

2006

Kirby Smith v. Mark Cazares : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

KIRBY SMITH, :
Plaintiff/Appellee, :
v. :
MARK CAZARES, : Case No. 20060384-CA
Defendant/Appellant, :

BRIEF OF APPELLANT

Appeal from judgment of breach of contract and remedied under Utah Code
Annotated Sections 70A-2-709 and 70A-2-710 in the Fourth Judicial District,
Provo Court, in and for Utah County, State of Utah, the Honorable Anthony W.
Schofield, District Judge, presiding.

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FILED
UTAH APPELLATE COURTS
NOV 30 2006

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Defendant/Appellant, :

STATEMENT OF JURISDICTION

Defendant Mark Cazares agrees that the Utah Court of Appeals has jurisdiction in this matter pursuant to *Utah Code Ann.* § 78-2a-3(2) (2001) (the Court of Appeals has appellate jurisdiction).

STATEMENT OF ISSUE PRESENTED FOR REVIEW

The issues presented on appeal from final judgment are: Can a registered co-owner transfer contractual responsibility to pay a secured creditor to a third-party without transferring title under Section 41-1a-702? *Utah Code Ann.* §41-1a-702(1) (1993).

If a registered co-owner does not have to transfer title pursuant to *Utah Code Ann.* §41-1a-702, does the co-owner have to comply with the statutory odometer

reporting requirements as reflected in Section 41-1a-902? Utah Code Ann. §41-1a-902(2) (1992).

STANDARD OF REVIEW

Generally, the Utah Court of Appeals does not have jurisdiction over an appeal unless the appeal is made from a final judgment or order. Loffredo v. Hold, 37 P.2d 646 (Utah 2001). Final judgment was made in this case on March 22, 2006. Addendum A. Since the facts are undisputed here, the Court will examine only issue of law on appeal. The Court of Appeals has jurisdiction to review the trial court's conclusions of law for correctness. Harline v. Barker, 92 P.2d 433 (Utah 1996).

DETERMINITIVE PROVISIONS

The following statutory provisions are determinative for this appeal.

1. Utah Motor Vehicle Act, governing Endorsement of Assignment and Warranty of Co-Owners, Utah Code Ann. §41-1a-702 (1993).

“(1)(a) To transfer a vehicle, vessel, or outboard motor the owner shall endorse the certificate of title issued for the vehicle, vessel or outboard motor in the space for assignment and warranty of title.”

“(1)(b) The endorsement and assignment shall include a statement of all liens and encumbrances on the vehicle, vessel or outboard motor.

2. Utah Motor Vehicle Act, governing Odometer Statement Disclosure,
Utah Code Ann. §41-1a-902 (1992).

“(2) At the time of the sale or transfer of a motor vehicle, the transferror shall furnish to the transferee a written odometer disclosure statement in a form prescribed by the [Division of Motor Vehicles]. This statement shall be signed and certified as to its truthfulness by the transferor, stating:

- (a) the date of transfer;
- (b) the transferor’s name and address;
- (c) the transferee’s name and address;
- (d) the identity of the motor vehicle, including its make, model, year, body type, and identification number;
- (e) the odometer reading at the time of transfer not including tenths of miles or tenths of kilometers;
- (f) (i) that to the best of the transferor’s knowledge, the odometer reading reflects the amount of miles or kilometers the motor vehicle has actually been driven
- (ii) that the odometer reading reflects the amount of miles or kilometers in excess of the designated mechanical odometer limit; or
- (iii) that the odometer reading is not the actual amount of miles or kilometers; and

(g) a warning to alert the transferee if a discrepancy exists between the odometer reading and the actual mileage.

STATEMENT OF THE CASE

In May of 2002, Appellee Kirby Smith purchased a 2000 Toyota Tundra and a 1998 Lincoln Navigator. R. 133. Just six months later, Mr. Smith placed an advertisement in Auto Trader Magazine listing his Toyota Tundra for sale. R. 21. At the time, Mr. Smith was experiencing financial difficulties, was over \$1000.00 in arrears on the Tundra payment, and as a result wanted to sell at least one of his four family vehicles to reduce his debt and monthly car note payments. R. 21, 26.

On or around December 2002, Kirby Smith was contacted by Mr. Charles Martinez on behalf of a company called U.S. Auto Management. R. 21. U.S. Auto Management responded to Mr. Smith's advertisement and obtained Mr. Smith's permission to facilitate arrangement of a third-party to take over payments owed to Toyota Financial on Mr. Smith's Tundra. R. 21-23. U.S. Auto Management told Mr. Smith they were a "kind of middle man," that found buyers for private sellers of vehicles. R. 22. In addition to finding a buyer for the Tundra, U.S. Auto Management agreed to manage the contractual relationship between the buyer and seller by ensuring that payments were made timely made by the 5th day of each month. R. 22.

That same month, U.S. Auto Management notified Mr. Smith that they had found a buyer for the Tundra. R. 23. U.S. Auto Management did not disclose the identity of the buyer to the Smiths, however, U.S. Auto Management promised the first monthly payment of \$528.82 would be arriving shortly. R. 23, 28, 168. In the event that the payment did not arrive or if the buyer faltered on the payments, U.S. Auto Management told the Smiths that they would provide collection and repossession services. R. 23. This arrangement continued uninterrupted through February 2003. At this time, U.S. Auto Management notified the Smiths that the buyer was in arrears and U.S. Auto Management was attempting to repossess the Tundra. R. 31.

In March 2003, Mr. John Redmond contacted Ms. Smith. R. 30-31. Mr. Redmond said he was an employee of Appellant Mr. Mark Cazares. R. 30-31. Mr. Mark Cazares had purchased Mr. Smith's Tundra through U.S. Auto Management. R. 30. According to Mrs. Smith, Mr. Redmond told her that Mr. Cazares wished to arrange a direct agreement with the Smiths to purchase the Tundra, thereby circumventing the contract through U.S. Auto Management. R. 30.

Mr. and Mrs. Smith arranged to meet Mr. Cazares and Mr. Redmond at Serenity Salon (the Smith's family business) in Orem, Utah. R. 32. At the meeting, Mr. Smith and Mr. Cazares agreed to continue the purchase agreement as originally established by U.S. Auto Management. R. 33. The Smiths opened a

bank account at Mr. Cazares' bank, Mountain America by which Mr. Cazares was to deposit roughly \$528 per month directly into Mr. Smith's account. R. 33. The Smiths would thereby make the payment to Toyota Financial. R. 33. The parties entered into a contract whereby the parties agreed to continue with the financial arrangements made through U.S. Auto Management. R. 33. The contract also provided that Mr. Cazares would maintain auto insurance, vehicle registration, and vehicle upkeep. R. 33.

On June 9, 2003, the Smiths allegedly made an oral agreement with Mr. Cazares to take over the Smiths' \$587.97 monthly payment on a 1998 Lincoln Navigator. R. 39. Mr. Cazares was to pay \$587.97 to WFS financial by the 10th day of each month until the entire amount of the Smiths' loan was paid. R. 3, 162. The Smiths gave Mr. Cazares possession of the Navigator, but they did not transfer possession of the title to the vehicle because WFS financial retained possession of the title. R. 39-40. The Smiths purport that the oral Navigator agreement obligated Mr. Cazares to procure auto insurance on the Navigator. R. 42.

Sometime during the month of June 2003, Mrs. Smith claims she had a conversation with Mr. Cazares in which Mr. Cazares orally agreed to purchase (not rent) the Smiths' Hydroskiff Boat. R. 42, 45. At the time, the Smiths had garaged the Hydroskiff in Salt Lake to have the boat winterized. R. 47. Mr. Cazares went to Hydroskiff in Salt Lake to pick up the boat. R. 48. The parties then agreed to

meet at a gas station at Thanksgiving Point located in Alpine, Utah on July 3, 2003. R. 48. The parties met on this date so that Mr. Cazares could learn how to operate the boat. R. 48.

Mrs. Smith testified that in a telephone conversation with Mr. Cazares regarding the boat, the parties agreed to "have a written contract the exact same as on the Tundra and Navigator," which included taking over payments, registering the boat, maintaining insurance, and performing maintenance on the boat. R. 48. If Mr. Cazares performed all of these terms fully, he would receive title to the boat from the lien holder. R. 48. However, just as with the Navigator agreement, Mr. Cazares never signed a written contract. R. 52.

Ms. Smith purports that Mr. Cazares was to transfer the money for the monthly payments on these three vehicles to the Smiths' bank account at Mountain America, by which the Smiths would make the monthly payments to the lien holders. R. 59-62. At trial, the Smiths stated that Mr. Cazares began making late payments on the vehicles as of July 2003. R. 69-74. Mr. Smith testified that he made several calls to Mr. Cazares regarding the late payments during August 2003. R. 95-99.

On September 13, 2003, Mr. Cazares met with the Smiths at Serenity Salon to return possession of the Navigator and Hydrosniff boat. R. 75. At this time, the Navigator had a past-due balance of \$1,264.71 and the boat had a past-due balance

of \$917.72. R. 77-78. The Smiths did not make any additional payments on the Navigator or the boat. R. 82-83. The Smiths subsequently voluntarily returned the Navigator to WFS financial on December 30, 2003. R. 82. Bank of America, the lien holder on the HydrosSwift boat, obtained possession of the boat and sold it to minimize the balance of the loan. R. 84-87.

On September 30, 2003, the Smiths had received notice that the Tundra had a past-due balance of \$1,072.01. R. 79. Upon receiving this notification, Ms. Smith gave a set of keys to the Tundra to her brother, Mr. Devin Stevenson so that Mr. Stevenson could locate and repossess the Tundra from Mr. Cazares. R. 121. Mr. Stevenson testified that he found the Tundra in the parking lot of Mamma's Southern Plantation Café in Salt Lake City. R. 122. Mr. Stevenson called Mrs. Smith, who then subsequently called the police to alert the law enforcement authorities that Mr. Stevenson was going to attempt to obtain possession of the vehicle from Mr. Cazares. R. 123. When Mr. Stevenson saw Mr. Cazares emerge from the restaurant, he approached Mr. Cazares and asked him to turn over the Tundra. R. 124. Mr. Stevenson also told Mr. Cazares that the police had been called and would be arriving shortly. R. 124. Mr. Cazares refused to give Mr. Stevenson the vehicle and instead sat in the vehicle and waited for the police. R. 124-125. Mr. Stevenson subsequently positioned himself in front of the truck in an effort to prevent Mr. Cazares from driving away. R. 124-125. Because the police

were taking a long time to arrive, Mr. Cazares left in the Tundra. R. 124. Toyota Financial eventually repossessed the Tundra in February 2004. R. 80.

Mr. Cazares' name was never listed as a co-owner on the titles held by the various lien holders. At all times, the Smiths remained co-owners of the Tundra, Navigator, and the Hydroskiff boat. Mrs. Smith testified that Mr. Cazares was never provided with odometer disclosure on the Tundra or on the Navigator. R. 140-141. While Mr. Cazares signed a written agreement to purchase the Tundra, he never signed a written agreement to purchase either the Navigator or the Hydroskiff boat. R. 146. The Smiths did not perform a credit check on Mr. Cazares and furthermore, the Smiths allowed Mr. Cazares to take possession of all of the vehicles without any kind of a lump sum down payment. R. 195.

Mr. Smith did not have authorization from WFS Financial, Toyota Financial or Bank of America to sell these vehicles to Mr. Cazares. As a result, Mr. Cazares was not given formal notice regarding the delinquency of the accounts. R. 190, 202. The Smiths' contractual relationship with WFS financial expressly stated that the Smiths would "keep the property in your possession in good condition and repair." R. 185. The contract further stated that the Smiths would "not attempt to sell the property unless it is properly identified inventory, or otherwise transfer any rights in the property to anyone else without our (WFS's) prior written consent." R. 186.

Mr. Cazares was never shown any purchase documents or finance documents on any of the three vehicles prior to September 13, 2003. R. 197. While Mr. Cazares was not provided with written odometer disclosure regarding the three vehicles, Mr. Cazares did understand his agreement with the Smiths to be a continuation of the purchase agreement first formed through U.S. Auto Management. R. 199-200. In Mr. Cazares' testimony he states that the Smiths asked him if he was interested in purchasing a boat, to which he replied that he would be interested in renting the boat during the months of July and August 2003. R. 201. The Smiths agreed to this arrangement, thereby Mr. Cazares returned the boat to the Smiths on September 13, 2003. Mr. Cazares further testified that Mr. Smith called and asked Mr. Cazares to return the Navigator not because Mr. Cazares was delinquent in payments, but because Mr. Smith needed another vehicle. R. 203. At this time, Mr. Cazares returned the vehicle to Mr. Smith. R. 203.

On March 22, 2006, the Fourth Judicial District Court entered final judgment in favor of Appellee Kirby Smith against Appellant Mark Cazares for breach of contract for purchase of the Toyota Tundra, Lincoln Navigator, Hydrosift, the respective interest for each vehicle, incidental damages, reasonable interest fees and taxable costs totaling \$65,893.93. Addendum A.

SUMMARY OF THE ARGUMENT

1A. Mr. Smith did not hold title to the vehicles at issue. Therefore, Mr. Smith did not have anything to convey to Mr. Cazares. Utah Code Ann. § 41-1a-702 provides that an owner of a vehicle must endorse the certificate of title and provide a statement of all liens and encumbrances on the vehicle. Where Mr. Smith failed to list Mr. Cazares as the registered co-owner of the vehicles, Mr. Smith did not convey his interest in the Tundra, Navigator, or Hydroswift boat to Mr. Cazares. Mr. Smith's failure to list Mr. Cazares on the titles does create a private right of action where consumer protection is a significant policy behind the statute.

1B. Utah Code Ann. § 41-1a-902 further requires a written odometer disclosure statement to be made at the time the vehicle is conveyed. Ultimately, Mr. Smith did not provide the odometer disclosure mandated by the Code. Mr. Smith's failure to provide the odometer disclosure statement creates a private right of action where consumer protection is a significant policy consideration behind the statute.

2. The Navigator and Tundra Agreements regarding default or breach are illusory and unenforceable. Furthermore, the section of Paragraph Three contemplating the return of both vehicles to Smith under all circumstances in any event or default or breach by Mr. Cazares does not reflect any accord between the

parties as to a reasonable forecast of just compensation for the harm that Mr. Cazares' breach or default would cause. Accordingly, Paragraph Three of the Agreements is a penalty clause, does not describe liquidated damages, and is therefore unenforceable. Gelzos v. Frontier Investments, 896 P.2d 1230 (Utah App. 1995).

ARGUMENT

I. MR. SMITH DID NOT CONVEY HIS INTEREST IN THE TUNDRA, NAVIGATOR, OR HYDROSWIFT BOAT BECAUSE HE NEVER CONVEYED TITLE OR ODOMETER DISCLOSURE TO MR. CAZARES.

Mr. Smith never conveyed anything to Mr. Cazares where he did not have the title changed to reflect Mr. Cazares' name nor did he convey odometer disclosures for the vehicles. Utah Code Ann. § 41-1a-702 provides that to properly transfer ownership of a vehicle, the owner must endorse the certificate of title issues for the vehicle and provide a statement of all liens and encumbrances on the vehicle. Utah Code Ann. § 41-1a-902 provides that at the time of the sale or transfer of a motor vehicle, the transferor shall furnish a written odometer disclosure statement.

Appellant Mark Cazares has brought this appeal based on these statutes, arguing that Appellee Kirby Smith did not convey his interest in the Tundra, Navigator, or HydrosSwift boat to Mr. Cazares. The trial court erred in ruling that Mr. Smith's violations does not create a private right of action where surely the

policy behind the statute is to protect consumers as well as the state. Mr. Smith's failure to convey title and failure to provide odometer disclosure is discussed in turn.

A. WHERE MR. SMITH FAILED TO COMPLY WITH THE TITLE CONVEYANCE REQUIREMENTS OF UTAH CODE ANN. § 41-1A-702, MR. SMITH FAILED TO CONVEY HIS INTEREST IN THE VEHICLES TO MR. CAZARES.

Mr. Cazares was never listed as a registered co-owner with any of the lien holders. Mr. Smith did not notify the three registered lien holders (Toyota Financial, WFS Financial, and Bank of America) that he intended to convey his interest in the vehicles to Mr. Cazares. Furthermore, Mr. Cazares never entered into a written agreement by which to purchase either the Lincoln Navigator or the Hydrosift boat. For these reasons, the decision of the trial court should be reversed.

The method for conveyance of title of vehicles is delineated by the Utah Motor Vehicle Act. At the time a vehicle is sold, the owner must endorse the certificate of title to the buyer. Utah Code Ann. § 41-1a-702(1)(a) (1993). The Statute further mandates that the seller's endorsement of title must include a statement of all liens and encumbrances on the vehicle. *Id.* at (1)(b).

The trial court found that the parties had entered into an oral contract to purchase the Navigator and boat identical to the terms of the purchase of the Toyota Tundra as arranged by U.S. Auto Management. The trial court ruling sets a

disturbing precedent that completely disregards the provision of Utah State Statutory code governing conveyance of title. Section 41-1a-702(1)(b) provides that to convey title, an owner must “include a statement of all liens and encumbrances on the vehicle, vessel or outboard motor.” The policy supporting this code provision is simple; the State has a compelling interest in maintaining accurate motor vehicle ownership records. The State is charged with many responsibilities where ownership of a motor vehicle is at issue (policing roadways, issuing motor vehicle tickets, etc), the State must be able to quickly identify the bona fide owner of any registered vehicle at any time. Section 41-1a-702 provides a procedure by which the State can effectively track ownership of all motor vehicles registered within the State of Utah.

Furthermore, financial lending institutions have a compelling interest in maintaining accurate motor vehicle ownership records. Financial lending institutions must keep track of vehicles to protect their interest as a secured creditor. Most lending institutions keep physical possession of the title as a way of perfecting their security interest. However, the interests of the lending institution are not properly protected if the debtor is allowed to adjoin third-parties to the repayment agreement absent prior consent from the financial institution.

And finally, the Statute governing conveyance of title protects individuals from fraudulent conveyances. Where a debtor can freely convey an encumbered

interest in a motor vehicle to a third-party absent conveyance of the title, the third-party's interest is unprotected. If there is no written record of the agreement or conveyance of title, the debtor could operate under a guise of conveying title to a third-party once all the payments are made to the lien holder. However, where the third-party's name is not memorialized on any of the documents, the third-party would have no course of action against a debtor seeking to perpetrate fraud. The reality of these types of fraudulent transfers conveys a private right of action in Mr. Cazares.

Ultimately, the State of Utah, financial lending institutions and consumers such as Mr. Cazares each have an overwhelming interest in preserving the integrity of the Statute governing conveyance of motor vehicle title. In this case, Mr. Smith did not convey anything to Mr. Cazares except present use of the vehicles – the rental rate. Mr. Smith did not effectively convey his interest in any of the vehicles to Mr. Cazares because Mr. Smith did not have title and did not have anything to convey, other than his present right to use the vehicles.

There was no privity of contract between Mr. Cazares and either WFS Financial, Bank of America or Toyota Financial. Those entities did not approve or ratify Mr. Smith's contemplated transfer of either the i) titles that he did not have to the navigator or the Tundra or; ii) Smith's underlying agreements with WFS Financial, Bank of America or Toyota Financial, respectively. Accordingly, Mr.

Cazares is not a party to or guarantor of Mr. Smith's agreements financing the Navigator or Tundra. Mr. Smith's obligations to WFS Financial, Bank of America and Toyota Financial are completely independent of his dealings with Mr. Cazares.

Because Mr. Smith failed to comply with Utah Code Ann. §41-1a-702 when Mr. Smith purported to transfer the Navigator and Tundra to Mr. Cazares, and because Mr. Smith never had title to those vehicles, the June 9, 2003 Agreements are void for failure of consideration. Mr. Smith never properly transferred title or an interest in the Navigator, Tundra, Hydroskiff motorboat or Metalcraft trailer to Mr. Cazares.

Ultimately, Mr. Smith could not sell what he did not own. Mr. Cazares' acts and omissions did not proximately cause the damage that Mr. Smith ascribes to Mr. Cazares' alleged default on the unenforceable, void June 9, 2003 Agreements. Mr. Cazares paid Mr. Smith a fair rental value for the Navigator, Tundra, Hydroskiff motorboat and Metalcraft trailer while Mr. Cazares had those items in his possession. As a result, Mr. Cazares owes Mr. Smith no damages, attorney's fees or costs. Thus, Judge Schofield erred in ruling that Mr. Smith's failure to comply with these statutory provisions does not convey a private right of action to Mr. Cazares. R. 265; Addendum A.

**B. WHERE MR. SMITH FAILED TO COMPLY WITH THE
ODOMETER DISCLOSURE REQUIREMENTS OF UTAH CODE
ANN. § 41-1A-902, MR. SMITH FAILED TO CONVEY HIS
INTEREST IN THE VEHICLES TO MR. CAZARES.**

Mr. Smith failed to provide any odometer disclosure statement to Mr.

Cazares as required by the Utah Motor Vehicle Act governing odometer statement disclosure. Utah Code Ann. § 41-1a-902. (1992). The Utah Motor Vehicle Act requires that at the time of transfer, a seller shall furnish a buyer with a written odometer disclosure statement in a form prescribed by the Division of Motor Vehicles. Id. at 902(2). The statement requires several elements including; the seller's signature to stipulate to the truthfulness of the odometer reading, the date of transfer of the vehicle, both the buyer's and the seller's name and address, the identity (make, model, year, body type, identification number) of the vehicle, the exact odometer reading at the time of transfer and a warning to the buyer if a discrepancy exists regarding the odometer. Id.

Mr. Smith never provided Mr. Cazares with odometer disclosure statements as required by the statute. As a result, Mr. Smith failed to convey his interest in the vehicles to Mr. Cazares. For this reason, combined with Mr. Smith's failure to list Mr. Cazares on the title of the vehicles, the decision of the trial court to award Mr. Smith recovery against Mr. Cazares should be reversed.

II. EVEN IF MR. SMITH HAS CONVEYED HIS INTEREST IN THE VEHICLES DESPITE HIS NON-COMPLIANCE WITH THE STATUTE, THE “EVENT OF DEFAULT” PROVISION IN THE CONTRACT IS ILLUSORY AND UNENFORCEABLE.

The provision contained in Paragraph Three of the Navigator and Tundra Agreements contemplating the return of both vehicles to Smith under all circumstances in any event of default or breach by Cazares is illusory and unenforceable. Furthermore, the section of Paragraph Three contemplating the return of both vehicles to Smith under all circumstances in any event or default or breach by Mr. Cazares does not reflect any accord between the parties as to a reasonable forecast of just compensation for the harm that Mr. Cazares' breach or default would cause. Accordingly, Paragraph Three of the Agreements is a penalty clause, does not describe liquidated damages, and is therefore unenforceable.

Gelzos v. Frontier Investments, 896 P.2d 1230 (Utah App. 1995).

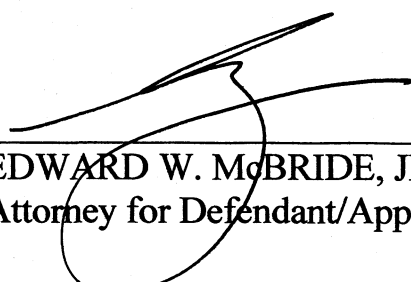
Mr. Smith never communicated with or otherwise notified Mr. Cazares of any repossession, auction or foreclosure proceedings concerning the Navigator, Tundra, Hydrowsift motorboat or Metalcraft trailer. Mr. Smith's failure to do so also constitutes his failure to mitigate the damages Mr. Smith attributes to Mr. Cazares' alleged default. Mr. Smith's failure to communicate or otherwise appraise Mr. Cazares of any repossession, auction or foreclosure proceedings concerning the Navigator, Tundra, Hydrosift motorboat or Metalcraft trailer

deprived Mr. Cazares of the opportunity to mitigate his own exposure or otherwise address any issue concerning those items.

CONCLUSION

Mr. Cazares requests this Court to reverse the decision of the lower court and remand this matter for a new trial where the Court is instructed to use the Utah Motor Vehicle Act governing Endorsement of Assignment and Warranty of Co-Owners and Odometer Statement Disclosure to decide this case.

Dated this 30th Day of November, 2006.



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NOV 30 2006

Attorney for Defendant/Appellant

IN THE UTAH COURT OF APPEALS

KIRBY SMITH,

Plaintiff/Appellee,

v.

MARK CAZARES,

Defendant/Appellant.

Certificate of Service

Case No.: 20060384-CA

I hereby certify that on the 30th day of November, 2006, I caused to be served via first class U.S. mail, postage pre-paid, a true and correct copy of the foregoing **Brief of Appellant** to the following:

Evan Schmutz
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DATED this 30 day of November, 2006.

BENNETT & McBRIDE, PLLC



Edward W. McBride, Jr.

Certificate of Mailing

I hereby certify that on the 30th day of November, 2006, I caused to be served via first class U.S. mail, postage pre-paid, a true and correct copy of the foregoing **Certificate of Service** to the following:

Evan Schmutz
HILL, JOHNSON & SCHMUTZ
3319 North University Avenue
Provo, Utah 84604

ADDENDUM A

FILED
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IN THE FOURTH JUDICIAL DISTRICT COURT
OF UTAH COUNTY, STATE OF UTAH

KIRBY SMITH, an individual,

Plaintiff,

vs.

MARK CAZARES, an individual,

Defendant.

JUDGMENT

Case No. 030404279

Judge: Schofield

This matter was tried to the Court on October 25, 2005, the Honorable Anthony W. Schofield presiding. At the conclusion of trial, the Court issued a Bench Ruling in favor of Plaintiff on the question of liability, but left certain issues as to remedies under the Uniform Commercial Code for further determination. On November 22, 2005, the Court issued a written Ruling concluding that Plaintiff was entitled to the remedies available under §70A-2-709 for an action for the price, and for incidental damages under §70A-2-710. On 3-22-06, the Court entered Findings of Fact and Conclusions of Law.

Accordingly, the Court being fully advised in the premises and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment shall be entered as follows:

1. Plaintiff Kirby Smith is hereby awarded judgment against Defendant Mark Cazares for breach of contract as follows:

a. For breach on the Toyota Agreement in the amount of \$7,621.88, including interest at the compounded rate of 5.9% per annum, through the date of judgment.

b. For breach on the Lincoln Agreement in the amount of \$7,801.80, including interest at the compounded rate of 11.49% per annum, through the date of judgment.

c. For breach on the Hydrosift Agreement in the amount of \$29,770.08, including interest at the compounded rate of 8.75% per annum, through the date of judgment.

d. For incidental damages \$6,507.22, including prejudgment interest at the rate of 10% per annum, through the date of judgment.

2. Plaintiff is hereby awarded his reasonable attorney's fees in the amount of \$13,405.50, and taxable costs in the amount of \$787.45.

3. Plaintiff is therefore entitled to and is hereby awarded judgment against Defendant in the total amount of:

Damages	\$51,700.98
Attorneys Fees	\$13,405.50
Taxable Costs	\$787.45
Total Judgment	\$65,893.93

4. Interest shall continue to accrue on the total judgment from the date of judgment at the blended rate of 9.23 % per annum.

5. Plaintiff is entitled to augment this judgment in the amount of any reasonable attorney's fees and/or taxable costs incurred in the collection hereof. The amount of any augmented judgment shall be established by affidavit.

DATED this 22 day of March, 2006.

BY THE COURT:

/s/ Anthony W. Schofield

Honorable Anthony W. Schofield
Fourth District Judge

Approved as to form and content:

Edward T. McBride
Attorney for Defendant

CERTIFICATE OF MAILING

I hereby certify that I personally mailed a copy of the foregoing on this 2nd day of March, 2006, by first-class, U.S. mail, postage prepaid, to the following:

Edward W. McBride, Jr.
Otto & McBride, P.C.
57 West 200 South, Suite 101
Salt Lake City, Utah 84101

Kim Altamirano