9-9-2011

Michelsen v. Broadway Ford Appellant's Reply Brief Dckt. 38111

IN THE SUPREME COURT OF THE STATE OF IDAHO

TANNER MICKELSEN,

Plaintiff-Appellant,

v.

BROADWAY FORD, INC.,

Defendant-Respondent,

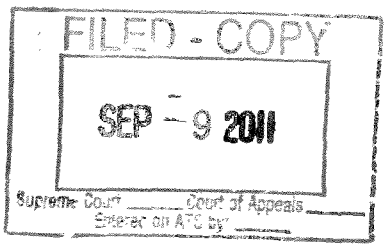
and

US BANK, NA; USB LEASING LT,

Defendants.

Case No. CV-2009-6348

Docket No. 38111-2010



APPELLANT'S REPLY BRIEF

Appeal from the District Court of the Seventh Judicial District
of the State of Idaho, in and for the County of Bonneville

Honorable Joel E. Tingey, District Judge

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I. ARGUMENT

A. THERE REMAIN GENUINE ISSUES OF MATERIAL FACT ON MICKELSEN'S FRAUD CLAIMS WHICH PREVENT BROADWAY FORD FROM PREVAILING ON SUMMARY JUDGMENT

1. *The truck was leased with the fraudulent representation that it came with a full bumper-to-bumper warranty.*

This action is one for fraud, not breach of warranty. Broadway Ford's assertion that it "never represented to Mickelsen that there was a 'dealer warranty' or any other warranty given by Broadway Ford with respect to the vehicle" is immaterial. *Respondent's Brief*, at 11. Broadway Ford may have this Court believe that since it did not personally warranty the truck and its component parts, it cannot be held liable. But Mickelsen has not claimed breach of a "dealership warranty," but rather that Broadway Ford made fraudulent misrepresentations concerning the Ford factory warranties. Broadway's argument is a "red herring" argument, intended to distract the listener from the real claim.

The facts are that Broadway leased the new truck with the representation of a full Ford factory warranty and now acknowledges that the lift kit and tires were not covered by the Ford bumper-to-bumper warranty.[1] *See* Ford Window Sticker in *Dep. of Tanner Mickelsen* at Ex. 1, p. 13, taken 4/8/2010, augmented 5/4/2011; *Dep. of Randy Cate* at 83, taken 6/18/2010, augmented 5/4/2011; *Dep. of Steve Riersen*, as attachment to *Aff. of Bron Rammell*, taken 7/6/2010, augmented 7/7/2011; and *Dep. of Mont Crnkovich* at 57,

[1] Broadway Ford attempts to dispute this fact in its Respondent's Brief, stating that "[s]uch a statement is unfounded, as evidenced by Mickelsen's failure to cite anywhere in the record to support such a statement." *Respondent's Brief* at 24. However, Mickelsen cites to three different parts of the record, including the depositions of Randy Cate, Steve Riersen and Mont Crnkovich, which all admit that the lift kit and tires were not covered under the warranty as Broadway Ford had originally represented.

taken 6/22/2010, augmented 5/4/2011. Broadway's representations that the truck came with a full Ford factory bumper-to-bumper warranty, covering all parts were made fraudulently, or at least as a mutual mistake.

a. Void vs. Voidable/Unwarrantable Repairs.

In its brief, Broadway Ford implies that Mickelsen has "quibble[d] over the exact name given the warranty," and that he is "attempting to 'split hairs' regarding the nomenclature relating to the warranty." *Respondent's Brief*, at 20-21. Yet simultaneously Broadway Ford quibbles significantly over the characterization of the warranty as being "void" as opposed to having repairs denied under warranty. *Id.* at 16, 17 & 25.

Regardless of whether the warranty was absolutely voided or whether repairs were denied under warranty (which they indisputably were), the representation that the truck was covered by a **Ford bumper-to-bumper** warranty was fraudulent. Mickelsen's statements regarding a "voided" or "void" warranty regard that portion of any warranty which may have covered the steering gear box and drag link, and not necessarily the entire warranty covering the entire truck. Tanner has freely acknowledged that he had to pursue several repairs on his truck under the Ford factory warranty prior to the culminating problems with the steering gear box and drag link. *R* at 163, ¶ 26. He hardly argues that the **entirety** of the Ford factory warranty was voided, but rather that the addition of certain non-factory parts voided the warranty as to the particular issues and repairs he needed. What is important behind this semantic dispute is the question: **was the truck fully covered, per Broadway Ford's representations, or was it not?**

It is significant that Ford Manufacturing's *Warranty and Policy Manual* notes that "[c]ustomers purchasing Ford vehicles that have been modified, altered, or final stage

manufactured by an entity other than Ford **must be informed** that the modified parts, as well as Ford parts that fail **because of the modification**, are not covered by either the Ford New Vehicle Limited Warranty or ESP." *R* at 367 (emphasis added). Broadway Ford, by failing to inform Mickelsen of the non-coverage of the non-factory parts, as well as all parts that fail because of the non-factory parts, not only committed fraud, but also violated Ford Company policy. More importantly, it made the warranty voidable, at least in part, as to subsequent repairs related to the non-factory parts added, namely, the drag link and steering gear box. This is significant because Broadway Ford attempts, in several portions of its brief, to assert that the truck was in fact covered fully under warranty, whether by Ford factory warranty or those warranties of the non-factory parts manufacturers. *Respondent's Brief*, at 6, 21, 23 & 25. The excerpt of the Ford *Warranty and Policy Manual* cited herein demonstrates that although the non-factory parts **may** have been covered under some separate individual part warranty, their interaction with the original Ford factory parts "voided" the Ford warranty not only as to the non-factory parts themselves, but all parts affected by the modification.

b. Mickelsen's failure to read and understand the factory warranty.

Broadway Ford points out, several times, that Mickelsen did not read or know all of the terms and conditions of his warranty aside from the fact that it contained a 3 year, 36,000 mile bumper-to bumper warranty and a 5 year, 60,000 mile power train warranty. *Respondent's Brief*, at 16, 17 & 20. Although Broadway Ford makes much noise concerning Mickelsen's failure to educate himself as to the terms and conditions of his truck's warranty, Broadway Ford cannot produce one term or condition which would preclude Mickelsen from having a repair done under the "full bumper-to-bumper"

warranty aside from the after-market parts exclusion in the *Warranty and Policy Manual*. *R* at 367. Very simply, the burden is on the dealer, Broadway Ford, to have informed Mickelsen, and other buyers and lessees, of the non-Ford parts and their respective **effects** on the Ford bumper-to-bumper warranty. *Id.*

2. *That Discovery Ford eventually repaired the same issue "under warranty" is neither dispositive nor informative for purposes of Mickelsen's fraud claims.*

Broadway Ford inserts a "red herring" into the mix by contending that the fact that Discovery Ford ultimately fixed the steering gear box and drag link, purportedly "under the Ford Manufacturer's warranty," means that the truck "always had a 'bumper-to-bumper' warranty" and that no fraud was committed. *Respondent's Brief*, at 6 & 18. This later repair is neither dispositive of the warranty issue, nor informative in determining whether a warranty existed as to Mickelsen and the truck when leased by him.

The heart of the matter is that Mickelsen's injury and cause of action for fraud arose when Broadway Ford fraudulently misrepresented to him that the truck came with a full Ford factory bumper-to-bumper warranty. The denial of warranty coverage, per Respondent's own characterization and that of Laura Riley, the warranty administrator at Discovery Ford, is discretionary, based on whether the after-market parts are the "root" of the problem. Id. at 27 and R at 377, Ll. 12-15. An ordinary purchaser, like Mickelsen, is in no position to challenge that discretion and the claims of warranty administrators and mechanics with technical knowledge. And yet, Mickelsen tried to understand the problem and even confirmed through Ford Manufacturing that Discovery Ford's decision was upheld by Ford. *Dep. Laura Riley* at Ex. 4, taken 7/14/2010, augmented 5/4/2011.

Throughout all of this, Broadway Ford did not take any action to ensure that its representation of a full bumper-to-bumper warranty was honored. *Id.*; R at 164-65, ¶¶ 38-48. There is no record that they ever called Ford Manufacturing to dispute Discovery Ford's denials. Instead, Broadway Ford washed its hands and placed the full burden on Mickelsen, expecting him to spend even more money to get what he had already presumably paid for.

The best that can be said for Discovery Ford is that they originally made a discretionary call to deny coverage to Mickelsen and then grant coverage to another person. The worst is that the same technician who determined that the exact same repair should be processed under the Ford warranty for the new owner was perpetrating a fraud on Ford Manufacturing. *R* at 391, Ll. 5-15. The fact that Discovery Ford acquired the truck at auction and then subsequently repaired it and sold it to a relative of a Discovery Ford employee (the same service manager who told Mickelsen the repairs were not reparable under Ford warranty) is a bit disturbing. *Dep. of Leo Gonzalez*, at 17-19, Ll. 19-25, 1-25, 1-19, taken 7/14/2010, augmented 5/4/2011; *R* at 164, ¶¶ 34-37 & 41-42.

Broadway Ford claims that Mickelsen has "sued the wrong party." *R* at 65 and *Respondent's Brief*, at 26. This insinuates that Mickelsen should have sued Discovery Ford instead of Broadway Ford. However, the U.C.C. does not place the burden of the determination of proper defendants and verifying which dealership is correct as to discretionary warranty coverage decision before exercising rescission under the U.C.C. Mickelsen, being a consumer, exercised his right to cancel under Idaho Code § 28-12-517. He afforded Broadway Ford the option, over the course of eight months, to take necessary steps to verify the warranty determination, repair the truck and so forth, yet

Broadway Ford did nothing to help him. *R* at 163 & 165. Mickelsen had the right to depend on the **discretionary** denial of warranty coverage as determined by the authorized personnel at Discovery Ford. If anything, Broadway Ford should have sued or counterclaimed against Discovery Ford, but has instead opted against such action.

Further, Broadway Ford's contention is misplaced. The **subsequent** fraud by Discovery Ford does not provide Mickelsen with a remedy for the fraud inducing the lease. If Broadway Ford has evidence to prove Discovery Ford fraudulently denied the warranty claim initially, then they have the burden of presenting evidence of this intervening act. They have presented none, relying only on their unfounded contention that, because Discovery Ford later repaired the problem via Ford "warranty," Discovery Ford defrauded Mickelsen. Discovery Ford's actions are frauds against Ford Manufacturing, not Mickelsen, since Mickelsen no longer leased the truck when Discovery Ford repaired the truck. Broadway Ford's argument would, therefore, potentially leave Mickelsen without **any** remedy.

3. *Causation between the addition of after-market parts and repairs being denied under warranty is, although not material, shown in the record.*

a. Causation is not material, as Mickelsen's claim is one for fraud, not warranty.

As discussed earlier, a claim for fraud does not require the causation deemed necessary by Broadway Ford. *Respondent's Brief*, at 30. To show that the damage to the steering gear box and drag link was caused by the lift or any other non-Ford part is unnecessary, as the injury to Mickelsen in the form of fraudulent misrepresentation was complete when Mickelsen leased the truck based on the fraudulent misrepresentations of

Broadway Ford and its employees. The fraud was consummated upon purchase. If the fraud had been discovered before repairs were even necessary, Mickelsen could have brought the cause of action against Broadway Ford immediately and/or opted to rescind or cancel, which he eventually did.

b. Mickelsen has shown, and the record reflects, causation.

Even though causation need not be shown, Mickelsen can, if needed, show causation between the non-Ford parts and the damage to the leased truck.

First, Mickelsen received a letter from Laura Riley, the warranty administrator at Discovery Ford, regarding the denial of warranty repairs on the truck. *Dep. of Laura Riley* at Ex. 1, taken 7/14/2010, augmented 5/4/2011. Laura Riley stated in her letter that Discovery Ford's "technician inspected the vehicle and determined that the drag link and steering gear was worn due to the lift that had been installed on the vehicle." *Id.* Broadway Ford claims that this letter is self-impeaching hearsay, arguing that the technician made the determination, not Laura Riley. *Respondent's Brief*, at 28. However, Laura Riley, as warranty administrator, has the "responsibility to determine the warrantability of repairs at [Discovery Ford]." *Dep. of Laura Riley* at Ex. 1, taken 7/14/2010, augmented 5/4/2011. In addition, in her deposition, Laura Riley states that it was her duty to make ultimate warranty determinations for Ford. Id. at 16., Ll. 3-11. If this were not enough, Randy McNair states that the custodian of all the documents in the warranty file for Discovery Ford is Laura Riley and that she would be the one to turn to for acquiring documents on Mickelsen's warranty file. Dep. of Randy McNair at 22, Ll. 11-25, at 23, Ll. 1-12. As such, Ms. Riley's determination as to causation and warrantability are final as to Ford warranties and must be given due credibility for

purposes of establishing causation. Laura Riley was simply acting as an agent of Discovery Ford, which, for purposes of warranty administration, served as an agent of Ford Manufacturing.

Most importantly, however, is that Ford Manufacturing itself stood behind the decision not to honor a warranty for the steering gear box and drag link repairs. In its CUDL Report, Ford Manufacturing makes it clear that "[a]fter reviewing the situation with [the] Service Manager, there [were] no warranties or other coverage available that would provide assistance." *Dep. Laura Riley* at Ex. 4, taken 7/14/2010, augmented 5/4/2011. Further, Ford went on to state that it "support[ed] the decision made by the dealership." *Id.* Ford Manufacturing itself stood by the determination of Laura Riley and Discovery Ford in denying warranty repairs, instead directing Mickelsen to contact Broadway Ford, which is exactly what he did. *Id.*

4. *Mickelsen's argument that damages accrued upon the fraud itself is not a new argument made on appeal.*

Broadway Ford attempts to bar one of Mickelsen's arguments on appeal by claiming that it is new and not before advanced. *Respondent's Brief*, at 31. The argument, as explained above, is that Mickelsen's damages did not accrue upon denial of his warranty repairs, but rather that damages accrued when Mickelsen leased the truck based on the fraudulent representations of Broadway Ford. This argument has been Mickelsen's theory since at least the time of filing of his *Amended Complaint*, which prays for rescission and damages of less than $25,000 on the first count of fraud. This argument is advanced in *Plaintiff's Memorandum in Opposition to Defendant's Motions for Summary Judgment.* Filed 7/12/2010, augmented 7/6/2011. Therein, Mickelsen

argues that his "consequent and proximate injury was in the fact that Defendants represented that he had a full bumper to bumper warranty, when he indisputably did not." *Id.* at 10. Mickelsen makes no mention of his damages accruing at a later date based on different theories or circumstances. Instead, he clearly advances the same argument he now advances—that he was injured upon Broadway Ford's misrepresentations, "regardless of Broadway Ford's recent argument that the lift kit did not cause the problem." *Id.*

In addition to this very specific argument, Mickelsen argues this theory elsewhere in the record, including in the *Hearing on Motion for Summary Judgment.* This is not the first time Mickelsen has advanced this argument.

Even had this been Mickelsen's first time arguing such a theory, the cases cited by Broadway Ford in support of its argument deal with cases which actually went to trial (or a full administrative hearing). Mickelsen's arguments have not been made in the context of a trial but rather in the context of a motion for summary judgment. To require Mickelsen to do more would essentially require a "paper trial."

5. *There is no duty to mitigate damages under the common law or the U.C.C. remedies of rescission and cancellation.*

Broadway Ford argues that Mickelsen is barred from incidental damages, which would suffice to prove injury, one of the elements of a fraud claim. *Respondent's Brief*, at 31. However, under both the U.C.C. and common law, there is no further duty to mitigate in addition to invoking the remedy of rescission. In essence, the rescission **is** the mitigation.

Under the U.C.C., Mickelsen's available remedies under Idaho Code § 28-12-523 include cancellation of the contract for lease, as contained in Idaho Code § 28-12-505. As Mickelsen exercised his U.C.C. cancellation remedy, no further duty to mitigate existed.[2]

The same applies for the common law remedy of rescission. The doctrine of mitigation "does not apply in actions to rescind a contract, since the duty to mitigate only arises out of a breach of a valid contract." 22 AM. JUR. 2D *Damages* § 352.

Broadway Ford's argument that no incidental damages may lie due to Mickelsen's failure to "mitigate" is incorrect and not supported by law.

B. THE MISREPRESENTATIONS MADE WERE MATERIAL UNDER BOTH THE UNIFORM COMMERCIAL CODE AND COMMON LAW

Broadway Ford argues that the misrepresentations made by Broadway Ford were not "material," thus defeating Mickelsen's fraud claim both under the UCC and the common law.

1. *Common law materiality.*

First, when analyzing common law materiality for fraud claims, Broadway states that Mickelsen incorrectly recites the basis for the court's decision on the issue of materiality. *Respondent's Brief*, at 20. After further review of the District Court's *Memorandum Decision*, Mickelsen strongly disagrees with this assertion, and he further counters that Broadway Ford itself incorrectly recites the basis for the court's decision.

[2] Broadway Ford states that Mickelsen declined repairs and ceased making lease payments as "a matter of principle." *Respondent's Brief*, at 31, fn.4 (quoting *Dep. Tanner Mickelsen*, at 42, Ll. 1-4, taken 7/14/2010, augmented 5/4/2011). However, in the same breath, Mickelsen states that he declined repairs given "the fact that [he] would not have leased a vehicle if it had not had [a] warranty." *Dep. Tanner Mickelsen*, at 42, Ll. 3-4, taken 7/14/2010, augmented 5/4/2011. The principle upon which Mickelsen declined repairs, therefore, was the principle of law providing for rescission and cancellation of a lease contract for nonconforming goods.

Broadway Ford posits that the District Court's decision was based on its finding that "all parts *were* covered by a warranty." *Respondent's Brief*, at 20. The District Court states:

> Plaintiff testified that Defendant Broadway Ford **informed him prior to purchasing the Vehicle that the lift-kit and tires were after-market parts**. The record also reflects that, although not covered by a factory warranty, **the lift-kit and tires were subject to a supplier's warranty**. **Given these facts**, it is unreasonable to believe that Defendant Broadway Ford knew or had reason to know that Plaintiff regarded a factory warranty on the after-market parts as critical or fundamental to the transaction. . . . That the lift kit and tires were not covered by a "factory" warranty is insignificant, particularly where **the after market parts did not adversely affect the factory warranty**.

R at 424 (emphasis added). As is clearly seen, the court based its opinion on these three findings, and the analysis in Mickelsen's *Appellate Brief* is on point and germane to the issue of materiality under the common law elements of fraud.

Second, Broadway Ford argues that it is unreasonable to believe Mickelsen attached such importance to the transaction, given that "1) all parts of the truck were in fact covered by a warranty, 2) the existence of the tires, rims and lift were fully disclosed to Mickelsen as non-Ford manufactured components, and 3) Mickelsen specifically sought to lease a truck with a 'lift.'" *Respondent's Brief*, at 21. Even though all parts of the truck **may** have been covered under individual, non-Ford warranties, the Ford *Warranty and Policy Manual* specifically states that "Ford parts that fail because of the modification[] are not covered by either the Ford New Vehicle Limited Warranty or ESP." *R* at 367 (emphasis added). Consequently, the conclusion that all parts of the truck were covered by a warranty is not only unsupported by the record, but is not a valid basis for finding a lack of materiality since even though a **non-Ford part itself** may be covered under warranty, **its interaction with Ford parts is not covered.**

More compellingly, however, is the fact that, notwithstanding that the tires, rims and lift were disclosed to Mickelsen as non-Ford parts and that Mickelsen specifically sought to lease a truck with a lift, he still asked for, and Broadway Ford gave him, assurances that the entire truck was under a full "factory" bumper-to-bumper warranty, which, by the admissions of three agents of Broadway Ford, was untrue. *R* at 162; *Dep. of Randy Cate* at 83, taken 6/18/2010, augmented 5/4/2011; *Dep. of Steve Riersen*, as attachment to *Aff. of Bron Rammell*, taken 7/6/2010, augmented 7/7/2011; and *Dep. of Mont Crnkovich* at 57, taken 6/22/2010, augmented 5/4/2011. The three grounds upon which the District Court found materiality lacking (which Mickelsen already individually addressed in his *Appellate Brief*) are the subject of genuine issues of material fact, and Broadway Ford was put on notice of how fundamental to the transaction the factory bumper-to-bumper warranty was to Mickelsen.

2. *Uniform Commercial Code materiality.*

In its brief, Broadway Ford attempts to transform the subjective test of materiality under the Uniform Commercial Code into an objective test by quoting *Jensen v. Seigel Mobile Homes Group*. 105 Idaho 189, 668 P.2d 65 (1983). It appears to Mickelsen that Broadway Ford has taken some liberties with the *Jensen* text in order to give it the meaning Broadway Ford desires. It interjects the word "however" (in the contrasting sense of the word) between two sentences where no contrast exists. *Respondent's Brief*, at 22. In doing so, Broadway Ford insinuates that, although the first portion of the quoted text from *Jensen* establishes a "subjective test" interpretation, the portion following the "however" advocates an objective test.

The word Broadway Ford has added, "however," replaces the phrase "As illustrated in *Jorgensen*," referring to *Jorgensen v. Pressnall*, 274 Or. 285, 545 P.2d 1382 (Or. 1976), an Oregon Supreme Court case dealing with the definition of "substantially impairs" in the U.C.C. context. *Jensen*, 105 Idaho at 193. In *Jorgensen*, the Court sets forth a two-step test for determining whether "materiality" is met for purposes of the U.C.C. and whether the nonconformities were sufficiently serious to justify revocation of acceptance. 274 Or. 289. The first step or inquiry is a "subjective question in the sense that it calls for a consideration of the needs and circumstances of the plaintiff who seeks to revoke; not the needs and circumstances of the average buyer," being a completely subjective test. *Id.* The second step or inquiry is:

> whether the nonconformity **in fact** substantially impairs the value of the goods **to the buyer, having in mind his particular needs**. This is an objective question in the sense that it calls for something more than plaintiff's assertion that the nonconformity impaired the value to him; it requires evidence from which it can be inferred that **plaintiff's needs were not met because of the nonconformity**.

Id. at 290 (emphasis added). The test provided in *Jorgensen*, and adopted in *Jensen*, has an objective second step only in that it calls for some evidence that the nonconformity substantially impairs the value of the goods **to the buyer**, having in mind his particular needs.

In the present case there is at the very least a genuine issue of material fact as to whether the nonconformity, or the admitted lack of a full bumper-to-bumper warranty, kept Mickelsen's needs from being met in the underlying lease transaction. The reality is that Mickelsen, in obtaining a lease for a new truck, instead of purchasing or getting a used truck, planned on having a hassle-free and fully warranted driving experience, and

made the importance of this feature very well-known through his asking multiple Broadway Ford employees multiple times whether the bumper-to-bumper warranty covered the entire truck and whether it would be covered at any Ford dealership. *R* at 162. At the very least, these facts and others in the record permit a strong inference that the nonconforming warranty substantially impaired the value of the truck to Mickelsen, resulting in a "material misrepresentation."

C. MICKELSEN'S ARGUMENT THAT REVOCATION IS AN ISSUE FOR A JURY DOES NOT ATTEMPT TO ARGUE SIMULTANEOUSLY THAT UCC REMEDIES CANNOT BE DEFEATED ON SUMMARY JUDGMENT.

Broadway Ford seems to misunderstand Mickelsen's argument that, in the event this Court reverses the District Court's decision and remands this matter to the District Court for further proceedings, the District Court will have no basis in law for trying Mickelsen's Uniform Commercial Code cancellation claims otherwise than through a jury. Mickelsen makes no claim or argument that summary judgment is precluded as to legal remedies. The District Court found that Mickelsen's "only remedy lies in equity, [so] the Court would be the trier of fact if the case proceeded to trial." *R* at 423. Mickelsen disagrees with this assertion and asks this Court to appropriately instruct the District Court that the U.C.C. remedy of cancellation lies in law and presents a question of fact for a jury.

D. APPELLANT DISPUTES RESPONDENT'S VERSION OF THE FACTS AND NATURE OF THE CASE

Appellant, Tanner Mickelsen ("Mickelsen") disputes several assertions by Respondent, Broadway Ford, particularly those that are misstatements of important facts

in the record. Only a few will be addressed herein, however, in an attempt to focus on those issues most pertinent to the case at hand.

Broadway Ford would have the Court believe that Mickelsen simply "abandoned the truck, stopped making lease payments and sued Broadway Ford for misrepresentation concerning the warranty" when the warranty repairs on his truck were denied. *Respondent's Brief*, at 5; *see Id.* at 12. In contrast, it is an undisputed fact that, once the repairs on the truck's drag link and steering gear box had been denied, Mickelsen continued to communicate with Broadway Ford and Ford Manufacturing, Inc., and continued to make lease payments for **eight (8) months**. *R.* at 165, ¶¶ 50, 53-54. Furthermore, at the end of eight months of attempting to informally resolve the issues and continuing to make lease payments, Mickelsen finally opted to rescind the contract with Broadway Ford. *Id.* at 55. He also communicated to U.S. Bank where they could retrieve the truck. *Id.* at 56. At no time did he "abandon" it.

Additionally, Broadway Ford claims that the truck "always had . . . a supplier's warranty covering all non-Ford parts, including the tires, custom wheels and lift kit." *Respondent's Brief*, at 6. There is no citation to the record to support this claim. Because Broadway Ford's assertion cannot be supported and because all reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving party, Mickelsen is entitled to the favorable inference that the non-Ford parts were not covered by a supplier's warranty. *See* Bonz v. Sudweeks, 119 Idaho 539, 541, 808 P.2d 876, 878 (1991).

Finally, in a footnote, Broadway Ford implies that counsel for Mickelsen, Bron Rammell, lied in the Affidavit of Bron Rammell. *Respondent's Brief*, at 8, fn.1. Had

Broadway Ford read the entirety of the paragraph to which it cites in Mr. Rammell's affidavit, it would have seen that Mr. Cheney "works in areas where there is no cell phone service or e-mail service and is gone for **days at a time**" (not months or years at a time). *R* at 74, ¶ 23. That Mr. Cheney provided an affidavit **ten days later**, then, should come as no surprise or as a basis for suspecting unethical and untrue statements from Mickelsen's counsel. Mickelsen points out this fact in the record to the Court only for purposes of showing his good faith and that of his counsel, contrary to the insinuations of Broadway Ford.

II. CONCLUSION

Appellant, Tanner Mickelsen, would request, based on the preceding briefing and record on appeal, that the Court find the District Court decision to be in error and reverse such.

DATED this 7th day of September, 2011.

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CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing *Appellant's Reply Brief* was served on the following named persons at the addresses shown an in the matter indicated.

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DATED this 7th day of September, 2011.

MAY, RAMMELL & THOMPSON, CHTD.