

1976

# John Christopher and Ruth Christopher v. Larson Ford Sales, Inc., Ford Marketing Corporation, and Murray First Thrift and Loan Compnay; Larson Ford Sales, Inc.; condor Coach Corporation : Brief of Respondent

Utah Supreme Court

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BRIEF

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JOHN CHRISTOPHER and RUTH  
CHRISTOPHER,  
Plaintiffs-Respondents,

vs.

LARSON FORD SALES, INC., FORD  
MARKETING CORPORATION, and  
MURRAY FIRST THRIFT AND LOAN  
COMPANY,

Defendants-Appellants,

vs.

LARSON FORD SALES, INC.,

Defendant-Third Party  
Plaintiff-Appellant,

vs.

CONDOR COACH CORPORATION,

Third Party Defendant.

BRIGHAM YOUNG UNIVERSITY  
J. Reuben Clark School

Case No. 14063

FILED

APR 12 1976

BRIEF OF PLAINTIFF-RESPONDENTS

Clerk, Supreme Court, Utah

Appeal from a Dismissal of Third Party Claim and  
a Judgment on the Verdict of the Third Judicial  
District Court for Salt Lake County, State of Utah  
THE HONORABLE BRYANT H. CROFT, Presiding

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

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JOHN CHRISTOPHER and RUTH  
CHRISTOPHER,

Plaintiffs-Respondents,

vs.

LARSON FORD SALES, INC., FORD  
MARKETING CORPORATION, and  
MURRAY FIRST THRIFT AND LOAN  
COMPANY,

Defendants-Appellants,

vs.

Case No. 14063

LARSON FORD SALES, INC.,

Defendant-Third Party  
Plaintiff-Appellant,

vs.

CONDOR COACH CORPORATION,

Third Party Defendant.

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BRIEF OF PLAINTIFF-RESPONDENTS

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STATEMENT OF THE KIND OF CASE

This is an action seeking rescission of a contract of sale of a Condor Motor Home. Plaintiffs are buyers, defendant-appellant Larson Ford Sales, Inc. is the retail seller, Ford Marketing Corporation is the manufacturer, and Condor Coach Corporation is the assembler and manufacturer.

### DISPOSITION IN LOWER COURT

This case was tried to a jury, verdict and judgment for the plaintiff. Defendant Larson Ford Sales, Inc. appeals.

### RELIEF SOUGHT ON APPEAL

Defendant Larson Ford Sales, Inc. seeks the reversal of the trial court judgment and entry of judgment of no cause of action, or, in the alternative, for a new trial.

### STATEMENT OF FACTS

Plaintiff cannot accept as a complete and accurate statement of the material facts those set forth in defendant-appellant's brief. The facts he believes are supported by the evidence favorable to the verdict of the jury are as follows:

On or about the 9th of May, 1972, plaintiff and his son, Robin Christopher, visited the Larson Ford Sales, Inc. lot in Murray, Utah and became interested in purchasing a Condor Coach which was exhibited for sale by Larson.

Their discussions were with Jon P. Larson, who signs himself as Vice President of Larson Ford Sales, Inc. Christopher advised Larson that the vehicle which was to be purchased was for the use of his son Robin in taking children from the American Fork Training School on a trip to sell merchandise. It would be necessary that the vehicle pull an Econovan which would be required after the boys and Robin arrived at the cities where sales were to be solicited (R. 397).

Larson represented at that time that the Condor Motor Home that they were looking at had sufficient power to carry the ten boys and pull the Econovan and that a person with such a Condor pulled a big horse trailer with four horses in it with no problem (R. 397).

After preliminary examination, the Christophers came to the conclusion that the vehicle was the kind that they needed, and on the 13th of May a downpayment of \$1,500.00 was given on the motor home. Again discussion occurred about the ability of the Condor to pull the car and haul the boys and Larson assured them that that would be no problem (R. 400). Financing was arranged through Larson Ford for the purchase price of the vehicle, money to be advanced by Murray First Thrift and Loan (R. 24, Exhibit 8-P).

The vehicle was not in operable condition at the time of the downpayment and was not operated until the final payment on the purchase price of \$975.00 (R. 403). On the 19th of May the plaintiff and his son Robin hooked the Econovan on to the Condor and drove it up Parleys Canyon for a test drive (R. 406). They noticed that the vehicle slowed down excessively and that they came to the conclusion that it was not sufficiently powered to handle the Econovan and carry the ten boys that it was being purchased to carry. Plaintiff returned to Larson Ford on the 20th of May. He discussed with Jon Larson the fact that the machine seemed to be gutless and that there was a howling in the

rear end and the brakes were defective. In response to this information, Jon Larson said to the plaintiff, "The brakes we can fix it right now. The howl because it is heavy duty commercial transmission, the transmission and the motor is all heavy duty commercial and they will all do it." They argued some, and then Jon Larson said, "Goddam it, man, give us a chance. It set there all winter. Let me take it in. We will tune it, then take it to the west coast or wherever you are going with it, and then if you have got a complaint, bring it back." (R. 409). At that time all but the final payment of \$975.00 had been paid by Christopher on the purchase price of the motor home. Robin's version of the conversation is at page 514 of the record.

Neither of the statements by Robin Christopher or John Christopher are contradicted by any testimony. The testimony is corroborated by Jon Larson (page 734 of the record). He mentions the discussion of the howl in the transmission and that he told the Christophers this was normal and that thwn they returned to the dealership any problems would be taken care of.

The Condor was then taken and driven by Robin Christopher to California and through the Northwest. During this trip the defects appeared in the vehicle which rendered it unfit for the Christophers' purpose.

There were no warranty documents available for delivery to Christophers at the completion of the sale. Jon Larson wrote out on Larson Ford Sales stationery Exhibit 3-P. The language of

3-P that is important is "this unit is fully covered under Ford service warranty at time of delivery." And, "we will guarantee his service policy as valid and in effect", and is signed Jon P. Larson, V. Pres.

Larsons were kept informed of the problems as they arose on the Northwest trip.

Immediately upon getting the vehicle back to Salt Lake City, Christopher requested that the sale be rescinded. This remedy was refused by Larson Ford.

Christopher was unable to get the vehicle back to Salt Lake without having it serviced at Reno, Nevada by a Ford agency. Exhibit 6-P reveals the rear end was repaired, the starter motor and relay replaced, and Christopher advised concerning the defective condition of the vehicle (R. 424).

Plaintiff produced an expert witness, Haslam, who had 26 years of mechanic experience, worked on buses for Lewis Bros. Stages, was employed as a mechanic working on buses, trucks and cars for Granite School District where he was still employed.

He testified that he discovered the following defects in the Condor: (1) The starter solenoid was mounted on the chassis so close to the exhaust manifold that it got hot, which caused it to malfunction (R. 609). (2) The generator at the fuel pump was crossthreaded and sucked air instead of fuel (R. 611). (3) The fuel line to the generator was put in so that it only picked up when the tank was above half full and would operate only out of the top half of the tank (R. 613). (4) The engine was mounted



on the chassis in a manner that restricted the air supply, and it was Haslam's opinion that the air supply was not adequate to permit the engine to operate properly (R. 621). (5) There was a howl in the rear end in the differential (R. 623) and the howl sounded like a mismatch between the green gear and pinion, that the transmission, drive line and differential were too small to handle the motor home (R. 624).

On June 3 plaintiff talked to Jon Larson about the troubles that Robin Christopher had had with the motor home. He was told the fact that the motor home would not go over grades at a reasonable speed, and the starting problem. He told Jon that they would have to bring the machine back, that it was a lemon and wouldn't do the job for them (R. 415). Jon Larson replied, "I am only the Vice President. I can't make the decisions and Park, my brother, is out of town, and I will certainly take it up and see what we can do." (R. 416).

On the 23rd of June a conversation occurred between plaintiff and the sales manager of Larson Ford. Christopher was instructed to bring the machine back to Salt Lake City (R. 418). The motor home was in the Ford outlet at Reno, Nevada for repairs.

Christopher drove the motor home from Reno to Salt Lake and experienced the same general problems that had been reported. As soon as the vehicle was in Salt Lake, it was delivered to the witness Haslam's home (R. 426). The next morning Christopher discussed the matter with Jon Larson (R. 428), advised him that

he wanted to bring the motor home back as it was not satisfactory. Jon Larson replied, "You have bought yourself a new machine and I won't discuss it with you." (R. 429).

A great deal of testimony was produced by all parties to the legal action. The court instructed the jury and submitted the matter to the jury on two basic propositions--fraud and breach of warranty. As to the fraud which would justify rescission of the sale by the buyer, two basic propositions were submitted, whether or not the seller knew that the representations he made were false or made them recklessly, knowing that he had insufficient knowledge upon which to base such a representation. Jon Larson had never used the coach and had no information on its ability to do the jobs required.

Court also submitted the matter to the jury on the basis of whether or not the plaintiff could rescind as a result of breach of warranty on the basis that the motor vehicle to be merchantable must be at least such as was fit for the ordinary purposes for which such goods are used. It is noted that the appellant does not take issue with any of the court's instructions and it appeared that the instructions were free from substantial error on which reversal of the case could be predicated.

Appellant made its complaint over against Condor Coach Corporation based on a warranty theory. Plaintiff submits this amounts to an acceptance as true the claims of breach of warranty by plaintiff.

## ARGUMENT

### POINT I

BREACH OF WARRANTY WAS CLEARLY ESTABLISHED BY THE EVIDENCE.

The evidence clearly established without contradiction that the Condor Coach was so defective that it was not useable for the ordinary purposes for which such vehicles are used and was therefore not merchantable.

U.C.A. 70A-2-314, entitled "Implied warranty - Merchantability - Usage of trade", in subsection 2(c), defines merchantability as: "Goods to be merchantable must be at least such as (c) are fit for the ordinary purposes for which such goods are used;".

In addition to the foregoing section of the Utah Code, plaintiff claimed that the appellant breached U.C.A. 70A-2-315, entitled "Implied warranty - Fitness for particular purpose". This section covers the situation where the buyer makes known to the seller a particular purpose for which the goods are to be used and required.

The evidence clearly shows that the vehicle would not operate at a reasonable speed, could not be started after it was warmed up and had been driven far enough to heat up the solenoid, that it was underpowered, and that its differential and drive train were inadequate. This evidence shows the violation of both sections of the Utah Code Annotated.

Utah law concerning the type of breach of warranty claimed by plaintiff has been clear for many, many years. In 1917 this

court decided Studebaker Bros. Co. of Utah v. Anderson, et al, 50 Utah 319, 167 Pac. 663. The case involved a situation very similar to the present case and contained both a breach of implied warranty of merchantability and a breach of warranty for specific use.

Buyer, in the Studebaker case, purchased a used vehicle for the purpose of carrying passengers to the New Grand Hotel and to the railroad depot. The vehicle proved to be inadequate. It was conceded that it was defective. Seller attempted to make the vehicle run, but could not do so.

Buyer had advised seller that he knew nothing of vehicles and related the kind of work that had to do with the vehicle. This court held that under the circumstances there was a breach of warranty and that the seller was liable under an express warranty, having represented that the vehicle was reasonably fit for the purpose it had been advised the buyer needed to have satisfied. The remedy available was rescission, the remedy which respondent-buyer here seeks.

In the case of Cook v. Covey-Ballard Motor Co., 69 Utah 161, 253 Pac. 196, the court reaffirmed its prior holding and added that where a vendee has been induced to purchase by deceit, he has his choice of remedies upon the discovery of the fraud. He may affirm the contract and sue for damages, or he may rescind it and sue for his price.

A modern and current holding of the court decided in 1971 is Vernon v. Lake Motor, 26 Utah 2d 269, 488 P.2d 302. The Vernon case is important to plaintiff's position as it points out that the conduct of the parties is important in warranty actions. At page 275 the court stated:

"The warranty should be given effect, not in any unduly precise or technical interpretation, but in accordance with what the ordinary purchaser would understand from its language; and if there is any uncertainty therein as to how it should apply, the conduct of the parties in performing under it may be looked to to determine its meaning."

It is respectfully submitted that the evidence and the law fully support the action of the trial court and the jury verdict.

#### POINT II

NO ERROR WAS COMMITTED AT THE TRIAL JUSTIFYING REVERSAL.

The trial court carefully prepared instructions submitting the issues to be determined by the jury on two basic theories. First, on the basis of fraud, and second, on breach of implied warranty of merchantability.

It, in instruction No. 9, clearly laid the groundwork for the instructions that followed relating to the basic requirements to be met by the plaintiff in order to succeed. Instruction No. 10 (R. 150) set down the various requirements as to the evidence to be submitted in a fraud case. Instruction No. 11 (R. 152) set down the various elements that plaintiff was required to prove.

Appellant does not claim that there was not a careful, correct and error-free set of instructions given to the jury, but

does claim that the evidence does not rise to the necessary proof for submission to the jury.

The evidence is clear, uncontradicted and, respondent submits, convincing.

Jon Larson, the source of representations to the plaintiff, knew nothing about the actual operating capacity of the Condor Coach which he was selling. His knowledge and experience being limited to those generally in the same line of manufactured goods. However, he represented that this particular coach would do the job that plaintiff needed done. Even when closely questioned about whether or not it would, he induced plaintiff to go forward by representing that the defects were due to a winter's lack of use and by promising the vehicle could be returned if it proved inadequate on the trip to the Northwest contemplated by purchasers. Larson supplied the handwritten warranty, Exhibit #3, to facilitate servicing of the vehicle and set forth that it had a new vehicle warranty by the Ford Motor Company.

None of the evidence relating to the representations nor their falsity were seriously contravened by sworn testimony. In the position taken by appellant, i.e. that Condor Coach breached its warranty, it admitted the vehicle's inadequacy and admitted that it had induced the purchaser to try it out and see if it would not do the job which purchaser needed accomplished.

Plaintiff submits that this evidence is clear, convincing, and, as a matter of fact, undisputed and would justify the jury's finding in his favor under the fraud theory.

### POINT III

MERCHANTABILITY WAS CLEARLY DEFINED BY THE COURT.

The court also submitted the matter to the jury under the breach of warranty of merchantability. Instruction No. 12 (R. 154) sets forth this general theory.

One of the arguments made by appellant is that the court erred in submitting the issue to the jury on the question of merchantability and did not define what merchantability was.

In instruction No. 12 the court did define, in accordance with the statute heretofore quoted, what goods to be merchantable must be and stated:

"Goods to be merchantable must be at least such as are fit for the ordinary purpose for which such goods are used."

The evidence clearly demonstrated and, plaintiff submits, the appellant has conceded that the Condor Coach did not meet the standard of merchantability.

The many defects that the witness Haslam outlined in his testimony clearly reveal that the Condor Coach was not useable for the ordinary purposes for which it was manufactured. His testimony is uncontradicted and while, in some instances, it is disputed, no witness took the witness stand to deny that the defects he encountered were not present.

Plaintiff submits that the jury could well have found that a Condor Coach with a solenoid so close to the exhaust manifold that it got hot and the heat caused it to malfunction, was not reasonably fit for the purpose intended; or that a Condor Coach

where the generator sucked air instead of fuel would not be reasonably fit for the purpose; or that a Condor Coach with a fuel line to the generator put in so that it only picked up when the gas tank was above half full would not be fit for the ordinary purpose; or that a Condor Coach with an engine mounted on the chassis in such a manner as to unduly restrict the air supply; or that a Condor Coach with a howl in the rear end indicating a mismatch between the green gear and the pinion; or a Condor Coach with a drive line and differential too small to handle the motor home was not fit for the ordinary purpose for which the Condor Coach was manufactured. In this instance we had a Condor Coach with all of these defects in it. It is respectfully submitted that each defect the jury could have found rendered the Condor Coach not reasonably fit for the purpose for which it was intended.

One of the arguments made by the appellant was that it should have been given an opportunity to make further repairs. It will be recalled that the Condor Coach had been in the hands of appellant since June 10, 1970, practically two years, and the various defects had not been remedied if, in fact, they could have been remedied for a reasonable sum. Certainly the air supplied to the engine and differential would have been major items that could not have been fixed without extensive remodeling and repair work.

Our Utah law permits the buyer to have rescission or keep the vehicle and claim the damages by comparison of value



with price. Under Utah law a buyer may not be required to keep a defective vehicle, but may return it to the dealer and obtain his money. Studebaker Bros. Co. of Utah v. Anderson, et al, 50 Utah 319, 167 Pac. 663, page 8, and Cook v. Covey-Ballard Motor Co., 69 Utah 161, 253 Pac. 196, page 8. This shifts the responsibility for placing the vehicle in a reasonable and useable condition to the dealer where, it is respectfully submitted, it should ultimately come to rest.

It is respectfully submitted that the evidence supported the submission of the plaintiff's claims to the jury, that the instructions of the court were entirely consistent with the evidence and were proper statements of the law as it applied to plaintiff's case. It is further respectfully submitted that the verdict was a fair, just and equitable disposition of the dispute, that the parties had their day in court where their opportunity to present any defensive matter was clearly protected.

#### CONCLUSION

It is respectfully submitted that the court should affirm the jury verdict and the judgment of the trial court in plaintiff's favor and against defendant Larson Ford Sales, Inc.

Respectfully submitted,

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Attorney for Plaintiff-Respondent

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