

1977

Vernon S. Cheever and Charlie Garofolo v. Orval R. Schramm and Harold L. Christensen : Brief of Respondents on Appeal

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2

 Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Ray M. Harding; Attorney for Appellants;

Cullen Y. Christensen; Attorney for Respondents;

Recommended Citation

Brief of Respondent, *Cheever v. Schramm*, No. 15147 (Utah Supreme Court, 1977).
https://digitalcommons.law.byu.edu/uofu_sc2/624

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT OF UTAH
STATE OF UTAH

VERNON S. CHEEVER and
CHARLIE GAROFALO,

Plaintiffs and
Respondents,

vs.

ORVAL R. SCHRAMM and
HAROLD L. CHRISTENSEN,

Defendants and
Appellants.

Case No. 15147

RESPONDENTS' BRIEF ON APPEAL

APPEAL FROM A JUDGMENT OF THE
FOURTH DISTRICT COURT OF UTAH COUNTY,
HONORABLE GEORGE E. BALLIF, JUDGE.

CULLEN Y. CHRISTENSEN, for
CHRISTENSEN, TAYLOR & MOODY
Attorneys for Respondents
55 East Center Street
Provo, Utah 84601

RAY M. HARDING
Attorney for Appellants
59 West Main Street
American Fork, Utah 84003

FILED

JUL 22 1977

TABLE OF CONTENTS

	<u>PAGE</u>
STATEMENT OF NATURE OF CASE	1
DISPOSITION IN THE LOWER COURT	1
RELIEF SOUGHT ON APPEAL	1
STATEMENT OF FACTS	1
ARGUMENT	5
POINT I	5
THE TRIAL COURT DID NOT ERR IN RULING THAT THE DEFENDANTS HAD BECOME FULLY BOUND BY THE CONTRACT BETWEEN THE PARTIES.	
POINT II	8
THE TRIAL COURT DID NOT ERR IN RULING THAT THERE WERE NO FRAUDULENT MIS- REPRESENTATIONS MADE BY THE PLAINTIFFS.	
POINT III	10
PLAINTIFFS, AS THE PREVAILING PARTIES, ARE ENTITLED TO AN AWARD OF ADDITIONAL REASONABLE ATTORNEYS FEES IN CONNECTION WITH THIS APPEAL.	
CONCLUSION	11

CASES CITED

<u>Ahrendt v. Bobbitt</u> , 119 Utah 465, 229 P. 2d 296	7
<u>Bountiful v. Swift</u> , 535 P. 2d 1236	5
<u>Coombs v. Perry</u> , 2 Utah 2d 381, 275 P. 2d 680	5
<u>Jaeger and Branch Inc. v. Pappas</u> , 20 Utah 2d 100, 433 P. 2d 605	5
<u>McCarren v. Merrill</u> , 15 Utah 2d 179, 389 P. 2d 732	5
<u>McCollum v. Clothier</u> , 121 Utah 311, 241 P. 2d 468	5

Nasner v. Burton, 2 Utah 2d 236, 272 P. 2d 163

Pollesche v. Transamerica Insurance Co., 27 Utah 2d
430, 497 P. 2d 236

Swain v. Salt Lake Real Estate and Investment Co.,
3 Utah 2d 121, 279 P. 2d 709

Tibbitts v. Openshaw, 18 Utah 2d 442, 425 P. 2d 160

Universal CIT Credit Corporation vs. Sohm,
15 Utah 2d 262, 391 P. 2d 293

IN THE SUPREME COURT
OF THE STATE OF UTAH

VERNON S. CHIEVER and
CHARLIE GAROFALO,

Plaintiffs and
Respondents,

vs.

ORVAL SCHRAMM and
HAROLD L. CHRISTENSEN,

Defendants and
Appellants.

Case No. 15147

STATEMENT OF NATURE OF CASE

This is an action brought by plaintiffs as sellers of an automobile repair business against the defendants as buyers for breach of contract.

DISPOSITION IN THE LOWER COURT

The lower court found a breach of contract on the part of defendants and awarded damages to the plaintiffs.

RELIEF SOUGHT ON APPEAL

Plaintiffs and respondents seek affirmance of the Judgment of the lower court and reasonable attorneys fees in connection with this appeal.

STATEMENT OF FACTS

In their brief the defendants and appellants have restated the evidence presented to the court below in a light

most favorable to defendants' position and have failed to

adequately indicate the contrary evidence which was in support of the judgment made by the lower court. Consequently, plaintiffs and respondents hereby call the attention of this Court to the following facts supported by the evidence in the trial below:

During or about the month of August 1975, plaintiffs began an automobile repair business under the name of C & B Sports Car Service Center (Tr. 5). At that time plaintiffs had Sisken Investment Company construct a building for their use at 136 East 100 South, Orem, Utah (Tr. 6), and plaintiffs entered into a written five year lease with Sisken at \$725.00 per month (Tr. 12, Pl's Ex #4). Plaintiffs borrowed \$10,000.00 from Walker Bank & Trust Company with interest at 12.68% per annum repayable in installments of \$267.46 per month (Tr. 8, Pl's Ex #2 and #3), which money was used to buy equipment and inventory for the business (Tr. 8, 9). The business progressed to the point where plaintiff Vern Cheever was required to spend more time at it than he had anticipated and when the health of plaintiff Charlie Garofolo became such that he was advised by his doctor to move to a warmer climate (Tr. 10), plaintiffs decided to sell the business. The defendants subsequently responded to a newspaper advertisement indicated that the business was for sale early in January 1976 (Tr. 7, 13). Defendants talked with plaintiffs about the business for several days, brought various people to look over the facilities, inventoried the equipment and supplies, read and reviewed the plaintiffs' lease agreement (Tr. 53, 69), and then on a Sunday afternoon, February 1, 1976

came to the home of plaintiff Vernon Cheever and stated that they wanted to buy the business (Tr. 13-19, 40; P1's Ex #7). Plaintiff Vern Cheever then made up an agreement (P1's Ex #1) which was signed by the parties and defendants paid \$200.00 earnest money to the plaintiffs (Tr. 17). Defendants actually took over the business operation on February 9, 1976, including all equipment, records and the Walker Bank loan payment book, but for the week prior thereto defendants worked in the operation with plaintiffs so that they, the defendants, might familiarize themselves with the business and its operation (Tr. 19, 20). Plaintiffs, themselves, also worked with defendants for the week following February 9, 1976, to help the defendants get better acquainted with the operation of the business (Tr. 13). Defendants operated the business until February 18, 1976, when they paid to the plaintiffs the balance of the cash involved in the selling price (Tr. 21).

At the time defendants took over, the business was good (Tr. 24). Prior to the take over, plaintiffs were paying their mechanics 50% of the labor charged to customers or \$100.00 per week, whichever was greater, and this was reflected in the business records exhibited to the defendants (Tr. 24, 25).

Plaintiffs, after the take over of the business by the defendants, and pursuant to the sales agreement, arranged for a new lease to be prepared which was identical to plaintiffs' lease, except that the defendants were shown as lessees (Tr. 25, 45-47). When the lease was presented to the defendants, defendants objected to a provision requiring a second mortgage on defendants'

homes to secure the lease payments even though plaintiffs' lease did contain such a provision (Tr. 26, 48). Plaintiffs then arranged to have the mortgage provision stricken from the lease, which amendment was then approved by the lessor (Tr. 26, 27, 42, 91), and the revised lease agreement was then delivered to the defendants for their signatures (Tr. 27, 50). Defendant refused to sign the lease personally and attempted to insist it be signed on behalf of C & B Sports Car Incorporated, a corporation formed by the defendants after execution of the agreement between the parties (Tr. 73), and then after having operated the business for approximately two months, defendant closed the business without executing the lease agreement, took all of the equipment away from the premises, returned the Walker Bank payment book to the plaintiffs and dismissed the employees of the business (Tr. 28-33). Thereupon, plaintiffs became obligated to respond to the claims of Walker Bank & Trust Company for the business loan previously taken out and which was to have been assumed by the defendants, and the plaintiffs also were held liable to Sisken for the lease payments which were to have been assumed by the defendants. After defendants vacated the premises, the business was no longer viable because defendant had stripped the building of all equipment and inventory (Tr. 36, Pl's Ex #5 and #6).

After defendants' refusal to sign the lease with Sisken, defendant vacated the premises, and closed the business, the new lease which had been prepared by Sisken for defendants to sign was destroyed by Sisken (Tr. 57).

Plaintiffs thereupon brought suit against the defendants to recover damages. After trial of the matter, the court below awarded plaintiffs damages against the defendants in the sum of \$12,110.31 together with \$1250.00 attorneys' fees and costs of court in the amount of \$29.60, making an aggregate judgment in the sum of \$13,389.91 (R 39-40).

POINT I

THE TRIAL COURT DID NOT ERR IN RULING THAT THE DEFENDANTS HAD BECOME FULLY BOUND BY THE CONTRACT BETWEEN THE PARTIES.

As hereinabove pointed out, the defendants have restated the evidence presented to the court below in a light most favorable to defendants' position and they have failed to indicate the ample contrary evidence which was in support of the decision made by the trial court. The rule is clear that on appeal, the appellate court must determine whether there is credible evidence to support the decision below and, if so, that judgment must stand even though there may be some dispute in the evidence (Pollesche v. Transamerica Insurance Company, 27 Utah 2d 430, 497 P. 2d 236). The plaintiffs having prevailed in the court below, they are entitled to the benefit of the evidence viewed in the light most favorable to the plaintiffs, together with every inference and intendment fairly and reasonably arising therefrom (Bountiful v. Swift, 535 P. 2d 1236; Coombs v. Perry, 2 Utah 2d 381, 275 P. 2d 680; Jaeger and Branch Inc. v. Pappas, 20 Utah 2d 100, 433 P. 2d 605; McCarren v. Merrill, 15 Utah 2d 179, 389 P. 2d 732; McCollum v. Clothier, 121 Utah 311, 241 P. 2d 468; Nasner v. Burton, 2 Utah 2d 236, 272 P. 2d 163).

Defendants contend that the contract between the parties was never implemented. The contrary is obvious. Defendants took over the business completely and operated the same for approximately two months; they made a payment on the Walker Bank loan (Tr. 11, 23); credit cards were changed into their names (Tr. 62); they hired and paid their own employees (Tr. 62); they made a lease payment to Sisken (Tr. 34); and although the defendants did not actually enter into a written lease arrangement directly with Sisken, such failure was due entirely to the actions of defendants in that they wrongfully attempted to insist that the lease be signed by C & B Sports Car Incorporated (Tr. 34) rather than by defendants personally as contemplated in the original agreement (Pl's Ex #1). The evidence is clear that defendants were offered a lease by Sisken according to the terms of the original agreement (Tr. 47-50), and it was the defendants themselves, who wrongfully failed to execute the same as lessors.

Defendants refer to Line 35 of Plaintiffs' Exhibit 1 and now complain that there was no further instrument of conveyance executed, when as a matter of fact all inventory and equipment was turned over to and accepted by defendants on February 1, 1976 (Tr. 19), and defendants claimed and removed the same as their own property completely when defendants stripped and vacated the business premises on or about April 1, 1976 (Tr. 32, 33). Defendants became fully possessed and vested with the inventory and equipment and their title to the same is not in dispute. The agreement of the parties in that respect was fully consummated. The performance of a condition precedent to the formation of

contract may be waived either expressly or by acts evidencing such intention, and the performance of any condition precedent to the taking effect of the contract between the parties to this action was clearly waived by defendants in treating the agreement as being in full force and effect (Ahrendt v. Bobbitt, 119 Utah 465, 229 P. 2d-296).

Defendants further say that the agreement between the parties never became effective because defendants were not furnished an inventory of assets. The fact is they took their own inventory (Tr. 14-40) which was later confirmed in writing on February 18, 1976 (Tr. 23, Pl's Ex #22, Tr. 31, Pl's Ex #23), and as above indicated, defendants had no difficulty in identifying assets when they stripped the building on or about April 1, 1976. Defendants have made no claim at any time, either at the trial or in connection with this appeal, that they did not get every item of inventory and equipment that they bargained for.

With respect to defendants' contentions that the agreement did not become operative because plaintiff Charlie Garofolo did not provide thirty to forty-five days of assistance after defendants took over the business, the evidence is uncontradicted that defendants waived any such stipulation shortly after defendants took over the business by telling Mr. Garofolo that they did not want him to continue working in the business (Tr. 21, 104).

Defendants, in passing, have alluded to alleged heresay testimony concerning whether Sisken ever was willing to accept the defendants as tenants. The record is replete with

testimony by Mr. Rowley, agent for Sisken, and others, that the offered lease was signed on behalf of Sisken by Warner Murphy, its principal officer, and was submitted to defendants for their signatures (Tr. 26, 27, 45-50). In any event, defendants made no objection to the testimony about which they complain when it was offered at the trial (Tr. 26).

POINT II

THE TRIAL COURT DID NOT ERR IN RULING THAT THERE WERE NO FRAUDULENT REPRESENTATIONS MADE BY THE PLAINTIFFS.

A party alleging fraud and misrepresentation must prove such assertions by clear and convincing evidence (Univ. CIT Credit Corporation v. Sohm, 15 Utah 2d 262, 391 P. 2d 295; Tibbits vs. Openshaw, 18 Utah 2d 442, 425 P. 2d 160). In this case each item of alleged misrepresentation attributed to the plaintiffs is controverted by valid and believable evidence to the contrary, which the court below chose to believe. This evidence as to each alleged point is as follows:

1. With respect to the charge that defendants were told by plaintiffs that the business was grossing approximately \$10,000.00 per month, the record is clear that plaintiff Vern Cheever showed the books and records of the company to the defendants, discussed the same with the defendants (Tr. 18, Pl's Ex #7), and even helped defendants set up their own record (Tr. 23). Defendants worked with plaintiffs in the business a week before defendants took over (Tr. 19, 20), and then defendants operated the business for another week after taking over before making another cash payment on the contract (Tr.

defendants well knew that the business had gross income for the entire year of 1975 of approximately \$10,000.00 as shown by plaintiffs' records exhibited to the defendants (Pl's Ex #7) and not \$10,000.00 per month.

2. As to the advertising practices of the plaintiffs, this was discussed with the defendants (Tr. 16). There is no evidence in the record to refute the fact that plaintiffs, while they were operating the business, did terminate their advertising from time to time. Likewise, defendants have offered no testimony to refute plaintiffs' statement that the defendants were advised at the outset to begin their own advertising program (Tr. 16) and in fact, plaintiff Vern Cheever attempted to encourage defendants to commence an advertising program (Tr. 23, 24).

3. Defendants allege they were misinformed about how the mechanics were paid; however, defendants had full access to the company books (Pl's Ex #7) showing how the employees were paid and defendants were informed how plaintiffs paid their mechanics (Tr. 24, 25). Defendants were under no obligation to hire any particular mechanic, and in fact did choose to hire two of those previously employed by plaintiffs on the same basis of pay as paid by the plaintiffs (Tr. 61, 62).

4. Regarding the loan from Walker Bank & Trust Company, defendants were informed that the original loan was for \$10,000.00 with interest at approximately 12-1/2% per annum, payable at \$267.46 per month (Tr. 8; Pl's Ex #2). This information was reflected in the company books which defendants

inspected (Pl's Ex #7) and was communicated to defendants by plaintiff Vern Cheever (Tr. 15, 16). In addition, defendants took possession of the payment book (Pl's Ex #3) and made at least one payment thereon (Tr. 11). Defendants were not misinformed about the particulars of the loan to be assumed by them and the court below correctly so concluded.

5. The evidence with respect to allegations as to the value of the inventory and equipment is at least in conflict. Plaintiff Vern Cheever testified that plaintiffs did not assign a particular value, item by item, at the outset, nor was any request made by defendants for such a valuation (Tr. 14, 15). The business was offered for the aggregate price of \$6,000.00 cash, plus assumption of the loan at Walker Bank & Trust Company and the lease with Sisken. Defendants fully inspected the inventory and equipment, the company books and records, and participated in the operation of the business for at least two weeks before paying the purchase price.

The claims of fraud and misrepresentation are not supported by the evidence and certainly not in any event by clear and convincing evidence as required under the law.

POINT III

PLAINTIFFS, AS THE PREVAILING PARTIES, ARE ENTITLED TO AN AWARD OF ADDITIONAL REASONABLE ATTORNEY FEES IN CONNECTION WITH THIS APPEAL.

By the terms of the agreement between the parties, the defendants having breached the same, the plaintiffs are entitled to an award for expenses incurred in "enforcing thi

agreement, or of any right arising out of the breach thereof, including a reasonable attorneys' fee" (Pl's Ex #1). The court below awarded plaintiffs attorneys' fees incident to the trial of the case (Tr. 65, 66; R 40, 49). The plaintiffs have incurred further expenses as attorneys' fees incident to the defense of this appeal and matters subsequent to the trial below in an amount of at least \$750.00. Plaintiffs are therefore entitled to an additional award in such an amount (Swain v. Salt Lake City Real Estate and Investment Company, 3 Utah 2d 121, 279 P. 2d 709).

CONCLUSION

Plaintiffs sold a viable, growing business to defendants and within two months defendants wrongfully closed the same, stripped the premises of all inventory and equipment and left plaintiffs with a defunct operation, a loan obligation to Walker Bank & Trust Company, and a leasehold liability to Sisken. The judgment and damages awarded plaintiffs against the defendants by the court below should be sustained and the plaintiffs should be awarded additional attorneys' fees of \$750.00 as expenses incident to this appeal pursuant to the terms of the agreement between the parties.


Respectfully submitted,



Cullen Y. Christensen, for
CHRISTENSEN, TAYLOR & MOODY
Attorneys for Plaintiffs
and Respondents
55 East Center Street
Provo, Utah 84601

CERTIFICATE OF MAILING

Two copies of the foregoing were mailed, postage prepaid, to Ray M. Harding, attorney for defendants and appellants, 59 West Main Street, American Fork, Utah 84003, this 21st of July, 1977.


CULLEN Y. CHRISTENSEN, ATT