The summaries of the Colorado Court of Appeals published opinions constitute no part of the opinion of the division but have been prepared by the division for the convenience of the reader. The summaries may not be cited or relied upon as they are not the official language of the division. Any discrepancy between the language in the summary and in the opinion should be resolved in favor of the language in the opinion.

SUMMARY
June 22, 2023

2023COA57

No. 22CA0916, *Hagerty v. Luxury Asset* — Uniform Commercial Code — General Obligations and Construction of Contracts — Warranty of Title — Goods Sold "As Is" and Without Express or Implied Warranties

A division of the court of appeals considers whether the warranty of title imposed by section 4-2-312, C.R.S. 2022, may be excluded by contractual language announcing that a good is sold "as is" and without any express or implied warranties. Addressing this novel issue in Colorado, the division concludes that such language is not sufficient to exclude the warranty of title. The warranty may be excluded only by specific language or by the circumstances described in section 4-2-312(2). The division also holds that the district court erred by granting summary judgment to the buyer on the question whether the circumstances gave "the

buyer reason to know that the person selling [did] not claim title in himself or that he [was] purporting to sell only such right or title as he or a third person may have." § 4-2-312(2). The division concludes that a genuine dispute of material fact on this question precludes summary judgment. Therefore, the division affirms the district court's ruling that the warranty of title was not excluded by specific language, but the division reverses the court's ruling as to whether the warranty was excluded by the circumstances surrounding the sale at issue.

COLORADO COURT OF APPEALS **2023COA57**

Court of Appeals No. 22CA0916
City and County of Denver District Court No. 20CV33842
Honorable Darryl F. Shockley, Judge

Hagerty Insurance Agency, LLC, as subrogee of Robert W.J. Mortenson; and Robert W. J. Mortenson,

Plaintiffs-Appellees,

v.

Luxury Asset Capital, LLC, a foreign limited liability company,

Defendant-Appellant.

JUDGMENT AFFIRMED IN PART AND REVERSED IN PART,
AND CASE REMANDED WITH DIRECTIONS

Division V
Opinion by JUDGE NAVARRO
Brown and Yun, JJ., concur

Announced June 22, 2023

Dworkin, Chambers, Williams, York, Benson & Evans, P.C., Steven York, Sean O'Brien, Denver, Colorado, for Plaintiffs-Appellees

Campbell, Killin, Brittan & Ray, LLC, Bruce Rohde, Margaret Pfluegar, Denver, Colorado, for Defendant-Appellant

¶ 1 Defendant, Luxury Asset Capital, LLC (Luxury Asset), appeals the judgment entered in favor of plaintiffs, Hagerty Insurance Agency, LLC (Hagerty) and Robert W.J. Mortenson, on Mortenson's breach of contract claim and Hagerty's equitable subrogation claim. We affirm in part, reverse in part, and remand for further proceedings. In doing so, we hold, as a matter of first impression in Colorado, that contractual language announcing that a good is sold "as is" and without any express or implied warranties is not sufficient to exclude the warranty of title imposed by section 4-2-312, C.R.S. 2022.

I. Procedural History and Summary of Holding

¶ 2 In January 2019, Luxury Asset, a pawnbroker doing business in Colorado, provided a loan to Kathryn Lee Thompson secured by a 2015 Rolls Royce. When Thompson pawned the car, Luxury Asset took possession of it but agreed that she could reclaim it by paying a certain sum in a timely fashion. After Thompson failed to make the required payments, Luxury Asset advertised the car for sale online.

¶ 3 Mortenson responded to the advertisement and negotiated purchase of the car with Richard Shults, Luxury Asset's Chief

Underwriting Officer. After agreeing on a purchase price of $127,000, Mortenson paid to transport the car to Nevada, where he resided. Shults went to Nevada to complete the transaction, including transferring title of the car to Mortenson.

¶ 4 In February 2020, the Nevada Department of Motor Vehicles (DMV) informed Mortenson that the vehicle identification number (VIN) on the car was forged and a search using the authentic VIN from the car's on-board computer revealed that the car was stolen. The car was impounded and never returned to Mortenson. The car had been insured under a policy issued by Hagerty, which paid Mortenson the policy limit of $50,000.

¶ 5 Mortenson sued Luxury Asset for breach of contract (specifically, for breach of the warranty of good title), promissory estoppel, negligence, negligent misrepresentation, and negligence per se. Hagerty brought a claim for equitable subrogation against Luxury Asset.

¶ 6 After discovery, the parties filed motions for partial summary judgment. The district court granted Mortenson's motion and denied Luxury Asset's motion. The court decided, as matters of law, that (1) Luxury Asset had not disclaimed the statutorily

imposed warranty of title by specific language, and (2) the warranty had not been disclaimed by the circumstances of the transaction. Therefore, the court granted summary judgment for Mortenson on his breach of contract claim and for Hagerty on its equitable subrogation claim. The court denied Luxury Asset's motion for summary judgment on Mortenson's remaining claims, and those claims have since been dismissed pursuant to the parties' stipulation.

¶ 7 Luxury Asset appeals the grant of summary judgment in favor of Mortenson and Hagerty. We conclude that, although the district court was correct that the warranty of title was not excluded by specific language, disputed issues of material fact remain as to whether the warranty was excluded by the circumstances. Hence, we affirm the summary judgment in part and reverse it in part.

II. Exclusion of Warranty of Title by Specific Language

¶ 8 Luxury Asset first argues that the grant of summary judgment in favor of plaintiffs was improper because specific language in the bill of sale between Luxury Asset and Mortenson excluded the warranty of title imposed by law. Like the district court, we disagree.

A. Standard of Review and Preservation

¶ 9 Summary judgment is appropriate if the pleadings and supporting documents establish that no genuine issue of material fact exists and judgment should be entered as a matter of law. *Doe v. Wellbridge Club Mgmt. LLC*, 2022 COA 137, ¶ 12; C.R.C.P. 56(c). We review de novo a summary judgment ruling. *Doe*, ¶ 12. We also review de novo any questions of statutory interpretation. *Coyle v. State*, 2021 COA 54, ¶ 10.

B. Relevant Facts

¶ 10 The bill of sale for the car[1] contains the following language:

> The sale and transfer of this motor vehicle is made on "AS IS" basis, without any express or implied warranties, with no recourse to the Seller. The Buyer has been given the opportunity to inspect, or has inspected, the vehicle described above and agrees to purchase it in its existing condition.

When granting plaintiffs' motion for partial summary judgment, the district court decided that this "as is" language applied only to the

[1] The bill of sale that all parties agree was part of the contract between Luxury Asset and Mortenson states that it is executed "by and between" *Thompson* and Mortenson. It does not mention Luxury Asset.

car's physical condition and, therefore, did not disclaim any warranty of title.

C. Foundational Law

¶ 11 Colorado has adopted the Uniform Commercial Code (UCC), *see* § 4-1-101(a), C.R.S. 2022, and section 4-2-312 of the UCC governs the warranty of title for the sale of goods. As pertinent here, section 4-2-312 provides as follows:

> (1) Subject to subsection (2) of this section, there is in a contract for sale a warranty by the seller that:
>
> (a) The title conveyed shall be good, and its transfer rightful; and
>
> (b) The goods shall be delivered free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge.
>
> (2) A warranty under subsection (1) of this section will be excluded or modified only by specific language or by circumstances which give the buyer reason to know that the person selling does not claim title in himself or that he is purporting to sell only such right or title as he or a third person may have.

Because this section is based on a uniform act, we may consider, when construing this section, authorities from other jurisdictions that have also adopted the act. *See* § 4-1-103(a)(3), C.R.S. 2022

(explaining that the UCC must be construed to promote its underlying purposes, one of which is "[t]o make uniform the law among the various jurisdictions"); *West v. Roberts*, 143 P.3d 1037, 1041-42 (Colo. 2006) (construing the UCC and recognizing that "[w]hen a Colorado statute is patterned after a model code, this court may draw upon outside authority in interpreting the provision").

¶ 12 Article 2 of the UCC is "generally applicable to problems arising from transactions involving transfer of automobile ownership." *Hudson v. Gains*, 403 S.E.2d 852, 853 (Ga. Ct. App. 1991) (citation omitted). In particular, the UCC section on which section 4-2-312 is modeled has been interpreted "to extend liability to a seller who sells a stolen car." *Marvin v. Connelly*, 252 S.E.2d 562, 563 (S.C. 1979). Moreover, the seller need not be a merchant, and the seller is not saved by their ignorance of the defect in the title. *Id.*; *see Colton v. Decker*, 540 N.W.2d 172, 176 (S.D. 1995) ("Once breach of good title is established, good faith is not a defense, nor is a lack of knowledge of the defect."). In other words, even though the seller may have acted innocently in the sale of a car that turned out to be stolen, the seller may be liable to the

buyer for breach of warranty of title. *See Crook Motor Co. v. Goolsby*, 703 F. Supp. 511, 520 (N.D. Miss. 1988).

D. Application

¶ 13 Luxury Asset argues that the "as is" language in the bill of sale excluded the warranty of title imposed by statute. Luxury Asset asserts that "'as is' has been the 'go to' language for sellers when they want to make it clear to the buyer that 'what you see is what you get' for generations." Whether the warranty of title imposed by section 4-2-312 can be excluded by "as is" language in a contract appears to be a matter of first impression in Colorado. We conclude that such "as is" language is not sufficient to exclude the warranty of title.

¶ 14 According to comment 6 to section 4-2-312, which the UCC drafters authored and our legislature adopted, the warranty of title "is not designated as an 'implied' warranty, and hence is not subject to Section 2-316(3) [of the UCC]. Disclaimer of the warranty of title is governed instead by subsection (2), which requires either specific language or the described circumstances." § 4-2-312 cmt. 6. Comments to a uniform law that are adopted by our legislature are pertinent to construing the statute modeled on the uniform law.

See West, 143 P.3d at 1041 ("Comments to a statute are relevant in its interpretation."); *In re Estate of Runyon*, 2014 COA 181, ¶ 12 (considering a uniform act's comment that was adopted by the legislature); *see also Copper Mountain, Inc. v. Poma of Am., Inc.*, 890 P.2d 100, 106 (Colo. 1995) ("Without more, we accept the intent of the drafters of the uniform law as that of our own General Assembly by its verbatim enactment of the uniform act provision.").

¶ 15 Our legislature incorporated section 2-316(3) of the UCC into section 4-2-316(3), C.R.S. 2022. Section 4-2-316(3)(a) provides that, unless the circumstances indicate otherwise, "all implied warranties are excluded by expressions like 'as is' . . . or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty."

¶ 16 Considering these various provisions together, it is clear that "as is" language is not sufficient to exclude the warranty of title imposed by section 4-2-312(1). The purpose of noting in comment 6 to section 4-2-312 that this warranty is not an implied warranty is to emphasize that language commonly used to exclude an implied warranty — such as "as is" — does not satisfy the

"specific language" criterion of section 4-2-312(2). *See Kel-Keef Enters., Inc. v. Quality Components Corp.*, 738 N.E.2d 524, 537 (Ill. App. Ct. 2000) ("It appears from committee comment six that the 2-312 warranty of title was not designated as an implied warranty to prevent the 2-316 disclaimer provisions from applying to it in place of the internal disclaimer provisions provided by 2-312(2)."); 2A Gregory J. Ramos, *Colorado Practice Series, Methods of Practice* § 81:11, Westlaw (7th ed. database updated Aug. 2022) (explaining that the warranties of title and against infringement are not considered implied warranties and "[t]he most important effect of this status is that these warranties may not be disclaimed by the general language used to disclaim implied warranties").

¶ 17 Not surprisingly, then, other jurisdictions have agreed that declaring that a good is sold "as is" is not sufficient to exclude the warranty of title imposed by law. *See, e.g.*, *Rochester Equip. & Maint. v. Roxbury Mountain Serv., Inc.*, 891 N.Y.S.2d 781, 782 (App. Div. 2009) (upholding judgment in favor of the buyer, in part because the "as is" provision of the contract "related to the condition and operability of the vehicle rather than its title" and because "the contract otherwise failed to include specific language

disclaiming the statutory warranty of title required by UCC 2-312(2)"). Like in *Rochester*, the bill of sale in this case suggests that the disclaimer applies only to the physical condition of the car. The bill of sale refers to the buyer's "opportunity to inspect" and notes that the buyer "agrees to purchase [the vehicle] in its existing condition." Because this language implicates the car's physical condition, not its title, it is not specific enough to waive the warranty of title. *See id.*

¶ 18 On a related note, we reject Luxury Asset's contention that the disclaimer of "any express or implied warranties" in the bill of sale was adequate to exclude the warranty of title imposed by statute. We agree with other jurisdictions that "very precise and unambiguous language must be used to exclude a warranty so basic to the sale of goods as is title." *Jones v. Linebaugh*, 191 N.W.2d 142, 144-45 (Mich. Ct. App. 1971); *see Lawson v. Turner*, 404 So. 2d 424, 425-26 (Fla. Dist. Ct. App. 1981) (same); *Kel-Keef Enters.*, 738 N.E.2d at 535-36 (same); *Rockdale Cable T.V. Co. v. Spadora*, 423 N.E.2d 555, 558 (Ill. App. Ct. 1981) (same). To hold that the general disclaimer of warranties in the bill of sale here was

sufficient to exclude the warranty of title would be to negate the "specific language" condition of section 4-2-312(2).

¶ 19 Rather than using such a general disclaimer, a party may exclude the warranty of title by specific language through precise words that operate as "a positive warning or exclusion in regard to the status of title" and that would "catch the eye of an unsophisticated buyer." *Sunseri v. RKO-Stanley Warner Theaters, Inc.*, 374 A.2d 1342, 1344-45 (Pa. Super. Ct. 1977). Ideally, the language should express what the buyer is or is not receiving rather than rely on "negative terminology[] expressing what the seller will not be liable for." *Id.*; *see also Kel-Keef Enters.*, 738 N.E.2d at 536 (concluding that, if the language in a purported disclaimer "expresses how the seller's liability will be limited rather than what title (or lack thereof) the seller purports to transfer, the purported disclaimer is ineffective"). Some examples of sufficiently specific disclaimers recognized in the case law include "Seller makes no warranty as to the title to the goods, and buyer assumes all risks of nonownership of the goods by seller" and "The seller does not warrant that he has any right to convey the title to the goods." *Sunseri*, 374 A.2d at 1345 (citations omitted).

¶ 20 Because the bill of sale in this case did not mention the car's title, much less address whether Luxury Asset did or did not warrant good title, the bill of sale did not exclude the warranty of title under section 4-2-312(2). Furthermore, because the question whether the contract sets forth the specific language contemplated by section 4-2-312(2) is a question of law that we review de novo, we decline Luxury Asset's invitation to remand this question for the fact finder's resolution. *See Lawson*, 404 So. 2d at 426; *Jones*, 191 N.W.2d at 144; *Rochester Equip. & Maint.*, 891 N.Y.S.2d at 782; *Sunseri*, 374 A.2d at 1345; *see also Bledsoe Land Co. LLLP v. Forest Oil Corp.*, 277 P.3d 838, 842 (Colo. App. 2011) ("The interpretation of a contract is a question of law that we review de novo.").

¶ 21 Accordingly, the district court correctly granted summary judgment to Mortenson and Hagerty on the question whether the warranty of title was excluded by specific language.

III. Exclusion of Warranty of Title by the Circumstances

¶ 22 Under section 4-2-312(2), the warranty of title may also be excluded "by circumstances which give the buyer reason to know that the person selling does not claim title in himself or that he is purporting to sell only such right or title as he or a third person

may have." Luxury Asset contends that the district court erred by granting plaintiffs' motion for partial summary judgment on this question because genuine issues of material fact exist as to whether such circumstances were present. We agree that the grant of summary judgment was improper.

¶ 23 Comment 5 to section 4-2-312 elaborates on the circumstances contemplated by subsection (2). According to this comment, subsection (2) of section 4-2-312 recognizes that sales by "sheriffs, executors, certain foreclosing lienors and persons similarly situated may be so out of the ordinary commercial course that their peculiar character is immediately apparent to the buyer and therefore no personal obligation is imposed upon the seller who is purporting to sell only an unknown or limited right." § 4-2-312 cmt. 5. But comment 5 also says that "[f]oreclosure sales under Article 9 [of the UCC] are another matter" and that "unless properly excluded under subsection (2) or under the special provisions for exclusion in Section 9-610 [of the UCC], a disposition under Section 9-610 of collateral consisting of goods includes the warranties imposed by subsection (1)." *Id.*

¶ 24 In their summary judgment motion, plaintiffs acknowledged that Luxury Asset was a "non-bank lender" that "exercised its rights as a secured party to sell the Rolls Royce." Mortenson conceded in his deposition that he knew Luxury Asset was a pawnbroker, though he said he considered it "not your traditional pawn broker." Mortenson also agreed that he did not view working with Luxury Asset to be "much like buying a vehicle from an automobile dealership" because Luxury Asset personnel informed him that it was not an automobile dealer. In light of comment 5 to section 4-2-312, we conclude that, although these facts do not establish as a matter of law that Mortenson had reason to know that the sale of the Rolls Royce to him for $127,000 was so out of the ordinary commercial course that its peculiar character should have been immediately apparent to him, these facts (in combination with those we discuss next) could support a reasonable factual finding that the sale was of such a peculiar character. *See id.*

¶ 25 Immediately before the sale to Mortenson, the car was titled in South Carolina, and the South Carolina certificate of title showed Thompson as the owner. No paperwork showed that the title was endorsed or transferred to Luxury Asset. That is, before the sale,

Mortenson never saw a title listing Luxury Asset as the owner. Although Mortenson testified that he did not see the South Carolina title until after the title was transferred to his name via a new Nevada title, he also admitted that he had assumed the South Carolina title listed Thompson as the owner. Mortenson explained that Thompson's name on the title did not "raise any big red flags" because he believed that Luxury Asset's "loan documents to Ms. Thompson would've included some legal language that would've transferred the title over to them immediately upon the exercise of the loan. I don't understand it, but that was my understanding." Moreover, Mortenson agreed that he expected the title to pass directly from Thompson, who was named on the South Carolina certificate of title, to him, and that he would then obtain a Nevada certificate.[2]

¶ 26 Furthermore, as previously noted, the bill of sale executed by Mortenson as the buyer of the car identifies Thompson as the seller,

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[2] In our view, Mortenson's deposition testimony is somewhat confusing as to what he knew about the South Carolina title and when he knew it. We have done our best to understand his testimony. In any event, the ambiguity surrounding this evidence further counsels against granting summary judgment.

not Luxury Asset. The record shows that Mortenson executed this document on November 24, 2019, and that he did not execute the wire transfer to pay for the car until the next day. So the record indicates that he was aware that Thompson was named as the seller on the bill of sale before he completed the purchase. Other record evidence suggests — and the parties acknowledged at oral argument in this appeal — that the parties considered Luxury Asset to be "the person selling" the car and that its representative actually signed the bill of sale. § 4-2-312(2). We conclude that the fact that the bill of sale names Thompson as the seller raises a factual question as to whether Mortenson had reason to know that Luxury Asset "d[id] not claim title in" itself or that it was "purporting to sell only such right or title as [it] or a third person may have." *Id.*

¶ 27 On the other hand, some evidence in the summary judgment record could support a finding that Mortenson did not have reason to know that Luxury Asset did not warrant good title to the car. As mentioned, Mortenson testified he did not see the South Carolina title with Thompson's name until after title had passed to him because Luxury Asset's agent, Shults, handed the South Carolina title directly to the recorder at the Nevada DMV.

¶ 28 In addition, no evidence showed that anyone from Luxury Asset expressly told Mortenson that the car was not titled in its name. Instead, and according to Mortenson, Shults said the car had "a clean, clear Carfax," which Mortenson interpreted to mean that the car had "a clean, clear title." And the Carfax report in the record states that none of the following "major title problems" was reported by a state DMV: (1) "salvage, junk, rebuilt, fire, flood, hail, [or] lemon"; and (2) "not actual mileage, exceeds mechanical limits." But the Carfax report makes no additional guarantees about the title of the vehicle.[3]

¶ 29 Finally, Mortenson notes that Shults said "[i]f anything goes wrong, Luxury Asset will make it right," and that Mortenson believed this statement applied to any problems with the title. A careful reading of Mortenson's deposition, however, reveals that his conversation with Shults about Luxury Asset "mak[ing] things right" pertained to any liens on the car. Thus, the record does not

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[3] In his deposition, Mortenson testified that the Carfax report "means that [the car is] not a rebuilt wreck. It has good title. It has not been repaired and had significant damage. It's not a flood car or any of those types of things."

make clear whether Shults was addressing potential problems with the title.

¶ 30 Given the ambiguity surrounding what Mortenson was told and what he knew about the car's title, and given that a reasonable fact finder could determine that this sale was out of the ordinary commercial course, we conclude that disputed issues of material fact remain that preclude the grant of summary judgment. On this point, we align with other jurisdictions recognizing that whether the circumstances gave the buyer reason to know that the seller did not claim title in itself (or that the seller purported to sell only such title as the seller or a third party may have) is typically a question of fact to be decided by the trier of fact. *See Jones*, 191 N.W.2d at 145 ("Under the record herein, and absent the claimed exclusion in the bill of sale, the question of whether the buyer had 'reason to know' that the seller did not have title is one of fact which cannot be resolved on summary judgment."); *see also Maroone Chevrolet, Inc. v. Nordstrom*, 587 So. 2d 514, 517 (Fla. Dist. Ct. App. 1991); *Spoon v. Herndon*, 307 S.E.2d 693, 696 (Ga. Ct. App. 1983); *Kel-Keef Enters.*, 738 N.E.2d at 536; *Rockdale Cable T.V. Co.*, 423 N.E.2d at 558.

¶ 31 For all these reasons, the district court erred by granting summary judgment to Mortenson (and to Hagerty as to its subrogation claim premised on Mortenson's breach of contract claim) on the question whether the circumstances gave Mortenson reason to know that Luxury Asset did not claim title in itself or that Luxury Asset purported to sell only such title as it or a third party may have. We reverse that portion of the judgment and remand for further proceedings.

IV. Conclusion

¶ 32 The judgment is affirmed in part and reversed in part, and the case is remanded for further proceedings.

JUDGE BROWN and JUDGE YUN concur.