

2006

Kirby Smith v. Mark Cazares : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

KIRBY SMITH,

Plaintiff-Appellee,

v.

MARK CAZARES,

Defendant-Appellant.

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BRIEF OF PLAINTIFF-APPELLEE

Appellate Case No. 20060384

Oral argument requested

Appeal from the Judgment of the Fourth Judicial District Court,
County of Utah, State of Utah
The Honorable Anthony W. Schofield, District Court Judge

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COURTS

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	:	BRIEF OF PLAINTIFF-APPELLEE
Plaintiff-Appellee,	:	
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STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction in this matter pursuant to Utah Code Ann. § 78-21-3(2)(2002).

APPELLEE'S STATEMENT OF ISSUES

Appellee's statement of the issues presented are stated differently than as set forth in the statement provided by Appellant; however, the following statements track the issues argued in Appellant's Brief.

- I. Did the trial court correctly determine that Smith conveyed his interest in the Tundra, Navigator and Hydroskift, despite Cazares' allegation that Smith failed to comply with U.C.A. § 41-1a-702(1)(a) and § 41-1a-902?

Standard of Review: De Novo. Because this is a question of law, the trial court's legal conclusions are given no deference and its decision is reviewed for correctness. *White v. Gary L. Deeselhorst, NP Ski Corp.*, 879 P.2d 1371, 1374 (Utah 1994).

- II. Did the trial court correctly determine that U.C.A. § 41-1a-702(1)(a) and § 41-1a-902 fail to provide a private right of action?

Standard of Review: De Novo. Because this is a question of law, the trial court's legal conclusions are given no deference and its decision is reviewed for correctness. *White*, 879 P.2d at 1374.

DETERMINATIVE PROVISIONS

The interpretation of the following statutes may be determinative, or of central importance, to this appeal:

1. U.C.A. § 41-1a-702(1)(a): “To transfer a vehicle, vessel, or outboard motor the owner shall endorse the certificate of title issue for the vehicle, vessel, or outboard motor in the space for assignment and warranty of title.”
2. U.C.A. § 41-1a-702(1)(b): “The endorsement and assignment shall include a statement of all liens or encumbrances on the vehicle, vessel, or outboard motor.”
3. U.C.A. § 41-1a-902(2): “At the time of any sale or transfer of a motor vehicle, the transferor shall furnish to the transferee a written odometer disclosure statement in a form prescribed by the division. This statement shall be signed and certified as to its truthfulness by the transferor....”

STATEMENT OF CASE

This case is a breach of contract dispute for the sale of three vehicles, including a Toyota Tundra (“Tundra”), a Lincoln Navigator (“Navigator”) and a Hydroskiff boat and trailer (“Hydroskiff”). The Plaintiff/Appellee is the seller of these three vehicles and Defendant/Appellant is the buyer.

On October 25, 2005 the parties came before the Fourth District Court, the Honorable Anthony W. Schofield presiding, for trial. R. at 237. At the conclusion of

trial, the court issued the following undisputed findings of fact (undisputed because Cazares is not appealing the findings):

1. In March 2003 the parties entered into an agreement that Cazares would buy and Smith would sell the Tundra on terms whereby Cazares agreed to become obligated for the remaining payments due on Smith's underlying obligation to the lender. R. at 236.
2. Subsequently, on June 9, 2003, the parties memorialized their agreement in writing regarding the Tundra ("Tundra Agreement"). *Id.*
3. Pursuant to the Tundra Agreement, Cazares agreed to purchase the Tundra from Smith for the purchase price of all monthly payments remaining on the underlying financing agreement between Smith and the lender, to make such payments on a timely basis, to maintain insurance on the vehicle in his own name for so long as Smith retained title to the Tundra and to maintain the vehicle in good operating condition. R. at 235-36.
4. The parties also agreed that Smith would hold title to the Tundra until Cazares paid all payments in a timely manner pursuant to the Tundra Agreement. R. at 235.
5. Further, the parties agreed that Cazares would have possession of the Tundra so long as he was not in breach of any material term of the Tundra Agreement. *Id.*

6. Cazares received delivery of and accepted the Tundra approximately eight months before the parties entered into the Tundra Agreement. At the time of the Tundra Agreement, Cazares again accepted the Tundra and retained possession. *Id.*
7. Cazares breached his obligations under the Tundra Agreement by failing to make payments as they were due and in the amount that they were due. Cazares also refused and failed to return possession of the Tundra to Smith after he had defaulted and he kept the Tundra in his possession for at least eight months without making the required payments. R. at 234.
8. Eventually, Cazares surrendered the Tundra to Toyota Financial for repossession in January 2004. *Id.*
9. Also on June 9, 2003, the parties entered into a written agreement for the purchase and sale of the Navigator (“Navigator Agreement”). The terms of the Navigator Agreement were identical to the terms of the Tundra Agreement, except that the amount of the monthly payments differed. R. at 235.
10. On or about this same day, Cazares accepted and held possession of the Navigator until he returned the vehicle to Smith. *Id.*
11. Cazares also breached his obligations under the Navigator Agreement by surrendering the Navigator to Smith on September 13, 2003 and failing to make any payments thereafter. Cazares also failed to maintain insurance on the

Navigator, which caused the lender to place a substitute insurance on the vehicle and bill Smith for the insurance cost. R. at 234.

12. Shortly prior to July 3, 2003, the parties entered into a verbal agreement whereby Cazares agreed to purchase the Hydrosift from Smith on terms identical to the terms and provisions of the Tundra Agreement, except that the monthly payments were set at a different amount (“Hydrosift Agreement”).
Id.
13. The terms of the Hydrosift Agreement are set forth in an unsigned document that the trial court found to reflect the agreement reached by the parties. *Id.*
14. On July 3, 2003, at Smith’s instruction, Cazares picked the Hydrosift up from storage at the boat dealer’s place of business. Cazares informed the dealer that he was purchasing the Hydrosift from Smith. Smith’s wife confirmed the sale with the dealer via telephone. R. at 233-34.
15. Subsequently, Cazares paid for the service charges on the Hydrosift and took possession of the boat. That same day Cazares met Smith’s wife and son to receive training and instruction on operating the boat. R. at 233.
16. At that time, Smith’s wife also gave Cazares the written Hydrosift Agreement. Cazares agreed to sign the Hydrosift Agreement and deliver it to the Smiths. *Id.*
17. Cazares took possession of the Hydrosift and held possession until he returned the boat to Smith on September 13, 2003. At the time Cazares returned

the Hydroswift, it was in damaged condition, including the hull, propeller, skeg, upholstery and the interior. *Id.*

18. Cazares breached his obligations under the Hydroswift Agreement by failing to make the required payments. *Id.*

19. Following the return of the Navigator and Hydroswift, and the repossession of the Tundra, Smith attempted to make monthly payments on the vehicles, but was unable to financially make all payments. Thus, Smith voluntarily surrendered the Navigator and Hydroswift to the respective financial lenders. R. at 232-33.

20. Each vehicle was sold by the respective financial lender and Smith was charged with the costs of sale. Further, after deducting the amount realized from each sale, Smith was charged a deficiency judgment for the remaining unpaid obligations. R. at 232.

21. Smith's action in voluntarily permitting repossession of the vehicles and allowing them to be resold was reasonable under the circumstances. R. at 231.

22. Each of the agreements entered into between the parties provide for an award of reasonable attorneys' fees and costs to the prevailing party in any action to enforce the terms of the agreements. R. at 230.

SUMMARY OF ARGUMENT

Cazares is appealing the trial court's ruling that Smith transferred title to the Tundra, Navigator and Hydroswift despite his failure to comply with U.C.A. § 41-1a-702 and § 41-1a-902. Further, Cazares is appealing whether the default provision in

the agreements between the parties is valid and enforceable. However, Cazares appeal should be dismissed and the trial court's ruling should be affirmed for the reasons set forth below.

First, Cazares failed to properly raise either of these issues in the trial court and, thus, they are not ripe for appeal. For example, at trial, the court held that Cazares failed to properly plead his claims regarding U.C.A. § 41-1a-702 and § 41-1a-902. Further, Cazares did not raise an issue and there was no discussion at trial regarding the enforceability of the default provisions. Accordingly, Cazares' appeal should be dismissed because he failed to properly raise these issues below.

Second, Cazares claims that the facts are undisputed and only an issue of law is on appeal. However, Cazares inconsistently asserts many findings that contradict the Court's actual findings. In order for Cazares to properly challenge the Court's factual findings, he must marshal all the evidence in support of the trial court's findings and demonstrate that even viewing this evidence in a light most favorable to Smith, the evidence is insufficient to support the Court's findings.

However, Cazares failed to marshal any evidence in support of the Court's findings and has placed that burden upon Smith instead. In reviewing the trial testimony and exhibits, the record demonstrates that the trial court had sufficient evidence to find the parties entered into written contracts for the Tundra and the Navigator, and a binding oral agreement for the Hydrosift. The Court also had sufficient evidence to find that Smith mitigated his damages. Accordingly, this Court

should accept the trial court's factual findings in full and disregard Cazares' challenges to said findings since he failed to appropriately marshal the evidence.

Third, assuming *arguendo* this Court finds Cazares has properly preserved his issues on appeal, his appeal should be dismissed nonetheless because U.C.A. § 41-1a-702 and § 41-1a-902 do not create a private right of action for Cazares. Smith's failure to convey the certificate of title and/or odometer disclosure statement potentially only creates a right of action for the State. In fact, Cazares admits that the State, not Cazares, has an interest in maintaining accurate motor vehicle information. Cazares is not harmed by the State's inability to maintain accurate motor vehicle records.

Further, the statutes do not prevent parties from entering into other sale agreements. The pertinent statutory provisions are not intended to be controlling between parties to a transaction. They do not confer substantive rights and are merely intended to warn prospective purchasers of existing encumbrances. Thus, the mere fact that Smith did not comply with these statutes, does not give Cazares the right to enter into these contracts, use the vehicles for months without making the required payments and then claim he has no interest in the vehicles under U.C.A. § 41-1a-702 and § 41-1a-902. Moreover, Cazares fails to cite any legal support providing him with a private right of action.

Fourth, Cazares' appeal is without merit because he received equitable title to the vehicles. Cazares claims he never received an interest in the vehicles because Smith did not convey the certificate of title or odometer disclosure statement.

However, these requirements do not convey substantive rights and equitable title may pass regardless of whether these documents are conveyed. Cazares became an equitable title holder upon the bona fide sale, despite the fact that legal title had not formally been transferred into his name.

Fifth, Cazares' appeal is without merit because Smith's failure to comply with the statutes does not negate Cazares' contractual obligations. It would be poor policy to allow a buyer to enter into a contract for the sale of a vehicle, take possession of the vehicle, not make any payments on the vehicles and then claim no responsibility for the vehicles under U.C.A. § 41-1a-702 and § 41-1a-902.

Sixth, Cazares' appeal is without merit because he sought damages under U.C.A. § 70A-2-709 instead of pursuant to the default provision of the agreements. Thus, the validity of the default provision is irrelevant to the trial court's decision.

Finally, Smith is entitled to an award of attorneys' fees and costs since he was awarded fees below and such is provided for in the agreements between the parties.

ARGUMENT

I. CAZARES FAILED TO RAISE HIS APPEAL ISSUES BELOW

Cazares is appealing whether the trial court erred in holding that Smith transferred title in the Tundra, Navigator and Hydroswift boat despite Smith's failure to comply with U.C.A. § 41-1A-702 and § 41-1A-902. Further, Cazares is appealing whether the "Event of Default" provision in the agreements is enforceable between the parties.

However, Cazares failed to properly raise these issues below and thus, they are not ripe for appeal. “It is axiomatic that defenses and claims not raised by the parties in the trial cannot be considered for the first time on appeal.” *Bangerter v. Poulton*, 663 P.2d 100, 102 (Utah 1983) (citations omitted). *See also Hart v. Salt Lake Co. Comm’n*, 945 P.2d 125, 129-30 (Utah Ct. App. 1997).

As to Cazares’ claims regarding U.C.A. § 41-1A-702 and § 41-1A-902, the trial court already ruled that Cazares failed to plead either of these claims properly. R. at 265:16-22. Specifically, the trial court stated that, “the law obligates a person who is wishing to raise affirmative defenses to plead them, meaning to put everybody on notice of them. The first time that [these claims] are then disclosed in the court’s file is here today.” *Id.* Further, the trial court emphasized “there is no pleading that raises an affirmative defense.” *Id.* At 266:3-4. Moreover, Cazares also failed to properly raise the issue that the contracts between the parties were allegedly unenforceable due to the default provision.

Accordingly, Cazares failed to properly raise the applicability of U.C.A. § 41-1A-702 and § 41-1A-902 as an affirmative defense and he also failed to properly raise the issue of the enforceability of the default provision. Thus, Cazares’ appeal should be dismissed since he failed to properly raise the issues below as required.

II. CAZARES FAILED TO MARSHAL FACTS AND EVIDENCE IN SUPPORT OF THE TRIAL COURT’S DECISION

If this Court finds that Cazares properly raised his appeal issues below, his appeal should nonetheless be narrowly construed and dismissed. Although Cazares attempts to

present his appeal issues as questions of law, he simultaneously challenges the trial court's finding of fact. However, an appellate court will refuse to address such challenges to the findings unless the appellant has properly marshaled the evidence. *See Child v. Gonda*, 972 P.2d 425, 433-34 (Utah 1998); *Witear v. Labor Comm'n*, 973 P.2d 982, 985 (Utah Ct. App. 1998). "To successfully attack the verdict, *an appellant must marshal all the evidence supporting the verdict* and then demonstrate that, even viewing the evidence in the light most favorable to that verdict, the evidence is insufficient to support it." *Martinez v. Wells*, 88 P.3d 343, 349 (Utah Ct. App. 2004) (citations omitted; emphasis added).

If an appellant fails to properly marshal facts, "the court of appeals must assume that the record supports the findings of the trial court." *Eggett v. Wasatch Energy Corp.*, 2004 UT 28, ¶ 10 (citation omitted); *Valcarce v. Fitzgerald*, 961 P.2d 305, 312 (Utah 1998). If an appellant properly marshals the evidence, he must show that such evidence is legally insufficient to support the challenged findings when viewing the evidence and inferences in a light most favorable to the decision. *Child*, 972 P.2d at 433. Finally, not only must the court of appeals conclude that a finding is against the clear weight of the evidence for it to be clearly erroneous, but the court of appeals must also "give 'due regard' to the trial court's opportunity to assess the credibility of the numerous witnesses called by each party." *Reid v. Mutual of Omaha Insurance Co.*, 776 P.2d 896, 900 (Utah 1989).

In the present case, the trial court issued detailed findings based on a full day of testimony and more than 30 exhibits introduced into evidence. Despite these findings, Cazares has failed to marshal *any* evidence in support of the trial court's findings. Further, Cazares has failed to acknowledge that the trial evidence must be viewed in a light most favorable to Smith and that the appellate court must give "due regard" to the trial court's ability to assess the credibility of witnesses.

Because Cazares has failed to marshal evidence in support of the trial court's ruling, but instead has placed that burden on Smith to show this Court that evidence exists to support the trial court's ruling (evidence which Cazares should have marshaled), this Court should accept the trial court's findings in full and ignore Cazares' challenges to said findings. Following is a list of trial testimony and documentary exhibits that support the trial court's ruling:

1. First, Cazares claimed that the parties allegedly did not enter into a written agreement for the Lincoln. However, this is contrary to the trial court's findings and evidence presented at trial.
  - Trial Exhibit 22 is a written contract entered into on June 9 that provides for the sale of the Navigator.
  - The Court found that Cazares had the Navigator in his possession. R. at 263.
  - The Court found that Cazares surrendered the Navigator on the 13th of September 2003. *Id.*
2. Second, Cazares asserted that the parties did not enter into an agreement for the Hydrosift. Yet, the evidence presented demonstrates and the trial court found that the parties entered into a binding oral agreement for the Hydrosift

- Smith testified that Cazares wished to buy the boat. The trial court found that Smith's testimony was the most credible and consistent with all the evidence. R. at 264.
- Smith testified that the dealer would not allow Cazares to take the Hydroskiff without call Smith to verify that he was selling it. *Id.*
- Cazares paid for repairs to the Hydroskiff and took it. *Id.*
- Cazares received instruction from Smith's family members on how to use the Hydroskiff. *Id.*
- Cazares was presented with a contract for the Hydroskiff (similar to the contracts for the Tundra and Navigator) and he agreed to the terms. *Id.* See also Trial Exhibit 24.

3. Third, Cazares alleges that Smith failed to mitigate his damages. Again, this is contrary to the Court's findings that Smith did a number of things to mitigate damages.

- Smith permitted the underlying lenders to retake possession of the property. R. at 231.
- Each lender eventually resold their repossessed property in a reasonable fashion. R. at 165-67.
- Smith credited Cazares for the amounts his loans were reduced as a result of the proceeds from the auction sales. R. at 165.

Accordingly, based on the foregoing lists of testimony and exhibits which Cazares failed to marshal in his appeal brief, the trial court's findings that the parties entered into binding contracts for the Tundra, Navigator and Hydroskiff is well supported in the record. Also, the trial court never made a finding that Smith allegedly failed to mitigate his damages. The evidence demonstrates Cazares' complete failure of fulfilling his duty on appeal to marshal facts in support of the trial court's findings and conclusions. Consequently, based on the case law cited above, this Court should accept

the trial court's findings in full and reject Cazares' unsupported challenges to said findings.

III. THE TRIAL COURT CORRECTLY RULED THAT U.C.A. § 41-1A-702 AND U.C.A. § 41-1A-902 DO NOT CREATE A PRIVATE RIGHT OF ACTION FOR CAZARES

Cazares' appeal should be dismissed because U.C.A. § 41-1A-702 and U.C.A. § 41-1A-902 fail to provide him with a private right of action. Cazares argues that Smith allegedly failed to convey his interest in the Tundra, Navigator and Hydroskiff because he never conveyed a certificate of title (U.C.A. § 41-1A-702) or an odometer disclosure statement (U.C.A. § 41-1A-902). However, assuming *arguendo* that interest in a vehicle does not transfer without a conveyance of the certificate of title and odometer disclosure statement – which Smith contests below – such does not create a private right of action for Cazares.

The Motor Vehicle Act provides that “[t]o transfer a vehicle, vessel, or outboard motor the owner shall endorse the certificate of title issued for the vehicle, vessel, or outboard motor . . . .” U.C.A. § 41-1a-702(1)(a). Further, “[a]t the time of any sale or transfer of a motor vehicle, the transferor shall furnish to the transferee a written odometer disclosure statement in a form prescribed by the division . . . .” U.C.A. § 41-1a-902(2).

However, the trial court correctly held that neither statute prevents the parties from entering into other agreements. R. at 266:7-9. Thus, simply because Smith did not convey title or an odometer disclosure statement, does not prevent the parties from

entering into contractual obligations nor does it give Cazares the right to enter into these contracts, use these vehicles, keep the Tundra for many months without paying for it and then claim he has no liability because he never had an interest in the vehicles under these statutes. *See* R. at 266:11-15. Ultimately, the right of action belongs to the State – i.e., the Motor Vehicle Department. As the trial court held: “If the Motor Vehicle Department wants to come and attack the validity of this transaction they may do so.” *Id.* at 266:9-11. In fact, Cazares failed to cite any legal support providing him with a private right of action pursuant to these statutes.

Instead, Cazares relies on policy reasons for establishing a private right of action. For example, Cazares claims that the purpose behind these statutes is for the State to maintain accurate motor vehicle records and to assist in identifying vehicle owners. He also asserts that these statutes protect the interests of financial institutions as secured creditors. Assuming these policies are supported by U.C.A. § 41-1A-702 and/or U.C.A. § 41-1A-902, Cazares fails to explain how said policies provide him with a private right of action. If anything, these policies support Smith’s position that the statutes provide the State with a right of action, and not Cazares. Under these policies, Cazares is not harmed by the State’s inability to maintain accurate motor vehicle records or a financial institution’s ability to track its interest in collateral. Thus, neither of these policies support Cazares’ position that U.C.A. § 41-1A-702 and/or U.C.A. § 41-1A-902 provide a private cause of action.

The only policy presented by Cazares to possibly support his argument that U.C.A. § 41-1A-702 and U.C.A. § 41-1A-902 provide a private right of action is that the statutes protect individuals from fraudulent conveyances. Cazares explains that where a debtor encumbers his interest in a motor vehicle to a third-party, this third-party's interest is supposedly unprotected absent a written record or conveyance of title. The third-party could be required to make all the payments to the lien holder under the guise he would obtain title, yet he would allegedly have no recourse against the debtor since the third-party's name is not on any of the documents.

However, this policy also fails to create a private right of action generally for a third-party and specifically for Cazares. In a general sense, the statutes fail to confer any substantive rights and are merely intended to warn prospective purchasers of existing encumbrances. The statutes are not intended to protect a party involved in the transaction. For example, in *Allstate Insurance Co. v. Liberty Mutual Insurance Group*, 868 P.2d 110 (Utah Ct. App. 1994), the Court examined U.C.A. § 41-1-72 (1988), which contains similar language and requirements as the statutes at issue in the present case.¹ *Id.* at 112. Yet the Utah Supreme Court held that this section does “not

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¹ U.C.A. § 41-1-72 provides:

Until the department shall have issued such new certificate of registration and certificate of ownership, delivery of any vehicle required to be registered shall be deemed not to have passed, and said intended transfer shall be deemed to be incomplete and not to be valid or effective for any purpose....

Although this section is no longer a part of the Motor Vehicle Act, the requirements are comparable to those set forth in U.C.A. § 41-1A-702 and U.C.A. § 41-1A-902 and the interpretation of this section is applicable to the statutes currently at issue.

confer or deny substantive rights”, but that it merely provides “a flag of warning to prospective transferees or encumbrances. *Id.* at 113, citing *Jackson v. James*, 89 P.2d 235, 237 (Utah 1939). U.C.A. § 41-1-72 was “written to protect innocent purchasers and third parties from fraud”, but it was “not intended to be controlling as *between the parties to a transaction.*” *Id.* (emphasis added).

Further, under Cazares’ hypothetical scenario, if a third-party consistently makes payments on a motor vehicle, there would be a record of his payments establishing at least an equitable interest in the vehicle as well as a contractual obligation on the seller to transfer title. Also, the third-party would have recourse against the debtor through litigation, where testimony and evidence could be presented to establish the agreement between the parties. Further, the mere transfer of a certificate of title from debtor to a third-party would not automatically establish a contractual relationship between the parties in any event. A court would nonetheless be required to hear the evidence and testimony regarding the parties’ agreement, with or without a transfer of title.

Specifically, no private right of action is created for Cazares because he was a party to the transaction. In addition, Cazares’ policy argument fails because the parties did in fact have written records formalizing their agreements. The statutes provide no protection for Cazares against a fraudulent conveyance in this instance because the transactions were documented and Appellee did not engage in any fraudulent conduct.

Accordingly, U.C.A. § 41-1A-702 and U.C.A. § 41-1A-902 fail to provide Cazares with a private right of action.

IV. CAZARES' APPEAL IS WITHOUT MERIT BECAUSE HE RECEIVED EQUITABLE TITLE TO THE VEHICLES AND SMITH'S FAILURE TO COMPLY WITH STATUTORY REQUIREMENTS DOES NOT NEGATE CAZARES' CONTRACTUAL OBLIGATIONS

Even if Cazares establishes that U.C.A. § 41-1A-702 and/or U.C.A. § 41-1A-902 provide a private right of action, his appeal should be denied because it is without merit.

A. Cazares Received Equitable Title to the Vehicles

Cazares asserts that Smith allegedly failed to convey interest in the Tundra, Navigator and Hydrosift because Smith never conveyed the certificate of title or an odometer disclosure statement. However, U.C.A. § 41-1A-702 and U.C.A. § 41-1A-902 do not convey substantive rights, they are merely procedural or evidentiary in nature, meaning that equitable title may pass regardless of whether these other documents are conveyed by the seller.

For example, in *Allstate*, an employee decided to personally purchase a vehicle from a company that leased vehicles to his employer. *Allstate*, 868 P.2d at 111. The employee tendered payment, but before legal title formally transferred, the vehicle was involved in an accident. *Id.* The employee's insurance company (Allstate) and the employer's insurance company (Liberty Mutual) disputed who held title to the vehicle at the time of the accident and thus, who was ultimately responsible for insuring the accident. *Id.* at 112. The Court held that the employee was, "at the time of the accident, the purchaser, possessor, and *equitable title holder*" of the vehicle, even though "legal title had not yet formally been transferred into his name." *Id.* at 113 (emphasis added).

In reaching this conclusion, the Court relied on *Jackson*, which provides that the provisions of U.C.A. § 41-1-72 are “procedural or evidentiary in nature” in order to provide warning to prospective transferees. *Allstate Ins. Co.*, 868 P.2d at 113, citing *Jackson*, 89 P.2d at 237. As stated above, this section was “written to protect innocent purchasers and third parties from fraud but [were] not intended to be controlling as between the parties to the transaction.” *Id.*

In addition, in *State Farm Mutual Insurance Company v. Holt*, 503 P.2d 1205 (Utah 1972), an employee was purchasing a vehicle from his employer through monthly payroll deductions. *Id.* at 1205. The employee received possession of the vehicle, but the employer retained the title and registration pending full payment. *Id.* Subsequently, the employee was involved in an accident and a dispute arose as to who was the owner and who was liable for the vehicle. *Id.* “According to *Holt*, equitable title passes to the purchaser upon a bona fide sale for value, even though the formal requirements of § 41-1-72 are not complete.”² *Allstate*, 868 P.2d at 113. *See also Holt*, 503 P.2d at 1206, n. 1.

Also, in *Dahl v. Prince*, 230 P.2d 328 (Utah 1951), the appellants contended that the failure of the transferor to “effectuate a transfer of title on the records of the State Tax Commission, had the same effect as if no sale had been consummated....” *Id.* at 330. However, the Court held that “[o]bviously, the equitable title passes to the purchaser upon a bona fide sale for value.” *Id.* The statute requiring re-registration is “for the legal title to pass to the purchaser....” *Id.* Essentially, the “statute makes the registration evidence of title and ownership, for the protection of innocent purchasers.” *Id.*

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² See footnote No. 1.

Similar to the employee in *Allstate*, Cazares had tendered some payment, but he had not received a formal transfer of title. Nonetheless, Cazares held equitable title to the Tundra, Navigator and Hydrosift even though “legal title had not yet formally been transferred into his name.” *Allstate Ins. Co.*, 868 P.2d at 113. Likewise, the employee in *Holt* and Cazares both made payments for some period of time, yet they never received formal, legal title. However, the Court should find, as in *Holt*, that Cazares received equitable title despite the lack of formal requirements being completed. Further, under *Dahl*, Cazares became the equitable title owner of the relevant vehicles upon the bona fide agreement for sale of the vehicles. The purpose of the registration and title statutes are to give notice to innocent purchasers and are only necessary for legal title to pass.

Accordingly, since Cazares received equitable title to the Tundra, Navigator and Hydrosift, his argument that Smith allegedly failed to convey interest in these vehicles is without merit. Cazares obtained an equitable interest in the vehicles by entering into a bona fide sale, taking possession of the vehicles and making some payments toward the vehicles. Smith’s failure to comply with U.C.A. § 41-1A-702 and U.C.A. § 41-1A-902 does not affect whether Smith conveyed his interest in the vehicles. These provisions are merely procedural and are intended to protect potential innocent buyers.

B. Smith’s Failure to Comply With Statutory Requirements Does Not Negate Cazares’ Contractual Obligations

Although Smith may not have complied with the statutory requirements presented by Cazares, such does not negate Cazares’ contractual obligations. Pursuant to Cazares’ argument, merely because of a failure by Smith to comply with the

statutory provisions, Cazares would be entitled to retain and use the vehicles, fail to make contractually required payments and subsequently disclaim all obligations to Smith since legal title had not yet passed. In fact, this is exactly what he tried to do. Cazares had possession and use of the Tundra for eight months, during which time he failed to make payments and now he is asserting that he has no responsibility for this vehicle. The trial court correctly held, “I don’t, I simply don’t think that creates a private right of action and that that negates the contractual obligations the parties entered into.” R. at 266:19-21.

Accordingly, Cazares may not negate his contractual obligations merely because Smith did not convey legal title to the vehicles pursuant to U.C.A. § 41-1A-702 and U.C.A. § 41-1A-902.

V. THE TRIAL COURT CORRECTLY FOUND THAT SMITH IS ENTITLED TO DAMAGES PURSUANT TO U.C.A. § 70A-2-709

Cazares argues that the default provision in each agreement between the parties is allegedly illusory and unenforceable. However, this appeal issue is without merit and should be dismissed since Smith did not seek to enforce the default provision, but he instead sought his actual damages pursuant to U.C.A. § 70A-2-709.

The trial court correctly found that Smith’s remedy for Cazares’ breach of contract was an action for the price pursuant to the Uniform Commercial Code (“UCC”). R. at 166. The remedies provided by the UCC, “shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed.” U.C.A. § 70A-1-106. Specifically, an action for price exists, “[w]hen

the buyer fails to pay the price as it becomes due.” U.C.A. § 70A-2-709(1). *See also* R. at 166. Further, if Smith has control of the goods, he is obligated to mitigate damages by making “reasonable efforts to resell the goods at a reasonable price”, unless “circumstances reasonably indicate that such effort will be unavailing.” *Id.*

Cazares is not appealing the trial court’s finding that he failed to make payments on the three contracts as they became due, nor did he dispute this in the trial court. R. at 166. Further, although Cazares indirectly challenges the trial court’s finding that Smith mitigated his damages, Cazares does not specifically raise this issue on appeal. Smith mitigated his damages by allowing the lenders to repossess the vehicles, allowing the lenders to resell the vehicles in a reasonable fashion and giving Cazares credit for the amount his loans were reduced as a result of the auction sales. *Id.*

In addition, the trial court correctly found that Smith was also entitled to incidental costs of the sale incurred “in connection with return or resale of the goods or otherwise resulting from the breach.” U.C.A. § 70A-2-709(1) and § 70A-2-710. *See also* R. at 164. Cazares’ breach of the agreements caused Smith to default on his agreements and Smith subsequently incurred incidental costs on the resale of the vehicles.

Accordingly, Cazares’ appeal regarding the default provision should be denied since Smith sought damages pursuant to the UCC and not under this provision of the agreements. Even if the default provision was supposedly invalid, such would not affect the trial court’s ruling on damages and thus, it is unnecessary to examine the validity of the default provision.

VI. SMITH IS ENTITLED TO AN AWARD OF ATTORNEYS' FEES AND COSTS

Pursuant to the parties' contracts, Smith is entitled to an award of attorneys' fees and costs on appeal if he prevails. "A court may award costs and attorney's fees to either party that prevails in a civil action based upon...written contract...." U.C.A. § 78-27-56.5. Further, the trial court found that, "[e]ach of the agreements entered into between the parties provide for an award of reasonable attorneys fees and costs to the party prevailing in *any* action to enforce the terms of such agreement." R. at 230, ¶ 33 (emphasis added).

In addition, "[t]he general rule is that when a party who received attorney fees below prevails on appeal, the party is also entitled to fees reasonably incurred on appeal." *Utah Dep't of Soc. Servs. V. Adams*, 806 P.2d 1193, 1197 (Utah Ct. App. 1991). *See also Tretheway v. Furstenau*, 40 P.3d 649, 655 (Utah Ct. App. 2001) (citations omitted). The trial court found that "Smith [was] entitled to an award of reasonable attorney's fees under the terms of the agreements...." R. at 228, ¶ 9.

Accordingly, pursuant to the contracts between the parties and Smith's award of attorneys' fees below, Smith is also entitled to attorneys' fees and costs if he prevails on appeal.

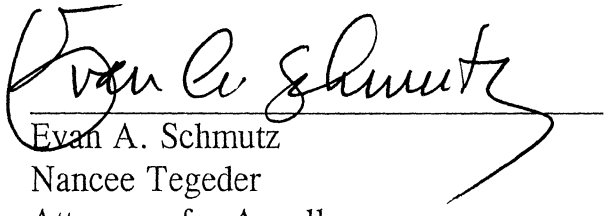
CONCLUSION

For the reasons stated in this brief, Plaintiff/Appellee Kirby Smith respectfully requests that this Court affirm the trial court's judgment, and deny this appeal in its

entirety. Further, Smith requests an award of attorneys' fees and costs incurred in defending this appeal.

DATED this 30 day of January, 2007

HILL, JOHNSON & SCHMUTZ, L.C.


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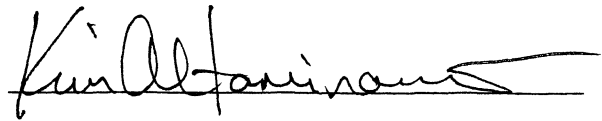
CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 30th day of January, 2007, she caused a true and correct copy of the foregoing Brief of Appellee to be delivered to the following:

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Sent Via:

☐ Hand-Delivery
☐ Facsimile
☒ Mailed (postage prepaid)

A handwritten signature in black ink, appearing to read "Kim Altman", written over a horizontal line.