

1992

# Guy Barco Zewadski v. Ford Motor Credit Company, Rick Warner Lincoln-Mercury : Brief of Appellant

Utah Court of Appeals

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Guy B. Zewadski; Appearing pro-se; Appellant.

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**IN THE UTAH COURT OF APPEALS**

---

GUY B. ZEWADSKI,  
Appellant,

APPEAL No. 920226

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

Category 16

---

**BRIEF OF THE APPELLANT**

---

APPEAL FROM THE JUDGMENT OF THE THIRD JUDICIAL  
DISTRICT COURT OF  
SALT LAKE COUNTY, STATE OF UTAH  
THE HONORABLE PAT B. BRIAN PRESIDING

---

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Appellant

**IN THE UTAH COURT OF APPEALS**

---

**GUY BARCO ZEWADSKI,**  
Plaintiff, Appellant,

**APPEAL No. 920226**

vs.  
**FORD MOTOR CREDIT COMPANY,**  
Defendant, Appellee,

**Category 16**

and,  
**RICK WARNER LINCOLN-MERCURY,**  
Defendant, Appellee.

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**BRIEF OF THE APPELLANT**

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DEFENDANT

**AND**

FORD MOTOR CREDIT COMPANY  
A DELAWARE CORPORATION  
WITH PRINCIPLE PLACE OF BUSINESS IN  
DEARBORN, MICHIGAN  
WITH A BRANCH OFFICE AT  
535 EAST 4500 SOUTH, SUITE D-40  
SALT LAKE CITY, UTAH 84107  
REGISTERED AGENT  
C.T. CORPORATION SYSTEM  
8TH FLOOR  
50 WEST BROADWAY  
SALT LAKE CITY, UTAH 84101  
DEFENDANT

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**IN THE UTAH COURT OF APPEALS**

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GUY BARCO ZEWADSKI,  
Plaintiff, Appellant,

vs.

FORD MOTOR CREDIT COMPANY,  
Defendant, Appellee,

**APPEAL No. 920226**

and,

RICK WARNER LINCOLN-MERCURY,  
Defendant, Appellee.

Category 16

-----

**BRIEF OF THE APPELLANT**

Appellant, Guy Barco Zewadski, (hereinafter  
"Zewadski"), appearing pro-se, hereby submits this brief.

**JURISDICTION**

**1.** The Supreme Court of Utah has appellate jurisdiction over orders, judgments and decrees of any court of record over which the Court of Appeals does not have original appellate jurisdiction. This jurisdiction is conferred pursuant to the Constitution of Utah, Art. VIII, Sec. 3, and U.C.A. 78-2-2(3)(j); said Court referred the matter to the Court of Appeals and its jurisdiction is based upon U.C.A. 78-2a-3(h); and Rules 3, 4, and 42, of the U.R.A.P..

**2.** This is an appeal from a final summary judgment in a contract dispute in favor of Ford Motor Credit Company's counterclaim, entered by the

Honorable Pat B. Brian of the Third Judicial District Court of Salt Lake County, State of Utah, and orders entered prior to final disposition, granting a summary judgment dismissing Zewadski's complaint, and attorneys' fees.

### **ISSUES PRESENTED ON APPEAL**

- 1.** Whether trial court erred in finding all warranties as to merchantability or fitness for purpose were excluded by a disclaimer clause in the lease contract, permitting summary judgment, or if such disclaimer clauses are without effect in consumer transactions for new consumer products which have express warranties or service contracts, as a matter of law? Question of law reviewed for correctness.
- 2.** Whether the admissible evidence before the trial court below is sufficient to support the granting of the summary judgment order, and its findings, dismissing Zewadski's First Amended Complaint? Question of law reviewed for correctness.
- 3.** Whether summary judgment in favor of Ford Motor Credit Company's ("Ford Credit") counterclaim was available as a matter of law? Question of law reviewed for correctness.
- 4.** Whether the Utah Consumer Sales Practices Act serves to protect Zewadski from unconscionable or deceptive practices by Rick Warner Lincoln-Mercury ("Rick Warner") and Ford Credit in this case? This is a question of law reviewed for correctness.

**5.** Whether the granting of attorneys fees to Ford Credit was supported by law in view of the issues presented hereinbefore absent showing that the all terms of the contract for such recovery had been met; and whether Ford Credit failed to apportion the fees to reflect only expenses incurred in the counterclaim contrary to an order of the trial court to so apportion? This is a question of law reviewed for correctness.

### **STATEMENT OF DETERMINATIVE PROVISIONS**

**1. U.R.C.P. Rule 56(c), (Summary Judgment):**

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

**2. U.R.C.P. Rule 15(b), (Amended and supplemental pleadings):**

**"(b) Amendments to conform to the evidence.** When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendments of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended when the presentation of the merits of the action will be sub served thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court shall grant a

continuance , if necessary, to enable the objecting party to meet such evidence.

**3. "U.C.S.P.A.": U.C.A. 13-11-1 through 22, amended:**

**U.C.A. 13-11-2: Construction and purposes of act.**

"This act shall be construed liberally to promote the following policies:

- (1) to simplify, clarify, and modernize the law governing consumer sales practices;
- (2) to protect consumers from suppliers who commit deceptive and unconscionable sales practices;
- (4) to make state regulation of consumer sales practices not inconsistent with the policies of the Federal Trade Commission Act relating to consumer protection;"

**U.C.A. 13-11-3: Definitions:**

(2) "Consumer transaction" means a sale, lease, assignment, award by chance, or other written or oral transfer or disposition of goods, services, or other property both tangible and intangible (except securities and insurance) to a person for primarily personal, family, or household purposes, or for purposes that relate to a business opportunity that requires both his expenditure of money or property and his personal services on a continuing basis and in which he has not been previously engaged, or a solicitation or offer by a supplier with respect to any of these transfers or dispositions. It includes any offer or solicitation, any agreement, and any performance of an agreement with respect to any of these transfers or dispositions. "

(5) "Person" means an individual, corporation, government, governmental subdivision or agency, business trust, estate trust, partnership, association, cooperative, or any other legal entity."

(6) "Supplier" means a seller, lessor, assignor, offeror, broker, or other person who regularly solicits, engages in, or enforces consumer transactions, whether or not he deals directly with the consumer."

**U.C.A. 13-11-5(1)(2)(3): (Unconscionable act or practice):**

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

(2) The unconscionability of an act or practice is a question of law for the court. If it is claimed or appears to the court that an act or practice may be unconscionable, the parties shall be given a reasonable opportunity to present evidence as to its setting, purpose, and effect to aid the court in making its determination.

(3) In determining whether an act or practice is unconscionable, the court shall consider circumstances which the supplier knew or had reason to know."

**U.C.A. 13-11-4 (1)(2)(2j): Deceptive act or practice:**

"(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.

(2)(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 indication is false."

**U.C.A. 13-11-19. Action by consumer:**

"(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 \$2,000.00, whichever is greater, plus court costs."

**4. Magnuson-Moss- Warranty- Federal Trade Commission Improvement Act, 15 U.S.C.A. Sec. 2301(1)(3)(4)(5)(6)(7)(8):**

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

installed).

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

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

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

(6) The term "written warranty" means ---

(A) any written affirmation of fact or written promise made in connection with the sale of a consumer product by a supplier to a buyer which relates to the nature of the material or workmanship and affirms or promises that such material or workmanship is defect free or will meet a specified level of performance over a specified period of time, or

(B) any undertaking in writing in connection with the sale by a supplier of a consumer product to refund, repair, replace, or take other remedial action with respect to such product in the event that such product fails to meet the specifications set forth in the undertaking, which written affirmation, promise, or undertaking becomes part of the basis of the bargain between a supplier and a buyer for purposes other than resale of such product.

(7) The term "implied warranty" means an implied warranty arising under State law (as modified by sections 108 and 104(a) in connection with the sale by a supplier of a consumer product.

(8) term "service contract" means a contract in writing to perform, over a fixed period of time or for a specified duration, services relating to the

maintenance or repair (or both) of a consumer product."

15 U.S.C.A. Sec. 2308: Implied Warranties, restrictions on disclaimers...

"(a) No supplier may disclaim or modify... any implied warranty to a consumer with respect to such consumer product if (1) such supplier makes any written warranty to the consumer with respect to such consumer product, or (2) at the time of sale, or within 90 days thereafter, such supplier enters into a service contract with the consumer which applies to such consumer product.

(c) A disclaimer, modification, or limitation made in violation of this section shall be ineffective for purposes of this chapter and State law. "

### NATURE AND DISPOSITION OF CASE.

1. This is an action brought in a contract dispute wherein appellant Zewadski brought action, with a verified complaint, against respondents Ford Credit and Rick Warner for rescission of contract and damages regarding a lease of a new automobile for personal use, alleging fraud and misrepresentation, and Ford Credit brought a counterclaim to enforce the contract. Zewadski answered setting forth affirmative defenses of estoppel and fraud, and denials.

2. After hearings on briefed arguments, wherein Ford Credit submitted no affidavits or impeaching evidence, Ford Credit was granted a summary judgment dismissing Zewadski's complaint.

3. Ford Credit moved for summary judgment on their counterclaim with no supporting affidavits, and the court granted that motion finding Zewadski in default of the contract. Zewadski filed several affidavits and verified pleadings opposing summary judgment.

4. Several interim motions of Zewadski to amend the pleadings and vacate interlocutory summary judgment on Zewadski's complaint were heard and denied on basis that the issues sought to supplement had already been heard and decided.

5. Judge Pat B. Brian entered Final Judgment on September 20, 1991, reaffirmed by an Order entered December 30, 1991.

6. The trial court granted Zewadski's motion that Ford Credit's attorneys' fees affidavit apportion the fees to claim recovery only for fees directly incurred in the counterclaim, and ordered Ford Credit to file a supplemental attorneys' fees affidavit and amended order.

7. Zewadski filed a notice of Appeal January 29, 1992, and was assigned number 920054 with the Supreme Court.

8. This matter was thereafter referred to the Court of Appeals of the State of Utah, and is now presently pending

before this body in the instant case as number 920226-CA.

**STATEMENT OF FACTS:**

- 1.** This case was instituted by Zewadski to rescind a contract, recover deposits and damages, for fraud by Zewadski's filing a verified complaint (TR-2 -7), and verified amended complaint (TR-9-19) on April 4, 1989. The suit was brought by Zewadski against both Rick Warner, and Ford Credit (TR-2, TR-9), and both answered (TR-22-31; TR-110-114).
- 2.** The lease contract was negotiated between Zewadski and Rick Warner, and was assigned to Ford Credit upon its signing, pursuant to terms of the contract (TR-303, TR-17-18, TR-26, TR-550, TR-553-554).
- 3.** The contract was for the lease of a new passenger automobile, for personal use (TR-17; TR-553-554; TR-549-550), which, as part of the bargain, expressly included a service contract, incorporated by reference upon the face of the lease instrument (TR-17-18; TR-305, TR-550-554, 554a, 554b).
- 4.** The suit was instituted after Zewadski discovered the misrepresentations of the automobile and lease, and sought cure, was offered no cure by Rick Warner or Ford Credit, who denied warranty responsibilities and would not agree to rescind the

contract (TR-4, TR-10-11, TR-182-183, TR-270).

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5. Zewadski gave written notice of rescission of the contract and returned the automobile promptly upon realization that Rick Warner and/or Ford Credit denied existence of warranty responsibilities.( TR-167-183, 182; TR-351, TR-270, TR-4, TR-11, TR-348-353).

6. Zewadski verified his Complaint (TR-7), and First Amended Complaint (TR-16), setting forth facts under oath.

7. Ford Credit answered to Zewadski's complaint and counterclaimed to enforce the terms of the lease, alleging default for failure to make payments, (TR-22-27), to which Zewadski answered, (TR-48-55).

8. Summary judgments issued on both the complaint, (TR-228-230); and on the counterclaim(TR-573-575).

9. Zewadski was deposed by both Rick Warner and Ford Credit on the 14th day of September, 1989, however said deposition was not filed with the trial court and is not part of the record on appeal.

10. Summary Judgment was granted dismissing Zewadski's complaint upon the courts finding: "that all warranties, if any, as to merchantability or fitness for purpose were excluded" ,

"that there is no credible showing that the vehicle failed to perform within acceptable standards", "that there is no genuine issue as to any material fact", and "that Ford Motor Credit Company is entitled to Judgment as a matter of law" (TR-228-230).

**11.** A second Summary Judgment was granted in favor of Ford Credit's counterclaim upon the court finding: "there is no remaining issue as to any material fact in this case, including but not limited to, such issues regarding service contracts or warranties", "that all events have occurred which entitle FMCC to recover a judgment from Plaintiff pursuant to the terms of the Lease", and "that FMCC is entitled to judgment on its Counterclaim against Plaintiff as a matter of law" (TR-573-575).

**12.** During the time between the summary judgment on Zewadski's complaint, and the final summary judgment upon Ford Credit's counterclaim, Zewadski submitted several motions with affidavits, which were heard, and for which orders and findings were entered, attempting to get leave of the court to supplement or amend his complaint and first amended complaint (TR-376-376a; TR-383-392; TR-367-370); and his answer to Ford Credits counterclaim (TR-283-293, TR-268-278, TR-296-300), vacate an order (TR-355-366, TR-367-372), all

based upon affidavits and memorandums, and verified proposed supplemental pleadings (TR-377-382) (TR-337-343) showing that the contract which Ford Credit sought enforcement of was unenforceable due to a fraud upon its face, and/ or, was unconscionable (TR- 268-278, TR-296-300, TR-283-292), TR-376-376a, TR-383-392, TR-367-370, TR-355-366, TR-367-372). Ford Credit offered no supporting affidavits or evidence opposing these motions. The court denied Zewadski's motion to vacate the first summary judgment of January 2, 1991 (TR-501), and his motion to supplement his complaint and first amended complaint (TR-500-501), finding that Zewadski offered no new factual or legal argument beyond what had been briefed prior to the first summary judgment (TR-500), apparently referring to Zewadski's affidavit and supplemental pleadings opposing summary judgment on complaint (TR-167-196 ).

**13.** The court denied Zewadski's motion to supplement his answer to Ford Credit's counterclaim, after reviewing the proposed answer (TR-500-501)(TR-337-343), and hearing extensive argument (TR-580-581), finding that his amended answer to counterclaim was based upon and raised factual and legal issues regarding a service contract and warranties, upon which the court had held do not exist or are not relevant in the case (TR-580-581).

**14.** Ford Credit submitted an attorneys fee affidavit, (TR-

418-427); a supplemental attorneys fee affidavit, (TR-565-575); and last, after a court order, another supplemental attorneys' fee affidavit (TR-504-538).

**15.** After the final Summary Judgment was entered, including an award of attorneys fees (TR-573-575), Zewadski moved the court to strike the attorneys' fee affidavits (TR-586-589, 590-593) questioning the legal basis of the award, in which proper apportionment of fees was brought in issue (TR-638-640). A hearing was had on the attorneys' fees issues (TR-721-726 ), and the trial court granted Zewadski's motion and ordered Ford Credit to file a supplemental attorneys' fee affidavit that properly apportioned the attorneys' fees to show those due under the contract, and law, and further comply with Utah law (TR-722-723) (TR-679-680), and to file an amended order reflecting correct fees (TR-724, lines 16-22).

**16.** Zewadski moved for a new trial (TR-594-595, TR-597-604, 605-607) which was decided against Zewadski, embodied in a "Supplemental Order" (TR-679-680).

**17.** The trial court record doesn't contain transcripts for (1) the hearing on the motion for summary judgment on the first amended complaint (TR-228-230) and; (2) the hearing on

Zewadski's motions to (a) supplement the complaint, (b) vacate the summary judgment on the complaint, (c) supplement Zewadski's answer to Ford Credits counterclaim; and Ford Credit's motion for summary judgment on the counterclaim, (TR-498-501), (TR-570-582, TR-573-575).

17. The Trial Court found that the instant lease was a true lease (TR-574).

### **SUMMARY OF ARGUMENT**

#### **1. SUMMARY JUDGMENT IS NOT AVAILABLE UNLESS THE MOVING PARTY IS ENTITLED TO JUDGMENT AS A MATTER OF LAW AND THERE IS NO GENUINE ISSUE OF FACT.**

Summary judgment in this case was an error of law as there are genuine issues of material fact. The trial court erred in interpreting the law regarding disclaimer clauses in consumer transactions. Ford Credit submitted no affidavits, depositions, or other evidentiary material to contradict Zewadski's sworn facts in verified complaint and affirmative defences of estoppel and fraud supported by affidavits and verified pleadings.

#### **2. THE TRIAL COURT ERRED IN FINDING THAT ALL IMPLIED WARRANTIES WERE PROPERLY DISCLAIMED**

a.) The trial court apparently relied on Billings Yamaha v. Rick Warner Lincoln-Mercury, 681 P.2d 1276 (Utah

1984), concerning a dispute between two merchants, dealers in vehicles, wherein the U.C.C. law was applied to validate the clause disclaiming implied warranties.

b.) In a consumer transaction such as this case, implied warranties survive disclaimer clauses in contracts if there is a service contract. 15 U.S.C.A. Sec. 2308(a)(c).

**3. THE TRIAL COURT ERRED IN FINDING THAT THERE WERE NO ISSUES OF MATERIAL FACT AND ERRED IN WEIGHING CREDITABILITY AND VERITY OF UN IMPEACHED SWORN TESTIMONY OF FACTS**

Neither Rick Warner nor Ford Credit submitted any affidavits or evidentiary material to contradict or impeach Zewadski's facts set forth in verified pleadings and affidavits. It was an error in law for the trial court to weigh the credibility and verity of Zewadski's sworn testimony, and to grant summary judgment when genuine issues of material fact existed.

**4. THE CONTRACT AT ISSUE IS UNCONSCIONABLE AND DECEPTIVE UNDER THE "UTAH CONSUMER SALES PRACTICES ACT" WHICH PROHIBITS SUPPLIERS FROM PERFORMING UNCONSCIONABLE OR DECEPTIVE ACTS OR PRACTICES IN CONSUMER TRANSACTIONS**

a.) (U.C.A. 13-11-1 through 19) prohibits suppliers from performing unconscionable or deceptive acts or practices, before during or after the transaction. In this case, the

instruments and trial court record shows several violations regarding warranty and service contract matters.

b.) Both Rick Warner and Ford Credit have violated the U.C.S.P.A. (1) Rick Warner violated by both putting an express clause in the lease contract which disclaimed implied warranties when in fact there were implied warranties; and by including a service contract which by its express terms was invalid, or ineffective without the manufacturer's new vehicle warranty which Rick Warner omitted from the contract. (2) Ford Credit violated by representing to Zewadski and the trial court that there were no implied warranties for the vehicle, when, in fact there were implied warranties by application of law, and by continuing to represent to Zewadski and the trial court, after admitting the existence of a service contract, and being informed that implied warranties survive disclaimer clauses in contracts if there is an express warranty or service contract.

## **ARGUMENT**

### **POINT 1.**

**THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT DISMISSING FIRST AMENDED COMPLAINT, FINDING THAT ALL WARRANTIES AS TO MERCHANTABILITY OR FITNESS FOR PURPOSE WERE EXCLUDED**

The trial courts granting of summary judgment in favor of Ford Credit dismissing Zewadski's first amended complaint (TR-228-230) was in error if based upon the legal theory that the contract in dispute contained language effectively excluding implied warranties as to merchantability or fitness for purpose. Summary judgment was granted in favor of Ford Credit upon the trial courts finding that, in part, found "that all warranties, if any, as to merchantability or fitness for purpose were excluded" (TR-229). Utah Courts have held:

"Even if there is no genuine issue as to any material fact, a summary judgment is proper only if the pleadings and other documents demonstrate that the moving party is entitled to a judgment as a matter of law." Lockhart Co. v. Anderson, 646 P.2d 678 (Utah 1982)

The Utah case law cited by Ford Credit supporting their argument that the implied warranties were disclaimed wasn't a "consumer" case but was a case of a commercial dispute between two dealers in vehicles, familiar with commercial practices, applying the law of the U.C.C.. In the instant case Zewadski is not a business person but is a "Consumer" as defined in the 15 U.S.C.A. Sec. 2301(3), and leased the vehicle for personal use. Transactions, such as the one at issue wherein Zewadski was a "consumer" of a "consumer products", are protected from such disclaimers by Federal law. The lease

contract instrument at issue expressly shows upon its face that the lease was for "personal" use, and that part of the bargain from the very beginning was a service contract (TR-17, TR-170-173) ( TR-173, TR-549-554b), and Ford Credit admits under oath that a service contract was included in the lease (TR-305).

The Federal consumer protection laws regarding warranties states in part:

"(a) No supplier may disclaim or modify... any implied warranty to a consumer with respect to such consumer product if (1) such supplier makes any written warranty to the consumer with respect to such consumer product, or (2) at the time of sale, or within 90 days thereafter, such supplier enters into a service contract with the consumer which applies to such consumer product.

(c) A disclaimer, modification, or limitation made in violation of this section shall be ineffective for purposes of this chapter and State law. "

Magnuson-Moss- Warranty- Federal Trade Commission Improvement Act, 15 U.S.C.A. Sec. 2308 (a)(c).

Zewadski hasn't found any similar Utah cases involving the Federal consumer protection warranty laws, so here cites a case from another state:

..."We next consider whether the complaint states causes of action against Maloney for breach of implied warranties under the UCC and Magnuson-Moss. The issue raised here is the efficacy of the disclaimers contained in Maloney's sales contract.

The UCC permits both the exclusion or limitation of an implied warranty of merchantability by conspicuous writing which uses the word "merchantability", and disclaimer of an implied warranty of fitness for a

particular purpose, provided the disclaimer is conspicuous... Conspicuous writing is defined as so written that a reasonable person against whom it is to operate ought to have noticed it...

Maloney's contract expressly provides in three separate places that Maloney is disclaiming all warranties, express or implied, including any implied warranty of merchantability or fitness for a particular purpose... Such disclaimers effectively avoid liability for breach of implied warranty under the UCC...

Maloney's disclaimers under Magnuson-Moss, however, must be treated differently. Magnuson-Moss prohibits a supplier of goods as Maloney, from disclaiming implied warranties if: (1) the supplier has given a written warranty to the consumer; or (2) the supplier has entered a service contract with the consumer within 90 days of a sale. (15 U.S.C. sec. 2308(a) (1982).)"

Rothe v. Maloney Cadillac, Inc., 492 N.E. 2d 497, 503 (Ill. App. 1 Dist. 1986)."

The Utah case cited by Ford Credit (TR-137-138, 140) supporting the efficacy of the disclaimer clause in their motion for summary judgment, Billings Yamaha v. Rick Warner Ford, Inc., 681 P.2d 1276 (Utah 1984), was a case of a commercial dispute between merchants, not a "consumer" case, and was decided using law of the Uniform Commercial Code, here cited:

"Plaintiff, a partnership, purchased a new 1976 Thunderbird from defendant in July of 1976... According to the testimony of Delyle Billings, one of plaintiff's principles, the car developed problems...

Automobile buyer's remedy for alleged defect in automobile was effectively limited to manufacturers express warranties by disclaimers in installment sales and security agreement and in purchase order, both of which expressly excluded warranties of fitness and merchantability, and both of which were signed by

buyer's principle and his wife... and where buyer, which was dealer in motorcycles, was experienced with commercial practices...

Nor is this a case where the buyer was inexperienced or unfamiliar with commercial practices. This buyer was a dealer in motor vehicles (motorcycles)."

Billings Yamaha v. Rick Warner Ford, Inc., 681 P.2d 1276 (Utah 1984).

The lease contract's express inclusion of a service contract (TR-17, TR-305, TR-171, TR-312, TR-553) preserves implied warranties for the automobile regardless of the disclaimer clause in the contract by application of 15 U.S.C.A. 2308(a)(c) ), and the trial court erred in finding that all implied warranties were properly disclaimed as a matter of law. This argument was properly before the court (TR-185-195) prior to the interlocutory summary judgment on complaint.

## **POINT II.**

### **THE EVIDENCE BEFORE THE TRIAL COURT PRECLUDES AVAILABILITY OF SUMMARY JUDGMENT AS THERE ARE GENUINE ISSUES OF MATERIAL FACT**

The trial courts granting of summary judgment in favor of Ford Credit dismissing Zewadski's first amended complaint (TR-228-230) was error if based upon legal theory that there was no genuine issue as to any material fact (TR-229), and upon findings that, in part, found:

"that statements of Rick Warner Lincoln-Mercury or its employees were not false, fraudulent nor material misrepresentations or omissions relating to the capabilities of

the vehicle" (TR-229), and; "that there is no credible showing that the vehicle failed to perform within acceptable standards" (TR-229).

Summary judgment is available only when no material facts are at issue. In the instant case Zewadski provided sworn testimony, a "verified" complaint, regarding the misrepresentations of Rick Warner and its agents as an inducement to enter into the contract , and the failure of the vehicle to perform within acceptable standards as represented (TR-9-11); to which Ford Credit produced no facts, opposing testimony, or impeaching evidence. The trial court erred in weighing credibility and verity of Zewadski's sworn testimony, and erred in finding facts contrary to those submitted by Zewadski. The Utah courts have held that it is not the station of summary judgment to weigh testimony or credibility of witnesses.

Held: "Court cannot consider the weight of testimony or credibility of witness on motion for summary judgment; court simply determines that there is no disputed issue of material facts and that as matter of law one party should prevail." Singleton v. Alexander, 431 P.2d 126 (1967), Sandberg v. Klein, 576 P.2d 1291 (Utah 1978).

Held: "Summary judgment is never used to determine what the facts are, but only to ascertain whether there are any material issues of fact in dispute." Hill ex rel. Fogel v. Grand Cent., Inc., 477 P.2d 150, 25 Utah 2d 121, (1970).

Held: "In ruling on motion for summary judgment, trial court must not weigh evidence or assess credibility." Mountain States, Etc. v. Atkin, Wright & Miles, 681 P.2d 1258 (Utah 1984).

The Utah courts have held that summary judgment should be denied where there are genuine issues of material fact, and can consider only facts not in dispute, here cited:

Held: "In ruling on motion for summary judgment, the court may consider only facts that are not in dispute." Sorenson v. Beers, 585 P.2d 458 (Utah 1978);

Held: "This statement was not contradicted or challenged by the guarantors and must be accepted as an uncontested fact for purposes of summary judgment." Landes v. Capital City Bank, 795 P.2d 1121, 1131 (Utah 1990).

Held: "A motion for summary judgment should be denied where the evidence presents a genuine issue of material fact which, if resolved in favor of the non moving party, would entitle him to judgment as a matter of law."

"A genuine issue of fact exists where, on the basis of the facts in the record, reasonable minds could differ on whether defendant's conduct measures up to the required standard." Jackson v. Dabney, 645 P.2d 613 (Utah 1982).

Zewadski submitted sworn testimony prior to the motion for summary judgment, in his verified first amended complaint, setting forth sworn facts of causes of action.(TR-10-11). Utah courts have held that verified pleadings meet the requirement of affidavits to defeat a summary judgment, here cited:

"A plaintiff's verified pleading that meets the requirements for affidavits can be considered the equivalent of an affidavit for the purpose of defeating a motion for summary judgment. " Pentecost v. Harward, 699 P.2d 696 (Utah 1985).

The failure of Ford Credit to object to Zewadski's verified first amended complaint, , or to present any affidavits contradicting or impeaching the facts set forth by Zewadski leaves facts at issue, and the facts are material, setting forth fraud and misrepresentation, which would entitle Zewadski to relief if resolved in his favor, and so summary judgment is not available as a matter of law. Summary judgment is only available to the moving party if there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. The pertinent rule U.C.A .Rule 56(c), is here cited in part:

"The judgment sought shall be rendered forthwith if the pleadings, depositions, answers, to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Though Ford Credit tried to impeach Zewadski's testimony by referring in their memorandums to a deposition, and Zewadski cited the same deposition, nevertheless, Zewadski's testimony was not impeached nor any facts set forth contradicting Zewadski's sworn facts, or supporting Ford Credit's motion for summary judgment, because Ford Credit failed to file the deposition with the court.

Evidence not properly before the court cannot be considered in

determining the merits of such a motion. In Thompson v. Ford Motor Co., 384 P.2d 109 , 14 Utah 2d 334 (1963), depositions were taken but never published, marked, or introduced into evidence nor read by the trial court. Although both parties cited from the depositions in their briefs before the trial court, this Court said on appeal from summary judgment, "... we must assume that the testimony contained in the deposition was not presented to or considered by the lower court." Similar rulings were made in the cases of Reliable Furniture Co. v. Fidelity and Guaranty Insurance Underwriters, Inc., 380 P.2d 135 , 14 Utah 2d 169 (1963), and Rosander v. Larsen, 376 P.2d 146, 14 Utah 2d. 1 (1962). In Rosander, the Court said:

"It deserves mentioning that the plaintiff's deposition was taken in this action. Defendant in his brief makes reference to this deposition. However, the deposition as received by this court was still in the sealed envelope of the reporter. Under the circumstances we cannot consider its contents and must assume that it was not considered by the lower court."

Matters not admitted in evidence before trier of fact will not be considered on appeal. Pilcher v. State of Utah Department of Social Services, 663 P.2d 450 (Utah 1983); Utah Department of Transportation v. Fuller, 603 P.2d 814 (Utah 1979); Corbet v. Corbet, 472 P.2d 430, 24 Utah 2d 378 (1970).

In reviewing the record on appeal:

Held: "In reviewing the record on appeal from a summary judgment, court treats the statements and evidentiary materials of the appellant as if a jury would receive them as the only credible evidence and the court sustains the judgment only if no issue of fact which could affect the outcome can be discerned." Blodgett v. Martsch, 590 P.2d 298 (Utah 1978).

In brief summary, a motion for summary judgment can only be granted if supported by admissible evidence properly before the court. It cannot be granted if only supported by pleadings, inadmissible evidence or evidence not submitted to the court on a timely basis.

The trial court's findings in its summary judgment order (TR-228-230) weighing the verity and creditability of Zewadski's sworn testimony, and finding that there was no genuine issue as to any material fact , is an error in law and is subject to review for correctness here.

### **POINT III.**

#### **THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON FORD CREDIT'S COUNTERCLAIM AS A MATTER OF LAW AND IN VIEW OF ZEWADSKI'S UNCONTRADICTED VERIFIED AFFIRMATIVE DEFENSE'S OF ESTOPPEL AND FRAUD**

The trial courts granting of summary judgment in favor of Ford Credit's counterclaim (TR-573-575) was an error if based upon earlier findings contained in the interlocutory summary judgment filed January 2, 1991 (TR-228-230), in this instant case, which issues are argued hereinabove.

The Summary Judgment granted in favor of Ford

Credit's counterclaim found, in part, that:

"there is no remaining issue as to any material fact in this case, including but not limited to, such issues regarding service contracts or warranties", "that all events have occurred which entitle FMCC to recover a judgment from Plaintiff pursuant to the terms of the Lease", and "that FMCC is entitled to judgment on its Counterclaim against Plaintiff as a matter of law" (TR-573-575).

The basis of the trial courts summary judgment on counterclaim was that the trial court had already earlier ruled upon the issues (TR-228-230, TR-500-501).

The earlier interlocutory summary judgment on the complaint issued forth apparently first on the theory that all implied warranties were properly disclaimed by a clause in the contract and so no material facts were at issue because the problems Zewadski complained of were of the implied warranty nature (TR-228-230).

This basis is more apparent when an earlier order is examined (TR-500-501). Zewadski sought by motion (TR-355-366) with affidavit (TR-367-372), to vacate the first summary judgment ; and by motion (TR-376-376a, TR-383-392) with affidavit (TR-393-398), and verified proposed amended pleading (TR-377-382), to amend the complaint; and sought by motion (TR-283-292) with affidavits (TR-296-301, TR-268-279) and

verified proposed supplemental answer (TR-337-343) to amend the answer to Ford Credits counterclaim, and the trial court ruled, in an order filed August 30, 1991 (TR-500-501), that the issues sought to be introduced had already been presented previously and ruled upon in the earlier summary judgment order (TR-228-230).

The trial court had ruled earlier that there were no implied warranties on the automobile (TR-229) due to a disclaimer clause in the contract and so apparently did not give much weight to the implied warranty type problems complained of by Zewadski, however the trial court did rule that the problems complained of were without creditability, and that the claimed misrepresentations had not been made (TR-229), which was an error when Ford Credit neither contradicted nor impeached Zewadski's sworn testimony with any evidence.

Zewadski answered (TR-48-55) to Ford Credit's counterclaim (TR-26-27) setting forth denials, and express affirmative defenses of fraud and estoppel (TR-48-55, TR-50, 50a). Neither Ford Credit's counterclaim, nor its motion for summary judgment upon it, were supported by any sworn evidence to contradict Zewadski's affirmative defenses of fraud and estoppel, said defenses the particularity for which were set forth in Zewadski's earlier verified first amended complaint (TR-10-11) quoted above, and other verified

pleadings admitted into the record pursuant to U.R.C.P. Rule 15(b).

Additional affirmative defenses of fraud, to those set forth in Zewadski's verified complaint (TR-10-11) were introduced without objection and tried by implied consent, amending Zewadski's pleadings by application of U.R.C.P. Rule 15(b), showing the lease contract was fraudulent; an executory contract, incorporating by express reference a service contract, which two instruments together serve as an integrated contract, that, when construed together, show fraud upon the face of the instruments by their failure to provide a valid service contract or warranty, which was part of the bargain, and for which money was paid. (TR-549-554b, TR-542-548, )(TR-337-343) (TR-296-300) (TR-268-278) (TR-377-343).

Here quoted is part of Zewadski's Affidavit opposing Ford Credit's motion for summary judgment on their counterclaim, filed September 9, 1991. (TR-549-554b):

"10. The lease contract included, as a material part of the bargain, a service contract for the vehicle, which was included and integrated into the lease contract by its being expressly listed upon the face of the lease contract instrument, integrated by reference, stated in this language:

"The Vehicle is covered by any extended warranty or service contract described in this Lease and the following, if checked:"

12. The service contract delivered to me was invalid by its express terms, stating in the following language:  
"The Extended Service Plan Contract coverage is

designed to complement the manufacturer's warranty and cannot be substituted for it.

and;

"Other Services and Repairs Not Covered:

Repairs covered by the manufacturer's New Vehicle Warranty."

13. The Lease contract instrument omits and did not provide me any manufacturer's warranty, or manufacturer's new vehicle warranty.

14. The lease contract contains an integration clause in paragraph 31, stating:

"This lease sets forth all of the agreements of the lessor and the Lessee for the lease of the Vehicle. There is no other agreement." (TR-549-554b)

Two other verified pleadings set forth facts admissible as evidence supporting Zewadski's case of fraud and/or unconscionability. The "Supplemental/ Amending Complaint of Guy Barco Zewadski", filed July 26, 1991 (TR-377-382), and the 'Verified Proposed Supplemental Answer", filed July 22, 1991, (TR-337-343) were verified, and submitted pursuant to procedural rules, in support of Zewadski's motions to supplement his complaint, and his answer to Ford Credit's counterclaim. Though the court denied Zewadski's motions to supplement his pleadings, nevertheless, these two verified testaments are admissible as evidence in this case. They were not stricken from the record, nor objected to by the opposing parties, but rather, argument was had on the issues (TR-383-392, TR-325-327), the trial court finding that there had been

extensive oral argument, lasting 40 to 45 minutes, and that no new factual or legal arguments were offered beyond those which had been briefed previously and ruled upon (TR-500-501).

Utah law allows issues to be tried by implied consent between the parties by the introduction of evidence without objection.

U.R.C.P. Rule 15 (b), and so, the sworn material is properly introduced as evidence. The fact that these two proposed amended pleadings were verified (TR-377-382; TR-337-343), and found by the court not to raise anything not raised before (TR-499-501; TR-580-582), merely makes them, in effect, opposing affidavits for purpose to oppose a motion for summary judgment and doesn't prejudice the opposing parties.

Utah courts have held:

"A plaintiff's verified pleading that meets the requirements for affidavits can be considered the equivalent of an affidavit for the purpose of defeating a motion for summary judgment. " Pentecost v. Harward, 699 P.2d 696 (Utah 1985).

Utah law allows issues to be tried by implied consent between the parties. U.R.C.P., Rule 15 (b):

"(b) Amendments to conform to the evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendments of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment;

but failure so to amend does not affect the result of the trial of these issues. .." U.R.C.P. 15(b). (emphasis added)

Utah courts have held:

"There must be either express or implied consent of parties for trial of issues not raised in pleadings; implied consent may be found where one party raises issue material to other parties case, or where evidence is introduced without objection." General Insurance Company of America v. Carnicero Dynasty Corporation, 545 P.2d 502, 503 (Utah 1976). (emphasis added)

Zewadski's additional affirmative defenses of fraud and estoppel, properly brought into issue as hereinbefore explained, by the "Verified Proposed Supplemental Answer", filed July 22, 1991 (TR-337-343), are here quoted from the record, in part:

- "1. I believe the lease contract at issue is not enforceable as it is void, voidable, properly rescinded by notice, rescindable, or unconscionable, due to fraudulent misrepresentation by the lessor.
2. The lessor sold counter defendant a "service contract", for the leased vehicle at issue, represented as an "extended warranty", which expressly states it "... is designed to compliment the manufacturer's warranty and cannot be substituted for it." The "service contract" instrument was not delivered at the time of sale but mailed to counter defendant after complaint, counterclaim, and answer to counterclaim were filed.
3. No manufacturer's warranty was provided to counter defendant in any way; such warranty was omitted on face of contract instrument, and subsequent "corrections" of the lease instrument by the lessor and the counterplaintiff still omitted the "manufacturer's warranty".
4. The "service contract", incorporated in the lease agreement contract was sold to counterclaim defendant

for seven hundred and seventy five dollars (\$775.00) (about \$1200.00 including interest), and increased the monthly payments for the lease about twenty dollars (\$20.00) for the sixty (60) months of the lease.

5. Counter defendant paid several months lease payments prior to electing to rescind the contract by written notice to all parties, and was not delinquent or in default under the contract when the vehicle was returned as offered in the notice rescinding the contract.

6. Terms of the lease contract required counter defendant to maintain vehicle for the life of the lease, so the purchased "service contract" was a material element to the lessee in making the bargain.

7. Counter defendant was induced into the bargain by the representation that the "service contract" would provide valid, effective, extended warranty coverage for the life of the lease." (TR-337-343)

Considering the argument above, affirmative defenses of fraud and estoppel were set forth with sworn testimony by Zewadski, tried by the parties, and not contradicted or impeached by any sworn testimony. The defenses should be ruled as sufficient to defeat the trial court's grant of summary judgment on Ford Credit's counterclaim, (and summary judgment on Zewadski's complaint), in that issues of material fact are presented and in dispute, and that no basis for judgment is evident as a matter of law. Utah Courts have held:

"In reviewing the record on appeal from a summary judgment, court treats the statements and evidentiary materials of the appellant as if a jury would receive them as the only credible evidence and the court sustains the judgment only if no issue of fact which could affect the outcome can be discerned." Blodgett v. Martsch, 590 P.2d 298 (Utah 1978).

The trial court's finding that there was no genuine issue as to any material fact and that Ford Credit was entitled to summary judgment as a matter of law is an error in law and is subject to review for correctness here.

#### **POINT IV.**

#### **THE CONTRACT AT ISSUE IS UNCONSCIONABLE UNDER THE "UTAH CONSUMER SALES PRACTICES ACT" SO AS TO ENTITLE ZEWADSKI TO RELIEF UNDER THE ACT**

The record shows that the contract at issue is unconscionable both under common law and the U.C.S.P.A. and that both Rick Warner and Ford Credit have violated the Utah consumer protection laws set forth in the "Utah Consumer Sales Protection Act", ("U.C.S.P.A.") U.C.A. 13-11-1 through 19.

Zewadski acted timely in giving notice of rescission and returning automobile, upon discovery of misrepresentations (TR-348-353) (see this brief, statement of facts #5 ).

Rick Warner and Ford Credit are both "suppliers" in this case, as defined in U.C.A. 13-11-3(6); (TR-9, 10, 17; TR-23; TR-110, 111).

U.C.A. 13-11-3(6): "Supplier" means a seller, lessor, assignor, offeror, broker, or other person who regularly solicits, engages in, or enforces consumer transactions, whether or not he deals directly with the consumer."

Under the "U.C.S.P.A." it is unlawful, unconscionable, and against public policy for a "Supplier" to engage in a deceptive practice or act, or an unconscionable act or practice, regarding a "consumer transaction", including representations regarding warranties, either before, during or after the transaction (U.C.A. 13-11-4(2)(2J), and unconscionability is a proper subject for review by the appellate court in a summary judgment matter even if it is brought up for the first time on appeal, however, in this case it was at issue, (TR-191-193). Unconscionability, under the U.C.S.P.A. is a question of law and can be found by the Appellate Court even if the issue hasn't been raised at all but simply appears to the court. U.C.A. 13-11-5(1)(2)(3):

**"Unconscionable act or practice by supplier.**

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

**(2) The unconscionability of an act or practice is a question of law for the court. If it is claimed or appears to the court that an act or practice may be unconscionable, the parties shall be given a reasonable opportunity to present evidence as to its setting, purpose, and effect to aid the court in making its determination.**

**(3) In determining whether an act or practice is unconscionable, the court shall consider circumstances which the supplier knew or had reason to know."**

**Utah Code 13-11-5(1)(2)(3) (emphasis added)**

The Appellate Court is free to interpret the contract at issue in this instant case with no deference to the trial courts conclusions. This court has held:

" Standard of Review. In reviewing a summary judgment, we analyze the facts and inferences in the light most favorable to the losing party. *Atlas Corp. v. Clovis Nat'l Bank*, 737 P.2d 225, 229 (Utah 1987). Because summary judgment is granted as a matter of law, we review the trial court's conclusions of law for correctness. *Id.* If a trial court interprets a contract as a matter of law, that interpretation is not afforded any particular deference on appeal. *Power Sys. & Controls, Inc. v. Keith's Elec. Constr. Co.*, 765 P.2d 5, 9 (Utah App. 1988)..."  
*Fashion Place INV. v. Salt Lake County*, 776 P.2d 941, 943 (Utah App. 1989). (emphasis added)

The Appellate Court is free to interpret the contract in this case, and must construe both the lease instrument and the service contract instrument together, as the service contract was incorporated by express reference into the lease contract (see argument, point III., of this appellant's brief), and this fact is not in dispute, having been sworn to, admitted, and apparent upon the face of the instruments. ( TR-405, TR-378-379, TR-339; TR-17, 18; TR-170-173).

The Utah Supreme Court, in interpreting contracts, has held:

"Where two or more instruments are executed by same parties contemporaneously, or at different times in course of same transaction, and concern same subject matter, they will be read and construed together so far as determining respective rights and interests of the

parties, even though they do not in terms refer to each other."

Bullfrog Marina Inc. v. Gilbert M. Lentz, 501 P.2d 266, 28 Utah 2d 261 (1972).

"In determining issue of completeness of integration in writing, evidence extrinsic to the writing itself is inadmissible, and parol evidence is admissible to show circumstances under which the agreement was made and purpose for which the instrument was executed."

Bullfrog Marina, Inc. v. Lentz, 501 P.2d 266, 28 Utah 2d 261 (1972).

Some further general authorities regarding interpretation of contracts are here cited:

INTEGRATED AGREEMENTS: (1) An integrated agreement is a writing or writings constituting a final expression of one or more terms of an agreement." Restatement of the Law, Second, Contracts, Sec. 209.

RULES IN AID OF INTERPRETATION: (2) A writing is interpreted as a whole, and all writings that are part of the same transaction are interpreted together." Restatement of the Law, Second, Contracts, Sec. 202.

"INTERPRETATION OF INTEGRATED AGREEMENT: (1) The interpretation of an integrated agreement is to be directed to the meaning of the terms of the writing or writings in light of the circumstances, in accordance with the rules stated in this chapter." Restatement of the Law, Second, Contracts, Sec. 212.

A recent Utah case applying the U.C.S.P.A., and finding unconscionability, is here cited in length:

"The tenant also asserts that the landlord's actions were unconscionable under section 13-11-5 of the UCSPA. Under the statute, unconscionability does not require proof of specific intent but can be found by considering circumstances which the supplier "knew or had reason to know". Utah Code Ann. 13-11-5(3).

The determination of unconscionability is a question of law. Utah Code Ann. 13- 11-5(2). This court is therefore free to review the record and make its own conclusions as to this determination. See State ex rel. Div. Consumer Protection v. Rio Vista Oil, Ltd., 786 P.2d 1343, 1347 (Utah 1990); Henretty v. Manti City Corp., 791 P.2d 506, 510 (Utah 1990).

In Resource Management Co. v. Weston Ranch and Livestock Co., 706 P.2d 1028 (Utah 1985), we discussed the doctrine of unconscionability at length. The discussion was based on standards articulated in the Uniform Commercial Code, see U.C.C. 2-302, comment 1, and on contract law in general. The principles there discussed are, for the most part, applicable here.

In Resource Management, the court distinguished "substantive" and "procedural" unconscionability. Procedural unconscionability focuses on the manner in which the contract was negotiated and the circumstances of the parties, 706 P.2d at 1041, and can be characterized as the "absence of meaningful choice" and a gross inequality of bargaining power." Id. at 1042 (quoting Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965)). Substantive unconscionability examines the relative fairness of the obligation assumed ; it requires terms "so one-sided as to oppress or unfairly surprise an innocent party", Resource Management, 706 P.2d at 1041 (citing Bekins Bar V Ranch v. Huth, 664 P.2d 455, 462 (Utah 1983)); Bill Stremmel Motors, Inc. v. IDS Leasing Corp., 89 Nev. 414, 514 P.2d 654, 657 (1973), or "an overall imbalance in the obligations and rights imposed by the bargain." Bekins Bar V Ranch v. Huth, 664 P.2d at 462.

Under contract law, unconscionability is determined as of the time the parties enter into the contract. See Resource Management, 706 P.2d 1043. In contrast, under the UCSPA, an unconscionable act or practice may occur "before, during or after" a consumer transaction. In this case, therefore, consideration can be given to the landlord's actions during the course of the tenancy, as well as to his act of renting the premises initially." Wade v. Jobe, 818 P.2d 1006, 1016, 1017 (Utah 1991).

**Common law unconscionability:** A case with a remarkably

similar overall effect, but which was decided without benefit of consumer protection laws like the U.C.S.P.A., from another State, is here cited;

"According to the lease agreement, Irving disclaimed all warranties, express and implied, and assumed no responsibilities for the performance or maintenance of the equipment in issue. In the lease agreement, Irving did not assign to M & H it's rights as vendee of the equipment against the manufacturer- vendor for breach of warranty; thus, in the event the equipment is found to be defective, as it was in this case, the lease agreement leaves the lessee without recourse against either the lessor or the manufacturer for breach of warranty. It is our determination that such an inequitable result raises the issue of unconscionability of the lease agreement. Unconscionability arises from the inequity of compelling payment for equipment that cannot be used without the right to interpose a defense or set off on the part of the lessee. The lessee in this situation is left without recourse against either the lessor or the manufacturer for receiving defective machinery. Although we recognize that a lessor may disclaim all warranties in the leased goods, he may not leave the lessee with defective machinery and with no avenue for recourse against manufacturer. " Irving Leasing Corp. v. M & H Tire Co., 475 N.E. 2d 127 (Ohio 1984).

Zewadski's case is similar to the Irving case above, in that when viewed from the contract writings the overall effect of the contract, when construed as an integrated contract including the lease instrument and the service contract instrument, was that Zewadski was left with an automobile for 5 years, that he was required to keep in good order, and to see that all repairs were made, and for which he was liable for a all mechanical

defects, all electrical malfunctions, all rusted body parts, etc., explained in item #18 of the lease contract, but for which no manufacturer's warranty was included, and for which the service contract, by its express terms, was ineffective due to the lack of the manufacturer's warranty, and finally, for which all implied warranties were disclaimed, and denied to Zewadski by both Rick Warner, and Ford Credit. In the lease agreement, Rick Warner did not assign to Zewadski it's rights as vendee of the vehicle against the manufacturer for breach of warranty; thus, in the event the equipment was found to be unusable or defective, the lease agreement leaves the lessee without recourse against either the lessor or the manufacturer for breach of warranty.

U.C.A. 13-11-4 (1)(2)(2j): **Deceptive act or practice.**

"(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:

"(2)(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 indication is false. " Utah Code 13-11-4(1)(2)(2j)

Ford Credit's representation that the vehicle had no implied warranties (TR-135-138) was contrary to the

"U.C.S.P.A." and shows both a deceptive act or practice, and

an unconscionable act, in violation of the UCSPA, U.C. 13-11-4, and U.C. 13-11-5 , in that Ford Credit "had reason to know" (U.C. 13-11-5(3) that the disclaimer of implied warranties in the lease contract was negated by the "U.C.S.P.A."; and Ford Credit's deception violates both the U.C. 13-11-5(1), and U.C. 13-11-4(1)" whether it occurs before, during, or after the transaction"; and that it was was so represented with intent to deceive, in violation of U.C.A. 13-11-4, is evident by the fact that the very contract which Ford Credit seeks relief under in this instant case shows upon its face that a "service contract" was incorporated as part of the bargain (TR-17, TR-170-173, TR-549-554b).

This appellate court should rule that the lease contract at issue is unconscionable under common law, and, under the "U.C.S.P.A." (U.C.A. 13-11-5 (1)(2)(3), and so void and unenforceable.

#### **POINT V**

**SUMMARY DISPOSITION BY THIS COURT IS AVAILABLE ON SOME ASPECTS OF THIS CASE INCLUDING THE ISSUE OF UNCONSCIONABILITY OF THE CONTRACT AND TRANSACTION.**

This Court has the power to rule summarily on certain aspects of

this case. Upon appeal of a summary judgment this Court is free to interpret the law, and as this case is a contract dispute, this Court is free to interpret the contract.

Unconscionability of a contract and/ or transaction is a question of law, and under both common law and the U.C.S.P.A. this Court is free to determine if the contract and/ or transaction at issue is unconscionable.

This Court is free, in the instant case, based upon the record, pursuant to common law, and the U.C.A. 13-11-5 (1)(2)(3), to summarily rule that the contract and/ or transaction is unconscionable, if it should find it so, because the claim of unconscionability, and the evidence, facts and issues regarding unconscionability have been tried by the parties (TR-191-193; TR-170-173; TR-186-195; TR-268-279; TR-296-301; TR-367-372; TR-377-382; TR-549, 554b; TR-542-548; TR-689a-690; TR-707-711; TR-325-326 ), and Ford Credit and/ or Rick Warner have had ample opportunity to present opposing evidence as to the setting, purpose, and effect (per U.C.A. 13-11-5(2) to aid the court in making a determination of the claimed unconscionability of the contract and/ or transaction, and have chosen to present absolutely no evidence to contradict any of the evidence of unconscionability Zewadski has submitted.

The court may logically conclude that Ford Credit and/ or Rick Warner did not challenge Zewadski's claims of unconscionability of the contract and/ or transaction because

they accepted the facts as presented by Zewadski, that the unconscionability of the contract and/ or transaction is visible upon the face of the written instruments of the contract.

**Interpretation of law:** Regarding appeal of a summary judgment, this court is not bound to any interpretation of law given by the trial court. This Court has held:

"Since a summary judgment is granted as a matter of law rather than fact, the Court of Appeals is free to reappraise the trial court's legal conclusions. Barber v. Farmers Ins. Exch., 751 P.2d 248 (Utah Ct. App. 1988).

The Utah Supreme Court has held:

"In as much as a challenge to summary judgment presents for review conclusions of law only , because , by definition, summary judgments do not resolve factual issues, the Supreme Court reviews those conclusions for correctness, without according deference to the court's legal conclusions." Bonham v. Morgan, 788 P.2d 497 (Utah 1989).

**Interpretation of contracts:** Regarding the interpretation of contracts, this court is not bound to any interpretation made by the trial court. Utah courts have found that in reviewing on appeal a summary judgment enforcing a contract the Supreme Court, and/ or Appellate Court of the State of Utah gives no particular deference to the interpretation of the contract given by the trial court, and is free to reappraise the trial courts legal conclusions for correctness, analyzing the facts

and inferences in the light most favorable to the losing party.

" Standard of Review. In reviewing a summary judgment, we analyze the facts and inferences in the light most favorable to the losing party. *Atlas Corp. v. Clovis Nat'l Bank*, 737 P.2d 225, 229 (Utah 1987). Because summary judgment is granted as a matter of law, we review the trial court's conclusions of law for correctness. *Id.* If a trial court interprets a contract as a matter of law, that interpretation is not afforded any particular deference on appeal. *Power Sys. & Controls, Inc. v. Keith's Elec. Constr. Co.*, 765 P.2d 5, 9 (Utah App. 1988)..."

*Fashion Place INV. v. Salt Lake County*, 776 P.2d 941, 943

(Utah App. 1989).

**Unconscionable:** Considering the foregoing argument, this Court is free as a matter of law to determine whether the contract and transaction at issue is unconscionable under both common law and the "Utah Consumer Sales Protection Act"..

(see Point IV. above). The Utah Supreme Court has held:

â\*b1W

"The determination of unconscionability is a question of law. Utah Code Ann. 13- 11-5(2). This court is therefore free to review the record and make its own conclusions as to this determination. See *State ex rel. Div. Consumer Protection v. Rio Vista Oil, Ltd.*, 786 P.2d 1343, 1347 (Utah 1990); *Henretty v. Manti City Corp.*, 791 P.2d 506, 510 (Utah 1990).

This case, being a dispute of an express contract, with an integration clause, and in which the record shows none of the parties have claimed or suggested that the contract is ambiguous, is subject to the parol evidence rule. The contract

may only be construed from its writings. The trial court record, as shown hereinabove, uncontradictedly presents the contract into evidence as an integrated contract of two instruments, a lease contract instrument and a service contract instrument, incorporated by express reference. As this Court is free to interpret the contract at issue from its writings only, Ford Credit and/ or Rick Warner have not and in fact cannot hope to add anything to the issue, and there is no reason this court should delay in ruling whether the contract is unconscionable upon its face, and that the transaction was unconscionable.

If this Court should determine that, as a matter of law, the contract and or transaction at issue was unconscionable, then Zewadski submits that the summary judgments against him should be vacated and Ford Credit's Counterclaim to enforce the contract dismissed. Such an action is not without precedent in Utah: The Supreme Court of Utah has held:

"Where ... it appears on appeal that the vendor, under the law as applied to contracts and the admitted facts, is entitled to recover any damages, the case will not be remanded for new trial, but the trial court will be directed to enter judgment dismissing the action.... Ordinarily in law cases we merely reverse the judgment, and remand the case for a new trial. However, where it is apparent, as in this case, that no view that can be taken of the law can the respondent recover on the contract in question, it would be useless to remand the case for a new trial....When it is clear from the record that a plaintiff cannot recover under any possible state of the evidence, a new trial should not be allowed merely to permit the parties to

satisfy a litigious spirit . But , under our practice , the plaintiff's in this case may, in any event , within a specified time, as a matter of right, institute another action, if they should be so inclined. In no event , therefore should they be permitted to prosecute this action further." Dopp et al. v. Richards, 135 P. 98, 43 Utah 332 (Utah S. Ct. 1913)

## **CONCLUSION**

The trial court erred in granting summary judgment against Zewadski's complaint, and summary judgment in favor of Ford Credit's counterclaim, upon basis that all implied warranties were excluded on the automobile due to a disclaimer clause in the contract, and in weighing the credibility and verity of Zewadski's uncontradicted testimony. It was an error in law for the trial court to rule that the implied warranties were properly disclaimed by a clause in the contract when Federal law makes such disclaimers void if there is, as in this case, a service contract. It was an error in law, in a summary judgment proceeding, for the trial court to weigh the credibility and verity of Zewadski's uncontradicted, and unimpeached testimony. The record shows Zewadski has supported his complaint of fraud, deceit, and rescission of contract against Ford Credit and Rick Warner with admissible testimony and that neither Ford Credit nor Rick Warner contradicted Zewadski's testimony with any evidentiary material.

In defense to Ford Credit's counter suit Zewadski set

forth affirmative defenses of estoppel and fraud, the particularity of which were set forth in the verified complaint, timely first amended complaint, affidavits with exhibits, and lastly, by verified pleadings admitted into evidence and tried by the parties as argued above.

In Ford Credit's motions for summary judgments, both on Zewadski's complaint and on Ford Credit's counterclaim, no affidavits were used to support any contention that Zewadski's claims were false and that there were no genuine issues of material fact justifying summary judgment. Zewadski contends there are such issues, supported by affidavits and verified pleadings, and that his affirmative defenses of fraud and estoppel are well supported by evidence in the record.

In spite of the fact that Rick Warner and Ford Credit had ample opportunity to do so, they have chosen to present no evidence contradicting any of the above. No evidence was ever given or presented to the Tryor of Fact to indicate that the representations made by Zewadski were, in fact, false.

Though Ford Credit cited the deposition they took of Zewadski in their pleadings and memorandums for summary judgments, Ford Credit chose not to file the deposition with the trial court.

The only logical conclusion from the above is that Ford Credit and

Rick Warner did not challenge the various claims made by Zewadski concerning fraudulent misrepresentations made by Rick Warner's agents because they accepted the fact that the misrepresentations had in fact been made. Therefore Ford Credit proceeded to contend that Zewadski was precluded from pursuing his claims as a matter of law because what Zewadski complained of were implied warranty issues and the contract at issue excluded all implied warranties with a disclaimer clause.

This legal strategy by Ford Credit is deceptive and unconscionable, in that they should have known such disclaimers are without legal effect in cases like this and that the automobile had implied warranties regardless of any disclaimer clause. The record shows that Zewadski brought the Federal law regarding implied warranties [15 U.S.C.A. Sec. 2301 et. seq. ] to Ford Credit's attention, and that their attorney's studied the matter (including it in their attorney's fee affidavit) and did not amend their position. Under the U.C.S.P.A., once they did know that the disclaimer clause in the contract was without effect, it was a deceptive and unconscionable act or practice for them to continue their case against Zewadski on that basis, because the U.C.S.P.A. applies to acts and practices committed before, during, and after a consumer transaction.

The record shows Zewadski gave timely notice of rescission of the contract to both Ford Credit, and Rick Warner,

and returned the vehicle in good condition as directed.

This case is based upon an express integrated contract consisting of the lease instrument and a service contract listed upon the lease instrument and incorporated by reference, both in the record. The complaint, and the affirmative defenses the record shows Zewadski set forth of fraud and estoppel, simply rely upon the writings of the integrated contract. This Court is free to interpret the contract with no deference to the trial courts interpretation. This Court is free to find unconscionability of a contract or transaction as a matter of law. Rescission of a contract is a remedy available in this case.

Zewadski respectfully requests that this Court vacate the lower court's summary judgment on Ford Credit's counterclaim, and dismiss it, or that failing, said judgment should be reversed and dismissed, or reversed and remanded for trial or further action by the trial court.

Zewadski respectfully requests that this Court reverse the lower court's summary judgment dismissing Zewadski's first amended complaint, and remand the matter for trial or further proceedings.

DATED this 1st day of July, 1992.

  
-----  
Guy Barco Zewadski

Plaintiff/ Appellant  
Appearing Pro-se

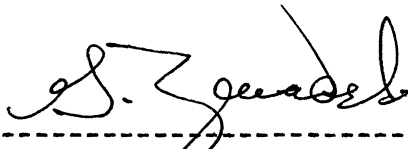
**Mailing Certificate**

I do hereby certify that I caused to be mailed, postage prepaid, a true and correct copy of the foregoing Brief of Appellant to the following, on this 1st day of July, 1992:

Kim R. Wilson  
Thomas F. Taylor  
Snow, Christensen & Martineau  
Attorneys for Ford Motor Credit Company  
10 Exchange Place, Eleventh Floor  
Post Office Box 45000  
Salt Lake City, Utah 84145

and;

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

  
-----  
Guy B. Zewadski

## **ADDENDUM A**

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

Third Judicial District

SEP 20 1991

*Guy Barco*

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

---

GUY BARCO ZEWADSKI,

Plaintiff,

v.

RICK WARNER LINCOLN-MERCURY  
and FORD MOTOR CREDIT COMPANY,

Defendants.

SUMMARY JUDGMENT ORDER

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FORD MOTOR CREDIT COMPANY,

Counterplaintiff,

v.

GUY BARCO ZEWADSKI,

Counterdefendant.

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

---

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

00573

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

ORDERED, ADJUDGED AND DECREED as follows:

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

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

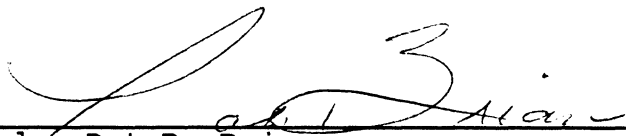
3. FMCC is hereby granted judgment in the amount of \$5,692.44 plus interest at the rate of 10% per annum from and after August 28, 1989 to the date hereof.

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

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

APPROVED this 20 day of September, 1991.

BY THE COURT:

  
\_\_\_\_\_  
Judge Pat B. Brian

*Plt. may  
challenge the  
reasonableness  
of said fee  
P.B.*

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JAN 02 1991

SALT LAKE COUNTY  
By Mary B. [Signature]  
Deputy Clerk

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

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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

---

GUY BARCO ZEWADSKI,  
Plaintiff,

vs.

SUMMARY JUDGMENT

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

---

FORD MOTOR CREDIT COMPANY,  
Counterplaintiff,

Civil No. 89-0901423CN

Judge Pat B. Brian

vs.

GUY BARCO ZEWADSKI,  
Counterdefendant.

---

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

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

ORDERED, ADJUDGED AND DECREED as follows:

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

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

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

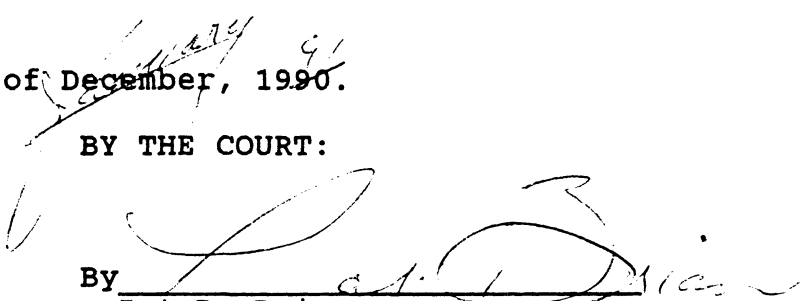
3. Costs and attorney's fees are awarded to Ford Motor Credit Company in an amount to be determined in further proceedings.

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

DATED this 2 day of December, 1990.

BY THE COURT:

By

  
Pat B. Brian  
District Court Judge

09\bjd\08958.252\summary.jud

## **ADDENDUM B**

00508

# OTHER AGREEMENTS

- (18) **Excess Wear and Tear.** The Lessee will pay the cost of all repairs to the vehicle that are not the result of normal wear and tear. These costs include but are not limited to the cost necessary to:
- replace any two tire part of a matching set of four or any tire which has less than 1/8 inch of remaining tread;
  - repair all mechanical defects;
  - repair or replace all dented, scratched, chipped, rusted or mismatched body panels, paint or vehicle identification items; all dented, scratched, rusted, pitted, broken or missing trim and grill work; all scratched, cracked, pitted or broken glass; all faulty window mechanisms; all broken or burned out lights; all electronic malfunctions; all interior rips, stains, burns or worn areas; and all damage which would be covered by collision or comprehensive insurance whether or not such insurance is actually in force.
- (19) **Return of the Vehicle.** At the end of this Lease, the Lessee will return the Vehicle to the Lessor's address shown on the reverse side or to such other place as Ford Credit may direct. If the Lessee keeps possession of the Vehicle past the end of the Lease term, the Lessee shall continue to pay the monthly Lease payments (item 4 on the reverse side). That payment shall not permit the Lessee to keep the Vehicle. The Lessee also shall pay to the Lessor any damage which the Lessor may have because the Lessee failed to return the Vehicle at lease end.
- (20) **Termination.** The Lease shall terminate upon (i) the end of the term of this Lease; (ii) the return of the Vehicle to the Lessor; and (iii) the payment by the Lessee of all amounts owed under this Lease. The Lessor may terminate this Lease if the Lessee defaults under this Lease.
- (21) **Voluntary Early Termination.** This Lease may be terminated by the Lessee before the end of the term if the Lessee is not in default under this Lease. If the Lessee terminates this Lease, 10 days written notice shall be given to the Lessor and the Lessee shall pay to the Lessor at once the following: (a) an early termination fee of \$200; (b) the difference, if any, between the Adjusted Balance Subject to Lease Charges and the Realized Value of the Vehicle; and (c) all other amounts then due under this Lease. The Adjusted Balance Subject to Lease Charges will be figured by reducing the Balance Subject to Lease Charges each month by the difference between the Monthly Payment (item 2(a) on reverse side) and the part of the Lease Charges (item 16 on reverse side) earned in that month on an actuarial basis. The Balance Subject to Lease Charges shall be calculated by adding the Lease Residual Value (item 16 on reverse side) to the Lease Depreciation. The Lease Depreciation shall be calculated by subtracting (i) the Lease Charges (item 15 on reverse side) from (ii) the amount of the Monthly Payments (item 2(a) on reverse side) multiplied by the Lease term in months (item 6 on the reverse side). The Realized Value of the Vehicle shall mean the fair market, wholesale value of the Vehicle agreed to by the Lessor and the Lessee. If the Lessee and the Lessor do not agree on the value of the Vehicle, the Lessee may obtain, within 10 days and at his own expense, from an independent third party agreeable to the Lessor and Ford Credit, a professional appraisal of the wholesale value of the Vehicle which could be realized at sale. The appraised value shall then be used as the actual value. If the value of the Vehicle is not determined by agreement or appraisal, the Realized Value shall be the net amount received by Ford Credit upon the sale of the Vehicle at wholesale.
- (22) **Termination — Life Insurance.** The Lessee agrees that upon the death of the insured, if life insurance described on the reverse side is in effect and is payable, the Lessee and his estate shall be obligated to purchase the Vehicle from Ford Credit. The purchase price shall be the sum of (a) the Adjusted Balance Subject to Lease Charges (see item 21 above) and (b) all other amounts then due under this Lease. The purchaser shall be responsible for the payment of any applicable sales tax. All life insurance proceeds received by Ford Credit will be applied to the purchase price.
- (23) **Loss or Destruction of Vehicle.** If the Vehicle is lost or destroyed and the Lessee is not in default under this Lease, the Lessee may provide a substitute vehicle, satisfactory to Ford Credit, and continue this Lease. Any insurance proceeds paid with respect to the Vehicle shall be applied to the purchase of the substitute vehicle. If the Lessee does not provide a substitute vehicle, the Lessee shall pay to Ford Credit the difference, if any, between (a) the sum of (i) the Adjusted Balance Subject to Lease Charges (see item 21 above) and (ii) all other amounts then due under this Lease and (b) the amount of insurance proceeds received by Ford Credit for the Vehicle.
- (24) **Default.** If the Lessee fails to make any payment under this Lease when it is due or if the Lessee fails to keep any other agreement in this Lease, the Lessor may terminate this Lease and take back the Vehicle. The Lessor may go on the Lessee's property to retrieve the Vehicle. Even if the Lessor retrieves the Vehicle, the Lessee must still pay at once the sum of (a) the difference, if any, between the Adjusted Balance Subject to Lease Charges (see item 21 above) and net amount received by Ford Credit upon the sale of the Vehicle at wholesale and (b) all other amounts then due under this Lease. The Lessee must also pay all expenses paid by the Lessor to enforce the Lessor's rights under this Lease, including reasonable attorney's fees as permitted by law, and any damages caused to the Lessor because of the Lessee's default. The Lessor may sell the Vehicle at public or private sale with or without notice to the Lessee.
- (25) **Taxes.** The Lessee will pay all sales, use and other taxes, and all fees and charges, that are levied on the Vehicle during the term of this Lease. The Lessee will also pay all taxes that are charged to the Lessor by reason of the Lessor's interest in the Vehicle except for income taxes.
- (26) **Title.** The Vehicle will be titled in the name of Ford Credit. It will be registered as directed by Ford Credit. The Lessee will pay the title and registration costs.
- (27) **Vehicle Use.** The Lessee will obey all laws in using the Vehicle. The Lessee will not use or permit the use of the Vehicle (i) outside the state where the Vehicle was first titled and/or registered for more than 30 days without the Lessee's and Ford Credit's prior written consent; (ii) outside of the United States except in Canada or Mexico if such use does not exceed 30 days; or (iii) as a public or private carrier. The Lessee shall not place any sign or mark on the Vehicle unless the Lessor agrees to it. If the Lessor agrees, the Lessee will pay the cost to remove the sign or mark and all needed repairs that are caused by the removal.
- (28) **Indemnity.** The Lessee will indemnify the Lessor and Ford Credit from any loss or damage to the Vehicle or its contents during the term of this Lease. The Lessee will also indemnify the Lessor and Ford Credit from all claims, losses and costs arising out of the use or condition of the Vehicle. The Lessee will pay all fines imposed on the Vehicle or on any driver of the Vehicle during the term of this Lease. If the Lessee fails to pay the fines and the Lessor pays the Lessee will pay the Lessor a \$20.00 administration charge, where permitted by law, for each time the Lessor must pay a fine. In addition to any fine or penalty imposed.
- (29) **Security Deposit.** Any security deposit held by the Lessor under this Lease may be used to pay all costs that the Lessee should pay under this Lease but does not.
- (30) **Reconditioning Reserve.** Any reconditioning reserve held by the Lessor under this Lease may be used to pay the cost of reconditioning the Vehicle that the Lessee should pay under this Lease but does not.
- (31) **General.** This Lease sets forth all of the agreements of the Lessor and the Lessee for the lease of the Vehicle. There is no other agreement. The only way this Lease can be changed is by a new lease signed by Ford Credit. The law that will apply to this Lease is the law of the state where the Lessor's place of business is, as set forth on the front of this Lease. If that law does not allow any of the agreements in this Lease, the ones that are not allowed will be void. The rest of this Lease will still be good.

## GUARANTY

To cause the Lessor to lease the Vehicle to the Lessee, the person(s) who signs below as a Guarantor, guarantees payment of this Lease. This means that if the Lessee fails to pay any money that is owed on this Lease, the Guarantor will pay it when asked. The Guarantor agrees to be bound even if one or more other persons guaranty payment of this Lease. He or she also agrees to be bound even if the Lessor does one or more of the following: (a) gives the Lessee more time to pay one or more payments; or (b) gives a release in full or in part to any of the other Guarantors; or (c) releases any security. The Guarantor also states that he or she has received a completed copy of the Lease and this Guaranty at the time of signing.

Guarantor \_\_\_\_\_ Address \_\_\_\_\_  
 Guarantor \_\_\_\_\_ Address \_\_\_\_\_

FC 18725 P, JUN 87  
 Previous editions may NOT be used

The Lessee states that he has been given a filled in copy of this Lease at the time he signs it and notice of the assignment of this Lease to Ford Credit.

Lessee Eugene Zouadski Co Lessee \_\_\_\_\_  
 FC 18725 P, JUN 87 NOTICE SEE OTHER SIDE FOR IMPORTANT INFORMATION  
 Previous editions may NOT be used

00509

## Extended Service Plan/Contract Provisions #3

This is an ESP TOTAL Service contract (with options listed in Note-1 below) between G ZEWADSKI and RICK WARNER LINCOLN-M and is insured by The American Road Insurance Company. Under this contract the dealership agrees to repair or replace any covered parts that are defective in materials or workmanship. You will be charged the deductible amount stated below for all repairs or replacements initiated during the Contract Period. If applicable, covered parts include Maintenance and Wear items.

1. **CONTRACT PERIOD.** This contract provides coverage up to the earlier of 100000 miles, or 60 months from the original in-service date, whichever occurs first.
2. **WHERE TO GO FOR REPAIRS.** It is recommended but not required that you return to your selling dealership for repair of a covered component (Just present your membership card). As the seller of the contract, your dealership is interested in your satisfaction. If your vehicle is a long distance from that dealership, contact the nearest participating Ford or Lincoln-Mercury dealership in the United States or Canada.
3. **COVERED COMPONENTS.** Components, including Maintenance and Wear items (if specified in Note-1 below), covered by this contract are described on the reverse side. During the Contract Period, the dealership agrees to repair or replace any covered components that are found to be defective in materials or workmanship. For each eligible repair visit, you will be charged a deductible of \$ 25 by the dealership which you must pay.
4. **REPAIRS.** Repairs will be made with service or remanufactured parts authorized by Ford Motor Company.
5. **CARE OF VEHICLE.** Your vehicle must be properly operated and maintained in accordance with the maintenance schedule in the Owner's Manual.
6. **REFUND.** UPON WRITTEN REQUEST TO THE SELLING DEALER within 15 days from purchase, the dealership will terminate the contract and refund the full purchase price. Requests received after 15 days will be refunded on a partial refund basis (Short Rate Method). It is required that the application for contract, contract provision, an odometer reading or statement, and membership card(s) be returned with your request. If the membership card is unavailable, a written statement to that effect must be submitted. Refunds will be made to the purchaser or lienholder by the dealership. If the Maintenance and Wear Option was purchased with your contract, or added at a later date, it is considered part of the ESP contract. The contract and option cannot be cancelled separately from each other. If this contract is transferred, it is not eligible for a refund.
7. **TRANSPORTATION REIMBURSEMENT.** If your covered vehicle becomes inoperable and must be kept out of use overnight to make a repair under this contract, the dealership will reimburse the base rental charges (excluding taxes, insurance, and mileage) for a substitute vehicle, not to exceed \$25 for any one day (\$30 a day for luxury cars), for a maximum of five days while the repair is being completed. The replacement vehicle must be rented from a Ford or Lincoln-Mercury dealership or other commercial agency to be eligible for reimbursement.
8. **TOWING REIMBURSEMENT.** If a covered part fails and makes towing necessary, towing costs, not payable by insurance, will be covered for up to \$45 to the repairing Dealership.

The dealership is insured to the extent of its obligations under this Extended Service Plan Contract by a policy of insurance issued to it, by The American Road Insurance Company, The American Road, Dearborn, Michigan 48121.

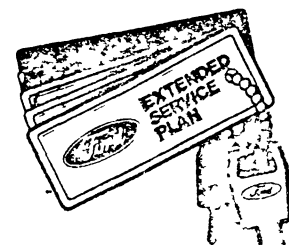
### Prepared For:

ESP TOTAL  
EXP: 60 100000 01-06-94  
PLAN-YR: 89 DLR-ST: UT

WF1BT80W3JM604292 MODEL-YR: 88

508708322 \* PAGE 1 OF 1 \*

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## Covered Components

EXHIB  
#3

All vehicle components are covered against defects in material and workmanship under the Ford Total Plans except for the items listed below as "Components Not Covered".

The Maintenance and Wear Option provides the following additional services:

- Maintenance - scheduled maintenance services as listed in the Owner Guide applicable to the vehicle.
- Wear Items - Brake pads and linings, clutch lining, spark plugs, engine drive belts and hoses, wiper blades and shock absorbers.

## Components NOT Covered

- Battery and cables, belts and hoses, brakes (front hub, drums, shoes, lining, disc rotors and pads), coolant, exhaust system, filters, fluids, lights (bulbs, sealed beam and lenses), lubricants, manual clutch assembly, shock absorbers, spark plugs and wires, squeaks and rattles, tires, tune-up, wheel balance and alignment, wiper blades.
- Exterior - Adjustments (glass and body parts), bright metal (outside ornamentation), bumpers, glass, moldings, paint, rust, sheet metal, side-view mirror(s), water leaks, wheel covers and ornaments, wind noise.
- Interior - carpets, rearview mirror, trim, upholstery.
- Damage from the environment (airborne fallout, chemicals, tree sap, salt, hail, windstorm, lightning, road hazards, etc.).
- Maintenance service and wear item replacements are not covered during the period covered by this contract unless the Maintenance and Wear Option was purchased. Services covered under the Maintenance and Wear Option are shown above.
- Repairs needed to a covered part caused by the failure of a non-covered part.
- Repairs to the vehicle if the odometer is altered, broken or repaired/replaced so that the actual mileage cannot be determined.

## Other Services and Repairs NOT Covered

- Repairs covered by the Manufacturer's New Vehicle Warranty.
- Repairs due to recalls by the manufacturer or repairs caused by damage or unreasonable use (damage from road hazards, accident, fire or other casualty, misuse, negligence, racing or failures caused by modifications or parts not authorized or supplied by Ford).
- Repairs resulting from lack of required maintenance (failures caused by the owner neglecting to perform the required maintenance services set forth in the Owner's Guide for the vehicle). Costs of these routine maintenance services are not covered.
- To the extent allowed by law, loss of use of vehicle including loss of time, inconvenience, commercial loss or consequential damages.
- Repairs to the vehicle performed outside the 50 States and Canada and repairs required because of use outside the 50 States and Canada.
- Repairs made on or before the enrollment date of this contract are not eligible for reimbursement.
- The Extended Service Plan Contract coverage is designed to complement the manufacturer's warranty and cannot be substituted for it. Failure to transfer the manufacturer's warranty will result in second owner responsibility for payment of the cost of repairs that the transfer of the warranty would have covered.

## Transferability

**1989 models** - This coverage is eligible for transfer provided it has not been cancelled.

**1988 and 1987 models** - This coverage may be eligible for transfer provided it has not been cancelled and any remaining first owner's powertrain and major component coverage warranty is transferred\*.

**1986 and prior model vehicles** - This coverage is eligible for transfer provided it has not been cancelled.

To transfer the remaining coverage, send the membership card, present mileage, the new owner's name and address, and a check for the appropriate

amount\*\* to the address shown below. Transferred contracts are not eligible for cancellation.

**Extended Service Plan Headquarters  
P.O. Box 1909  
Dearborn, Michigan 48121**

- \* See your local Ford or Lincoln-Mercury dealer for availability of warranty transfer and warranty transfer requirements
- \*\* Contract Dated Prior to 1/1/87 - \$25 transfer fee
- \*\* Contract Dated 1/1/87 or Later - \$30 transfer fee (or \$130 if \$100 transfer fee required for the powertrain warranty transfer)

Note: Repossessed vehicles are not eligible for transfer.