

IN THE UTAH COURT OF APPEALS

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Kirby Smith,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Plaintiff and Appellee,)	
)	Case No. 20060384-CA
v.)	
)	F I L E D
Mark Cazares,)	(July 6, 2007)
)	
Defendant and Appellant.)	2007 UT App 236

Fourth District, Provo Department, 030404279
The Honorable Anthony W. Schofield

Attorneys: Edward W. McBride Jr., Salt Lake City, for Appellant
Evan A. Schmutz, M. Reed Adams, and Nancee Tegeder,
Provo, for Appellee

Before Judges Bench, Greenwood, and Davis.

GREENWOOD, Associate Presiding Judge:

Defendant Mark Cazares appeals the district court's judgment in favor of Plaintiff Kirby Smith in a breach of contract dispute. We affirm.

Cazares claims the contracts at issue for purchase of two cars and a boat were invalid because Smith failed to comply with Utah Code sections 41-1a-702 and 41-1a-902. See Utah Code Ann. §§ 41-1a-702 (1993), 41-1a-902 (1992). Cazares also contends that the default provisions in the contracts were not valid and enforceable, notwithstanding the fact that the trial court did not apply the default provisions but awarded damages under Utah Code sections 70A-2-709 and 70A-2-710. See id. §§ 70A-2-709, -710 (2001). We review statutory interpretations as a matter of law, for correctness, "afford[ing] no deference to the determinations of lower courts." State v. Graham, 2006 UT 43, ¶16, 143 P.3d 268.

Cazares asserts that Smith's failure to comply with a statute requiring an odometer disclosure statement, see Utah Code Ann. § 41-1a-902, and a statute requiring disclosure of liens or encumbrances, see id. § 41-1a-702, invalidated the parties'

contracts. We do not address this claim because Cazares did not preserve it. Rule 24 of the Utah Rules of Appellate Procedure requires Cazares's brief to contain "citation to the record showing that the issue was preserved in the trial court." Utah R. App. P. 24(a)(5)(A). Cazares does not provide such citation, nor does he provide "a statement of grounds for seeking review of an issue not preserved in the trial court." Utah R. App. P. 24(a)(5)(B).

Cazares first mentioned the two statutory sections during closing argument. The trial court addressed Cazares's belated effort as follows:

I don't believe either of those have been pled properly. They both would be, either one would be an affirmative defense which has not been pled. And when all is said and done the law obligates a person who is wishing to raise affirmative defenses to plead them, meaning to put everybody on notice of them. The first time that they are then disclosed in the court's file is here today.

Cazares does not claim the trial court erred. Therefore, because his claim was not properly pleaded with the trial court, and he fails to argue plain error or exceptional circumstances, Cazares has not preserved this claim for appeal, and we decline to address it. See State v. Pinder, 2005 UT 15, ¶45, 114 P.3d 551 ("Under ordinary circumstances, we will not consider an issue brought for the first time on appeal unless the trial court committed plain error or exceptional circumstances exist." (quotations omitted)).

Cazares also claims that the default provisions in the contracts are unenforceable because they are "penalty clause[s]" and do "not describe liquidated damages." At trial, Smith did not seek to enforce the default provisions but sought and received actual damages. Cazares appeals only the applicability of the default provisions in the contracts, and not the statute under which the trial court awarded damages. Because Cazares does not address the applicability of the statute, or claim the trial court's ruling was in error, we do not address it here.

The trial court awarded Smith attorney fees under the terms of the contracts, which state that in the event of a material breach, the prevailing party shall be awarded attorney fees. "The general rule is that when a party who received attorney fees below prevails on appeal, the party is also entitled to fees reasonably incurred on appeal." Utah Dept. of Soc. Servs. v.

Adams, 806 P.2d 1193, 1197 (Utah Ct. App. 1991). Smith is therefore entitled to his reasonable attorney fees incurred on appeal.

We affirm and remand for a determination of attorney fees incurred on appeal.

Pamela T. Greenwood,
Associate Presiding Judge

WE CONCUR:

Russell W. Bench,
Presiding Judge

James Z. Davis, Judge