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UTAH SUPREME COURT
BRIEF

IN THE UTAH COURT OF APPEALS

TED SOMMER dba SOMMER'S AUTO WRECKING, Plaintiff-Appellee, vs. JACK W. SOMMER and WAYNE SOMMER, Defendants, TRANSMISSION TECH, INC., Defendant-Appellant.	Case No. 950210-CA Priority No. 15

APPELLANT'S REPLY BRIEF

Appeal from a Judgment of the Third Judicial Circuit Court
Salt Lake County, Salt Lake Department, State of Utah
The Honorable Sandra N. Peuler

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INTRODUCTION

Plaintiff-appellee, Ted Sommer d/b/a Sommer's Auto Wrecking ("Sommer's Auto Wrecking") argues in its brief ("App. br.") that it has a *valid* seller's lien and that the issue whether or *not* that lien has priority over defendant-appellant Transmission Tech, Inc.'s ("Trans Tech") mechanic's lien "is essentially a moot question" because the truck was sold in partial satisfaction of the judgment of Sommer's Auto Wrecking and accordingly "the repairman's lien is forever gone". (See App. br. pp. 25 ftn 4, 39-40) It has, of course, cited no legal authority for such an unjust result and Utah law nowise is so wooden. If Trans Tech prevails in this appeal, at a *minimum* the money proceeds from the formal public auction sale of the Truck in April, 1995 are rightfully recoverable, along with interest thereon. A more just result would provide for recovery of the amount for which Sommer's Auto Wrecking actually *resold* the Truck (i.e. damages for "conversion"), plus interest, since its successful bid at the auction was only a fraction of the Truck's real value. (See post, pp. 2, 21)

Sommer's Auto Wrecking does *not* really dispute that the *false notarization* transaction took place during March, 1991[1]. Moreover, it cites *no* legal authority from Utah or any other

---

[1] It claims, however, that "...it was Wayne Sommer's name that was notarized (and known to the employees of Plaintiff). (R. 363-365)". (App. br. p. 19) This is, at best, patently misleading, as the documents stated that that illegible signature being notarized was that of the owner "Jack W. Sommer".

jurisdiction which has ever put the seal of judicial legitimacy upon a sale-lien transaction in which the seller's lien was grounded in and derived from a "false notarization", by holding that the lien is nonetheless valid, enforceable and entitled to "constructive" notice priority (i.e. *not* "void" or "voidable"). This should be the threshold and decisive issue in this appeal, and if the lien is indeed "void" or "voidable" as a matter of law, a new trial would *not* be necessary. (See post, secs. I.D., IV) Cf. *e.g.* Alta Industries, Ltd. v. Hurst, 846 P.2d 1282, 1288-91 (Utah 1993) (trial court's legal errors held to be decisive and accordingly, case was *not* remanded for a new trial as to issues relating to fraud, conversion of property, and conspiracy; awarded compensatory damages based upon the amount of money received by the sale of the *converted* property plus interest); Ong. Intern. (U.S.A.) v 11th Ave. Corp., 850 P.2d 447, 452-3 (Utah 1993) (held releases were an "integral part" of the overall fraudulent "scheme" and accordingly "voidable").

Sommer's Auto Wrecking misstates the real issues to be resolved in this appeal in some of its argument headings (see App. br. pp. 18-9) In particular, the trial court's summary judgment adjudications concerning lien validity and priority did *not* hinge in any way upon Trans Tech's pre-trial motion to amend its pleadings (see post, sec. II) and did *not* hinge upon any common law principles such as unconscionability and equitable estoppel being pled or *not* pled as affirmative defenses. (see post, secs. III, IV, and V). Sommer's Auto Wrecking's Amended

Complaint requested the trial court to adjudge that it had a valid, enforceable and prior seller's lien in the Truck (see pars. 4, 5, 6, 11.d.). Moreover, Trans Tech's First Counterclaim based upon the Declaratory Judgment statute, Title 78, Chapter 33, Utah Stats., requested declarations by the trial court as to *all* of the rights of Sommer's Auto Wrecking, including without limitation, relating to the issue whether it "presently has a legally valid lien on the Truck ...". Given these allegations, common law principles such as unconscionability and equitable estoppel had to be dealt with *before* the trial court could properly make the partial summary judgment adjudications which it made. Affirmative defenses did *not* have to be expressly pled in order to raise those issues. (See post, secs. III, IV)

Sommer's Auto Wrecking meritlessly attempts to ignore the summary judgment adjudications which erroneously resolved almost all of the key factual issues in this case and to characterize this appeal insofar as it involves factual issues, as one from findings of fact made after a full blown trial. (See e.g. App. br. pp. 5, 34-6) But none of the eight cases cited by it, which did deal with such appeals, have anything whatsoever to do with this appeal which--with only a few limited exceptions--focuses upon erroneous partial summary judgment adjudications made a week before trial and erroneously adhered to during the trial. Those cases *only* relate to the few narrow disputed fact issues resolved by the trial court after the trial. (See also e.g. App. br. pp. 13, 37-9) The motion to "reconsider" the summary judgment

adjudications at the trial was *not* one for a "new trial" (see App. br. pp. 34-6), but rather one directed to getting a chance to litigate for the first time the key fact issues posed in this case.

The legal authorities cited and the detailed arguments made in Trans Tech's initial brief ("Tr.T.br.") will *not* be duplicated herein, but will be, at times, cross referenced.

I. <u>THE TRIAL COURT PREJUDICIALLY ERRED IN GRANTING SOMMER'S AUTO WRECKING'S PARTIAL SUMMARY JUDGMENT BECAUSE IT HAD NOT COMPLIED WITH ANY OF THE KEY PROCEDURAL REQUIREMENTS OR ESTABLISHED THAT THERE WERE NO "MATERIAL" ISSUES OF FACT REMAINING TO BE RESOLVED AT THE TRIAL WHICH WAS TO COMMENCE ABOUT ONE WEEK LATER</u>

One fatal fallacy in the arguments of Sommer's Auto Wrecking relating to the fact that there were cross motions for summary judgment is pinpointed by its assertion that "(w)here the *only* controversy brought by the parties was the *interpretation* of a writing and both parties placed the question in the hands of the court by making mutual motions for summary judgment, the losing party was not entitled to a trial on the facts after the court made its decision", relying upon <u>Mastic Tile</u>. (See App. br. pp. 3, 9) *No* such decisive written contract *interpretation* issue was posed in this case via the summary judgment motions or at trial.

There is no *per se* rule of law that the summary judgment cross motions, *ipso facto*, absolved Sommer's Auto Wrecking from its burden-duty of submitting sufficient evidence *vis a vis* all "material" factual subjects encompassed by its motion and magically transformed those *fact* issues into issues of law. Trans

Tech's motion was premised upon its legal positions concerning "void" or "voidable" (see post, secs. I. D., IV) and in the alternative, it sought a trial as to all "fact" issues which were "material" under the legal principles adopted by the trial court. The case law relied upon by Sommer's Auto Wrecking to support its meritless notions, nowise do so. It had the burden of proving that *no* genuine "material" issue of fact existed *vis a vis* the validity, enforceability and priority of its claimed seller's lien. (See post, pp. 14-5) Robinson v. Intermountain Health Care, Inc., 740 P.2d 262, 263 (Utah App. 1987) (see App. br. p. 26) so held, cautioning:

> Any *doubts* or *uncertainties* concerning issues of fact must be construed in favor of the party opposing summary judgment. (emphasis added)

Sommer's Auto Wrecking failed to satisfy its demanding burden of proof.

What might or might *not* have occurred orally *off the record* (e.g. said by Wayne Sommer) during the December 12, 1994 oral argument on the summary judgment motions, could not, and did not, *cure* those evidentiary deficiencies. (See post, I.B) As was held in Briggs v. Holcomb, 740 P.2d 281, 282-3 (Utah App. 1987) (see App. br. pp. 2, 31) where there *also* was no official record made of the summary judgment hearing and "concern" was expressed:

> ... although *prejudicial error* can result from failure to make a *complete record*, we *need not* reach the issue of whether Rule 2(k) is unconstitutional because, in the instant case, the *potential for prejudice* is remedied by the *intensive scrutiny* given *summary* judgments *on appeal*. (emphasis added)

So viewed, the trial court's partial summary judgment adjudications in favor of Sommer's Auto Wrecking cannot be affirmed by this Court. Its attempts to explain the *necessary* undisputed evidentiary underpinnings therefor, fall woefully short. (See App. br. pp. 11-2) Indeed, almost all of the "evidence" relied upon consists of written "hearsay" statements under oath by Ted Sommer who had *no* personal knowledge as to what really happened or why during March, 1991. (See post, sec. I.A.)

Sommer's Auto Wrecking's attempts to persuade this Court that it did *not* really have such a burden of proof, are also unavailing. The case law cited does not support that notion. For example, Anderson v. Liberty Lobby, Inc., Inc., 477 U.S. 242, 247-52, 256 (1986) (see App. br. p. 26) affirmed that "the movant has the burden of showing ...":

> The District Court granted summary judgment for the defendants, stating that there was no evidence from which reasonably minded jurors might draw an *inference of conspiracy*. We *reversed, pointing out that the moving parties' submissions had not foreclosed the possibility of the existence of certain facts from which "it would be open to a jury ... to infer from the circumstances" that there had been a meeting of minds.*
> (emphasis added)

Like "conspiracy" reasoning is controlling here. (See post, secs. I.D., V)

Celotex Corp. v. Catrett, Administratrix of Estate of Catrett, 477 U.S. 317, 321-9, 330-9 (1987) (see App. br. pp. 25-6) only dealt in a 5-4 decision with a situation *not* present here involving "...an element essential to that party's case and on

which that party will bear the burden of proof at trial". (See post, sec. I.B.)

In Schurtz v. BMW of North America, Inc., 814 P.2d 1108, 1109, 1111-2 (Utah 1991) (see App. br. p. 2) the trial court's granting of "partial summary judgment was reversed." It was held "... at the outset that a challenge to a summary judgment presents for review *only* conclusions of law because, by definition, cases decided on summary judgment do *not* involve factual issues" and "(w)e therefore accord *no* deference to a trial court's legal conclusions given to support the grant of summary judgment, but review them for correctness." See also e.g., Reliable Furniture Co. v. Fidelity & Guar. Ins. Under., 398 P.2d 685, 688 (Utah 1965) (see App. p. 3) (trial court's summary judgment in a fraud-duress setting was reversed, it being explained that "... any doubts which exist should be resolved in favor of affording him the privilege of a trial."); Watkiss & Campbell v. FOA & Son, 808 P.2d 1061, 1063-6, 1069 (Utah 1991) (see App. br. pp. 3, 34) (motion to "reconsider" a summary judgment was given legal effect on appeal and the summary judgment was reversed).

In L&A Drywall, Inc. v. Withmore Const. Co. Inc., 608 P.2d 626, 628-30 (App. p. 2) (Utah 1980) *not only* was the trial court's granting of summary judgment reversed (it is "appropriate *only* where there exist no genuine issue of fact relevant to the disposition of the claim underlying the motion."), but also because "(i)t is our view that, as a matter of law, plaintiff is

precluded from prevailing in this matter", the case was *not* remanded "for a trial on the merits." (608 P.2d at 63) This Court is in a position to do likewise, if it embraces Trans Tech's legal principles *vis a vis* "void" or "voidable". (See post, sec. IV)

Sommer's Auto Wrecking's total non-compliance with Rule 4 - 501, U.R.J.A., in processing its summary judgment motion--which it attempts to make light of and pass over (App. br. p. 30)--was in itself fatal to that motion. (See Tr.T.br. pp. 26-7) Cf also *e.g.* Crookston v. Fire Ins. Exchange, 817 P.2d 789, 796-7 (Utah 1991) (dealt with 10 days notice of hearing requirement of U.R.C.P. 56(c) for summary judgment motions and pointed out that "such a violation will void the grant unless the violation amounts to *harmless* error").

A. Summary Statement of Disputed and Undisputed "Material" Facts as of the December 12, 1994 Oral Argument

Incredibly, most of the "(u)ndisputed facts in the record" which are relied upon by Sommer's Auto Wrecking have as their genesis the "hearsay" affidavit of Ted Sommer which is "R. 625-7". (See App. br. pp. 11-2). The verification of the allegations in the Amended Complaint and the various documents by Ted Sommer, as well as his affidavit, had *no* legal effect and cannot support summary judgment adjudications. (Tr. T. br. pp. 25-6) See *also* e.g. Sandy City v. Salt Lake County, 794 P.2d 482, 485, 487-8, 491 (Utah App. 1990)

B. Sommer Eq.'s Motion For Partial Summary Judgment was, at Best from its Point of View, Premature Because Key "Material" Evidentiary Facts had not been Proven by It to be Undisputed

Sommer's Auto Wrecking adverts to Wayne Sommer's personal appearance at the summary judgment hearing on December 12, 1994 and claims that he orally acknowledged off the formal record that it was his personal signature on the documents which stated that the owner was his father "Jack W. Sommer" which had been *notarized* as that of his father. (App. br. p. 19). However, this is not admissible evidence in the summary judgment record and cannot cure the holes in the formal record. (See ante, pp. 5-6) Nor does this "false notarization" fact render the lien valid or enforceable, but rather "void" or "voidable." (See post, sec. I.D., IV)

C. Sommer Eq. did not Prove that Either Wayne Sommer or Jack W. Sommer Actually gave it a Valid Written Seller's Lien on the Truck Which was Then Enforceable

The mere fact that Sommer's Auto Wrecking reserved a security interest in the "falsely notarized" Certificate of Title application (App. br. p.27), does *not* answer the issue whether or not there was an underlying *valid* and enforceable seller's lien entitled in equity to priority. (See post, III) None of the cases cited by Sommer's Auto Wrecking have anything to do with this issue. For example, West Valley City v. Majestic Inv. Co., 818 P.2d 1311, 1313 (Utah App. 1991) (see App. br. p. 5) simply held that the "interpretation of a contract begins with a question of law, reviewed for correctness, i.e., "Is the contract

unambiguous?" But the written purchase contract *issue* in this case is *not* one of interpretation, but rather involves the validity, enforceability, and priority of its seller's lien. This also is the sole import of Wade v. Stangl, 869 P.2d 9, 11-3 (Utah App. 1994) (see App. br. p.5) which also only dealt with an *interpretation* issue. The key fact is that the documentation in the summary judgment record simply *did not* contain any terms giving the seller a lien on the Truck because the back side of the purchase order was *not* in that record. Moreover, extrinsic evidence is, of course, always admissible with respect to issues going to the enforceability (e.g. unconscionability, estoppel) of the written contract. (See post, sec. III)

But the real issue is how partial summary judgment adjudications could have been made as to the validity, enforceability, and priority of its claimed seller's lien *without* the trial court covering in its adjudication a number of most "material" factual subjects relating to that transaction (i.e. whether the blanks in the purchase order were all filled in when it was signed? who signed? when? why? was the signer given a copy? what document gave the seller a lien?) Sommer's Auto Wrecking tries in vain to defend these critical gaps in the summary judgment evidentiary record via trial findings of fact made after a very truncated "trial" during which the trial court adhered to its summary judgment adjudications and cut off most evidentiary inquiries encompassed thereby.

D. <u>Assuming, *Arguendo*, that a Valid Lien was Initially Created by the "Buyer" when the Truck was Purchased by Jack W. Sommer and/or Wayne Sommer, there were "Material" fact Issues as to whether it would be at that Juncture Equitably Unenforceable (e.g. Because of the Knowing Participation of One or More of Sommer Eq.'s Representatives in the Fraudulent Creation of a Falsely Notarized Certificate of Title Stating that "Jack W. Sommer" is the Legal Owner of the Truck, when this was not the Truth)</u>

Sommer's Auto Wrecking fallaciously lumps together various issues related to "fraud" occurring at the summary judgment juncture and at trial. (App. br. pp. 25-6) It *emphasizes* that the trial court found after the trial that "it was Defendant Wayne Sommer who requested title to be in his father's name" (see App. br. pp. 37-9), arguing that for some inexplicable reason, this is "not material to the summary judgment." But even if so requested by Wayne, there still could have been a wrongful conspiracy to "hinder" or "delay" creditors involving Wayne, Dale 11 and W. Anderson, which would have rendered that March, 1991 transaction "void" or "voidable". (See App. br. p. ii, 4, 14-5)

Where a fraudulent (e.g. void, voidable) sale-lien transaction is alleged involving a son and his father, the burden is on the alleged offenders (i.e. Dale and Wayne Sommer) to prove the "good faith" and "honest purpose" of that transaction by "clear and satisfactory evidence" since they are necessarily the *only* persons who really know what happened and why. *Cf. e.g.* <u>Paxton v. Paxton</u>, 15 P.2d 1051, 1053, 1056-7 (Utah 1932). The Supreme Court held:

> It is quite generally held that a *transfer* or mortgage of property between *near relatives* which

> is *calculated to prevent a creditor* from realizing on his claim against one of such relatives is subject to *rigid scrutiny*, 27 C. J. 495, and cases there cited. (15 P.2d at 1056; emphasis added)

It was held that that heavy burden of proof has *not* been met during that trial because of various "badges of fraud." For example, it was pointed out that the "notary" was present in court, but "not called to testify." (15 P.2d at 105-67).

These "intent to defraud, hinder or delay creditors" cases are useful analogies *vis a vis* the fraudulent intent issues posed in this case, since there also are several such "badges of fraud" in this summary judgment record. *See also e.g.* Zuniga v. Evans, 48 P.2d 513, 515-521 (Utah 1935) (held after trial that the transaction was fraudulent as to creditors because there was no fair consideration and there was disbelief of witnesses); Lund v. Howell, 67 P.2d 215, 217-9 (Utah 1937); Bocca Ler v. Bee, 126 P.2d 1063, 1067-8 (Utah 1942); Ned J. Bowman Co. v. White, 369 P.2d 962, 963 (Utah 1962) Sommer's Auto Wrecking's attempt to pass off this transaction as "a mere accommodation to the customer (App. br. p.28) certainly does *not* fly as a matter of law as the *only* "reasonable inference".

Territorial Sav. Loan Ass'n. v. Baird, 781 P.2d 452, 454-863 (Utah App. 1989) is closely in point. There *also* were *cross motions* for summary judgment and on appeal several of the trial court's summary judgment adjudications were reversed because there were genuine "material" issues of fact *vis a vis* various subjects (e.g. bona fide debts, good faith, fair equivalent,

fraudulent intent) relating to whether the conveyance of real estate was "void" *vis a vis* creditors:

> Since this case was disposed of on a motion for summary judgment, we review the facts *and inferences* reasonably drawn therefrom in the light *most favorable* to TSL....
>
> ***
>
> In granting summary judgment, a trial court must not weigh or resolve disputed evidence.... Furthermore, "[c]ross-motions for summary judgment do not *ipso facto* dissipate factual issues, even though *both* parties *contend* for the purposes of their motions that they are entitled to prevail because there are no material issues of fact." (781 P.2d at 454, 456; emphasis added)

The appellate court focused upon whether the debtor had used the conveyance for the purpose of placing his "property" beyond the reach of their creditors' just claims, while simultaneously retaining and enjoying virtually all the advantages of ownership". (781 P.2d at 456-7) That shoe certainly fits via reasonable inference the March, 1991 transaction set up by Wayne Sommer, Dale al and the deceased notary public, W. Anderson. (See also post, sec. IV.)

In Territorial there was extensive discussion *vis a vis* such inferential "badges of fraud":

> They are *not usually* conclusive proof; they are open to explanation. They may be *almost conclusive*, or they may furnish merely a *reasonable inference* of fraud, according to the weight to which they may be entitled from their intrinsic character and the special circumstances attending the case. Often a *single one* of them may *establish and stamp* a transaction as fraudulent ...
>
> The *generally recognized badges of fraud* are the *lack of consideration* for the conveyance, the transfer of the debtor's *entire* estate, the

> *relationship* between transferor and the transferee, the pendency or threat of litigation, *secrecy* or hurried transaction, insolvency or indebtedness of the transferor, departure from the usual method of business, the *retention* by the debtor of *possession* of the *property*, and the *reservation of benefit to* the transferor.

> However, "[t]he facts which are recognized indicia of fraud are numerous, and no court could pretend to anticipate or catalog them all." Koch, 716 P.2d at 184 (quoting 37 Am.Jur.2d *Fraudulent Conveyances* §10 (1968))
> (781 P.2d at 462-3 emphasis added).

Such "reasonable inferences" in the summary judgment record render the trial court's adjudications to the contrary made, as a matter of law, prejudicial error.

It is *not* decisive whether or not Wayne Sommer had also done so in the past or whether or not it was a general practice for other buyers to also put vehicles in other persons' names. (App.br. pp. 6, 11, 14-5) The key was the "false notarization" of "Jack W. Sommer's" signature. Trade usage and course of dealing are "admissible evidence" under § 70A-1-205, U.C.A., only *vis a vis* the interpretation of a written agreement's ambiguous terms. No such interpretation issue is posed in this case.

II. UNDER UTAH LAW, TRANS TECH'S PROPOSED COUNTERCLAIM AGAINST SOMMER'S AUTO WRECKING FOR THE DAMAGES IT HAD SUSTAINED AS A RESULT OF THE MARCH, 1991 FRAUDULENT-"FALSE NOTARIZATION" SALE TRANSACTION IS MANDATORY AND, ACCORDINGLY, SHOULD HAVE BEEN ALLOWED BY THE TRIAL COURT TO BE ASSERTED IN THIS ACTION

None of the three cases cited by Sommer's Auto Wrecking are even remotely in point and nowise justify the trial court's denial. For example, in Kleinert v. Kimball Elevators, 854 P.2d 1025, 1027-8 (Utah App. 1993) (see App. br. pp. 4, 36, 37) the

trial court's grant of summary judgment as to the negligence claim was reversed ("... we view the evidence and all reasonable inferences therein in the light most favorable to the appellant") and it explained:

> Utah Courts have focused on three factors when deciding whether to grant a motion to amend: (1) the *timeliness* of the motion; (2) the *justification* given by the movant for the delay; and (3) the *resulting prejudice* to the responding party. (854 P.2d at 1028; emphasis added)

None of these three factors justified the denial of Trans Tech's motion to amend to assert its mandatory counterclaim which would be legally lost unless asserted in this action.

Contrary to Sommer's Auto Wrecking's contentions, (see App. br. pp. ii; 4, 15, 17, 18), it is not until Dale Mickelson eventually-finally answered *shortly* before trial some of Trans Tech's written interrogatories to Sommer's Auto Wrecking that there was any formal discovery responses from anyone with *personal knowledge* as to what really had happened during that March, 1991 transaction. Moreover, Wayne Sommer continued to refuse to obey the trial court's Order that he answer the written interrogatories to the time of trial.

Most importantly, there would have been *no* "resulting prejudice" to Sommer's Auto Wrecking. No new parties would have been added as in Kelly (App.br.p.4). Sommer's Auto Wrecking argues that "... additional discovery would not have been feasible within the time remaining for trial." But there was *no need* for any discovery by it and no need to delay the trial, for

it *always* had access to Dale Mickelson's memory. (See App. pp. 29, 36-7) Sommer's Auto Wrecking also argues that such amendments would have been "legally insufficient or futile" because sufficient detailed facts had *not* been pled in the amendment to set forth a claim sounding in fraud. But even assuming *arguendo*, such as deficiency existed, it could have been easily rectified via amendments by Trans Tech if a motion to dismiss that fraud contention on that basis had been interposed.

Kasco Services Corp. v. Benson, 831 P.2d 86, 89, 92-3 (Utah 1992) (see App. br. p. 2) held that the refusal to allow the amendment *was an abuse of discretion*:

> Rule 15(a) of the Utah Rules of Civil Procedure states in part that leave to amend "shall be freely given when justice so requires." We have held, "A primary consideration that a trial judge must take into account in determining whether leave should be granted is whether the opposing side would be put to *unavoidable prejudice* by having an issue adjudicated for which he had not had time to prepare."
>
> 831 P.2d at 92; emphasis added.

This same reasoning establishes that the trial court in this case also abused its discretion, as there was no evidence of such "unavoidable prejudice" to Sommer's Auto Wrecking.

III. THERE IS, AS A MATTER OF LAW, NO VALID SIGNED AGREEMENT IN THE RECORD BEFORE THIS COURT GIVING SOMMER'S AUTO WRECKING A SELLER'S LIEN ON THE TRUCK AND ACCORDINGLY NO "CONSTRUCTIVE NOTICE" THEREOF WAS GIVEN TO TRANS TECH

This issue involves not only the aforesaid "void" vs. "voidable" common law principles relating to the *false notarization* of "Jack W. Sommer's" illegible signature, but also

the additional issues whether there is a valid and enforceable underlying written contract entitled to legal priority. By the trial, the missing back side of the purchase contract which purported to give Sommer's Auto Wrecking a seller's lien, was finally in evidence. But Resource Management Co. v. Weston Paneh, 706 P.2d 1028, 1040-9 (Utah 1985) (App. br. p. 33) set forth the basic common law principles of procedural and substantive "unconscionability" which nonetheless rendered that purported seller's lien invalid and unenforceable.

"The determination of unconscionability is a question of law" and accordingly, "the court is therefore free to review the record and make its own conclusions as to the determination". Wade v. Jobe, 818 P.2d 1006, 1016 (Utah 1991).

> In Resource Management, the court *distinguished* "substantive" and "procedural" unconscionability. Procedural unconscionability *focuses* on the manner in which the contract was *negotiated* and the *circumstances* of the parties, 706 P.2d at 1041, can be characterized as the "absence of meaningful choice" and a "gross inequality of bargaining power." ... Substantive unconscionability *examines the relative fairness* of the *obligations assumed*; it requires terms "so one-sided as to oppress or unfairly surprise an innocent party," ... or "*an overall imbalance* in the obligations and rights imposed by the bargain."
>
> (818 P.2d at 1017; emphasis added)

The underlying written contract purporting to give Sommer's Auto Wrecking the seller's lien in the Truck as a matter of law cannot pass muster either a "procedurally" or "substantively" (See also ante, sec. I.C.)

Such validity and enforceability issues posed *vis a vis* the genesis of the claimed seller's lien are *not*, as Sommer's Auto Wrecking meritlessly argues, ones involving statute of fraud and equitable estoppel affirmative defenses. (App. br. pp. 29-33) There is *no* question of any oral agreement giving it a seller's lien. These issues were raised by Trans Tech's first counterclaim seeking declarations under the Utah Declaratory Judgment Act *vis a vis* all of Plaintiff-Appellee's legal rights in the Truck and indeed, by the Amended Complaint itself. (See ante, pp. 2-3; Tr.T.br. pp. 32-5, 37-40, 49) These issues all involve *essential* elements in Sommer's Auto Wrecking's claim that it had a valid and enforceable seller's lien having "constructive notice" priority.

IV. <u>ALL THE SALES DOCUMENTATION CREATED IN THE MARCH, 1991 "FALSE NOTARIZATION"-FRAUDULENT SALES TRANSACTION INVOLVING THE TRUCK WERE "VOID" *AB INITIO* OR AT LEAST "VOIDABLE"</u>

Sommer's Auto Wrecking's notions are incompatible with <u>Meyer v. General American Corp.</u>, 569 P.2d 1094, 1095 (Utah, 1987)[2] where it was held that the conveyance of a caterpillar tractor was "void" because it was a "fraudulent sale" *vis a vis* creditors in that the vendee did *not* take possession, there was a "lack of good faith", and there was constructive notice of fraudulent intent *vis a vis* creditors because of circumstances ... that

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[2] Appellee's counsel adverts to this case (App. br. p. 27, ftn. 5), but *never* inquired of appellant's counsel as to what its full citation was, even though there obviously had been a typographical omission in appellant's initial brief.

should put a reasonable person on guard so as to require further inquiry on his part" that the "transaction *may* be tainted and that other persons are likely to be involved":

> Other *indicia of fraud*--failure of Terra to deliver the caterpillar to McCurtain, failure of McCurtain to take steps to protect his interest, and the attempt made by the parties to keep the transactions "secret" from Meyer ... are enough to justify the court's findings.
>
> Under the evidence as presented, the trial court committed no error in holding that the conveyance from GAC to Terra and, subsequently, to McCurtain, was *void*. (569 P.2d at 1097; emphasis added)

In this case there are also similar "indicia of fraud" and the basic March, 1991 sale-lien transaction also should be adjudged "void". (See also ante, sec. I.)

In Meyer also the party involved in that tainted transaction argued that its lien was valid and had priority under the Utah Uniform Commercial Code. But the Supreme Court held to the contrary, ruling that another statute, the Utah Fraudulent Conveyance Act, was controlling "as a protection against ... [an] unjust result against an innocent party because of a strict application of the priorities "established in the statute." (569 P.2d at 1097-8) It was reasoned that "(w)hen a conveyance is found *void* under the Utah Fraudulent Conveyance Act, it is treated as if the transaction *never took place* at all; hence, it is *not* necessary to reach the question of priorities under Article 9 of the Utah Uniform Commercial Code since the *security agreement cannot* be held to *exist* if the conveyance from which

the security interest arose is *void* from its inception." (569 P.2d at 1098).

Like reasoning is controlling *vis a vis* Sommer's Auto Wrecking's claimed seller's lien in the Truck which should be held by this Court to have *never* existed legally. See also e.g. Molitor v. Molitor, 440 A.2d 215, 218-9 (Conn. 1981) (affirmed trial court's adjudication that conveyance was "void" under common law fraudulent conveyance-creditors principles). Sommer's Auto Wrecking argues that the "statutes are clear on the" priority, validity and enforceability issues involving the seller's lien and that the seller's lien "is valid where, as here, said lien is disclosed in the title." (App. br. pp. 15-6, 18-9,) But it can cite no such statute or even any supporting case law.

Its sole attempt to justify the "false notarization" transaction, ala Meyer, involves reliance upon the inapposite U.C.A. § 70A-9-112 (See App. br. pp. 21-3) However, that section only deals with the rights and duties of the secured party *vis a vis* collateral that is "owned" by a party who is not the "debtor" Clearfield State Bank v. Contos. 562 P.2d 622, 624 (Utah 1977). It nowise legally justifies a "false notarization" of an illegible signature so as to result in the issuance of a Certificate of Title falsely stating that the "owner" is "Jack W. Sommer". Official Comment to U.C.C. § 9-112.

§ 70A-9-112 has nothing to do with Wayne Sommer's unauthorized placing of the Truck in his father's name via a

"false notarization" of his name on the application for the Certificate of Title. Id. Such issues are left for the judiciary to resolve via common law principles and other statutes. Id. *Cf.* e.g., Towe Farms, Inc. v. Cent. Iowa Prod. Credit, 528 F.Supp. 500, 505-7 (S.D. Iowa 1981) (cattle repossessed and sold; summary judgment denied; held section "does not apply where, as in this case, the debtor pledges another's property *without authority* to do so"; issue involved alleged "conversion" of the cattle); Peoples Nat. Bk. of N. J. v. Fowler, 372 A.2d 1096, 1101-4) (N.J. 1977).

U.C.A. § 70A-9-112 does *not* deal with the issue whether a "false notarization" in the application for a vehicle Certificate of Title results in the underlying sale-lien transaction being "void" or "voidable"--particularly as to creditors (e.g. mechanic's lien claimants) who do *not* have actual personal knowledge as to what really happened. The Official U.C.C. Comment explains:

> The section does *not* purport to be an *exhaustive treatment* of the subject. It isolates *certain problems* which may be expected to arise and states rules as to them. Others will *no doubt arise*: their *solution is left to the courts*.
> (emphasis added)

The drafters of the Uniform Commercial Code also noted in the official comment 4(e) to § 70A-9-103, U.C.A. that the "state will have every reason, nevertheless, to make its certificate of title reliable to the type of person who most needs to rely on it." The Certificate of Title is what third parties (e.g. creditors)

are supposed to be able to rely on as totally accurate. Cf. e.g. General Motors Acceptance Corp. v. Rupp, 122 B.R. 436, 441-4 (D. Utah 1990). The "false notarization" destroyed the reliability of the "Jack W. Sommer" is "owner" Certificate of Title.

Clearfield's reasoning also mandates that § 70A-9-112 "does not apply to a situation" where Wayne Sommer "without authority to do so" puts the Truck in the name of his father, "Jack W. Sommer", via a conspiracy with Dale Mickelson and W. Anderson utilizing a *false notarization* of Wayne's illegible signature as being that of Jack's. Sommer's Auto Wrecking's attempt to 'whitewash" this March 1991 transaction by lumping this transparent ploy to hide this asset from a ne'er-do-well person's (Wayne Sommer's) creditors together with other persons' legitimate desires to make non-*false notarization* "gifts" or to use vehicles in their corporations (See App. br. p. 23), is meritless. (See ante, sec. I.D.)

Their subjective "intent" to thwart, hinder and delay the legal rights of Wayne Sommer's creditors may, of course, be inferred. (ante, sec. I.D.) In re Independent Clearing House Co., 77 B.R. 843 (D. Utah en banc 1987) also held that an intent to defraud can be inferred-- particularly if "no other reasonable inference is" advanced to explain the conduct--when persons are "intentionally carrying out the transaction with full knowledge that its effects will be detrimental to creditors". It was held that this issue "would ordinarily present a factual question [but] we conclude that, from the undisputed evidence in this

record, *only one* inference is possible ["as a matter of law"]--namely, that the debtors had the intent to hinder, delay or defraud creditors". Such a ruling in this appeal would obviate the necessity of a new trial and Sommer's Auto Wrecking attempts to explain their real motivation are most suspect, if not unbelievable.

The reference in U.C.A. § 38-2-3, to mechanics lien being "subject and subordinate to the rights and interests of any secured parties..." (App. br. p. 24-5), when properly interpreted, only refers to *valid* and *enforceable* lien "rights and interests" equitably entitled to such property--not to those which are "void" or "voidable". But the "public policy" choice for this Court in fashioning the controlling common law principles is clear. Unless common law teeth are put into the statutory requirements relating to vehicle Certificates of Title, unprincipled sellers such as Sommer's Auto Wrecking will doubtlessly continue to feel free to use "false notarization" sales whenever and for whomever they please--regardless of the injurious consequences to other.

It is certainly true that the "false notarization" of "Jack W. Sommer"'s signature did *not* cause or induce Trans Tech to do the repairs and it did not actually rely on the Certificate of Title in doing so. (App. br. pp. 16, 20-1, 24, 25) But once the repairs had been made by it without knowledge as to had really occurred in March, 1991 and Trans Tech began to try to sort out what its legal rights were *vis a vis* being paid for its repairs

on the Truck, the legal mischief flowing from the "false notarization" transaction was akin to Pandora's Box. Trans Tech and Wayne Sommer's father, Jack W. Sommer, both ended up being thrust into this lawsuit and caused to go through extensive discovery, summary judgment proceedings, and finally a trial, all in an effort to have a court of law determine what really happened factually as to that March, 1991 sale of the Truck and what its legal consequences were in 1994-5.

That is the real answer to the query by Sommer's Auto Wrecking as to "what is the damage caused by the *alleged* misrepresentation". (App. br. p. 24) Such a legal morass could *not* have existed but for the "false notarization" of that illegible signature by W. Anderson as being that of the vehicle *owner* "Jack W. Sommer." The Utah Legislature's goal of Certificate of Title certainly is emasculated when its key statutory mandate that the title ***owners must*** sign the Applications for Certificate of Title and *must* have *their* signatures notarized, are *ignored* by vehicle sellers such as Sommer's Auto Wrecking. (See Tr.T.br. pp. 22-3, 43-4) "Void" or "voidable" is not only an appropriate punishment, but also a necessary deterrent to other vehicle sellers having, or being tempted to engage in, such "customary practices."

V. THERE ALSO WAS NOT THE REQUISITE "PERFECTION" OF THE CLAIMED SELLER'S LIEN AND ACCORDINGLY NO "CONSTRUCTIVE *NOTICE THEREOF WAS GIVEN TO TRANS TECH*

Interestingly, Sommer's Auto Wrecking never even attempts to explain how the March, 1991 "false notarization" sale-lien transaction could have legally "perfected" its seller's lien so as to give it "constructive notice" lien priority over the mechanic's lien of Trans Tech, an innocent party having no actual knowledge thereof. (See Tr.T.br. pp. 23-4, 31-2, 44-50)

CONCLUSION

Depending upon the common law legal principles embraced by this Court, this case should be either remanded for a new trial on *all* "material" facts issues or for entry of a judgment in favor of Trans Tech as a matter of law.

Respectfully submitted this 17th day of August, 1995.

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CERTIFICATE OF FILING AND SERVICE

The undersigned certifies that on August 17, 1995 he personally arranged for the following numbers of Appellant's reply brief to be mailed, postage pre-paid, to the following persons and addresses:

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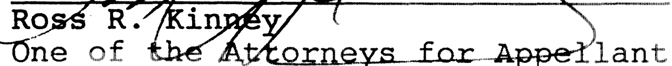

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