1976

Chrysler Credit Corporation v. Gilbert E. Burns : Brief of Appellant

Utah Supreme Court

Morris and Bishop; Attorneys for Third-Party Plaintiff-Appellant;
MIchael W. Park; Attorney for Third-Party Defendant-Respondent;

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

CHRYSLER CREDIT CORPORATION, Plaintiff and Respondent, vs. GILBERT E. BURNS, Defendant, Third-Party Plaintiff and Appellant, vs. U. & S. MOTOR COMPANY, INC., a Utah corporation, Third-Party Defendant, and Respondent.	Number 14640

APPELLANT'S BRIEF

Appeal from the Judgment of the Fifth Judicial District Court for Iron County, Honorable J. Harlan Burns, Judge

MORRIS AND BISHOP
172 North Main Street
Cedar City, Utah 84720
Attorneys for Third-Party
Plaintiff/Appellant

MICHAEL W. PARK
110 North Main Street
Cedar City, Utah 84720
Attorney for Third-Party
Defendant/Respondent

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BRIEF OF APPELLANT

STATEMENT OF THE KIND OF CASE

This was an action for repossession and sale of a certain recreational trailer, and for attorney fees and deficiency judgment. Defendant, Third-Party Plaintiff and Appellant GILBERT E. BURNS answered the Complaint, and cross-claimed against Third-Party Defendant and Respondent U. & S. MOTOR COMPANY claiming breach of warranty, and thereafter

sought statutory damages for failure of U. & S. MOTOR COMPANY to follow mandatory procedures in the repossession and sale of the recreational trailer.

DISPOSITION IN LOWER COURT AND IN PREVIOUS PROCEEDINGS BEFORE THE SUPREME COURT

The case was tried before the Honorable J. Harlan Burns, sitting without a jury. Judgment was entered in favor of Defendant/Third-Party Plaintiff/Appellant BURNS, and against Third-Party Defendant/Respondent U. & S. MOTOR COMPANY. U. & S. MOTOR COMPANY appealed to the Supreme Court, which reversed and remanded, with instructions to the lower court to sell the recreational trailer, to determine the amount of deficiency, if any, and to determine attorney fees and costs. In the lower court, U. & S. MOTOR COMPANY sought a deficiency judgment and attorney fees, while GILBERT E. BURNS sought statutory damages based upon failure of U. & S. MOTOR COMPANY to follow mandatory procedures in the repossession and sale of the trailer. The lower court entered judgment denying the award of a deficiency to U. & S. MOTOR COMPANY, but awarded attorney fees in the amount of $473.13. The lower court's judgment also denied GILBERT E. BURNS an award of statutory damages.

RELIEF SOUGHT ON APPEAL

Defendant/Third-Party Plaintiff/Appellant GILBERT E. BURNS seeks to have the judgment of the trial court reversed and remanded insofar as the award of attorney fees to Respondent and the denial of statutory damages to Appellant are concerned.

with instructions to the trial court to enter judgment denying Respondent any attorney fees, and awarding Appellant statutory damages in the amount of $1,457.56.

STATEMENT OF FACTS

On 12 October 1971, Appellant BURNS was medically retired from the service by reason of chronic emphysema and other physical disabilities which made him unfit for active duty. Upon being discharged, Mr. BURNS flew directly to Cedar City, Utah, to be with his brother who could care for him, since Mr. BURNS was so weak and disabled as to be unable to tie his own shoes (Transcript, page 14). Finding quarters cramped and needing a place in which to live permanently, Mr. BURNS approached Respondent U. & S. MOTOR COMPANY (Transcript, page 15).

On or about 19 October 1971, Appellant BURNS informed one Scott Urie, employee and agent of U. & S. MOTORS, concerning a vehicle which could be used by Appellant as a permanent residence. Appellant informed U. & S. MOTOR COMPANY of his needs, and was assured that the recreational trailer subsequently purchased would meet Mr. BURNS' needs for a permanent place of residence (Transcript, pages 20-21). On the same day, Appellant purchased the recreational trailer in the firm belief, based upon the assurances of U. & S. MOTOR COMPANY's agent, Urie, that the vehicle would serve as a permanent home, and took the trailer from the sales lot. Later, on 28 October 1971, Mr. BURNS signed the Retail Installment Contract provided by U. & S. MOTORS, which covered the sale of the trailer (Exhibit #1).

Immediately upon taking possession of the trailer, Mr. BURNS attempted to establish it as a permanent home structure, but began to experience innumerable difficulties generally inherent in the design of the unit, which, rather than being suitable for permanent residence as had been stated by U. & S. MOTOR COMPANY, was a unit specifically designed for mobile, highway use, and for short periods of temporary occupancy (Memorandum Decision, page 2).

Among other things, toilet and plumbing facilities of the trailer were constantly in a non-functional state. At trial, U. & S. MOTOR's agent testified that in order for the plumbing facilities to function properly, the unit had to be moved frequently, since road action was necessary to keep solids broken up. Lighting fixtures and wiring were adequate only for auxiliary use. Rodents and insects were able to penetrate the trailer at will (Memorandum Decision, pages 2-3). Lights and wiring crumbled, melted, and smoked (Transcript, pages 27-31). Shorts in the wiring caused the trailer shell itself to be electrified, causing shocks to Mr. BURNS and his pet (Transcript page 35). A vent on the top of the trailer leaked (Transcript, page 36). The furnace wouldn't function properly in cold weather (Transcript, pages 36-37).

Appellant BURNS many times attempted to get U. & S. MOTOR COMPANY to remedy the defects, with only a perfunctory response. In November of 1971, Mr. BURNS moved out of the trailer, due to the stink and general difficulties inherent in

the trailer (Transcript, pages 37-38). In an effort to get the problems corrected, Mr. BURNS discontinued payments on the vehicle, and this action was filed on 25 January 1973 to repossess the trailer and collect money alleged to be owed by Mr. BURNS. BURNS cross-claimed against U. & S. MOTOR COMPANY, and at trial, the lower court determined that U. & S. MOTOR COMPANY had breached its warranty that the trailer was fit for use as a stationary house trailer, rescinded the contract of purchase, and gave judgment to Appellant BURNS in the amount of $2,388.81, with interest and costs, but subject to an offset in favor of Respondent U. & S. MOTOR COMPANY in the amount of $883.47 (Memorandum Decision; Conclusions of Law).

U. & S. MOTOR COMPANY appealed. This Court found that any warranty of fitness had been disclaimed in writing, and reversed and remanded, with instructions to the trial court to determine any deficiency, and to determine any award of attorney fees and costs (Remittitur, and Opinion).

The recreational trailer was subsequently repossessed by U. & S. MOTOR COMPANY, reconditioned, and sold, but not pursuant to any order of the lower court (Affidavit of Scott M. Urie). No written notice of the time, date, place and manner of sale of the trailer was ever given to Mr. BURNS (Judgment dated 17 May 1976, and Affidavit of BURNS dated 6 September 1975). Had Appellant BURNS been given such notice, he would have taken every step available to protect his rights in the trailer (Affidavit of Mr. BURNS dated 6 September 1975). On 21 April 1975,

U. & S. MOTOR COMPANY moved that the lower court grant judgment against Mr. BURNS for a claimed deficiency of $517.00, claimed attorney fees of $1,500.00, costs, and other relief (Motion, dated 18 April 1975). On or about 20 August 1975, U. & S. MOTOR COMPANY supported its Motion with the Affidavit of Scott M. Urie, alleging a deficiency of $517.00, but providing no accounting of the amount received for the trailer, or of the amounts expended in retaking the vehicle, storing, reconditioning, and selling it, if any. Also on or about 20 August 1975, U. & S. MOTOR COMPANY's counsel filed the Affidavit of Michael W. Park, setting forth that a reasonable attorney fee was the amount of $473.13, not $1,500.00 as claimed in the Motion.

On 8 September 1975, Mr. BURNS' Affidavit Supporting Continuation of Memorandum of Points and Authorities in Opposition to U. & S. Motor Company's Motion for Deficiency Judgment and Attorney Fees was filed, and on 1 October 1975, Mr. BURNS filed a Motion for Relief in the Form of Judgment, seeking judgment against U. & S. MOTOR COMPANY in the amount of $1,457.56 based upon U. & S. MOTOR COMPANY's failure to follow mandatory procedure in the repossession and sale of the trailer. The lower court took both motions under advisement, and on 17 May 1976, signed the Judgment denying Respondent any deficiency, awarded Respondent $473.13 as attorney fees, and denied Appellant BURNS judgment in the amount of $1,457.56, even though the court specifically found that no written notice of the time, date, place and manner of sale of the repossessed trailer was ever

mailed or given to Appellant BURNS (Judgment, dated 17 May 1976). From this Judgment, Mr. BURNS appealed those portions granting U. & S. MOTOR COMPANY $473.13 as attorney fees, and denying Appellant judgment against U. & S. MOTOR COMPANY in the amount of $1,457.56. Respondent U. & S. MOTOR COMPANY did not appeal that portion of the Judgment denying a deficiency judgment against Appellant BURNS.

ARGUMENT

POINT I.

THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT AWARDED ATTORNEY FEES TO U. & S. MOTOR COMPANY FOR THE REASON THAT U. & S. MOTOR COMPANY FAILED TO COMPLY WITH MANDATORY PROVISIONS OF LAW IN THE REPOSSESSION AND SALE OF THE TRAILER, AND FAILED TO PROPERLY APPLY THE PROCEEDS OF SUCH SALE.

It is abundantly clear from the record that Respondent U. & S. MOTOR COMPANY did not send notice of the method, date, time, place and manner of sale to Appellant BURNS, nor was a detailed accounting of the proceeds of the sale ever provided. There is nothing in the record to indicate to whom the sale was made, and the circumstances of this case from start to finish give rise to a certain skepticism as to the propriety of the actions of U. & S. MOTOR COMPANY and its agents. Therefore, the lower court's award of attorney fees should be reversed, for the following reasons:

a. U. & S. MOTOR COMPANY, as a matter of law, is and was not entitled to an award of attorney fees for the reason that it failed to send notice of the time, place, and manner of

sale to Appellant. The lower court specifically found that U. & S. MOTOR COMPANY failed to send notice of the time, date, place and manner of the sale of the repossessed trailer to Appellant BURNS. This failure, especially where proceeds of the sale have been misapplied, as set forth in paragraph "c" below, and where the sale was commercially unreasonable, as shown in "b" below, requires that the award of attorney fees be reversed.

U.C.A. 70A-9-504(3) provides for notice to be given by a foreclosing seller to the debtor. The law states:

> "Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor" (Emphasis supplied).

Language of the statute is in the mandatory mode. The collateral in this case was a trailer house, definitely not the sort of collateral which is perishable or which threatens to decline speedily in value, as might fruit or vegetables. In addition, a repossessed Roadrunner trailer house is not the type of collateral customarily sold on a recognized market. See Community Management Association v. Tousley, 505 P.2d 1314 (Colo.App.). There simply does not exist a recognized market for the sale of repossessed Roadrunner trailers. Since the collateral was not perishable, did not threaten to decline speedily in value, and is not the type customarily sold on a

recognized market, U. & S. MOTOR COMPANY was required to send notice of the disposition to Appellant BURNS. This it failed to do.

U. & S. MOTOR COMPANY does not contest the fact that it did not send notification to Mr. BURNS, but only argues that the results of the previous appeal to this Court were such notification required by the statute. There is no merit to Respondent's contention for the reason that the notice required is notice of the time and place of sale, and whether public sale is involved, or private sale or other disposition. The order of this Court on the previous appeal was that:

> " . . . the judgment of the District Court herein be, and the same is, reversed and remanded with directions to order a sale of the trailer . . . " (Remittitur, emphasis added).

The record shows no such order of the District Court requiring the sale of the trailer, and Respondent is therefore not only in violation of the statutory law concerning repossession and sale of collateral, but is in direct violation of the law of this case, since, pursuant to the above, the sale was only to be conducted by order of the District Court. No judicial sale ever occurred. Obviously, had such a sale been ordered, Appellant BURNS would have been protected, in that he would undoubtedly have received notice from the District Court of the time, place, and manner of the proposed sale, and in that he would have had opportunity to exercise his statutory right of redemption, granted by U.C.A. 70A-9-506 (1953, as amended),

prior to any such sale. Having violated the terms of the earlier remand, Respondent cannot claim that the same was the notice to Respondent required by the statute. We must presume that the order contained in the Remittitur meant that the sale was to be conducted according to law, and Respondent has violated both statutory law and the law of this case as to the sale of the trailer. The failure to follow the law voided any right of U. & S. MOTOR COMPANY to attorney fees or to a deficiency judgment. The Respondent cannot rely on the previous opinion of this Court to cover its egregious errors in failing to follow the law covering disposition of collateral. As a matter of fact, it is impossible to determine from the record just when the sale took place, and it is thoroughly possible that it occurred prior to the date of the Remittitur of this Court, or to a friend, employee, or relative of Mr. Urie, or to Respondent itself, at a sacrifice price. The failure to supply details of the time, place, and manner of sale, and the failure to provide a proper accounting, justifiably arouses suspicion.

Where a creditor does not strictly comply with the notice provisions of U.C.A. 70A-9-504(3) (1953, as amended), the proper remedy is to deny him an award of attorney fees, especially where such an award takes the nature of a deficiency judgment after the seller has improperly applied the proceeds received from the sale, which proceeds should have been applied to the payment of attorney fees prior to the satisfaction of

indebtedness. Had the proceeds been properly applied, the question in the lower court would have been one as to the propriety of awarding a deficiency judgment where no notice was given to the debtor, which question was decided favorably to Appellant, and which Respondent did not appeal. The law in this case, therefore, is that failure to give proper notice bars an action for a deficiency judgment. For other cases in which a deficiency judgment was denied for failure to give notice, see Aimonetto v. Keepes, 501 P.2d 1017 (Wyo.); Alliance Discount Corporation v. Shaw, 195 Pa.Super. 601, 171 A.2d 548; Skeels v. Universal C.I.T. Credit Corporation, 222 F.Supp. 696 (D.C.Pa.), vac. other grounds, 335 F.2d 846 (CA 3rd); Brasswell v. American National Bank, 117 Ga.App. 699, 161 S.E.2d 420; Tauber v. Johnson, 8 Ill.App.3d 789, 291 N.E.2d 180; and Leasco Data Processing Equipment Corporation v. Atlas Shirt Company, 66 Misc.2d 1089, 323 NYS2d 13.

In all fairness, it must be admitted that there is a minority position which would permit the award of a deficiency under certain circumstances, even though the seller failed to give the required notice. Community Management, supra. The better and majority rule, however, is to deny it, for the reason that failure to give the required notice unjustly deprives the debtor of his right to redeem the collateral, which right is afforded to him by U.C.A. 70A-9-506 (1953, as amended). It is clear from the record that Mr. BURNS would have taken every step available to protect his interests in the

collateral had he been given notice.

b. U. & S. MOTOR COMPANY, as a matter of law, is not and was not entitled to an award of attorney fees for the reason that it has failed to make a showing that the repossession sale was commercially reasonable, and said sale was commercially unreasonable. The record of this case clearly shows that GILBERT E. BURNS bought the trailer for his own personal and household use, and that U. & S. MOTOR COMPANY was a merchant with respect to the goods sold, held a security interest in the trailer, and sought to foreclose the same. The Utah Uniform Commercial Code applies, as determined by this Court on the previous appeal.

U.C.A. 70A-9-504(3) requires that:

> " . . . every aspect of the disposition, including the method, manner, time, place and terms, must be commercially reasonable." (Emphasis added.)

The burden of establishing the reasonableness of the disposition is upon the secured party. See Vic Hansen & Sons, Inc. v. Crowley, 57 Wis.2d 106, 203 N.W.2d 728, 59 A.L.R.3d 369. In this case, where a secret sale was made, where no notice of the method, manner, time, place and terms of the sale was given to Appellant, and where Respondent claims to have reconditioned the trailer, but gave no accounting of any expenses of retaking, holding, preparing for sale, selling, and the like to Appellant, the sale was clearly commercially unreasonable. Therefore, this Court should reverse the award of attorney fees, and deny the same to Respondent.

c. U. & S. MOTOR COMPANY, as a matter of law, is not and was not entitled to an award of attorney fees for the reason that the proceeds of the repossession sale were not applied according to law. It is undisputed that after having repossessed the trailer, U. & S. MOTOR COMPANY sold the same, and the entire proceeds of the sale, whether the sale was public or private, were applied to partial satisfaction of the principal amount owed by Appellant to Respondent. Such application was improper, and not authorized by Utah law.

U.C.A. 70A-9-504(1) (1953, as amended) states in part:

> "The proceeds of disposition shall be applied in the order following to (a) the reasonable expenses of retaking, holding, preparing for sale, selling, leasing and the like and, to the extent not prohibited by law, the reasonable attorney's fees and legal expenses incurred by the secured party; (b) the satisfaction of indebtedness secured . . . " (Emphasis added).

The wording of the statute is mandatory The Affidavit of Scott M. Urie shows conclusively that the proceeds from the sale of the trailer were not applied in accordance with law. The amount owing by Mr. BURNS to U. & S. MOTOR COMPANY was $3,155.25 (Transcript, page 9, lines 23-25). U. & S. MOTOR COMPANY claimed a deficiency of $517.00 and attorney fees of $473.13. Simple subtraction shows that at least $2,638.25 of the proceeds were applied to satisfaction of indebtedness. Such an amount would have been more than enough to satisfy the claimed attorney fee of $473.13, had it been taken from the proceeds, but having chosen to apply such amount to the

indebtedness rather than attorney fees, Respondent cannot now be heard to claim attorney fees. Attorney fees, in cases such as this, can only come from the proceeds of the sale, and where the proceeds have been exhausted by prior application to other categories, it is error to award attorney fees. See Florida First National Bank v. Fryd Construction Company, 240 So.2d 883.

POINT II.

THE TRIAL COURT ERRED AS A MATTER OF LAW IN FAILING TO GRANT JUDGMENT TO APPELLANT IN THE AMOUNT OF $1,457.56, IT HAVING BEEN ESTABLISHED THAT U. & S. MOTOR COMPANY FAILED TO FOLLOW MANDATORY PROVISIONS OF LAW IN THE REPOSSESSION AND SALE OF THE ROADRUNNER MOBILE HOME, AND FAILED TO PROPERLY APPLY AND DISTRIBUTE THE PROCEEDS OF THE SALE.

As shown by Exhibit 1 in the record, on or about 28 October 1971, Appellant BURNS signed a retail installment contract covering the purchase of a recreational trailer. The cash price was $4,540.00. A trade-in allowance of $1,000.00 was involved. There was an unpaid balance of cash price in the amount of $3,540.00, physical damage insurance in the sum of $160.00, credit life insurance in the sum of $102.24, and a total unpaid balance of $3,802.24. The contract provided for a finance charge in the amount of $741.32. The total deferred payment price came to $5,543.56. See Exhibit 1, Record.

Appellant BURNS defaulted on the contract, and U. & S. MOTOR COMPANY repossessed the trailer. Thereafter, without notice to Appellant, Respondent sold the trailer at secret private sale, in a commercially unreasonable manner, and applied

the proceeds of the sale in a manner not authorized by law, all as set forth in Point I above. For these reasons, and the following, Appellant is entitled to a reversal of the order of the lower court denying judgment to Appellant, and to a remand with instructions to the lower court to enter judgment for Appellant in the amount of $1,457.56.

a. Utah law provides a remedy to a debtor where a creditor has failed to follow the statutory procedure for repossession and sale of collateral, and has failed to properly apply the proceeds of such sale. U.C.A. 70A-9-507(1) provides:

> "If it is established that the secured party is not proceeding in accordance with the provisions of this part disposition may be ordered or restrained on appropriate terms and conditions. If the disposition has occurred the debtor or any person entitled to notification or whose security interest has been made known to the secured party prior to the disposition has a right to recover from the secured party any loss caused by a failure to comply with the provisions of this part. If the collateral is consumer goods, the debtor has a right to recover in any event an amount not less than the credit service charge plus ten per cent of the principal amount of the debt or the time price differential plus ten per cent of the cash price." (Emphasis supplied.)

It can be readily seen that where a creditor fails to comply with the provisions of law governing the repossession and sale of collateral, and the subsequent application of proceeds, the debtor may recover his damages from the creditor. More importantly, where the collateral consists of consumer goods, the law provides a minimum rule of recovery for the debtor. See Comment 1 to Uniform Commercial Code, §9-507(1).

b. Utah law required that notice be sent to Appellant BURNS of the time, place, and manner of disposition of the trailer, and no such notice was sent. See I.a. supra, for discussion of Utah law concerning notice, and the failure of U. & S. MOTOR COMPANY to send the same to Appellant.

c. Utah law required that sale of the repossessed trailer be accomplished in a commercially reasonable manner, but the sale was made in a commercially unreasonable manner and Respondent failed to show the sale was commercially reasonable. See I.b. supra.

d. Utah law established the priority of application of the proceeds from the sale of the trailer, and Respondent failed to so apply the proceeds, but applied them in a manner other than that provided by law. See I.c. supra, for analysis of Utah law concerning application of proceeds.

e. The collateral in this case is consumer goods. U.C.A. 70A-9-109(1) states in part:

> "Goods are 'consumer goods', if they are used or bought for use primarily for personal, family, or household purposes . . ."

The record in this case is replete with references to the fact that Appellant BURNS purchased the Roadrunner trailer for his own personal and household purposes. Such being true, the trailer was consumer goods, and Appellant is entitled to the statutory minimum recovery allowed by reason of U. & S. MOTOR COMPANY's failure to follow statutory procedure in the repossession, the sale of the trailer, and in the improper application

of proceeds.

f. As a matter of law, Appellant GILBERT E. BURNS is and was entitled to Judgment against Respondent U. & S. MOTOR COMPANY, it having been established that Respondent failed to follow mandatory provisions of law in the repossession and sale of the Roadrunner recreational trailer, and in applying the proceeds of the sale. U.C.A. 70A-9-507(1) states in part, referring to a situation where disposition of consumer goods has occurred with the seller having failed to comply with statutory provisions concerning repossession, sale, and application of proceeds, or has failed in any other manner to comply with appropriate provisions of law:

> "If the collateral is consumer goods, the debtor has a right to recover in any event an amount not less than the credit service charge plus ten per cent of the principal amount of the debt, or the time price differential plus ten per cent of the cash price."

Simple computations then establish Appellant's right to judgment in the amount of $1,457.56:

Deferred payment price:	$5,543.56
Less cash price:	4,540.00
Equals time price differential:	$1,003.56
Plus ten per cent of cash price:	454.00
Equals amount due to debtor:	$1,457.56

In addition to the statutory language cited, see Atlas Credit Corporation v. Dolbow, 193 Pa.Super. 649, 165 A.2d 704, where the Pennsylvania Court permitted recovery of damages under the rule pertaining to consumer goods where the creditor sold a repossessed boat without giving notice to the debtor.

CONCLUSION

It appearing from the facts plainly apparent on the record that Respondent did not follow mandatory statutory procedure, or the procedure set forth by this Court in its previous Remittitur, in the repossession and sale of the Roadrunner trailer, but held a secret, private sale without giving notification to Appellant of the time, place, and manner of sale, and it appearing that the proceeds of the sale were not applied as set forth by law, and that due to the failure of Respondent to follow mandatory procedure, the sale cannot be deemed to have been conducted in a commercially reasonable manner, and because of the oppressive and overreaching conduct of Respondent at all stages of the proceedings, the Judgment of the trial court should be reversed and remanded, with instructions to vacate the award of $473.13 attorney fees to Respondent, and to enter Judgment in favor of Appellant in the amount of $1,457.56.

DATED: 16 August 1976.

Respectfully submitted,

MORRIS AND BISHOP

Willard R. Bishop
172 North Main Street
P. O. Box 279
Cedar City, Utah 84720

Attorneys for Defendant/Third-Party Plaintiff/Appellant