. (R. 159, at pp. 38-40, 73-5, 86).

B. SECOND TRANSACTION: DISCHARGE OF DEBT CREATED BY THE FIRST TRANSACTION.

The check dated July 3, 1989 was held as agreed and was finally deposited for payment on July 18, 1989. (R. 157, at p. 48). That check was subsequently returned to Warner Nissan stamped "RTM" "refer to maker". (R. 159, at p. 10-11). Thereafter, a replacement check was issued by Eagle Auto Leasing on the 27th day of July, 1989, which was given to Warner Nissan. (R. 159, at p. 49). That check was returned marked "Account Closed." (R. 159, Exhibit 2).

On or about August 22, 1989, Eagle Auto Leasing approached U.S. Capital asking as a favor for U.S. Capital to tender a check to Warner Nissan in the amount of \$10,143.50 to cover a debt created by the sale of the car from Warner Nissan to Eagle Auto Leasing. (R. 159, at pp. 58, 80). The president of Eagle Auto Leasing, Pat Brody, told Ron Hansen, an officer of U.S. Capital,

that Warner Nissan would not accept any more checks from Eagle Auto Leasing so he needed as a favor to have U.S. Capital provide a check drawn on U.S. Capital's account to Warner Nissan. Id. Eagle Auto Leasing stated that it would cover the U.S. Capital check that afternoon or the next day. (R. 159 at pp. 59-60). Prior to August 22, 1989, U. S. Capital and Warner Nissan had had no prior dealings with each other, (R. 157, at pp. 36-37) and U. S. Capital knew nothing about the transaction that created the \$10,043.00 debt. (R. 159, at p. 61).

On or about August 22, 1989, U.S. Capital delivered a check in the amount of \$10,143.50 to Warner Nissan to cover the debt obligation of Eagle Auto Leasing to Warner Nissan. (R. at 159, at pp. 19, 40, 79). With the delivery of the check, U.S. Capital received nothing from Warner Nissan, or any other party, for the delivery of the check. (R. 159, at pp. 41, 71, 76, 86). U.S. Capital never took possession of or acquired any interest in the car, never used the car and in fact never saw the car. (R. 159, at p. 85-6).

When Eagle Auto Leasing failed to provide funds to cover U.S. Capital's check, U.S. Capital issued a stop order against the check paid to Warner Nissan. (R. 159, at pp. 76-77).

C. RELATIONSHIP OF THE VARIOUS ENTITIES TO THE TRANSACTIONS.

Warner Nissan was the seller of the 1989 Nissan Sentra automobile (R. 159, at p. 8-9).

Eagle Auto Leasing, a Utah corporation, was the purchaser of the 1989 Nissan Sentra (R. 159, at p. 20).

Eagle In-House Services, is a corporation separate and distinct from Eagle Auto Leasing. (R. 159, at p. 57). Eagle In-House Services was not a party to any transaction in this case. (R. 159, at p. 36, 55).

U.S. Capital, a closely held corporation, as a favor to Eagle Auto Leasing, provided a check to Warner Nissan. (R. 159, at p. 80). U.S. Capital never purchased any vehicle from Warner Nissan. (R. 159, at p. 58). U.S. Capital had no relationship, contractual or otherwise, with Eagle Auto Leasing (R. 159, at p. 79, 83), and was not involved in negotiations to acquire Eagle Auto Leasing. (R. 159, at p. 83-4).

VIP Leasing has been mentioned in this case, but it is a misidentification of VIP*Comlink. (R. 159, at p. 57).

Karen Stoker purchased the 1989 Nissan Sentra from Eagle Auto Leasing and took possession of the vehicle. (R. 159, at p. 9). Karen Stoker had no contact or affiliation with U.S. Capital or VIP*Comlink. (R. 159, at p. 28).

SUMMARY OF ARGUMENT

This appeal raises issues concerning the sufficiency of the evidence supporting certain Findings of Fact made by the Trial Court, and also raises substantial questions concerning the application of §7-15-1 (the Dishonored Instruments statute) of the Utah Code Annotated, the adequacy of consideration given for U.S. Capital's check.

A. THE LOWER COURT CLEARLY ERRED IN MAKING CERTAIN CRITICAL FINDINGS OF FACT.

There is insufficient evidence to support the following Findings of Fact made by the Trial Court:

(1) The August 22, 1989 check of U.S. Capital was given to "cover the cost of the vehicle";

(2) U.S. Capital "paid for the cost of [sic] 1989 Nissan Sentra with its check";

(3) "U.S. Capital Corp. was negotiating to acquire Eagle Auto Leasing or one of its affiliates and U.S. Capital's interest in Eagle Auto Leasing was further consideration for the issuance of the check to plaintiff by U.S. Capital";

(4) Plaintiff has been "damaged by U.S. Capital's issuance of its bad check".

B. THE LOWER COURT ERRED IN ITS APPLICATION OF LAW.

The lower Court erred in its application of law by applying §7-15-1 of the Utah Code Annotated to this case, and under generally accepted principles of contract law, there was no consideration for the check that was given by U.S. Capital to Warner Nissan to support a claim for damages.

LEGAL ARGUMENT

The issues addressed in this appeal relate to the sufficiency of evidence to support the court's Findings of Fact, and relate to questions of the Court's application of the Dishonored Instrument statute to this case and holding that sufficient consideration was given to support a claim against U.S. Capital.

A. THE LOWER COURT CLEARLY ERRED IN MAKING CERTAIN FINDINGS OF FACT SINCE THEY ARE NOT SUPPORTED BY THE CLEAR WEIGHT OF THE EVIDENCE.

The applicable standard for reviewing the Trial Court's Findings of Fact is that if the Trial Court's findings are so lacking in support as to be "against a clear weight of evidence", or "clearly erroneous" those findings will be rejected. In re: Estate of Bartell, 776 P. 2d 885, 886 (Utah 1989), see also Scharf v. BMG Corp., 700 P. 2d 1068, 1070 (Utah 1985). In this instance, the Trial Court made certain Findings of Fact that are not supported by the clear weight of evidence, and should be reversed.

(1) THE LOWER COURT ERRED IN FINDING THAT THE AUGUST 22, 1989 CHECK WAS GIVEN TO "COVER THE COST OF THE VEHICLE".

Factually, it is essential to recognize that there were two separate transactions involved in this case. That factual distinction is essential to understanding the actions of the parties and one which the Trial Court failed to perceive. Because the Trial Court failed to understand that distinction, the Trial Court erroneously made the Finding of Fact that the August 22, 1989 check was given to "cover the cost" of the vehicle purchased by Eagle Auto Leasing and later sold to Karen Stoker.

The record before the Trial Court reflects the following undisputed set of facts: A 1989 red Nissan Sentra was sold by Warner Nissan to Eagle Auto Leasing for ultimate sale to Karen Stoker. The initial sale was accomplished on July 3, 1989 with the delivery of the automobile and arrangements by contract for payment to be made available later to cover the check delivered July 3, 1989. The only parties to that transaction were Eagle Auto Leasing

and Warner Nissan. The check was held to permit funds to be made available to pay the check. It is undisputed that the sale of the Nissan Sentra was completed on July 3, 1989. U.S. Capital was not involved with that transaction. All that remained of the transaction after July 3, 1989 was a debt obligation owed by Eagle Auto Leasing to Warner Nissan and to be collected from the July 3, 1989 check.

When the car was delivered for the agreed price a debt obligation was created from Eagle Auto Leasing to Warner Nissan, which Warner Nissan thereafter tried to collect. After the July 3, 1989 check from Eagle Auto Leasing did not clear the bank, a second check was given to Warner Nissan by Eagle Auto Leasing on July 27, 1989. It also was returned uncollected.

Warner Nissan was aware that the car was to be resold to Karen Stoker, and it also knew that it could not rescind the sale of the vehicle or pursue repossession because the car was no longer in the hands of Eagle Auto Leasing. Its only recourse was to pursue collection of the debt obligation from Eagle Auto Leasing.

By August 22, 1989, when U.S. Capital provided its check to Warner Nissan as a favor to Eagle Auto Leasing, U.S. Capital and Warner Nissan understood that the check was being provided to clear up problems created by the dishonored instruments, and that U.S. Capital would not receive the automobile or any interest in it. The check delivered to Warner Nissan by U.S. Capital contained, at Eagle Auto Leasing's direction, an extra \$100.00 which was

understood to be a bonus for inconvenience created by the dishonor of the prior two checks tendered by Eagle Auto Leasing.

From the record, there is nothing to indicate or support a finding that the August 22, 1989 check was given to "cover the cost of the vehicle". The transaction involving the vehicle was completed upon its delivery on July 3, 1989, and the agreement to receive payment in the future. The evidence clearly establishes, that the August 22, 1989 check was intended to cover only the debt obligation of Eagle Auto Leasing to Warner Nissan which had not previously been satisfied because Eagle Auto Leasing's checks were dishonored. In fact, plaintiff's two witnesses' testimony confirms and supports that fact. There is absolutely no evidence before the Trial Court to support a finding that the check "covered the cost of the vehicle". That finding should be rejected, and the Court should find, in accordance with the evidence, that the check was given to cover the debt of Eagle Auto Leasing to Warner Nissan and not for the purchase of the car, or as the Trial Court stated "to cover the cost of the vehicle."

(2) THE COURT ERRED IN FINDING THAT U.S. CAPITAL PAID FOR THE COST OF THE 1989 NISSAN SENTRA WITH ITS AUGUST 22, 1989 CHECK.

For the reasons stated above in (1), the August 22, 1989 check did not relate to the actual purchase of the 1989 Nissan Sentra, and those funds were not used in the closing of that transaction. The check provided by U.S. Capital was part of a separate transaction related to the retirement of the unpaid debt owed to Warner Nissan. The conveyance of the 1989 Nissan Sentra to Eagle

Auto Leasing, and its subsequent conveyance to Karen Stoker were completed more than a month and a half before U.S. Capital became involved. U.S. Capital's check did not relate to the securing of the conveyance of the Nissan Sentra. U.S. Capital's involvement related only to resolving the debt obligation created by the earlier sale of the car by Warner Nissan to Eagle Auto Leasing.

Nothing from the testimony of any party gives any credence to the finding that "U.S. Capital paid for the cost of the Nissan Sentra with its check". The evidence before the Trial Court is insufficient to support its finding and should therefore be rejected.

- (3) **THE LOWER COURT ERRED IN FINDING THAT "U.S. CAPITAL WAS NEGOTIATING TO ACQUIRE EAGLE AUTO LEASING OR ONE OF ITS AFFILIATES AND U.S. CAPITAL'S INTEREST IN EAGLE AUTO LEASING WAS FURTHER CONSIDERATION FOR THE ISSUANCE OF THE CHECK BY U.S. CAPITAL".**

The Trial Court found that U.S. Capital was negotiating to acquire Eagle Auto Leasing and the interest U.S. Capital had in Eagle Auto Leasing was sufficient consideration for the issuance of the check to Warner Nissan. The evidence on the record is not sufficient to support such a finding and thus, it should be rejected.

Testimony from Warner Nissan's witnesses is equivocal on the question of the relationship between U.S. Capital and Eagle Auto Leasing. That testimony is essentially based on unclear recollection of conversations with officers of U.S. Capital. Testimony of U.S. Capital's witnesses, however, is unequivocal and clear that U.S. Capital was not negotiating to acquire an interest

in Eagle Auto Leasing. Confusion with regard to this point appears to arise out of plaintiff's failure to recognize that another unrelated entity, VIP*Comlink, was identified as considering the acquisition of Eagle In-House Services, Inc., a Utah corporation. Eagle In-House Services, Inc. had a business relationship with Eagle Auto Leasing but was separate and distinct from Eagle Auto Leasing. VIP*Comlink is a Utah corporation, separate and distinct from U.S. Capital, and has never been a party to any of the transactions in this suit.

For example, in the examination of Douglas R. Johnson, general manager for Rick Warner Nissan, when asked by plaintiff's counsel "Did you understand that U.S. Capital would be taking over and acquiring Eagle Auto Leasing?" his answer was "I wasn't exactly sure that there was anything that was going to happen there. I know that I tried to reach Pat Brody a number of times and he was over at Mr. Hansen's office before this time so I'm not sure." (R. 159, at p. 15). In fact, Mr. Johnson candidly admits that with regard to U.S. Capital's connection with Eagle Auto Leasing that he "didn't quite catch all at that time. I was more interested in collecting our funds". (R. 159, at p. 13).

Patrick Terrill, assistant sales manager for Warner Nissan, testified that on or about August 22, he and Mr. Johnson had talked with Mr. Hansen. Mr. Terrill stated that "Approximately 8-22 Doug told me in the morning that he had talked to the Capital Financial people. I don't know the name." (R. 159, at p. 50) (emphasis added). Mr. Terrill went on to describe the meeting. "Mr. Hansen

did most of the talking, saying that they had acquired Eagle Auto Leasing and they wanted to continue to do business with us. He gave us a check saying -- here is the check for the car to pay for it." Id. When asked specifically about U.S. Capital's relationship to Eagle Auto Leasing, Mr. Terrill stated that "they talked about this VIP leasing program that they had going. I don't know anything about it and I said well we'll continue to do business with you and show them good faith to that point." (R. 159, at p. 59). On cross-examination, Mr. Terrill stated that "U.S. Capital had acquired Eagle Auto Leasing," (R. 159, at p. 53), but could not identify the entity acquiring Eagle Auto Leasing as anyone other than the person he talked with, Ron Hansen. (R. 159, at p. 53).

On plaintiff's direct examination of Ron Hansen, an officer of U.S. Capital, the relationship between U.S. Capital and Eagle Auto Leasing was fully explained. Mr. Hansen explained that VIP*Comlink had at one time looked into acquiring Eagle In-House Services, Inc., a different corporation than Eagle Auto Leasing. U.S. Capital is separate and distinct from VIP*Comlink or any of its subsidiaries. VIP*Comlink, was not involved in this transaction, and it was VIP*Comlink that at some earlier date had been interested in acquiring Eagle In-House Services, Inc. At no time did VIP*Comlink or U.S. Capital discuss, negotiate or agree to acquire Eagle Auto Leasing.

The plaintiff's witnesses concede that they were never sure of the relationship between U.S. Capital and Eagle Auto Leasing. At

best, they claim they heard there was a relationship, but they admit that they were only concerned with collecting the money due from Eagle Auto Leasing regardless of the source.

In short, the record before the Trial Court is devoid of any clear evidence that U.S. Capital was negotiating to acquire Eagle Auto Leasing. The finding by the court that U.S. Capital was negotiating to acquire Eagle Auto Leasing or one of its affiliates and U.S. Capital's interest in Eagle Auto Leasing was further consideration for the issuance of the check to plaintiff by U.S. Capital is not supported by substantive evidence and should be rejected.

(4) THE TRIAL COURT ERRED IN FINDING THAT "PLAINTIFF HAS BEEN DAMAGED BY U.S. CAPITAL CORPORATION'S ISSUANCE OF ITS BAD CHECK."

There is nothing in the record that would indicate that Warner Nissan was damaged by U.S. Capital's tender of its check which it stopped payment on. The history of the case is clear. Warner Nissan delivered the car to Eagle Auto Leasing and accepted two checks from Eagle Auto Leasing that were later dishonored before U.S. Capital tendered its check to Warner Nissan at the request of and as a favor to Eagle Auto Leasing. Warner Nissan had never threatened suit, and had not attempted to repossess the automobile, an action which Warner Nissan concedes it had no right to do because the car was almost immediately transferred to Karen Stoker. Warner Nissan did not refrain or forebear from taking any action because of U.S. Capital's tender of its check, and no new injury resulted from the stop order.

In short, the tender of the check by U.S. Capital did not create any new damage, new loss or any damage or loss at all to Warner Nissan. The record is replete with confirmation from Warner Nissan that they parted with nothing at the time the check was tendered by U.S. Capital. Where the record is so complete in its demonstration that no damage was done to Warner Nissan, the court's finding that plaintiff has been damaged is without substantive evidence, and clearly erroneous.

B. THE TRIAL COURT ERRED IN ITS CONCLUSION OF LAW.

The standard of review for conclusions of law entered by the Trial Court is that the court will accord conclusions of law no particular deference but review them for correctness. Scharf v. BMG Corporation, 700 P. 2d 1068 (Utah 1985). In this instance, the Trial Court erred in holding that U.S. Capital is liable to Warner Nissan under the Dishonored Instruments Statute, U.C.A. §7-15-1, and that adequate consideration existed for Warner Nissan's collection of the U.S. Capital check.

(1) U.S. CAPITAL DOES NOT HAVE LIABILITY UNDER THE DISHONORED INSTRUMENTS STATUTE.

The Dishonored Instruments Statute, §7-15-1, U.C.A. provides in pertinent part that

Any person who makes, draws, signs, or issues any check, draft, order or other instrument upon any depository . . . for the purpose of obtaining from any person, firm, partnership, or corporation any money, merchandise, property, or other thing of value or paying for services, wages, salary, or rent is liable to the holder of the check if the check . . . is not honored upon presentment and is marked "refer to maker" . . ., or the account upon

which the check . . . has been drawn does not exist , has been closed, or does not have sufficient funds or sufficient credit for payment in full of the check (emphasis added)

In this case, critical to the application of this statute against U.S. Capital is the check being sued on must be given for one of the purposes established in the statute. Section 7-15-1 applies only where the check is given "for the purpose of obtaining" "money, merchandise, property, or other like things of value, or paying for services, wages, salary or rent". In this case there is no allegation that the August 22, 1989, check was given for any of those specified purposes. In fact it is undisputed that U.S. Capital did not receive anything of value from Warner Nissan in exchange for the August 22, 1989 check. Thus, where the plaintiff did not part with anything of value in taking the August 22, 1989, check from the defendant there is no cause of action against the defendant under §7-15-1, U.C.A. Because the lower Court improperly applied the Dishonored Instruments statute to this case that determination should be reversed.

(2) WARNER NISSAN CANNOT COLLECT ON THE AUGUST 22, 1989, CHECK FROM U.S. CAPITAL BECAUSE THERE WAS NO CONSIDERATION GIVEN.

The lower Court erroneously held that sufficient consideration was given for U.S. Capital's August 22, 1989, check to permit Warner Nissan to enforce its collection. The record is clear, however, that no consideration was ever given by Warner Nissan or any other party to U.S. Capital for the benefit given. Corbin on Contracts states that "[t]he promise of one person to pay a pre-existing debt owed to the promisee by a third person is not

enforceable in the absence of a consideration . . . The third person's pre-existing debt is not a sufficient 'past consideration' to support the defendants promise to pay it." Id. at 306 (4th edition)(emphasis added). Corbin goes on to explain

it is beyond question that the debt or obligation of the principal obligor is not a sufficient basis for the enforcement of the promise of the surety or guarantor. If the promise of the principal and the surety are made simultaneously, they may be supported by a single consideration; the loan of money by the creditor to the principal is a sufficient consideration for the promise of both principal and surety. But for the promise of any surety that is made subsequently to the advance of money to the principal, there must be new consideration. The fact that the loan has been made and the principal is indebted is not a sufficient reason for enforcement of the surety's subsequent promise.

Id. (footnotes omitted)(emphasis added)

In this case, it is undisputed that the debt which arose between Eagle Auto Leasing and Warner Nissan was supported by consideration given by Warner Nissan in the form of the car conveyed. U.S. Capital, however, was not a party to that transaction. Two months later when U.S. Capital presented its check to Warner Nissan, no new consideration was given for its involvement. The pre-existing obligation between Warner Nissan and Eagle Auto Leasing, which included the conveyance of the car, is insufficient as a matter of law to serve as consideration for U.S. Capital's tender of its check.

The record is devoid of any evidence that consideration was given for U.S. Capital's check. The lower Court erroneously found that consideration for the check existed because U.S. Capital was acquiring Eagle Auto Leasing. Whether that is sufficient

consideration, is both unclear and irrelevant because U.S. Capital was not acquiring Eagle Auto Leasing and had never considered it. No other real or imagined benefit, by way of money, property or even forbearance to pursue legal remedies, was given for U.S. Capital's check to Warner Nissan.

If the debt created by the sale of the vehicle to Eagle Auto Leasing is viewed as consideration to support Warner Nissan's claim on U.S. Capital's check, it would mean that U.S. Capital's issuance of its check resulted in its assumption of the Eagle Auto Leasing debt. As assumption of the debt of another, to be enforceable, must meet the Utah Statute of Frauds, §25-5-1 et seq. or it is void. Section 25-5-4(2) provides that "every promise to answer for the debt . . . of another" is void "unless the agreement or some note or memorandum of the agreement is in writing signed by the party to be charged with the agreement." Furthermore, Utah law requires that any note or memorandum relied upon to satisfy the Statute of Frauds must contain all the essential terms and provisions of the assumption agreement. Birdzell v. Utah Oil Ref., Co., 242 P.2d 578 (1952). No evidence of any memorandum was ever presented by Warner Nissan, and the evidence is clear that U.S. Capital never intended to assume or become responsible for Eagle Auto Leasing's debt.

Finally, the lower Court held that Warner Nissan was holder in due course of the U.S. Capital check. That holding has no bearing on this case and does not preclude any of U.S. Capital's defenses to collection of the check. Section 70A-3-305(2), states that "a

holder in due course takes the instrument free from . . . all defenses of any party to the instrument with whom the holder has not dealt . . ."(emphasis added). In a suit against a party with whom the holder in due course has dealt, the defendant can plead all defenses to the collection of the check including lack of consideration. Hankland, Uniform Commercial Code, §§3-302:04, 3-305:03. Therefore, regardless of Warner Nissan's status as a holder in due course, there is no bar to U.S. Capital's defenses including the defense of lack or want of consideration.

The lower Court's ruling that there is adequate consideration for the enforcement of a claim for \$10,043.00 against U.S. Capital is without basis and should be reversed. The record fails to demonstrate any consideration flowing to any party because of the tender of the August 22, 1989 check by U.S. Capital. In addition, the record is clear that Warner Nissan suffered no detriment, gave nothing of value, and did not forebear or relinquish any right by the acceptance of the check. Where it is so abundantly clear that no consideration existed for the tender of the check, Warner Nissan has no claim to enforce the collection of the check against U.S. Capital.

CONCLUSION

The lower Court clearly erred in making Findings of Fact that the August 22, 1989 check of U.S. Capital was given to "cover the cost of the vehicle," and that U.S. Capital "paid for the cost of the 1989 Nissan Sentra with its check." There is no evidence to support those findings. If anything, those findings arose out of

the lower Court's failure to understand that the sale of the vehicle which had been completed nearly two months earlier, was not contingent upon or related to the delivery of the August 22, 1989 check.

In addition, the lower Court clearly erred in finding that consideration existed for the tender of the U.S. Capital check. Nothing of value passed from Warner Nissan or any other party to U.S. Capital in consideration for the check. Finally, the lower Court erred in finding that Warner Nissan had been damaged by U.S. Capital's issuance of its bad check. There is no evidence to support this finding, and in fact, the clear weight of the evidence establishes that Warner Nissan parted with nothing in accepting U.S. Capital's check, including any right to pursue any claim against Eagle Auto Leasing. Because there is insufficient evidence to support the Court's Findings of Fact, those Findings of Fact should be rejected, and this case should be remanded to the lower Court with directions that Findings of Facts be entered which are consistent with the clear weight of the evidence.

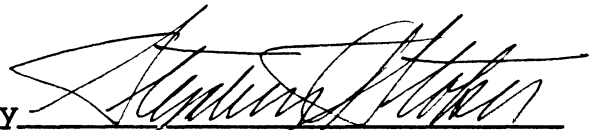
The lower Court erred in its application of law by applying §7-15-1 of the U.C.A., and in holding that sufficient consideration existed for the enforcement of collection of a \$10,043.00 debt from U.S. Capital. Specifically, §7-15-1 applies only when an instrument is given for the purpose of obtaining money, merchandise, property or other thing of value or paying for services, wages, salary or rent. The check given in this instance was given for none of those purposes, and nothing of value was

received in exchange for that check that meets the requirements of §7-15-1. Where the requirements of §7-15-1 have clearly not been met, the lower Court erred in applying that statute to this case. Similarly, the record before the Court is clear that no consideration was given for the issuance of U.S. Capital's check. Where there is a lack of consideration for an obligation, that obligation cannot be enforced.

Because the Court has erred in its application of both the Dishonored Instruments Statute, and in holding that consideration existed for the issuance of U.S. Capital's check, those determinations should be reversed, and the matter should be remanded to the lower Court with direction that judgment be entered in favor of U.S. Capital.

DATED this 12th day of April, 1991.

STOKER & THOMAS

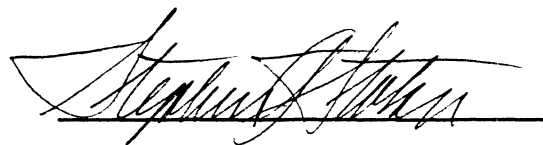
By 

Stephen G. Stoker
David B. Thomas
Attorneys for Defendant
U.S. Capital

CERTIFICATE OF SERVICE

The undersigned hereby verifies that on the 12th day of April, 1991, a true and correct copy of the foregoing Brief of Appellant was mailed, postage prepaid, to the following:

J. Angus Edwards
Purser, Okasaki & Berrett
39 Post Office Place, #300
Salt Lake City, Utah 84101

A handwritten signature in cursive script, appearing to read "J. Angus Edwards", is written over a horizontal line.

WARNER IMPORTS, INC.,
dba RICK WARNER NISSAN,

VS.

Defendants-Appellants.

Supreme Court No. 900480

On Appeal from the Judgment of the Third District Court
In and For Salt Lake County
Honorable Homer F. Wilkinson, Judge

J. Angus Edwards
PURSER, OKAZAKI & BERRETT
39 Post Office Place
Third Floor
Salt Lake City, Utah 84101
Attorneys for Appellee

This case having come on for trial before the above-entitled Court on the 16th day of July 1990 upon the plaintiff's Complaint, the Answer of defendant, U.S. Capital Corp., and the other pleadings and documents on file, the plaintiff being represented by J. Angus Edwards of Purser, Okazaki & Berrett, defendant,

U.S. Capital, being represented by Stephen G. Stoker of Stoker & Thomas and defendant, Eagle Auto Leasing Corp., not appearing in person or by counsel. The Court having heard and considered the evidence adduced at trial, the documents in the file and the arguments of counsel, the Court hereby makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Plaintiff is a Utah corporation with its principal place of business in Salt Lake County, Utah.

2. U.S. Capital Corp. is a dissolved Utah corporation.

3. The matter in controversy exceeds the sum of \$10,000.

4. Plaintiff is a full service Nissan automobile dealership.

5. Plaintiff sold a 1989 Nissan Sentra to defendant, Eagle Auto Leasing, for the use and benefit of Karen Stoker.

6. Defendant, Eagle Auto Leasing, issued a check dated July 3, 1989 in the sum of \$10,043.50 and a check dated July 27, 1989 in the amount of \$10,143.50 payable to plaintiff for the purchase of the 1989 Nissan Sentra on behalf of plaintiff, but both checks were dishonored for insufficient funds.

7. Defendant, U.S. Capital Corp., signed and issued a check made payable to plaintiff dated August 22, 1989 in

the sum of \$10,143.50 to cover the cost of the vehicle, service charges and the problems with the prior bad checks.

8. Plaintiff received two checks from Eagle and Auto Leasing and a third check from U.S. Capital and delivered them to its bank for payment.

9. Consideration for issuance of the check by defendant, U.S. Capital Corp., included the giving of the third check for the two prior bad checks.

10. Eagle Auto Leasing, promised to pay or reimburse U.S. Capital for the \$10,143.50 payment by check from U.S. Capital to plaintiff.

11. Plaintiff refused to accept any additional checks from Eagle Auto Leasing and, therefore, U.S. Capital paid for the cost of 1989 Nissan Sentra with its check as a direct result of plaintiff's refusal to receive further checks from Eagle Auto Leasing.

12. U.S. Capital Corp. was negotiating to acquire Eagle Auto Leasing or one of its affiliates and U.S. Capital Corp.'s interest in Eagle Auto Leasing was further consideration for the issuance of the check to plaintiff by U.S. Capital.

13. U.S. Capital issued a stop payment order only after Eagle Auto Leasing failed to deliver its reimbursement check to U.S. Capital.

14. The testimony by defendant was that the check from U.S. Capital Corp. was issued as a favor or gift to Pat Brody.

15. Defendant received timely and effective notice from plaintiff that defendant's check had been dishonored by certified letter dated October 17, 1989.

16. Plaintiff has been damaged by U.S. Capital Corp.'s issuance of its bad check in the amount of the check of \$10,143.50, including service charges of \$30.00, and a service charge on the check from U.S. Capital in the sum of \$15.00 for a total principal amount of \$10,158.50, plus pre-judgment interest at the lawful rate.

17. Plaintiff is entitled to all costs and reasonable attorney's fees pursuant to § 7-15-1, but determination of the amount of fees and costs is expressly reserved until the matter is scheduled and heard before the above-entitled Court.

18. Plaintiff was an innocent party and had no knowledge or warning that the check from U.S. Capital might be dishonored or was contingent on payment from Eagle Auto Leasing.


CONCLUSIONS OF LAW

1. The jurisdiction and venue of this Court is proper.
2. Default Judgment shall be entered only against defendant, Eagle Auto Leasing, for its failure to answer or otherwise appear.
3. Adequate consideration was given by plaintiff in exchange for the check from defendant, U.S. Capital Corp.
4. U.S. Capital Corp.'s check was dishonored within the meaning of § 7-15-1.
5. Alternatively, plaintiff is deemed to be a holder in due course.
6. Defendant received timely and effective notice from plaintiff that its check had been dishonored by certified mail dated October 17, 1989.
7. Defendant is liable for the amount of its dishonored check in the sum of \$10,143.50, a service charge of \$15.00, pre-judgment interest at the lawful rate, all plaintiff's costs and reasonable attorney's fees to be determined at a subsequent hearing.

LET JUDGMENT BE ENTERED ACCORDINGLY

DATED this 5 day of Sept., 1990

BY THE COURT:


Honorable Homer F. Wilkinson
Third Judicial District Court Judge