

1993

Mark Erickson v. Ronald K. Platts, E-Z Street Auto : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MARK ERICKSON,

Plaintiff/Appellee/Cross-
Appellant,

vs.

RONALD K. PLATTS, dba
E-Z STREET AUTO,

Defendant/Appellant/Cross-
Appellee.

Case No. **930252-CA**
~~930252-CA~~

Priority No. 15

BRIEF OF APPELLEE

On Appeal from the
Third Circuit Court of the State of Utah
Salt Lake County, Murray Department
Honorable L.H. Griffiths, Circuit Court Judge

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UTAH COURT OF APPEALS
BRIEF

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Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MARK ERICKSON, :

Plaintiff/Appellee/Cross-Appellant, :

vs. : Case No. 930283-CA

Case No. 930283-CA

RONALD K. PLATTS, dba
E-Z STREET AUTO,

Priority No. 15

Defendant/Appellant/Cross-Appellee. :

BRIEF OF APPELLEE

JURISDICTION AND NATURE OF PROCEEDINGS

In this appeal and cross-appeal, Defendant/Appellant/Cross-Appellee Ronald K. Platts dba E-Z Street Auto ("E-Z Street") appeals from a judgment entered against him after a bench trial for violation of the federal odometer fraud statute, 15 U.S.C. § 1981 et seq., and for fraud. Plaintiff/Appellee/Cross-Appellant Mark Erickson ("Erickson") cross-appeals that judgment claiming that he should have been awarded three times the amount of actual damages he sustained, as provided for under 15 U.S.C. § 1989. This Court has appellate jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(d) (1992).

ISSUES PRESENTED ON APPEAL
AND
STANDARDS OF APPELLATE REVIEW

Cross-Appellant identifies the following issues on appeal:

1. Did the trial court correctly deny Erickson's claim for damages in the amount of three times his actual damages as provided pursuant to 15 U.S.C. § 1989 (federal odometer fraud statute)?

This issue is a question of statutory interpretation, which is reviewed under a correction of error standard, according no deference to the trial court's interpretation. Scharf v. BMG Corp. 700 P.2d 1068 (Utah 1985); Automotive Manufacturers Warehouse, Inc. v. Service Auto Parts, Inc., 596 P.2d 1033 (Utah 1979).

2. Did the trial court correctly construe 15 U.S.C. § 1988 to enter judgment against E-Z Street for purposefully professing ignorance regarding the exact mileage of the vehicle, and thus showing a reckless disregard for the truth?

This issue is a question of statutory interpretation, which is reviewed under a correction of error standard, according no deference to the trial court's interpretation. Scharf v. BMG Corp. 700 P.2d 1068 (Utah 1985); Automotive Manufacturers Warehouse, Inc. v. Service Auto Parts, Inc., 596 P.2d 1033 (Utah 1979).

3. Did the trial court correctly grant Erickson the remedy of rescission of the Purchase Agreement?

This issue is a question of law and will be reviewed using a correction of error standard. Scharf v. BMG Corp. 700 P.2d 1068 (Utah 1985); Automotive Manufacturers Warehouse, Inc. v. Service Auto Parts, Inc., 596 P.2d 1033 (Utah 1979).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

§ 1981. Congressional findings and declaration of purpose

The Congress hereby finds that purchasers when buying motor vehicles rely heavily on the odometer reading as index of the condition and value of such vehicle; that purchasers are entitled to rely on the odometer reading as an accurate reflection of the mileage actually traveled by the vehicle; that an accurate indication of the mileage traveled by a motor vehicles assists the purchaser in determining its safety and reliability; and that motor vehicles move in the current of interstate and foreign commerce or affect such commerce. It is therefore the purpose of this subchapter to prohibit tampering with odometers on motor vehicles and to establish certain safeguards for the protection of purchaser with respect to the sale of motor vehicles having altered or reset odometers.

(Pub.L. 92-513, Title IV, § 401, Oct. 20, 1972, 86 Stat. 961.)

§ 1988. Disclosure requirements upon transfer of ownership of motor vehicle

Promulgation of rules

(a) Not later than 90 days after October 20, 1972, the Secretary shall prescribe rules requiring any transferor to give the following written disclosure to the transferee in connection with the transfer of ownership of a motor vehicle:

- (1) Disclosure of the cumulative mileage registered on the odometer.
- (2) Disclosure that the actual mileage is unknown, if the odometer reading is known to the transferor to be different from the number of miles the vehicle has actually traveled.

Such rules shall prescribe the manner in which information shall be disclosed under this section and in which such information shall be retained.

Violation of rules and giving false statements to transferees prohibited

(b) No transferor shall violate any rule prescribed under this section or give a false statement to a transferee in making any disclosure required by such rule.

Acceptance of incomplete written disclosure by transferees acquiring ownership for resale prohibited

(c) No transferee who, for purposes of resale, acquires ownership of a motor vehicle shall accept any written disclosure required by any rule prescribed under this section if such disclosure is incomplete.

(Pub.L. 92-513, Title IV, § 408, Oct. 20, 1972, 86 Stat. 962; Pub.L. 94-364, Title IV, § 406, July 14, 1976, 90 Stat. 983.)

§ 1989. Civil actions to enforce liability for violation of odometer requirements; amount of damages; jurisdiction; period of limitation

(a) Any person who, with intent to defraud, violates any requirement imposed under this subchapter shall be liable in an amount equal to the sum of -

(1) three times the amount of actual damages sustained or \$1,500.00 whichever is the greater; and

(2) in the case of any successful action to enforce the foregoing liability, the costs of the action together with reasonable attorney fees as determined by the court.

(b) An action to enforce any liability created under subsection (a) of this section, may be brought in a United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction within two years from the date on which the liability arises.

(Pub.L. 92-513, Title IV, § 409, Oct. 20, 1972, 86 Stat. 963.)

STATEMENT OF THE CASE

Erickson filed his complaint in this matter on January 10, 1990, alleging that Appellant defrauded him in the sale of a vehicle that had 146,811 actual miles on it, but was sold as having approximately 46,811. On January 18, 1990, E-Z Street filed a verified answer denying Erickson's claims and counterclaiming for damages arising out of breach of contract.

The case was tried before the Honorable LeRoy H. Griffiths, sitting without a jury, on September 29, 1992 and October 19, 1992

(R. 92). On November 24, 1992, Judge Griffiths issued a Memorandum Decision in favor of Erickson and against E-Z Street (R. 85-88). On February 1, 1993, Judge Griffiths signed Findings of Fact and Conclusions of Law and an Order of judgment (R. 92-98). Erickson was awarded (1) judgment against E-Z Street; (2) rescission of the Purchase Agreement for the vehicle; (3) cancellation of his obligation evidenced by his credit card charges for purchase of the vehicle; (4) damages of \$1,212.80, plus interest at the rate of 10% per annum from December 1, 1989 until paid in full; (5) court costs of \$104.00; and (6) \$1,500.00 attorney's fees (R. 99-100). No punitive damages were awarded (id.).

On February 11, 1993, E-Z Street made a Motion to Alter and Amend the Judgment and for a New Trial, which was denied on March 18, 1993. E-Z Street filed its notice of appeal in the Court of Appeals on April 22, 1993 (R. 123). Erickson cross-appealed on April 28, 1993 (R. 125).

STATEMENT OF FACTS

In September 1989, E-Z Street offered a 1980 Volkswagen camper van ("vehicle") for sale (R. 85, 92).¹ On or about September 26, 1989, Erickson purchased the vehicle from E-Z Street. Erickson agreed to pay a total purchase price of \$4,291.00 (\$4,266.00, plus \$25.00 for an out of state permit). Erickson paid for the vehicle's purchase using two credit cards. Erickson charged

¹ All the statements in the Statement of Facts come from the Memorandum Decision dated November 24, 1992 (contained in the record at 85-88, and in this brief in Appendix I), and from the Findings and Conclusions of Law (contained in the record at 92-98, and in this Brief in Appendix I).

\$1,291.00 on his American Express card and \$3,000.00 on his Visa card (R. 86, 93).

Approximately one week prior to purchasing the vehicle, Erickson test drove the vehicle accompanied by one of E-Z Street's salesman, Paul Lives. While on the test drive, Erickson stopped at his father-in-law's home. Erickson's wife and his father-in-law inspected the vehicle. At this time the odometer indicated that the mileage on the vehicle was approximately 48,800 miles. Even though the vehicle was relatively old, given the low mileage shown on the odometer and the condition of the body, the three felt that the vehicle was in good condition (R. 86-87, 93).

Erickson and Mr. Lives specifically discussed the mileage shown on the odometer. Erickson testified that Mr. Lives told him that the miles shown were the actual miles. Mr. Lives testified that he told Erickson to have the vehicle checked by a mechanic because there was "no way" to determine the actual mileage on a car that old.

During the week prior to the vehicle's purchase, Erickson spoke with E-Z Street's manager, Ronald Memmott, regarding purchase terms. Both Erickson and his wife testified that Mr. Memmott told them that the 48,831 miles, as shown on the vehicle's odometer, were the actual miles of the vehicle (R. 87-88, 93-94).

On September 26, 1989, Mr. Memmott, on behalf of E-Z Street, finalized the vehicle's purchase with Erickson. Mr. Memmott prepared all of the necessary documents transferring ownership of the vehicle to Erickson. Mr. Memmott prepared the Purchase

Agreement on which he indicated the vehicle's mileage as 48,831.

Mr. Memmott prepared the Odometer Disclosure Statement which stated in pertinent part:

I, E.Z. Street Auto, state that the odometer . . . now reads 48,831 (no tenths) miles and to the best of my knowledge that it reflects the actual mileage of the vehicle . . . unless one of the following statements is checked.

- (1) I hereby certify that to the best of my knowledge the odometer reading reflects the amount of mileage in excess of its mechanical limits.
- ☒ (2) I hereby certify that the odometer reading is NOT the actual mileage. WARNING ODOMETER DISCREPANCY.

Mr. Memmott checked statement box by number (2) of the Odometer Disclosure Statement. At trial, Mr. Memmott denied that he misrepresented the mileage of the vehicle to Erickson, even though he knew that the actual mileage was far in excess of 48,831 miles. When statement (2) was checked, people were put on notice that there was an odometer discrepancy. However, Erickson and his wife both testified that Mr. Memmott told both of them that 48,831 was the actual mileage on the vehicle (86-88, 93-94).

Erickson bought the vehicle "as is" and signed statements that he realized the vehicle was sold without any warranties. However, Erickson believed he was purchasing an automobile with only 48,831 miles on it, not a vehicle with 148,831 and no warranty. Erickson drove the vehicle to his home in Evanston, Wyoming, and during the first week of operation he repaired the brakes, tail lights, door locks, and installed a new door rear-view mirror, all at a cost of \$123.24 (R. 86-87, 94-95).

At the beginning of the second week, Erickson, his wife, and their one year old daughter, left Evanston to drive to Los Angeles,

California. Approximately 80 miles north of Las Vegas, Nevada the vehicle broke down and had to be towed to Las Vegas. While in Las Vegas, Erickson was told by a Volkswagen repair shop that the engine needed a complete overhaul at an estimated cost of \$2,000.00. He was also told that from the condition of the engine it was evident that the actual mileage was greatly in excess of the mileage figure shown on the odometer (id.).

To avoid ruining their trip to California, Erickson rented a car in Las Vegas and continued traveling to Los Angeles. On their return trip, Erickson rented a truck large enough to tow the vehicle and brought it back to his father-in-law's home in South Salt Lake, Utah. It cost \$150.34 to rent the car and \$939.22 to rent the truck (id.).

Erickson's father-in-law, who is an experienced Volkswagen mechanic, disassembled part of the engine in an attempt to repair it. The engine showed evidence of many miles of use, and he determined that a complete engine overhaul was necessary. Erickson's negotiations to have E-Z Street repair the engine were unsuccessful. E-Z Street insisted that under its "as-is, no warranty" contract, E-Z Street had no legal obligation to repair the engine. Erickson testified, however, that he would not have purchased the vehicle "as is, no warranty" if he had known the mileage was over 100,000 miles. The trial court concluded that E-Z Street's agents knew or should have known that the odometer had "turned over" and that the actual mileage was 100,000 miles more than was shown on the odometer. The trial court further concluded

that E-Z Street should have written the actual mileage on the Odometer Disclosure Statement and the Purchase Agreement (R. 87-88, 96-98).

Erickson, upon finding an old registration form, discovered the name of the previous owners of the 1980 van. The previous owners informed Erickson that the actual mileage of the van, when they sold it, was 146,811 miles (R. 96; Appendix II of this Brief). The Court specifically found that as of January of 1989, E-Z Street knew or should have known that the odometer had turned over (R. 97). As a result of E-Z Street's failure to disclose this information, and as a result of E-Z Street's choice to "profess ignorance as to the actual mileage," the trial court further specifically found that "Defendant, through the actions of its agents, committed fraud on the plaintiff" (R. 97-98).

SUMMARY OF ARGUMENT

The trial court erred when it did not grant Erickson three times the amount of his actual damages, as required by 15 U.S.C. § 1989(a). However, the trial court did not commit any error in judging that E-Z Street violated 15 U.S.C. § 1988, or in rescinding the purchase agreement for the vehicle.

ARGUMENT

POINT I.

THE TRIAL COURT ERRED IN DENYING ERICKSON'S CLAIM FOR TREBLE DAMAGES PURSUANT TO 15 U.S.C. § 1989 (FEDERAL ODOMETER FRAUD STATUTE).

Erickson is entitled to treble damages under 15 U.S.C. § 1989, and the trial court erred in not awarding such damages. Section

1989 states:

(a) Any person who, with intent to defraud, violates any requirement imposed under this subchapter shall be liable in an amount equal to the sum of -

(1) three times the amount of actual damages sustained or \$1,500.00 whichever is the greater; and

(2) in the case of any successful action to enforce the foregoing liability, the costs of the action together with reasonable attorney fees as determined by the court.

15 U.S.C. § 1989. The language of this section is couched in mandatory terms: Any person who has violated any requirement of subchapter IV--the odometer disclosure requirements--(15 U.S.C. §§ 1981-91) shall be liable in the amount of three times the amount of actual damages or \$1,500, whichever is greater.² The trial court only awarded Erickson \$1,212.80 in damages. This is less than the statutory minimum amount of \$1,500. Furthermore, three times the amount of Erickson's actual damages would be \$3,638.40 (\$1,212.80 time three). The plain language of 15 U.S.C. § 1989 requires that the court award Erickson the greater of \$1,500 or \$3,638.40. Erickson respectfully submits that the trial court erred, as a matter of law, in awarding less than the statute mandates on its own plain terms.

Accordingly, Erickson respectfully moves this Court to remand this case to the trial court with an Order stating that the amount of damages awarded to Erickson shall be entered as \$3,638.40.

² The statute also provides for reasonable attorney's fees to a party who is successful in enforcing liability under the subchapter, 15 U.S.C. §§ 1981-91.

POINT II.

THE TRIAL COURT CORRECTLY CONSTRUED 15 U.S.C. § 1988 TO ENTER JUDGMENT AGAINST E-Z STREET FOR PURPOSEFULLY PROFESSING IGNORANCE REGARDING THE EXACT MILEAGE OF THE VEHICLE.

The trial court correctly applied the law regarding violations of 15 U.S.C. § 1988 in the present case. Section 1988(a)(1) requires that any transferor "give the following written disclosure to the transferee in connection with the transfer of ownership of a motor vehicle: (1) Disclosure of the cumulative mileage registered on the odometer." Furthermore, § 1988(b) states: "No transferor shall violate any rule prescribed under this section or give a false statement to a transferee in making any disclosure required by such rule." 15 U.S.C. § 1988(b). In interpreting the requirements of 15 U.S.C. § 1988, the trial court relied on Ryan v. Edwards, 592 F.2d 756 (4th Cir. 1979), and Haynes v. Manning, 917 F.2d 450 (10th Cir. 1990). In Haynes, the Tenth Circuit cited Ryan approvingly. E-Z Street's claim that the trial court erred in applying 15 U.S.C. § 1988 is thus meritless.

In Ryan, the Fourth Circuit held that a transferor may certify the mileage of a vehicle as unknown (i.e., check the box that E-Z Street checked) only when he believes that for a reason other than the odometer has "rolled over" the mileage is inaccurate. 592 F.2d at 760-61. In Ryan, the defendant auto dealership had in its files information that indicated that the vehicle at issue had over 100,000 miles on it. Nevertheless, when the defendant sold the automobile, it did not state this on the odometer disclosure statement. Rather, the dealership merely marked the second box on

the form that states that the true mileage is unknown. Id. at 759.

In addressing the requirements of 15 U.S.C. § 1988(a) and (b), the Fourth Circuit held that a transferor has a legal duty to use reasonable care to determine the exact amount of miles traveled by the vehicle. Id. at 760-61. Specifically, the court held that the defendant did not comply with the requirements of § 1988 by simply recording the mileage that the odometer stated. Id. at 761. The Court wrote:

When a transferor who knows that an odometer has "turned over" merely records the numbers appearing on the odometer and certifies that the true mileage is unknown, the consumer is not simply deprived of accurate mileage information; he is actually misled by the form itself. We cannot believe that Congress intended to enact a statute requiring that consumers be given false or misleading information.

We hold that when a transferor knows that a vehicle's odometer has "turned over" after registering 99,999 miles, the "cumulative mileage" which must be stated to satisfy the requirements of § 1988(a)(1) is the total of 100,000 plus the number actually appearing on the odometer. A transferor may certify the mileage as "unknown", § 1988(a)(2), only when he believes that, for some other reason, the odometer reading is inaccurate.

Id. at 760-61 (emphasis added). The Court further explained the level of certainty a car dealer must possess regarding whether an odometer has "rolled over": "The knowledge of the 'turn over' which the transferor must have is not the absolute certitude assumed by the district court. If, in the exercise of reasonable care, he would have had reason to know that the odometer had 'turned over', he must disclose this fact on the odometer mileage statement." Id. at 761 n.5 (citing Nieto v. Pence, 578 F.2d 640 (5th Cir. 1978) and Senate Report No. 92-413, Reprinted in 1972 U.S.Code Cong. & Admin.News pp. 3960, 3971).

The Tenth Circuit agreed with the reasoning of Ryan in its opinion in Haynes v. Manning, 917 F.2d 450 (10th Cir. 1990). In that case, the court stated if a defendant sold a vehicle with reckless disregard to the actual miles the vehicle had traveled, that such actions violated 15 U.S.C. § 1988. Id. at 452-53 (citing Ryan v. Edwards, 592 F.2d 756, 762 (4th Cir. 1979)).

In the present case, the trial court specifically held that E-Z Street had disregarded its duty to ascertain, with reasonable care, the correct odometer reading of the vehicle. The court stated:

4. There is a conflict in the evidence as to whether Defendant's salesman and manager told Plaintiff that the Vehicle's mileage was 100,000 miles less than the actual mileage. However, the court concludes that from January, 1989, Defendant's agents knew or should have known that the odometer had "turned over" and that the actual mileage was 100,000 miles more than as shown on the odometer.

5. This information was not given to the plaintiff. Mr. Memmott should have checked statement (1), and written the actual mileage on the Odometer Disclosure Statement and the Purchase Agreement.

[W]hen a transferor knows that a vehicle's odometer has "turned over" after registering 99,999 miles, the "cumulative mileage" which must be stated to satisfy the requirements of (the Act) is the total of 100,000 plus the number actually appearing on the odometer." Ryan v. Edwards, 592 P.2d 760.

6. What the agents did do was to profess ignorance as to the actual mileage. Such conduct mislead the plaintiff and constitutes reckless disregard for the truth if not actual intent to defraud.

7. The court concludes that Defendant, through the actions of its agents, committed fraud on the plaintiff.

(R. 97-98).

The holding of the trial thus correctly stated that E-Z Street

committed fraud by purposefully not exercising reasonable care to learn the exact mileage of the vehicle. This violation was all the more egregious when it came to light that E-Z Street had signed a document that stated the actual miles of the vehicle (R. 74, in the envelop containing the exhibits; see Appendix II of this Brief).

Even the lead case E-Z Street cites in support of its position, Nieto v. Pence, 578 F.2d 640 (5th Cir. 1978), accords with the holding of the Ryan case. In Nieto, the Fifth Circuit stated:

We hold that a transferor who lacked actual knowledge may still be found to have intended to defraud and thus may be civilly liable for a failure to disclose that a vehicle's actual mileage is unknown. A transferor may not close his eyes to the truth. If a transferor reasonably should have known that a vehicle's odometer reading was incorrect, although he did not know to a certainty the transferee would be defrauded, a court may infer that he understood the risk of such an occurrence.

Id. at 642 (emphasis added).

Accordingly, Erickson respectfully asks this Court to affirm the trial court's judgment that E-Z Street violated 15 U.S.C. § 1988.

POINT III.

E-Z STREET'S ARGUMENT THAT THE TRIAL COURT ERRED IN NOT REQUIRING PROOF OF FRAUD BY CLEAR AND CONVINCING EVIDENCE BEFORE GRANTING RESCISSION OF THE PURCHASE AGREEMENT IS WITHOUT MERIT.

The trial court's decision to grant rescission of the purchase agreement of the vehicle should be sustained on three grounds. First, the trial court ruled that E-Z Street had defrauded Erickson, and the evidence is clear and convincing that E-Z Street had signed a document that stated the actual miles of the vehicle

to be 146,811 as of March 2, 1989. See Appendix II. Therefore, the trial court's decision is consistent with Pace v. Parrish, 247 P.2d 273 (Utah 1952). Second, E-Z Street did not provide a record to this court to review. Without such a record, this Court will presume that the evidence below supported the trial court's actions. Intermountain Power Agency v. Bowers-Irons Recreation Land & Cattle Co., 786 P.2d 250, 252 (Utah App. 1990). Third, on the grounds of unilateral mistake, the trial court, in equity, could grant the rescission.

Regarding the first argument, the trial specifically stated that it found that E-Z Street's actions defrauded Erickson (R. 97-98). The court stated that E-Z Street's actions "constituted reckless disregard for the truth if not actual intent to defraud" (R. 97, emphasis added). Without even making recourse to the oral evidence offered at trial, Erickson introduced a document that demonstrated that the actual miles on the vehicle were 146,811. This document was signed by an agent of E-Z Street.

Regarding the nine elements of fraud, as explained in Pace, each element was met by clear and convincing evidence in this case. First, E-Z Street misrepresented the mileage of the vehicle. Second, Erickson testified that the mileage was a material fact in considering whether to buy to the car. Moreover, 15 U.S.C. § 1981 and State v. Forshee, 588 P.2d 181, 183 (Utah 1978) (holding that mileage on an odometer is likely to affect the judgment of the buyer and has a pecuniary significance) both hold that the mileage of a vehicle is material to its purchase. Third, the statement

that the exact mileage was unknown was false. Fourth, E-Z Street either made the statement with reckless disregard for the truth, or actively intended to defraud Erickson. Fifth, the purpose for making the statements were to induce Erickson to buy the vehicle.

Sixth, Erickson reasonable relied on such representation. He took the vehicle to his father-in-law, but without disassembling the engine, there was no way to know the approximate mileage of the car. The trial court even stated that "Even though the vehicle was relatively old, with low mileage shown on the odometer and the condition of the body, the three felt that it was in good mechanical condition" (R. 85, emphasis added). Seventh, Erickson did buy the car in reliance on the representation of the mileage. Eighth, Erickson was induced to take this action because of the representation. And ninth, Erickson was damaged in the value of the vehicle he received and the damages he suffered when the vehicle broke down. All the elements of fraud have been met by clear and convincing evidence.

A second ground why the trial court's remedy of rescission should be affirmed is that E-Z Street has not produced a record of the proceedings in this matter and is therefore barred from bringing arguments regarding the Court's findings and conclusions. Utah R. App. P. 11(e)(2) states:

Transcript required of all evidence regarding challenged findings or conclusion. If the appellant intends to urge on appeal that a finding or conclusion is unsupported by or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion.

In Intermountain Power Agency v. Bowers-Irons Recreation Land &

Cattle Co., 786 P.2d 250, 252 (Utah App. 1990), this Court stated that without a record on appeal, this Court can only presume that the judgment was supported by sufficient evidence. Erickson urges this Court to follow this presumption in the present case, to decline to reach E-Z Street's argument, and to affirm the trial court's order of rescission of the purchase agreement.

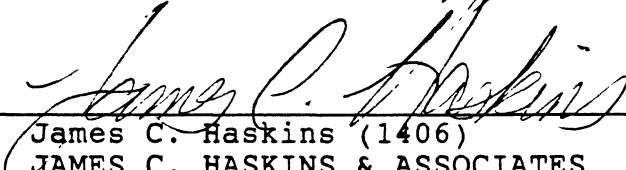
A third and final ground for affirming the trial court's order granting rescission is that, at the very least, Erickson entered into the purchase agreement under a mistaken belief of fact regarding the mileage of the vehicle. Obviously E-Z Street did not have clean hands in this matter, and on the basis of Erickson's unilateral mistake, the purchase agreement should, in justice and equity, be rescinded.

Pursuant to the arguments above, Erickson respectfully petitions this Court to affirm the trial court's Order and Judgment granting rescission of the purchase agreement.

CONCLUSION

Based upon the foregoing arguments, Erickson respectfully requests this Court to remand the case to the trial court with an Order to enter judgment for Erickson in the amount of \$3,638.40, plus interest at ten percent (10%), to award attorney's fees and costs for this appeal, and to affirm the trial court's order and judgment in all other respects.

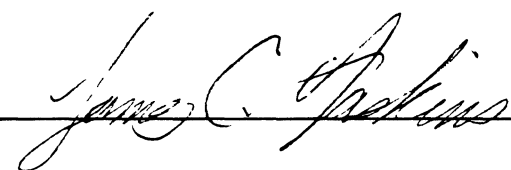
RESPECTFULLY SUBMITTED this 17th day of May,
1994.


James C. Haskins (1406)
JAMES C. HASKINS & ASSOCIATES
Attorney for Plaintiff/Appellee/
Cross-Appellant
5085 South State Street
Murray, Utah 84107

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the
foregoing Brief of Appellee was hand delivered on the
17th day of May, 1994 to:

John D. Russell
Attorney for Defendant/Appellant/Cross-Appellee
10 West 300 South, Suite 500
Salt Lake City, Utah 84101



APPENDIX I

Third Judicial Circuit Court Of Salt Lake County
Murray Department, State of Utah

MARK ERICKSON,

Plaintiff,

vs.

E Z STREET AUTO SALES,

Defendant.

MEMORANDUM DECISION

Case No. 903000298

In this action, the court is called upon to construe the mileage disclosure requirements as they apply to an odometer which has "turned over" after registering 100,000 miles. The testimony presented at the trial is convoluted and each party challenges the others accuracy as to what occurred. Upon consideration of all the evidence, the court finds for the plaintiff as hereinafter set forth.

September, 1989, defendant, E Z Street Auto Sales offered a 1980 Volkswagen Camper Van for sale. The record is not clear when defendant acquired this vehicle for sale, but the facts establish that defendant had it inspected on January 25, 1989. The inspection certificate indicates that the owner is E Z Street Auto Sales and the mileage was 46,811 miles. An affidavit filed with the Motor Vehicle Department of the State of Utah by the previous owners, Steven P. and Robyn Duncan, conveying the vehicle to defendant, indicates that the actual odometer reading was 146,811 miles.

On September 26, 1989, the plaintiff, Mark Erickson, purchased the Camper Van from the defendant. Approximately one week prior to the sale date, plaintiff had test-driven the vehicle. Paul Lives, a salesman for defendant, accompanied plaintiff on the test-drive. Plaintiff stopped at his father-in-law's home which is only a short distance from defendant's lot. Plaintiff's wife and father-in-law inspected the vehicle. At this time, the odometer showed the mileage to be around 48,800 miles. Even though the vehicle was relatively old, with the low mileage shown on the odometer and the condition of the body, the three felt that it was in good mechanical condition.

Plaintiff and Mr. Lives discussed the mileage as shown on the odometer. Plaintiff remembers that Mr. Lives said the miles shown were the actual miles. Mr. Lives remembers the conversation differently. He testified that he told plaintiff to have the vehicle checked by a mechanic since there was no way to determine the actual mileage on a car that old. During the week plaintiff talked on the phone with Ronald Memmott, the manager of defendant. The two mostly talked about the sale price of the vehicle. Mr. Memmott never told plaintiff what the actual mileage was.

On the date of the sale Mr. Memmott handled the negotiations for defendant. Both Federal and State law require that the seller state the mileage of the vehicle upon transfer of ownership. The Odometer Disclosure Statement is the document that conveys this information. Mr. Memmott prepared all of the necessary documents of sale. On the Purchase Agreement, on the line asking for the odometer reading, Mr. Memmott wrote 48,831. The Odometer Disclosure Statement, as completed by Mr. Memmott, states the odometer "now reads 48,831 (no tenths) miles and to the best of my knowledge that it reflects the actual mileage of the vehicle....unless one of the following statements is checked.

(1) I hereby certify that to the best of my knowledge the odometer reading reflects the amount of mileage in excess of its mechanical limits.

(2) I hereby certify that the odometer reading is NOT the actual mileage.

WARNING - ODOMETER DISCREPANCY."

Mr. Memmott checked statement (2). Mr. Memmott denies that he misrepresented the mileage of the vehicle to plaintiff, even though he knew that the actual mileage was not 48,831 miles. When statement (2) was checked, people were put on notice that there was an odometer discrepancy. Both plaintiff and his wife testified that Mr. Memmott told them that the 48,831 miles, as shown on the odometer, were the actual miles of the vehicle.

Plaintiff agreed to pay a total purchase price of \$4,291.00 (\$4,266.00, plus \$25.00 for an out of state permit). Plaintiff paid for the purchase by using two credit cards by charging \$3,000.00 on one card and \$1,291.00 on the second. Plaintiff bought the vehicle "as is" and signed statements that he realized the vehicle was sold without any warranties.

Plaintiff drove the vehicle to his home in Evanston, Wyoming. During the first week of operation he repaired the brakes, tail lights, and door locks, and installed a new door rear-view mirror, all at a cost of \$123.24. At the beginning of the second week, plaintiff, his wife, and one year old daughter left Evanston to drive to Los Angeles, California. The car broke down about 80 miles north of Las Vegas, Nevada. It was towed to Las Vegas. Plaintiff was told by a Volkswagen repair shop that the engine needed a complete overhaul. That the cost of such an overhaul would be in the neighborhood of \$2,000.00. He was also told that from the condition of the engine it was evident that the actual mileage was greatly in excess of the mileage figure shown on the odometer.

So as not to ruin their vacation trip to California, plaintiff rented a car in Las Vegas and continued on to Los Angeles. On their return trip, plaintiff rented a truck large enough to tow the Camper Van and brought it back to his father-in-law's home in South Salt Lake, Utah. It cost \$150.34 to rent the car and \$939.22 to rent the truck. The father-in-law, who is an experienced Volkswagen mechanic, disassembled part of the engine in an attempt to repair it. The engine showed evidence of many miles of use, and he determined that a complete engine overhaul was necessary.

Plaintiff was able to discover the name of the previous owners of the 1980 van. They informed him that the actual mileage of the van, when they sold it, was 146,811 miles. Plaintiff's negotiations to have the defendant repair the engine were unsuccessful. Defendant insisted that under its "as-is, no warranty" contract it had no legal obligation to repair the engine. Plaintiff testified that he would not have purchased the vehicle "as is, no warranty" if he had known the mileage was over 100,000 miles. It is plaintiff's contention that Mr. Memmott knew or should have known that the correct mileage was 148,831 miles. That defendant committed fraud when both its salesman and manager misrepresented the actual mileage of the vehicle. That by putting the odometer reading of 48,831 miles on the Odometer Disclosure Statement and the Purchase Agreement, defendant violated the Federal Motor Vehicle Information and Cost Savings Act, 15 U.S.C. §§ 1981-1991 (federal odometer statute).

The U. S. Congress in § 1981 stated its findings that purchasers, when buying motor vehicles, rely heavily on the odometer reading as an index of the condition and value of such vehicle; that purchasers are entitled to rely on the odometer reading as an accurate reflection of the mileage actually traveled by the vehicle; that an accurate indication of the mileage traveled by a motor vehicle assists the purchaser in determining its safety and reliability. In actions brought under this act, courts have enforced strict accountability on any person transferring ownership of a vehicle. The standard of proof in actions based on fraud is the preponderance of evidence standard. The "intent to defraud" required for a violation includes action taken with reckless disregard, as well as action taken with the specific intent to deceive or cheat potential purchasers. See Ryan vs. Edwards, 592 F 2d 756 (1979); Haynes vs. Manning, 917 F2d 450 (1990).

In Utah, it is recognized that the mileage on the odometer of a used car is a factor which is likely to affect the judgment of the buyer and has pecuniary significance. State v. Forshee, 588 P.2d 181. Plaintiff testified that he would have made a different deal, or no deal at all, had he known the actual mileage of the vehicle.

There is a conflict in the evidence as to whether defendant's salesman and manager told the plaintiff that the mileage of the vehicle was 100,00 miles less than the actual mileage. However, the court finds that from January, 1989, defendant's agents knew or


should have known that the odometer had "turned over" and that the actual mileage was 100,000 miles more than as shown on the odometer. This information was not given to the plaintiff. Mr. Memmott should have checked statement (1), and written the actual mileage on the Odometer Disclosure Statement and the Purchase Agreement.

"...when a transferor knows that a vehicle's odometer has "turned over" after registering 99,999 miles, the "cumulative mileage" which must be stated to satisfy the requirements of [the Act] is the total of 100,000 plus the number actually appearing on the odometer." Ryan v. Edwards, 592 P2d 760.

What the agents did do was to profess ignorance as to the actual mileage. Such conduct mislead the plaintiff and constitutes reckless disregard for the truth if not actual intent to defraud.

The court finds that defendant, through the actions of its agents, committed fraud on the plaintiff. Plaintiff is granted judgment against the defendant as follows: (1) The Purchase Agreement is rescinded. Plaintiff's obligation, as evidenced by the credit card charges, is cancelled. (2) Plaintiff is awarded damages of \$1,212.80, interest at the rate of 10% per annum from December 1, 1989, and his court costs. (3) Since the provisions of the Federal Act also apply to state actions (see § 1989), plaintiff is awarded \$1,500.00 attorney's fees. (4) No punitive damages are awarded.

Dated this 24th day of November, 1992.



L. H. Griffiths, Circuit Judge

James C. Haskins (1406)
HASKINS & ASSOCIATES
Attorney for Plaintiff
5085 South State Street
Murray, Utah 84107
Telephone: (801) 268-3994

93 JAN 29 AM 11:59

CLERK OF DISTRICT COURT
MURRAY DEPT.

IN THE CIRCUIT COURT OF THE STATE OF UTAH, BY
SALT LAKE COUNTY CLERK
MURRAY DEPARTMENT

MARK ERICKSON,	:	
Plaintiff,	:	FINDINGS OF FACT
vs.	:	CONCLUSIONS OF LAW
E.Z. STREET AUTO,	:	Civil No. 903000298
Defendant.	:	

This matter came on for trial on September 29, 1992 and October 19, 1992 before the Honorable Leroy H. Griffiths, Judge of The Circuit Court of the State of Utah, Salt Lake County, Murray Department.

The plaintiff, Mark Erickson, appeared in person and through his attorney, James C. Haskins and Jeff Hollingworth. The defendant, E.Z. Street Auto, appeared in person and through its attorney, John D. Russell. Evidence was produced by each of the parties through testimony and exhibits. At the conclusion of the presentation of testimony and exhibits, both parties rested. The court having heard all the evidence and being fully advised in the premises now makes its findings of fact and conclusions of law as follows:

FINDINGS OF FACT

1. In September 1989, Defendant E.Z. Street Auto offered a

1980 Volkswagen camper van ("Vehicle") for sale.

2. On or about September 26, 1989, Plaintiff purchased the Vehicle from Defendant.

3. Plaintiff agreed to pay a total purchase price of \$4,291.00 (\$4,266.00, plus \$25.00 for an out of state permit). Plaintiff paid for the Vehicle's purchase using two credit cards. Plaintiff charged \$1,291.00 on his American Express card and \$3,000.00 on his Visa card.

4. Approximately one week prior to purchasing the Vehicle, Plaintiff test drove the Vehicle accompanied by one of Defendant's salesman, Paul Lives.

5. While on the test drive, Plaintiff stopped at his father-in-law's home and Plaintiff's wife and father-in-law inspected the Vehicle. At this time the odometer indicated that the mileage on the Vehicle was approximately 48,800 miles.

6. Even though the Vehicle was relatively old, given the low mileage shown on the odometer and the condition of the body, the three felt that the Vehicle was in good condition.

7. Plaintiff and Mr. Lives discussed the mileage shown on the odometer. Plaintiff testified that Mr. Lives told Plaintiff that the miles shown were the actual miles. Mr. Lives testified that he told Plaintiff to have the Vehicle checked by a mechanic because there was no way to determine the actual mileage on a car that old.

8. During the week prior to the Vehicle's purchase, Plaintiff spoke with Defendant's manager, Ronald Memmott,

regarding purchase terms. Both plaintiff and his wife testified that Mr. Memmott told them that the 48,831 miles, as shown on the Vehicle's odometer, were the actual miles of the Vehicle.

9. On September 26, 1989, Mr. Memmott, on behalf of Defendant, finalized the Vehicle's purchase with Plaintiff.

10. Mr. Memmott prepared all of the necessary documents transferring ownership of the Vehicle to Plaintiff.

11. Mr. Memmott prepared the Purchase Agreement on which he indicated the Vehicle's mileage as 48,831.

12. Mr. Memmott prepared the Odometer Disclosure Statement which stated in pertinent part:

I E.Z. Street Auto state that the odometer . . . now reads 48,831 (no tenths) miles and to the best of my knowledge that it reflects the actual mileage of the Vehicle . . . unless one of the following statements is checked.

(1) I hereby certify that to the best of my knowledge the odometer reading reflects the amount of mileage in excess of its mechanical limits.

(2) I hereby certify that the odometer reading is NOT the actual mileage. WARNING ODOMETER DISCREPANCY.

13. Mr. Memmott checked statement (2) and at trial denied that he misrepresented the mileage of the Vehicle to Plaintiff, even though he knew that the actual mileage was far in excess of 48,831 miles. When statement (2) was checked, people were put on notice that there was an odometer discrepancy.

14. Plaintiff bought the Vehicle "as is" and signed statements that he realized the Vehicle was sold without any warranties.

15. Plaintiff drove the Vehicle to his home in Evanston, Wyoming and during the first week of operation he repaired the

brakes, tail lights, and door locks, and installed a new door rear-view mirror, all at a cost of \$123.24.

16. At the beginning of the second week, Plaintiff, his wife, and their one year old daughter left Evanston to drive to Los Angeles, California.

17. Approximately 80 miles north of Las Vegas, Nevada the Vehicle broke down and had to be towed to Las Vegas.

18. While in Las Vegas, Plaintiff was told by a Volkswagen repair shop that the engine needed a complete overhaul at an estimated cost of \$2,000.00. He was also told that from the condition of the engine it was evident that the actual mileage was greatly in excess of the mileage figure shown on the odometer.

19. So as not to ruin their trip to California, plaintiff rented a car in Las Vegas and continued traveling to Los Angeles. On their return trip, Plaintiff rented a truck large enough to tow the Camper Van and brought it back to his father-in-law's home in South Salt Lake, Utah. It cost \$150.34 to rent the car and \$939.22 to rent the truck.

20. The father-in-law, who is an experienced Volkswagen mechanic, disassembled part of the engine in an attempt to repair it. The engine showed evidence of many miles of use, and he determined that a complete engine overhaul was necessary.

21. Plaintiff's negotiations to have the defendant repair the engine were unsuccessful. Defendant insisted that under it's "as-is, no warranty" contract it had no legal obligation to

repair the engine.

22. Plaintiff, upon finding an old registration form, discovered the name of the previous owners of the 1980 van. They informed him that the actual mileage of the van, when they sold it, was 146,811 miles.

23. Plaintiff testified that he would not have purchased the Vehicle "as is, no warranty" if he had known the mileage was over 100,000 miles.

CONCLUSIONS OF LAW

1. The U.S. Congress stated in its findings of the Federal Motor Vehicle Information and Cost Savings Act, 15 U.S.C. §§ 1981-1991 ("Federal Odometer Statute"), that purchasers, when buying motor Vehicles, rely heavily on the odometer reading as an index of the condition and value of such Vehicle; that purchasers are entitled to rely on the odometer reading as an accurate reflection of the mileage actually traveled by the Vehicle; that an accurate indication of the mileage traveled by a motor Vehicle assists the purchaser in determining its safety and reliability.

2. In actions brought under the Federal Odometer Statute, courts have enforced strict accountability on any person transferring ownership of a Vehicle. The standard of proof in actions based on violation of the Federal Odometer Statute include action taken with reckless disregard, as well as action taken with the specific intent to deceive or cheat potential purchasers. See, Ryan v. Edwards, 592 F.2d 756 (1979); Haynes v. Manning, 917 F.2d 450 (1990).

3. In Utah, it is recognized that the mileage on the odometer of a used a car is a factor which is likely to affect the judgment of the buyer and has pecuniary significance. State v. Forshee, 588 P 2d, 181. Plaintiff testified that he would have made a different deal, or no deal at all, had he known Vehicle's actual mileage.

4. There is a conflict in the evidence as to whether Defendant's salesman and manager told Plaintiff that the Vehicle's mileage was 100,000 miles less than the actual mileage. However, the court concludes that from January, 1989, Defendant's agents knew or should have known that the odometer had "turned over" and that the actual mileage was 100,000 miles more than as shown on the odometer.

5. This information was not given to the plaintiff. Mr. Memmott should have checked statement (1), and written the actual mileage on the Odometer Disclosure Statement and the Purchase Agreement.

[W]hen a transferor knows that a vehicle's odometer has "turned over" after registering 99,999 miles, the "cumulative mileage" which must be stated to satisfy the requirements of (the Act) is the total of 100,000 plus the number actually appearing on the odometer."

Ryan v. Edwards, 592 P2d 760.

6. What the agents did do was to profess ignorance as to the actual mileage. Such conduct mislead the plaintiff and constitutes reckless disregard for the truth if not actual intent to defraud.

7. The court concludes that Defendant, through the actions

of its agents, committed fraud on the plaintiff.

8. Plaintiff should be granted judgment against the defendant as follows:

(1) The Purchase Agreement should be rescinded. Plaintiff's obligation, as evidenced by the credit card charges, should be cancelled;

(2) Plaintiff should be awarded damages of \$1,212.80, interest at the rate of 10% per annum from December 1, 1989, and his court costs of \$104.00;

(3) Since the provisions of the Federal Act also apply to state actions (see § 1989), Plaintiff should be awarded \$1,500.00 attorney's fees.

(4) No punitive damages should be awarded.

DATED this 1st day of February, 1993.

By the Court:

L. H. Griffiths
L. H. Griffiths, Circuit Judge

James C. Haskins (1406)
HASKINS & ASSOCIATES
Attorney for Plaintiff
5085 South State Street
Murray, Utah 84107
Telephone: (801) 268-3994

FILED

2 1992
CLERK OF THE CIRCUIT COURT
DEPU

IN THE CIRCUIT COURT OF THE STATE OF UTAH, SALT LAKE COUNTY
MURRAY DEPARTMENT

MARK ERICKSON,	:	
Plaintiff,	:	
vs.	:	ORDER
E.Z. STREET AUTO,	:	Civil No. 903000298
Defendant.	:	

This matter came on for trial on September 29, 1992 and October 19, 1992 before the Honorable Leroy H. Griffiths, Judge of The Circuit Court of the State of Utah, Salt Lake County, Murray Department and the court having made its Findings of Fact and Conclusions of Law, IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

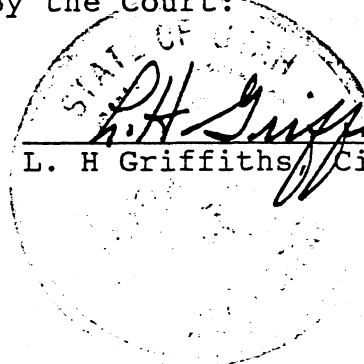
1. Plaintiff is granted judgment against the Defendant;
2. The Purchase Agreement is rescinded;
3. Plaintiff's obligation, as evidenced by the credit card charges, is cancelled;
4. Plaintiff is awarded damages of \$1,212.80, plus interest at the rate of 10% per annum from December 1, 1989 until paid in full.
5. Plaintiff is awarded his court costs of \$104.00;

6. Plaintiff is awarded \$1,500.00 attorney's fees.

7. Plaintiff is not awarded any punitive damages.

DATED this 1st day of February, 1993.

By the Court:


L. H. Griffiths
L. H. Griffiths, Circuit Judge

APPENDIX II

UTAH STATE TAX COMMISSION
MOTOR VEHICLE DIVISION 1000 MOTOR AVE.
SALT LAKE CITY, UT 84116
(801) 536-6300

FORM TC-886 A
REV. 05/88

PLEASE PRINT

SEE INSTRUCTIONS

① UTAH APPLICATION FOR: (Place an "X" in the appropriate box)

☒ TITLE AND REGISTRATION ☐ HIGHWAY VEHICLE ☐ DRIVER LICENSE NUMBER (SEE EM NO. 1 ON REVERSE SIDE)

☐ TITLE LIEN CHANGE ☐ O.H.V.

☐ PLATE AND TITLE TRANSFER ☐ SNOWMOBILE

☐ OTHER

EXPIRATION DATE FOR DUPLICATE REGISTRATION 6/89

LESSOR'S NAME SA 725

ADDRESS _____

CITY _____ STATE _____ ZIP _____

INSURANCE COMPANY ALLSTATE

POLICY NUMBER 020 964442

① PLATE TRANSFER

PLATE NO _____

VIN _____

MAKE _____

BODY STYLE _____

YEAR _____

GROSS WEIGHT _____

② VEHICLE IDENTIFICATION NUMBER

25A0106002

MAKE VW YEAR 1980 TYPE P

CYL 4 BODY STYLE Utility Van COLOR Black

FUEL TYPE GAS COUNTY Utah

① OWNER'S NAME(S) STEVEN P. DODD

ROBYN DODD

ADDRESS _____

CITY 1250 Northpark

COUNTY SLC STATE UT

WE CERTIFY UNDER PENALTY OF LAW THAT THIS VEHICLE IS

BE INSURED THROUGHOUT THE PERIOD OF REGISTRATION AS

PRESCRIBED BY LAW.

SIGNATURE Steven P. Dodd

① NOTE THIS SPACE MUST BE STAMPED TO SHOW TAX CLEARANCE OR A CERTIFICATE OF ASSESSMENT FURNISHED TO THE OWNER OF THIS VEHICLE IN ACCORDANCE WITH UTAH CODE ANN. § 41-1-32

① OFFICIAL USE ONLY-FEE SCHEDULE

NEW TITLE FEE _____

TRANSFER FEE _____

REGISTRATION FEE _____

REFLECTORIZATION _____

DRIVER'S EDUCATION FEE _____

PERCENT WEIGHT INCREASE _____

MISSING DECAL OR PLATE 725

ADDITIONAL FEES _____

STATE TRANSFER FEE _____

VALIDATED

⑦ Commission Will Assume Applicant Is Legal Owner If No Lien Holder Is Given

FIRST LIEN HOLDER Continental Bank & Trust MAR 8 1989

ADDRESS 3580 S. 2700 W.

CITY WVC STATE Ut ZIP 84119

⑧ PREVIOUS REGISTRATION INFORMATION

STATE Utah TITLE NUMBER 3339442

YEAR 88 PLATE NUMBER 062BLK

PREVIOUS OWNER Roger C Carter

ADDRESS 2033 S. Bountiful Blvd

CITY & STATE Bountiful Ut 84010

⑩ REPORT OF SALE BY UTAH LICENSED AND BONDED DEALER

☐ NEW ☒ USED BONDED DEALER NUMBER 2887

DATE OF REPORT 3/2/89 DATE OF SALE 2/23/89

DATE OF PERMIT 2/23/89 (CHECK IF NON RESIDENT SALE)

Temporary permit number F86831

The vehicle described herein has been transferred to the named purchaser by the signatory manufacturer or dealer who warrants title thereto and certifies the information in this report to be true and correct and in compliance with the Motor Vehicle Act (Utah Code Ann. Title 41 Chapter 1.)

DEALER E-2 Street Auto

SIGNATURE AND TITLE Nancy J. Smith

ADDRESS 4100 S. State St

CITY SLC STATE Ut ZIP 84107

COMPLETELY FILLED IN WITH TYPE, WHITE OR INK

① AFFIDAVIT OF OWNER

STATE OF UTAH

COUNTY OF Salt Lake

I, the undersigned, being first duly sworn, am the owner of the vehicle described above and the information contained herein is true and correct.

SIGNATURE OF OWNER(S) OF APPLICATION Steven P. Dodd

SUBSCRIBED AND SWORN TO BEFORE ME THIS 23 DAY OF March 1989.

Nicole J. Smith NOTARY PUBLIC

RESIDING AT Salt Lake City

① CERTIFICATE OF MOTOR VEHICLE INSPECTION

CITY _____

DATE _____

This is to certify that I have personally inspected the vehicle described above and find the description to be correct.

SIGNED _____

AGENCY _____

④ NEW TITLE CLEARED FOR SALES OR USE TAX

HOW CLEARED:

☐ DUE ☒ DEALER RESALE TAX LIC. NO. _____

☐ OTHER--SPECIFY FORM COMPLETED 24