

1992

Jim Yates v. Guy Taylor : Petition for Rehearing

Utah Court of Appeals

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



Part of the [Law Commons](#)

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

Gary Anderson; Attorney for Plaintiff.

Guy Taylor; Pro Se.

Recommended Citation

Petition for Rehearing, *Yates v. Taylor*, No. 920336 (Utah Court of Appeals, 1992).

https://digitalcommons.law.byu.edu/byu_ca1/4268

This Petition for Rehearing is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at

http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

DOCUMENT
KFU
5.9
S9
DOCKET NO.

BRIEF

UTAH COURT OF APPEALS
BRIEF

UTAH
DOCUMENT
KFU
59
.A10
DOCKET NO. 920336-CA

IN THE UTAH STATE COURT OF APPEALS

JIM YATES, dba CINCO EQUIPMENT

UTAH APPL COURT NO 920336 CA

Appellee,

VS

GUY TAYLOR,

Appellant,

TAYLOR'S RE-HEARING BRIEF

AN APPEAL, TO THE UTAH COURT OF APPEALS

FOR A RE-HEARING OF CASE NO. 920336 CA

GUY TAYLOR, PRO SE
H.C. 2 BOX 40
DUCHESNE, UTAH 84021

(801) 738-2608

GARY ANDERSON
ATTORNEY FOR PLAINTIFF
750 NORTH 200 WEST, SUITE 102
PROVO, UTAH 84601

(801) 373-6440

DEC 29 1992

IN THE UTAH STATE COURT OF APPEALS

JIM YATES, dba CINCO EQUIPMENT

UTAH APPL COURT NO 920336 CA

Appellee,

vs

GUY TAYLOR,

Appellant,

TAYLOR'S RE-HEARING BRIEF

AN APPEAL, TO THE UTAH COURT OF APPEALS

FOR A RE-HEARING OF CASE NO. 920336 CA

GUY TAYLOR, PRO SE
H.C. 2 BOX 40
DUCHESNE, UTAH 84021

(801) 738-2608

GARY ANDERSON
ATTORNEY FOR PLAINTIFF
750 NORTH 200 WEST, SUITE 102
PROVO, UTAH 84601

(801) 373-6440

IN THE UTAH COURT OF APPEALS

JIM YATES, dba CINCO EQUIPMENT,

PETITION FOR REHEARING

Appellee,

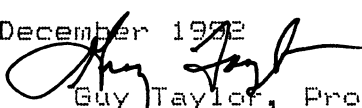
VS

CASE NO. 920336 CA

GUY TAYLOR,

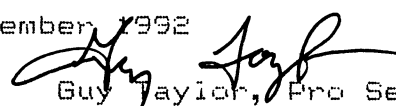
Appellant/Petitioner.

Taylor petitions, the Utah Court of appeals for a rehearing of case No. 920336, and Certifies that said petition is presented in good faith, and not for Delay.

Dated this 29th day of December 1992

Guy Taylor, Pro Se

CERTIFICATE OF MAILING

I certify I mailed (4) Copies of the foregoing petition for rehearing to Mr. Gary Anderson, Attorney for the Appellee Jim Yates , postage prepaid at the address below.

Dated this 29th Day of December 1992

Guy Taylor, Pro Se
H.C. 2 Box 40
Duchesne, Utah 84021

(801) 738 2608

Mr. Gary Anderson
Attorney for the Appellee
750 North 200 West, Suite 102
Provo, Utah 84601

(801) 373-6640

TABLE OF CONTENTS

MOTION FOR REHEARING _____	PAGE 1
STATEMENT OF THE CASE, FACTS OVERLOOKED BY THE COURT___	PAGE 1
FACT ONE_____	PAGE 1
FACT TWO_____	PAGE 2
FACT THREE_____	PAGE 2
FACT FOUR_____	PAGE 2
ARGUMENT FIRST FOUR FACTS_____	PAGE 2, 3
FACT FIVE_____	PAGE 4
FACT SIX_____	PAGE 4, 5
FACT SEVEN_____	PAGE 5
FACT EIGHT_____	PAGE 5, 6
FACT NINE_____	PAGE 6
FACT TEN_____	PAGE 6
CONCLUSION & ARGUMENT_____	PAGE'S 6, 7, 8, 9, 10
EXHIBITS AND POINTS	
POINT ONE, THE \$ 2,200.00 CONTRACT _____	PAGE 11
POINT TWO, YATES TOLD TAYLOR THAT THE EXCAVATOR WAS IN GOOD CONDITION, PRIOR TO TAYLOR PICKING UP THE EXCAVATOR___	PAGE'S 12, 13, ;
POINT THREE, YATES CLAIMS THE EXCAVATOR IS IN VERY GOOD CONDITION _____	PAGE 14 ;
POINT FOUR, STIPULATIONS EXCLUDING EXTRANEIOUS REPRESENTATIONS CONSISTING OR SHOWING FRAUD, _____	PAGE 15;
POINT FIVE, UTAH DECEPTIVE ACT OR PRACTICE BY SUPPLIER 13-11-4 (b) UTAH CODE: [Yates, told Taylor, The excavator is in very good condition, when it was not of that quality]_____	PAGE 16;
POINT SIX, THE UNIFORM DECEPTIVE TRADE PRACTICES ACT (7) yATES REPRESENTED THE QUALITY OF THE EXCAVATOR, AS GOOD_____	PAGE 17;
POINT SEVEN, YATES RECOMMENDS EQUIPMENT, TRIAL RECORD PAGE 83, LINES 23, 24, 25, _____	PAGE 18;

POINT EIGHT, YOUNG SAYS CAB WAS NOT BOLTED DOWN ON JANUARY 8,
WHEN THE MACHINE ARRIVED FROM LEHI_____PAGE 19;

POINT NINE, YOUNG SAYS THE ELECTRICAL SYSTEM DID NOT WORK ON
THE MACHINES ARRIVAL ON JANUARY 8, FROM LEHI_____PAGE 20;

POINT 10, YOUNG SAYS THE BATTERIES WERE NOT NEW ON THE ARRIVAL
OF THE MACHINE ON JANUARY 8, FROM LEHI_____PAGE 21';

GARY GARRETT, THE EXCAVATORS OWNER, SAYS THE CAB [WAS NOT
BOLTED DOWN] THE [ELECTRICAL SYSTEM DIDNT FUNCTION] THE
DRIVERS DOOR AS [WELDED SHUT] THE METAL WAS DENTED AND WHY,
[THE MACHINE WAS ROLLED OVER],_____PAGE 22;

GARY GARRETT, TESTIFIES HE SAW THE MACHINE JUST BEFORE TAYLOR
TOOK POSSESSION, AND VERY LITTLE ALTERATIONS HAD BEEN MADE
HOWEVER THE MACHINE HAD A NEW PAINT JOB_____PAGE 23;

YATES TESTIFIES, IF YOU CANT GET THE MACHINE TO RUN YOU
COULD NOT CHECK IT OUT_____PAGE 24;

YATES TESTIFIES THAT IF HE KNOWS ANYTHING WRONG WITH A MACHINE
HE "SIC" TELL'S PEOPLE ABOUT IT_____PAGE 25 ;

YATES TESTIFIES THAT IT NOT HAVE BEEN HIS INTENTIONS TO SELL
TAYLOR SOMETHING NOT WORTH THE MONEY_____PAGE 26;

YATES TESTIFIES THAT HE TOLD TAYLOR THE EXCAVATOR WAS IN GOOD
CONDITIPON_____PAGE 13;

TAYLOR TESTIFIES THAT THE CONTRACT WAS NOT RENEGOTIATED IT
WAS MERELY CORRECTED_____PAGE 27;

UNIFORM CONSUMERS SALES PRACTICE ACT_____PAGE 28;

PROVISION WAIVING OR IMMUNIZING FROM BAD FAITH OR FRAUD,
AND OBVERSATION_____PAGE 29;

IMPLIED WARRANTY 70A-2-213_____PAGE 30;

AFFIDAVIT OF DAN WHETSTONE_____PAGE 31

HAND WRITTEN LETTER TO COURT CLERK REQUESTING CONCLUSIONS AND
FACTS OF LAW_____PAGE 32

AFFIDAVIT OF GUY TAYLOR,AND DISCOVERY_____PAGE 33

RULING DATED JUNE 20, 1991_____PAGE 34

APPALLANT, PETITION'S THE COURT FOR A REHEARING, PURSUANT TO RULE 35, UTAH RULES OF APPELLATE PROCEDURE, TAYLOR HAS GOOD REASON TO BELEIVE THAT THE COURT'S HAVE BOTH OVERLOOKED FACTS, WHICH ANY ONE OF WHICH COULD HAVE CHANGED THE DISPOSITION OF THIS CASE, TOGETHER WITH POINTS OF LAW, WHICH HAVE NOT BEEN FULLY ADDRESSED BY THE APPLATE COURT, INCLUDING THE AFFECTS WHICH WILL BE FELT BY OTHER CONSUMERS UNDER LIKE CONDITIONS, WHO ARE SUBJECTED TO DECEPTIVE BUSINESS PRACTICES, BY EQUIPMENT SALESMEN, WHO RELY ONLY UPON THE WRITTEN CONTRACT. IN THIS CASE YATES VS TAYLOR, THE COURT SAID "TAYLOR BREACHED THE AGREEMENT". ITS TRUE TAYLOR RETURNED THE EXCAVATOR TO YATES, WHERE YATES RE SOLD THE MACHINE, FOR MORE MONEY THAN HE HAD SOLD THE EXCAVATOR TO TAYLOR FOR. THE COURT SAW TO IT TAYLOR RECEIVED THE OVERAGE AMOUNT, BUT CHARGED TAYLOR [WRONGFULLY] FOR YATES'ES IMPORPERLY CLAIMED REPAIRS, WHICH YATES CLAIMED WERE AS A RESULT OF DAMAGES YATES CLAIMED WERE CASUSED WHILE THE MACHINE WAS IN TAYLORS CUSTODY. THE COURT'S HAVE OVERLOOKED EVIDENSE WHICH PROVES BEYOND A DOUBT, THAT TAYLOR [DID NOT] CAUSE [ANY] DAMAGE TO THE EXCAVATOR AT ALL, BUT THAT TAYLOR ACTUALLY RETURNED THE EXCAVATOR IN BETTER CONDITION, AND IT IS TAYLOR THAT SHOULD BE PAID FOR HIS COSTS OF REPAIRS, NOT YATES. YATES MISREPRESENTED TO TAYLOR THE CONDITION OF THE EXCAVATOR. TAYLOR DID NOT RENEGOCIATE THE SALE, BUT MERELY "CORRECTED YATES MISTAKE'S". AND RETURNED THE EXCAVATOR.

FACT ONE

The court [did not] take into consideration the sub zero weather in Lehi, and that the six hours spent by Taylor [was not] spent in looking the excavator over but starting a cold deisel engine.

page 2

Fact two

The purchase agreement left by Yates and signed by Taylor on January 8, 1990, was for the sum of [Two Thousand two hundred dollars] . (see exhibit 37 C enclosed) Taylor could have left Yates a check on January 8, 1990 for, [\$ 2,200.00] and owned the cavator in question.

Fact three

Taylor called Yates attention to Yates mistake while Taylor was at Century Equipment Company. Yates [rushed] to meet Taylor at Century Equipment for the sole purpose of [correcting], not re-negotiating, the agreement, as the court concluded was the reason Yates meeting Taylor at Century. (see Trial record page 6 line's 11 thru 25)

Fact four

Repetedly, Yates admitted while under oath, Yates had told Taylor, prior to the sale, prior to Taylor removing the excavator from Yates equipment yard, that the excavator was [In Good Condition] . (see Trial Record pages, 120 line's 22,23,24; Page 121 line's 2,3,4,; Page 189 line's 10,11,12;)

Argument

In the case of the four facts presented Yates implied a warranty, that the excavator was in [good condition] Taylor wanted an excavator to excavate, not to look at. Taylor beleived Yates, a respected equipment dealer. Had Taylor left a check for

Page 3

the \$ 2,200.00 on January 8, 1990 pursuant to the agreement reduced to writing by Yates, as that sales agreement does state, Taylor could have taken advantage of Yates. Taylor however [did not entertain that idea] at all, but Taylor called Yates attention to Yates mistake. Yates intentionally told Taylor that the excavator was in [very good condition] or [good condition] This proved to be a total misrepresentation of fact. Taylor relied in Yates Judgement. Yates and Taylor had done business before. Yates is an expert, and has been recommending, and selling, used construction equipment for years. (see Trial Record page 83. line's 20 thru 25) The law simply does not condone misrepresentation and states in AmJur 17A 2d, 299, [Stipulations excluding extraneous representations constituting or showing fraud]. (see page 27, of Taylors brief, and note three additional law references are given, Uniform Commercial Code 70A-2-602 (1), Uniform Consumers Sales practice act, and Uniform Deceptive Sales Practices Act. All conclude that the acts are to protect the consumer from suppliers who engage in deceptive sales practices, who represent that goods or services are of a particular quality and grade. Yes, its true Yates admits he told Taylor that excavator [was in good condition] The court should not reward Yates for such mistatement of fact. Yates admitted where he got the machine, and that he painted the machine . (to make the machine look better)

Fact Five

The trial Court allowed for offsets, and damages Yates Claimed Taylor [did to the excavator] while the excavator was in Taylors possession. The exclusionary Rule was imposed. No witness heard the other's testimony, yet Mike Young Testified that the excavator cab was not bolted down upon the excavators arrival on the job site January 8, 1990. (see Trial Record page 151, line's 21,23) . Further that the machine had oil leaks, and that two barrells pf oil were put in it [110 gallons] which is totally excessive for 5 or 6 hours operation. (see Trial Record page 151, Line 25). That oil consumption amounts to 18 gallons per hour, at a price of \$ 7.00 per gallon, or \$ 126.00 per hour for oil consumption alone, absolutely unreasonable oil consumption. Additional questions regarding the condition of the excavator when it arrived on the job site on January 8, 1990, were presented to Mike Young on Page 153 of the trial record who responded, that the excavator's electrical system was not working well, (line 25 page 151) That the batteries were not new, That the Alternator, a major part of the electrical system, did not work at all, (See page 154 trial record). Yates claimed Taylor caused the cab to be loose, caused the electrical system to not work, caused oil leaks, etc., which simply was not the truth. All of these malfunctions [were present] at the time of sale to Taylor.

Fact six

The court [did not hear Garry Garrett]. Gary Garrett was the Non Disputed owner of the Excavator at the time of sale to Taylor by Yates since he had not received any payment from either Yates or Utah Track & Welding on January 8, 1990. In Garretts testimony, Garratt said while under oath, and Garrett [did not] hear the testimony of Mike Young. (Neither Young or Garrett heard the others testimony.). Garrett said, that when he last saw the excavator, that the Cab [was not] bolted down, that the excavator [did not] have a functional electrical system, that the drivers door [was welded] shut, that the metal was dented in bad condition. (See Trial Record Page 133) Further Garratt under oath stated he had seen the excavator just prior to its sale to Taylor, and that and that very little alterations or repairs had been made to the machine. (see Trial record page 146, line's 17 to 22).

Fact Seven

Yates, in his deposition, while under oath to tell the truth responded to Taylors question, {first you have got to make it run} Yates reply, was [Well if you can't make it run you couldnt check it out] neither Taylor, or any of his help could make the excavator run.

Fact eight

While Yates claimed he sent Taylor the Name of the person who purchased the Taylor machine, it was the day following the trial that Taylor [discovered] that Yates [did not perform] any of the

repairs Yates said were necessary after the machine was returned to Yates by Taylor. It is a gross injustice to reward Yates for repairs or work [he did not do]. The machine had all the defects Yates claimed [Prior to the Sale] to Taylor and [after] the Sale to Ackerman.

Fact Nine

Yates, while under oath told the court that [we] tell's the people {customers} what [we] know is wrong with the machine. Trial record page 122, line's 1,2,3). Yates told Taylor that the excavator he bought was in good condition, but yet he knew what was wrong with that excavator, and knew what to claim Taylor damaged on it. Yates was deceptive, and unfair with Taylor, yet Yates told the court on page 176 of the trial record, line's 3, 4, 5, that definitely not, no I wouldnt, sell you {Taylor} something not worth the money, and Yates goes on to repeat, " NO IT WOULD NOT HAVE BEEN" which leaves Taylor to beleive That Yates knew that the machine was not worth the money which he had sold to Taylor.

Fact ten

Taylor perserved his right to a Jury trial. In fact paid the proper Jury trial fee, and was timely in such filing. The court has not addressed this issue. Taylor has repetedly objected both through counsel, and pro -se concerning this fact. (see page 3, Taylors Brief, bottom senentace.

CONCLUSION

The references concerning this matter in the trial court is found on pages 102 and 103 of the trial court record the whole pages refer to the "short circuit " process. What is seems unreasonable to Taylor is that the court allowed Yates to ammend his complaint while in open court, taking Taylor totally by surprise and setting aside the Utah R. Civ. P., dealing with ammending a complaint. passing the blame to Mr. Johnson is no reason, for suspension of the Rules. The trial court judge made it clear that Taylor, " if you are going to represent yourself, You've got to comply with the Rules of practice". (trial Record page 4). Taylor was not supplied a copy of the findings of fact as the Utah App. Ct. States. It was only after Taylor made a hand written request to the clerk of the trial court on July 26, 1991, see exhibit 36, of Taylors brief, that Taylor received from the court clerk a copy of the Findings of fact and conclusions of Law to review after they were signed by the trial court judge. Page two of the conclusions, do not refer to Yates, statement that he, [Jim Yates] told Taylor that the excavator was in good condition. If that had been fact Taylor would have kept the excavator, as Taylor had kept the other equipment he had purchased from Jim Yates. Taylor was a repeat purchaser, as Yates always told Taylor, If it doesnt work out for you bring it back. The conclusions did not correctly refer to the \$ 2,200.00 sales agreement.

The court may ask the question, Why did Taylor take the the excavator out of Yates Yard with all the things wrong, that Taylor complains about. The Answer is simple. With the new shiney paint, with the representation of Yates that the machine was in good condition, with the representation made by Yates, that if the machine doesnt work for you bring it back, and I will refund your money. Of these there items, two are absolutely misrepresentations, to induce a sale. (1) Yates would not return any money. This law suit proves that point. (2) The excavator was not in good condition as claimed by Yates. Yates is claiming Taylor damaged the machine. This is absolutely false as testified by Young and Garrett, both had hands on knowledge, which they shared with the court. Discovery made after the trial, two seperate incidents, Where Yates did uses deceptive sales practices, one a man in Washington, the other case in Rock Springs Wyoming, point out that Taylor is not the only victum of Yates. If the court continues to [affirm] this Judgement, This will open the door for Yates to rip off consumer after consumer, with his simple disclaimer, and to back this up a court Ruling, in support of his (what you see is what is is) or (sold with out warranty expressed or implied). The court stated on its memorandum decision (do not publish). Why? A land mark decision, allowing that all prior law dealing with misrepresentation, with deceptive sales practices, should be important and shared with all equipment dealers, who all want to

be advised in law what the court considers as right in such matters. Taylor, considers that if the court panel of judges individually, were each subject to the same conditions as was Taylor, in connection with this excavator transaction, that all would join Taylor, and take the excavator back. Taylor Spent over five thousand Dollars into this machine for very little return. If the excavator dug 500 feet as testified, that repair bill amounted to \$ 10.00 per foot in repairs only, not to mention, the operator, fuel, etc. This is unreasonable. Taylors Counterclaim, and ammended counterclaim, were considered moot by the courts. Taylor again appeals to the court, to reconsider his counterclaims. Some where something is wrong, when Yates tells the court, "Yes I told Taylor the excavator is in good condition". and Taylor provided the actual Owner at the time of Sale, {Yates Sold an Excavator to Taylor owned by Garrett} no questions, asked, and further Garraw said the machine was aa peice of junk at trial, and yet the upp court Affirms, the Judgement of the lower court. Yates was not damaged. He RE sold the excavator to another party for more money, since he [did not do the repairs as claimed] The testimoney of whetstone, clears up doubt, if in fact there is any doubt after the testimony of Young, and Garratt, and Taylor is reconsidered. Surely the court panel can see why Yates discounted the machine \$ 1, 000.00. It wasnt to be fair to Taylor. The reason was to make Taylor feel good, so Taylor would beleive Yates story, and excute a corrected agreement, Ammending the \$ 2,200.00 agreement. Good salesmanship on the part of expert salesman

One of the reasons Taylor requested a Jury Trial was because Taylor did not think Judges understand construction Equipment. When its cold it wont start. When the frost is driven down by traffic, foot, cars, equipment, etc, you simply [can not] dig. That is a fact which the court 's did not take into consideration at all. No matter how badly Taylor wanted to, or how much looking under, over, or around the excavator, Taylor would never been able to "check out the Machine" at Yates Yard in Lehi. Its True while the machine was being heated and started Taylor called out certian repairs that needed made. Construction equipments sits idle in Utah County durning the month of January because its to cold to work when the ground is frozen. Thats Fact. A Jury Would understand and agree to that fact. Also the Courts, uphold at {times} the written instrument. Other Times they totally uphold Parol evidense over the written instrument's. This is confusing. Also a Pro Se Party has a better chance with a jury, than before a court Judge, who looks for procedural mistakes, and there are many times when a Pro Se party is unable to express clearly his defenses or arguments. The fact is Taylor was denied his right to a trial by Jury. The App Ct has not address this issue. Taylor, again Prays, the the App Ct. will consider all the evidense regarding this case, overturn the lower court judgement, and remand this matter back to the district court so Taylor can pursue his countreclaim.

Dated This 29th Day of January 1993.


Gary Taylor, Pro Se



CINCO EQUIPMENT



1195 EAST MAIN • LEHI, UTAH 8404.

(801) 768-4406

37C

DATE 1-8-90

OLD TO.

Gray Taylor Ranch
4C. 2 Box 40
Lucerne, Utah 84021

SHIP TO

Taylor pick up

CUSTOMER'S ORDER NO

BUS PHONE

RES PHONE

DESCRIPTION

PRICE

980B Case Hoe
SN # 6203826
Year is 1976

\$2200.00

Check This Machine out
What you see is what it is
New Batteries

Representations, where Machine is in
Excellent condition!

Pump to be repaired not to exceed \$500.00
For Tractor

Sight Draft to Rock National Bank
Mike Ysack 307-362-8801

No warranty, expressed or implied, verbal or written
buyer is responsible for determining condition of machinery by his own inspection

LES TAX

Exempt

TOTAL BILLING

Customer's Signature

1 A Um-hum. (yes) (handing)

2 Q Okay. We are talking about Mr. Vaughn Adams. And

3 we go through and we discuss what he does. "He has no re-

4 sponsibility other than the fact that he is just a mechanic?"

5 That was the question that I asked you.

6 A Um-hum. (yes)

7 Q Your reply: "He has a lot of responsibility, yes,

8 but mainly he is a mechanic."

9 A Um-hum. (yes)

10 Q He is a mechanic there and that is what he is

11 there for or he is there?

12 A Um-hum.

13 Q Question: "Is he an assistant manager?" Answer:

14 "No." Question: "You mentioned his responsibilities. Could

15 you elaborate on those besides being a mechanic and so on?"

16 And your answer was: "He is a husband and a homemaker." Had

17 no relevance to the question. I'm wondering if perhaps you

18 were confused when you made that answer?

19 A No. He does that too, yes.

20 Q Isn't it true that you told me the machine was in

21 excellent condition?

22 A I told you I thought it was in good condition, come

23 down and check it out and if you like it, buy it, if not,

24 leave it.

25 Q Okay. You did tell me that if it was in good

1 condition then or you admit telling me that?

2 A I admit I stated it was in good condition, you
3 come down and check it out, if you like it, take it, if not,
4 leave it.

5 Q Do you consider, let's look at Exhibit 1, do you
6 consider terms like "check the machine out, what you see is
7 what it is" --

8 A Yes.

9 Q Is reasonable?

10 A You bet. That's kind --

11 Q Without being unconscionable? *Note*

12 MR. ANDERSON: Objection, your Honor.

13 "unconscionable" is a legal term, calls for a legal conclu-
14 sion.

15 THE COURT: If he knows, he may answer.

16 MR. ANDERSON: Okay.

17 A That is laying it on the line as blunt as you can
18 lay it on the line. I mean, that's the reason I haven't been
19 to court at other times. I mean, I say it so bluntly that
20 there is no misunderstanding.

21 Q (By Mr. Taylor) Do you feel that you have an
22 obligation to inform a prospective buyer if a machine is
23 junk or not?

24 MR. ANDERSON: Objection, your Honor.

25 THE COURT: He may answer, if he knows.

1 why I'm inviting the customers in, and they come in time and
2 time again and buy. I don't know what happened to you this
3 time to stop payment on your check, but that's the way I
4 represented everything. And that's the only way I can sell
5 them.

6 Q In other words, you wouldn't see that you wouldn't
7 sell very much equipment if you said "what you see is what
8 you get" on the advertisements, instead of being in "good
9 condition"?

10 A It is in good condition. It was in very good con-
11 dition. And you did buy it. What you done to it afterwards,
12 I don't know.

13 Q Do you agree that those statements, "what you see
14 is what you get, as is, with no warranties," where is and
15 so forth, may possibly be unconscionable statements? Is that
16 kind of unconscionable, to take advantage of the --

17 A No, it does not.

18 Q By having initially taken advantage of the customer,
19 by having initially expressed in effect --

20 THE COURT: Now just a moment. Don't
21 argue with one another. Don't answer the question. I don't
22 want you to be argumentative within your question, Mr.
23 Taylor.

24 Q (By Mr. Taylor) I said, isn't it kind of an uncon-
25 scionable statement to have that type of phraseology before

■■■■ Observation: Under the Restatement, a term unreasonably exempting a party from the legal consequences of a misrepresentation is unenforceable on grounds of public policy.⁸⁴

§ 299. —Stipulations excluding extraneous representations constituting or showing fraud

One of the parties to a transaction or agreement memorialized by a writing may attempt to exclude from consideration, in the event of subsequent controversy or litigation, any statements, remarks, or representations which may have been made during the negotiations, or any such representations which may not be included in the writing itself. Such efforts at exclusion have generally been unsuccessful where such statements or representations are found to have been made fraudulently or to be of such nature that a charge of

79. Restatement, Contracts 2d § 195. — — — — — S2d 928; Baylies v Vanden Boom, 40 Wyo

80. Industrial & General Trust v Tod
215, 73 NE 7; Christian Mills, Inc.
Memorandum

17A Am Jur 2d

CONTRACTS

§ 299

fraud may be predicated thereon.⁸⁵ A provision in a writing that no representations were made to procure the contract,⁸⁶ that neither party shall be bound by any representation not contained therein,⁸⁷ that the writing contains the entire agreement⁸⁸ or all the terms, and that there is no warranty not specifically set forth in it,⁸⁹ or that the representative does not rely on representations by the other party, and expressly waives any claim on account thereof,⁹⁰ does not, in most jurisdictions, preclude a charge of fraud based on oral representations⁹¹ or proof of what representations were made.⁹² Different reasons, chiefly premised upon public policy, have been advanced as the basis for the above rule, which allows use and proof of fraud in the making of representations even though a written agreement between the parties attempts to eliminate any extraneous statements or actions.⁹³ Fraud will vitiate any contract procured thereby, and it is in application of this rule that stipulations seeking to avoid the result of fraud in procuring contracts are held to be inoperative and ineffectual in this regard.⁹⁴

In some jurisdictions effect is given to stipulations in written agreements which attempt to nullify the effect of any representations which may have been made extraneous to the written memorial. The courts following this view emphasize the desirability of certainty in the contractual relations of those who have made a definite agreement; and if the parties say that they contract without regard to prior representations, and that prior utterances have not been an inducement to their consent, any occasional damage to the individual

85. Arnold v National Aniline & Chemical Co. (CA2 NY) 20 F2d 364, 56 ALR 4; Jordan v Nelson (Iowa) 178 NW 544, 10 ALR 1464; Ganley Bros. v Butler Bros. Bldg. Co., 170 Minn 373, 212 NW 602, 56 ALR 1; Bowersock v Barker 186 Okla 48, 96 P2d 18, 127 ALR 130.

86. Arnold v National Aniline & Chemical Co. (CA2 NY) 20 F2d 364, 56 ALR 4; B. I. Jacobson & Co. v Jacobson, 130 Iowa 170, 106 NW 614; Ganley Bros. v Butler Bros. Bldg. Co., 170 Minn 373, 212 NW 602, 56 ALR 1; Security Holding Co. v Christensen, 53 SD 37, 219 NW 949, 60 ALR 1173; Baylies v Vanden Boom, 40 Wyo 411, 278 P 551, 70 ALR 924.

87. Arnold v National Aniline & Chemical Co. (CA2 NY) 20 F2d 364, 56 ALR 4 (holding that it is a contract that it

88. Nelson v Leo's Auto Sales, Inc., 158 MI 368, 185 A2d 121; Nash Mississippi Valley Motor Co. v Childress, 156 Miss 157, 125 So 708; Land Finance Corp. v Sherwin Electric Co., 102 Vt 73, 146 A 72, 75 ALR 1025.

89. Arnold v National Aniline & Chemical Co. (CA2 NY) 20 F2d 364, 56 ALR 4

90. Jordan v Nelson (Iowa) 178 NW 544, 10 ALR 1464; Ganley Bros. v Butler Bros. Bldg. Co., 170 Minn 373, 212 NW 602, 56 ALR 1; Meyer v Packard Cleveland Motor Co., 106 Ohio St 328, 1 Ohio L Abs 80, 140 NE 118, 28 ALR 986; Motor Contract Co. v Van Der Volgen, 162 Wash 449, 298 P 705, 79 ALR 29; Baylies v Vanden Boom, 40 Wyo 411, 278 P 551, 70 ALR 924.

91. Bowersock v Barker, 186 Okla 48, 96 P2 130

map, memorandum, subscription, stamp, flower, flag, button, sticker, ribbon, token, trinket, tag, souvenir, candy, or any other article in connection with which any appeal is made for any charitable purpose, or where the name of any charitable organization or movement is used or referred to as an inducement or reason for making any purchase donation, or where, in connection with any sale or donation, any statement is made that the whole or any part of the proceeds of any sale or donation will go to or be donated to any charitable purpose. A charitable solicitation is considered complete when made, whether or not the organization or person making the solicitation receives any contribution or makes any sale.

(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, any performance of an agreement with respect to any of these transfers or dispositions, and any charitable solicitation as defined in this section.

(3) "Enforcing authority" means the Division of Consumer Protection.

(4) "Final judgment" means a judgment, including any supporting opinion, that determines the rights of the parties and concerning which appellate remedies have been exhausted or the time for appeal has expired.

(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.

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

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

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

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

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

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

transaction is available to the consumer reason that does not exist;

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

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

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

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

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

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

(k) indicates that the consumer will receive a rebate, discount, or other benefit as an inducement for entering into a consumer transaction if the consumer does not return for giving the supplier the name of prospective consumers or otherwise helping the supplier to enter into other consumer transactions if the receipt of the benefit is contingent on the consumer's entering into a transaction occurring after the consumer enters into a transaction;

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

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

(n) promotes, offers, or grants participation in a pyramid scheme as defined under Chapter 13-11-01, Title 76; or

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

13-11-5. Unconscionable act or practice by supplier.

(1) An unconscionable act or practice by a supplier in connection with a consumer transaction

7, 1, 2 22, 14
§ 282. The Uniform Deceptive Trade Practices Act

The Uniform Deceptive Trade Practices Act,¹ promulgated in 1964 and revised in 1966, has been adopted in either the earlier or later version by a number of states,¹ albeit with additions, variations, omissions, and the like.

The Act provides that a person engages in a deceptive trade practice when, in the course of his business, vocation, or occupation, he: (1) passes off goods or services as those of another; (2) causes likelihood of confusion or of

93. *Law Reviews*: Sebert, *Enforcement of State Deceptive Trade Practice Statutes* 42 Tenn L Rev 689 (1975).

94. 15 USCS §§ 41 et seq.

95. *FTC v Sperry & Hutchinson Co.*, 405 US 233, 31 L Ed 2d 170, 92 S Ct 898, 1972 CCH Trade Cases ¶ 73861.

96. *Fonseca, Handling Consumer Credit Cases* 3d § 1:8.

Law Reviews: Gilleran and Stadfeld, *Little FTC Acts Emerge in Business Litigation*, 72 ABAJ 58 May 1, 1986.

Annotations: What constitutes "false advertising" of food products or cosmetics within §§ 5 and 12 of the Federal Trade Commission Act (15 USCS §§ 45, 52), 50 ALR Fed 16.

What constitutes "false advertising" of drugs or devices within §§ 5 and 12 of the Federal

Trade Commission Act (15 USCS §§ 4 49 ALR Fed 16

97. *Fonseca, Handling Consumer Cases* 3d § 1:8.

98. See, for example, *Commonwealth by Creamer v Monumental Properties, Inc.*, 459 Pa 450, 329 A2d 812, on remand 26 Pa Cmwlth 399, 365 A2d 442; *Unedus v California Shoppers, Inc.* (4th Dist) 86 Cal App 3d 932, 150 Cal Rptr 596, 1979-2 CCH Trade Cases ¶ 62845.

99. UDTPA §§ 1 et seq.

1. Am Jur 2d, Desk Book, Item No. 124, indicating such states as Colorado, Delaware, Georgia, Hawaii, Illinois, Maine, Minnesota, Nebraska, New Mexico, Ohio, Oklahoma, and Oregon.

217

goods or services; (3) causes likelihood of confusion or of misunderstanding as to affiliation, connection, or association with, or certification by, another; (4) uses deceptive representations or designations of geographic origin in connection with goods or services; (5) represents that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that he does not have; (6) represents that goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used, or second-hand; (7) represents that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another; (8) disparages the goods, services, or business of another by false or misleading representation of fact; (9) advertises goods or services with intent not to sell them as advertised; (10) advertises goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity; (11) makes false or misleading statements of fact concerning the reasons for existence of, or amounts of price reductions; or (12) engages in any other conduct which similarly creates a likelihood of confusion or of misunderstanding. The Act provides definitions of the terms used therein.²

1 to work for Rick Warner as a mechanic. And I worked there
2 for about two or three years, and he came down and asked me
3 to come in as a heavy truck salesman.

4 Q Did you do that?

5 A I did, yes.

6 Q How long did you do that?

7 A I totaled with Rick Warner, was 19-to-20 years.
8 And I was a mechanic for three.

Q And when did you leave Rick Warner?

A It was about four-to-five years ago. Yes.

Q And why did you leave there?

A The reason I left there, I was selling heavy trucks
for him, and I also had my business going in Lehi in heavy
equipment. And the heavy equipment just got so demanding
that I left Rick Warner.

Q How did it come that you started this business,
Jim, what caused you to start this business?

I was selling heavy trucks for Rick Warner, and
people would come in and need heavy equipment, and they knew
a lot of them knew my background and they'd ask that I'd
out and check on heavy equipment and --

Is this used equipment?

This is used equipment, yes, um-hum. And recommend
one way or the other. And then I decided, well, gee, I
ly don't get paid for that, so then I started to buy and

1 A Who owned it?

2 Q Um-hum. (yes)

3 A You.

4 Q Tayco Construction Company did not own that machine?

5 A (witness nodding affirmation)

6 Q And that was clearly indicated to you. Is that

7 correct?

8 MR. ANDERSON: I'm sorry, I didn't mean

9 to interrupt. Whose?

10 THE WITNESS: Guy.

11 MR. ANDERSON: Guy said he owned it, too?

12 THE WITNESS: Right.

13 MR. ANDERSON: All right. Thank you.

14 Q (By Mr. Taylor) Now, I want you to tell the Court

15 how many hours that machine actually operated on that job?

16 A Four-to-six hours, between breakdowns. Just didn't

17 run.

18 Q Why wouldn't it run?

19 A Because everything just was worn out on it.

20 Q Was the cab bolted down tight?

21 A No.

22 Q Secure?

23 A No.

24 Q Did it leak oil?

25 A All over. We put two barrels of it in it to run

1 that replaced that machine, dig in a an eight-hour dig?

2 A Depends on the dig. Between a thousand, two thou-

3 sand feet a way.

4 Q So this machine only dug 500 feet all the way it

5 was on the job?

6 A (witness nodding affirmation)

7 Q What was the rest of the time spent doing?

8 A Repairing it.

9 Q Tell me some of the repairs that were done to the

10 machine?

11 A Well, the track pins and bushings was wore out.

12 We put new track pins and bushings in it. The rams, the

13 dipper ram and the, the top ram, the, can't think of the

14 name of it. We repacked, put new packing in them. Busted

15 them apart. Put new packing in them. And, wouldn't run.

16 They had the tank, they had left the fuel cap off and sprayed

17 the tank full of, when they painted it they sprayed it full

18 of paint; and it just was in the fuel system, and it wouldn't

19 run.

20 Q Did it have an air cleaner on it?

21 A No.

22 Q Air cleaner was missing?

23 A (witness nodding affirmation)

24 Q Did it have a working electrical system?

25 A Not very well. It wouldn't charge the batteries.

1 Q Were the batteries new?

2 A No.

3 Q Did you take the batteries out and replace them
4 with some old batteries?

5 A No, I didn't.

6 MR. TAYLOR: This has already been marked.
7 I don't know, I want to re-, do I need to re-mark this? It
8 wasn't accepted. (off record with clerk)

9 Q (By Mr. Taylor) I want to show you what has been
10 marked as Defendant's Exhibit 8. I want you to carefully
11 read those items, and then I'm going to ask you if they
12 pertain to that particular machine.

13 A The air cleaner?

14 Q How about the batteries?

15 A Two batteries.

16 Q How about the alternator?

17 A It didn't work.

18 Q Did it ever work?

19 A No.

20 Q How did you start the machine?

21 A We had to jump it to start it.

22 Q If you were to buy a machine of that type, first
23 of all -- strike that question. The machine had a fresh
24 dupont-overhaul. Tell me what that is?

25 A Well, it's a new paint job and you buy a used

1 future value in it, I'd have kept it. I've been in the
2 business for 23 years. I know when something's been worn
3 out. If I could have made another thousand dollars worth of
4 it, I would have done it. If I could have made another
5 hundred dollars with it, I'd have done it. But we didn't,
6 we elected to do that with it.

7 Q Did you ever hear with your own ears, Roland Olman
8 said that he disagrees --

9 MR. ANDERSON: I'll object to even start-
10 ing that question, your Honor, if he's going to ask the wit-
11 ness if he's heard something someone else has said, that's
12 patently hearsay, and I object to it.

13 THE COURT: The objection is sustained.

14 MR. TAYLOR: Okay. Thinking about how to
15 rephrase the question.

16 Q (By Mr. Taylor) Was the cab securely bolted to the
17 machine?

18 A No, sir, it was not.

19 Q Did it have a functional electrical system?

20 A No, sir, it did not.

21 Q Was the driver's door welded shut?

22 A Yes, it was.

23 Q Was the metal ~~in dented, in bad~~ condition?

24 A Yes, it was. It was previously tipped that machine
25 on side and pretty well destroyed the cab on it.

1 wouldn't you?

2 A Yes.

3 Q I'm sorry, I didn't hear that.

4 A Yes.

5 Q Okay. What does that mean to you, Mr. Garrett,
6 when you get something that disclaims warranties for failures,
7 no warranties, sold as is; what does that mean when you buy
8 a machine like that?

9 A That means you are buying it the way it is, just
10 like it says.

11 MR. ANDERSON: No further questions.

12 Thank you, Mr. Garrett.

13 THE COURT: Any further, Mr. Taylor?

14 MR. TAYLOR: I only have one question.

15 REDIRECT EXAMINATION

16 BY MR. TAYLOR:

17 Q And this is, maybe I overlooked it, maybe you've
18 already answered it; but when you went back and looked at
19 the machine after it had been repainted, did you indicate
20 to me or was it your testimony that there had been very little
1 alterations or repairs made to the machine?

2 Yes.

3 Q Did I ask you the question that if you, isn't it --
4 maybe I'll rephrase that. Isn't it a common place, when you
5 buy equipment and they represent to you that it's in good

1 BY MR. GUY TAYLOR:

2 Q Okay, going back to check the machine out "what
3 you see is what it is" does this mean, Mr. Yates, that you
4 stand back 20 feet and look at the machine and that is the
5 check out?

6 A That means you can do anything you want to do with that
7 machine other than tip it over and wreck it in my yard.
8 In my yard there is a place out there you can go with a
9 backhoe and can go dig with and can run it around and check
10 it out. I understand that you did that.

11 Q First of all you have to get it to run isn't that
12 true, Mr. Yates?

13 A Well, if you can't make it run you couldn't
14 check it out.

15 Q That is true.

16 A Anyway I don't think I could, maybe you could.
17 Did you buy this not running?

18 Q Unfortunately Jim, I am asking the questions.

19 A Okay we will play your game.

20 Q All right if the machine is purchased, I am going
21 to rephrase that.

22 A Okay.

23 Q If a machine is purchased from a person who made
24 the representaiton that the machine is junk, and you put
25 a paint job on it, does that mean that you can, in good

Yates Deposition, Taylors Brief 37A

1 A If a machine, we sell a lot of stuff that is not
2 repaired and that, and if we know of anything wrong with it,
3 we do tell the people what we know is wrong with the machine.
4 Q (By Mr. Taylor) Do you recall that I asked you
5 who owned the machine prior to your obtaining it so that I
6 could call and talk to the previous owner?
7 A Which time?
8 Q At anytime. At any one time.
9 A I've told you it come from Utah Track, right, um-
10 hum.
11 Q Are you sure that you told me it come from Utah
12 Track?
13 A Well, I'm sure I've told you it come from Utah
14 Track, yes, I'm sure I told you it come from Utah Track.
15 Q You are sure on that? I'm going to ask you again,
16 because I'm going to come back to that question. Let's be
17 honest, Jim.
18 A If you would have asked me, I would have told you,
19 yes, I mean.
20 Q Isn't it true that you told me that you couldn't
21 remember the guy's name who was the previous owner?
22 A No, it is not. Utah Track.
23 Q And then the previous owner?
24 A Immediate, uh-huh. That's who I bought it from.
25 Q The term "check the machine out, what you see is

1 Q Would it have been your intention to have sold me
2 a piece of equipment that wasn't worth of money?

3 A Definitely not. no, it wouldn't. It would not
4 have been my intention to sell you something not worth the
5 money. No, it would not have been.

6 MR. TAYLOR: Okay. No further question.

7 THE COURT: Any questions.

8 MR. ANDERSON: May I approach the bench
9 and get some exhibits, your Honor?

10 THE COURT: You may.

11 MR. ANDERSON: I'll be as quick as I can.

12 FURTHER DIRECT EXAMINATION

13 BY MR. ANDERSON:

14 MR. ANDERSON: Okay, we are missing an
15 exhibit.

16 MR. TAYLOR: Would it be 9?

17 MR. ANDERSON: It would be 9, possibly.

18 Q (By Mr. Anderson) Okay, Jim, just tie this down.

19 MR. ANDERSON: I'm going to approach the
20 witness, your Honor.

21 Q (By Mr. Anderson) Showing you Exhibit No. 1.
22 That's the original document wherein the machine was sold to
23 Mr. Taylor. Is that correct?

24 A That's right, uh-huh.

25 Q On that document it talks about warranties in two

1 purpose of the under the Code, 70A-2-315: Implied warranty,
2 fitness for the purpose, where the seller at the time of con-
3 tracting has reason to know any particular purpose for which
4 the goods are required and the buyer is relying on the seller's
5 skill and judgment to select or furnish suitable goods, unless
6 excluded or modified under the next section. An implied
7 warranty.

8 Now, Mr. Yates represented to me that the machine
9 was in good condition. You heard the testimony, your Honor,
10 right here. He said it was in good condition, in fact even
11 went so far on one occasion to say that it was in excellent
12 condition at the time that it was picked up by me to try out.

13 The matter of the second agreement or the agreement
14 made in the Century Equipment yard. That particular agree-
15 ment had some conditions. Your Honor, Condition 1. was Mr.
16 Yates said "hey, if the machine doesn't work out for you,
17 bring it back and I'll give you your money back." No. 2., the
18 representation was made that he owed the bank for the machine
19 and with the machine gone he was out of trust, and based on
20 that it was reasonable that a check would be tendered so that
21 he was not sold out of trust. You heard that testimony and
22 recognize that that, on that basis the check was issued.

23 Also, the contract was not renegotiated, it was
24 merely corrected. The correction made to the contract, the
25 second one, was simply the amount of \$22,000 replaced \$2,200,

The Uniform Consumer Sales Practices Act

Uniform Consumer Sales Practices Act⁴ was promulgated in 1970 and adopted in 1971. It has been adopted by only a few states.⁵ Among the purposes of the Act are the protection of consumers from suppliers who engage in deceptive and unconscionable sales practices,⁶ and to make state consumer sales practices not inconsistent with the policies of the Federal Trade Commission Act relating to consumer protection.⁷

Generally, the Act prohibits deceptive acts or practices by a supplier in connection with a consumer transaction whether they occur before, during, or after the transaction,⁸ and sets forth in detail a number of acts or practices which are considered to be deceptive.⁹

The Act prohibits unconscionable acts or practices by a supplier in connection with a consumer transaction.¹⁰ The unconscionability of an act or practice is a question of law for the court, but the parties may be given a reasonable opportunity to present evidence to aid the court in making its determination.¹¹ The Act specifies in detail the circumstances which the court may consider in determining whether an act or practice is unconscionable.¹² The Act defines the terms used therein.¹³

PA § 2(a).

tions: Actionable nature of advertising quality or worth of merchandise acts, 42 ALR4th 318.

PA § 1.

PA §§ 1 et seq.

Jur 2d, Desk Book, Item No. 124
a footnote, indicates that three states
noted the Act. These states are Kansas.

6. UCSPA § 1(2).

7. UCSPA § 1(4).

8. UCSPA § 3(a).

9. UCSPA § 3(b)(1)-(11).

10. UCSPA § 4.

11. UCSPA § 4(b).

12. UCSPA § 4(c)(1)-(6).

Page 9
22414

§ 298. Provision waiving, or immunizing from, bad faith or fraud

11 X 11

Page 28

SECRET

79. Restatement, Contracts 2d § 195.

80. Industrial & General Trust v Tod, 180 NY 215, 73 NE 7; Christian Mills, Inc. v Savoia Macaroni Mfg. Co., 228 App Div 717, 239 NYS 283.

82. Ganley Bros. v Butler Bros. Bldg. Co., 170
Minn 373, 212 NW 602, 56 ALR 1; Young
Fehlhaber Pile Co. v State, 265 App Div 61, 37
NY521 928

81. United States v United States Cartridge Co. (CA8 Mo) 198 F2d 456, cert den 345 US 910, 97 L Ed 1345, 73 S Ct 645; Sovereign Camp, W. O. W. v Hefflin, 188 Ga 234, 3 SE2d 559; Jordan v Nelson (Iowa) 178 NW 544, 10 ALR 1464; Bates v Southgate, 308 Mass 170, 31 NE2d 551, 133 ALR 1349 (disapproving the distinction stated in Colonial Development Corp. v Bragdon, 219 Mass 170, 106 NE 635, between fraud "antecedent" to the contract and fraud "entering into the making" thereof); Ganley Bros. v Butler Bros. Bldg. Co., 170 Minn 373, 212 NW 602, 56 ALR 1.; Young Fehlhauer Pile Co. v State, 265 App Div 61, 97

83. **Arnold v National Aniline & Chemical Co.** (CA2 NY) 20 F2d 364, 56 ALR 4; **Barrie v Miller**, 104 Ga 312, 30 SE 840; **B. F. Bonewell & Co. v Jacobson**, 130 Iowa 170, 106 NW 614; **Ganley Bros. v Butler Bros. Bldg. Co.**, 170 Minn 373, 212 NW 602, 56 ALR 1; **Land Finance Corp. v Sherwin Electric Co.**, 102 VT 73, 146 A 72, 75 ALR 1025; **Holcomb & Hoke Mfg. Co. v Auto Interurban Co.**, 140 Wash 581, 250 P 34, 51 ALR 39; **Baylies v Vanden Boom**, 40 Wyo 411, 278 P 551, 70 ALR 524.

84. Restatement, Contracts 2d § 196.)

of the parties. Any such specification must be made in good faith and within limits set by commercial reasonableness.

(2) Unless otherwise agreed specifications relating to assortment of the goods are at the buyer's option except as otherwise provided in Subsections (1)(c) and (3) of Section 70A-2-319 specifications or arrangements relating to shipment are at the seller's option.

(3) Where such specification would materially affect the other party's performance but is not seasonably made or where one party's cooperation is necessary to the agreed performance of the other but is not reasonably forthcoming, the other party in addition to all other remedies

(a) is excused for any resulting delay in his own performance; and

(b) may also either proceed to perform in any reasonable manner or after the time for a material part of his own performance treat the failure to specify or to cooperate as a breach by failure to deliver or accept the goods.

70A-2-312. Warranty of title and against infringement — Buyer's obligation against infringement.

(1) Subject to Subsection (2) there is in a contract for sale a warranty by the seller that

(a) the title conveyed shall be good, and its transfer rightful; and

(b) the goods shall be delivered free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge.

(2) A warranty under Subsection (1) will be excluded or modified only by specific language or by circumstances which give the buyer reason to know that the person selling does not claim title in himself or that he is purporting to sell only such right or title as he or a third person may have.

(3) Unless otherwise agreed a seller who is a merchant regularly dealing in goods of the kind warrants that the goods shall be delivered free of the rightful claim of any third person by way of infringement or the like but a buyer who furnishes specifications to the seller must hold the seller harmless against any such claim which arises out of compliance with the specifications.

70A-2-313. Express warranties by affirmation, promise, description, sample.

(1) Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement pur-

porting to be merely the seller's opinion or commendation of the goods does not create a warranty.

70A-2-314. Implied warranty — Merchantability — Usage of trade.

(1) Unless excluded or modified (Section 70A-2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the servicing for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(2) Goods to be merchantable must be at least such as

(a) pass without objection in the trade under the contract description; and

(b) in the case of fungible goods, are of fair average quality within the description; and

(c) are fit for the ordinary purposes for which such goods are used; and

(d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

(e) are adequately contained, packaged, and labeled as the agreement may require; and

(f) conform to the promises or affirmations of fact made on the container or label if any.

(3) Unless excluded or modified (Section 70A-2-316) other implied warranties may arise from course of dealing or usage of trade.

70A-2-315. Implied warranty — Fitness for particular purpose.

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

70A-2-316. Exclusion or modification of warranties — Livestock.

(1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this chapter on parol or extrinsic evidence (Section 70A-2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.

(2) Subject to Subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

(3) Notwithstanding Subsection (2)

(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is," "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and

(b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to

1 IN THE FOURTH JUDICIAL DISTRICT COURT FOR UTAH COUNTY

2 STATE OF UTAH

3 JIM YATES,)
4 Plaintiff,) Civil No. 900 400 61
5 vs.) AFFIDAVIT OF DAN WHETSTONE
6 GUY TAYLOR,)
7 Defendant.)
8 STATE OF OREGON)
9 County of Tillamook.) ss.

10 I, DAN WHETSTONE, being first duly sworn and upon oath,
11 depose and say as follows:

12 1. I am the mechanic who had done repair work on a Case
13 980 Excavator, Serial No. 6203826, which was purchased from Mr.
14 Jim Yates in Lehi, State of Utah.

15 2. I was present when this machine arrived in Tillamook,
16 Oregon, and helped unload this machine.

17 3. This machine had a large pool of oil under it, it had
18 to be jumped started, and would barely move off the trailer.

19 4. The machine had been advertised in My Little Salesman,
20 June 1990 edition, and was priced for \$22,000.00.

21 5. Randy Ackerman went to Utah and purchased this machine.

22 6. Randy Ackerman works on a commercial fishing boat and
23 is at sea. Mr. Ackerman has been unable to use the machine to
24 date on his property for the purpose he intended to use the
25 machine.

26 7. Since the machine arrived in Oregon, I have worked on
27 the machine off and on for a total time of two weeks.

28 /////

8. The batteries were old, and I put new batteries in the machine. The windshield was missing. The side door window was cracked. The wiring system was out of order except for the ignition switch and starter button. I am still working on the wiring. The gages did not work. There are many serious hydraulic leaks. The track motors had to be rebuilt, and one digging break had to be rebuilt.

9. The machine was not in good condition as advertised in the June 1990 edition of My Little Salesman.

10. The total price of \$22,000.00 has been paid for the machine. This price included delivery to Tillamook, Oregon.

11. The machine is still not working properly and has \$3,500+ more that must be invested to get the machine to work properly.

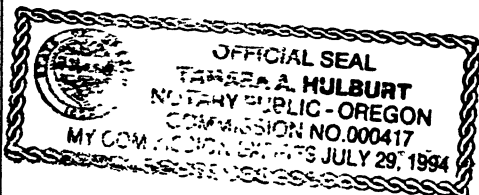
Further this affiant sayeth not.

DATED this 13th day of June, 1990.

Dan Whetstone
DAN WHETSTONE

Subscribed and sworn to before me this 3rd day of June, 1991.

Sandra Hulbert
Notary Public for Oregon
My Commission Expires: 7/29/94



July 26, 1991.

Dear Clerk:

Please send me, the finding of fact
and conclusions of law as filed
by Mr Gary Anderson. Civil #
900400061, Jim Jones vs Guy Taylor
and certify please. Please show filing
date from register as well.

Sincerely

Guy Taylor

A. D. Exhibit 35-C
Case No. _____

IN THE FOURTH JUDICIAL DISTRICT COURT

UTAH COUNTY, STATE OF UTAH

JIM YATES

Plaintiff,

CASE NUMBER: 900400061

vs.

RULING

GUY TAYLOR

Defendant.

This matter comes before the Court, under Rule 4-501, on the motion of defendant seeking a ruling on defendant's objections to Court's Findings of Fact, Conclusions of Law and Order. The Court has reviewed the file, and upon being advised in the premises, now makes the following:

RULING

1. The Court declines to rule upon said matter for the reason that no proposed written findings of fact, conclusions of law and order have yet been submitted to the Court by counsel for the plaintiff as directed at the close of the trial. Defendant's objections and motion are thus premature.

Dated this 20th day of June, 1991.

BY THE COURT:


CULLEN Y. CHRISTENSEN, JUDGE

cc: Guy Taylor
Gary Anderson, Esq.
Jim Yates

Guy Taylor, Pro Se
H.C. 2 Box 40
Duchesne, Utah 84021

Telephone No. (801) 738-2608

*Hand Sealed upon
Anderson 1:00 PM In the
Court Room - 7-31-92*

IN THE FOURTH JUDICIAL DISTRICT COURT FOR UTAH COUNTY

STATE OF UTAH

JIM YATES DBA CINCO EQUIPMENT

AFFIDAVIT OF GUY TAYLOR

Plaintiff/ Appellee,

VS

CASE NO. 900400061 CV

GUY TAYLOR,

Defendant/Appellant

HONORABLE CULLEN Y.
CHRISTENSEN, JUDGE

THE AFFIANT GUY TAYLOR, BEING FIRST SWORN, SAYS:

1. A TAPE RECORDING, AND AFFIDAVIT OF DAN WHETSTONE, COULD ONLY BE OBTAINED, AFTER THE COURT TRIAL, SINCE THE NAME OF THE PARTY THE PLAINTIFF SOLD THE EXCAVATOR TO, WAS NOT SUPPLIED TO THE DEFENDANT PRIOR TO TRIAL. [DISCOVERY DURNING THE TRIAL (A COPY OF A FAX TRANSMISSION FROM THE PLAINTIFF TO COUNSEL) WAS INTRODUCED TO THE DEFENDANT DURNING THE COURT TRIAL]. THIS FAX TRANSMISSION WAS ALTERED, AND THIS FACT WAS PRESENTED TO THE COURT (tr 111) ENCLOSED, DEFENDANTS EXHIBIT 1.

2. THE AFFIDAVIT STATES THE FOLLOWING [AFTER] RECEIVING THE MACHINE AT TILLAMOOK, OREGON.

- (1) THE BATTERIES WERE OLD
- (2) THE WINDSHIELD WAS MISSING
- (3) THE SIDE DOOR WINDOW WAS CRACKED
- (4) THE WIRING SYSTEM WAS OUT OF ORDER

Case No. _____

(5) THE GAGES DO NOT WORK
(6) THERE ARE MANY HYDROLIC LEAKS
(7) THE TRACK MOTOR HAD TO BE REBUILT
(8) ONE DIGGING BRAKE HAD TO BE REBUILT
(9) THE MACHINE WOULD BARELY MOVE OFF THE TRAILER
(10) THE MACHINE HAD A LARGE POOL OF OIL UNDER IT.
(11) THE MACHINE WAS ADVERTIZED IN THE JUNE EDITION OF
MY LITTLE SALESMAN AS BEING IN GOOD CONDITION.

(12) THE MACHINE [WAS NOT] IN GOOD CONDITION AS ADVERTISED
IN MY LITTLE SALESMAN.

3. THE DEFENDANT INTRODUCED THE JUNE (6-90) EDITION OF MY LITTLE
SALESMAN AT TRIAL AND IT WAS ACCEPTED AS DEFENDANTS EXHIBIT 10.

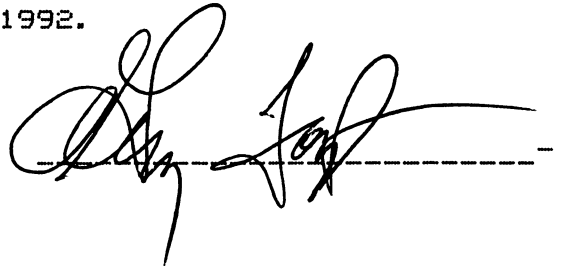
4. THE DEFENDANT [DISCOVERED] THAT NONE OF THE WORK CLAIMED
BY THE PLAINTIFF WAS EVER DONE TO SAID EXCAVATOR, AS CLAIMED
IN PLAINTIFFS TRIAL EXHIBIT 9, WHICH SPECIFICALLY IDENTIFIED
THE COSTS AND EXPENSES THE PLAINTIFF CLAIMED WERE MADE AS A
RESULT OF THE DAMAGES CAUSED BY THE DEFENDANTS USE OF SAID
EXCAVATOR.

5. DEFENDANT HAS AVAILABLE [NEWLY DISCOVERED EVIDENCE] FROM
THE PURCHASER OF THE HEIN WARNER MACHINE, MENTIOND DURNING
THE COURT TRIAL, WHERE THRE PLAINTIFF MISREPRESENTED THE
CONDITION OF THAT MACHINE ALSO. THIS MANS NAME IS GEORGE
COLLINS, WHO RESIDES IN ROCK SPRINGS WYOMING TELEPHONE
NUMBER 307 382 5463. [DISCOVERY] NOW INDICATES THAT THREE
PARTIES HAVE BEEN RIPPED OFF, THE DEFENDANT, WHETSTONE/ACKERMAN,
AND GEORGE COLLINS, ALL HAVE BEEN RIPPED OFF BY THE PLAINTIFF.

IN ADDITION, THE COURT LIKEWISE MADE A DECISION BASED UPON
EVIDENCE WHICH WAS NOT TRUE. (pLAINTIFFS EXHIBIT 9).

6. DEFENDANT FEELS THE COURT SHOULD, IN THE INTERST OF JUSTICE,
RELEIVE THE DEFENDANT FROM THIS JUDGEMENT WHICH WAS OBTAINED
THROUGH FRAUD.

DATED THIS 30TH DAY OF JULY 1992.



STATE OF UTAH

COUNTY OF DUCHESNE

SUBSCRIBED AND SWORN TO BEFORE ME THIS 31ST DAY OF
JULY 1992.

NOTARY PUBLIC



CERTIFICATE OF MAILING

I CERTIFY I MAILED A COPY OF THE FOREGOING TO THE FOLLOWING
POSTAGE PREPAID AT DUCHESNE UTAH, THIS 31ST DAY OF JULY
1992.

MR GARY ANDERSON, ESQ
ATTORNEY FOR THE PLAINTIFF
750 NORTH 200 WEST, SUITE 102
PROVO, UTAH 84601

1 the backside there, in case you are wondering what that is,
2 that's where your man was told not to sign it. Wrote that up
3 the day he brought that in. That gives his name and every-
4 thing at the bottom.

5 THE COURT: Now just a moment, wait until
6 he asks you a question, Mr. Yates.

7 THE WITNESS: Okay. Thank you, sir.

8 Q (By Mr. Taylor) What date was this? I was looking
9 for it. Usually, a Fax machine will leave a date that a
10 transaction is faxed to a party. And I note that's been
11 cut off of this. Was that for some reason?

12 A It certainly wasn't.

13 Q I mean, after all, that is a faxed copy. I have
14 no record of receiving a copy. Doesn't that seem kind of
15 strange to you?

16 A No, it don't.

17 Q Regarding this information that I requested that
18 you supply me with and you agreed to in your deposition.
19 Isn't it true I requested this information?

20 THE COURT: Mr. Taylor, where are you
21 going with this line of questioning?

22 MR. TAYLOR: I think Mr. Yates is purpose
23 ly holding back information to defraud me, to cost me money.
24 And that's where I'm going from.

25 THE COURT: You think he sold the prop-