

1978

# Karl Winsness and Associates, A Partnership v. M.J. Conoco Distributors, Inc., A Utah Corporation : Reply Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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CARL WINSNESS AND ASSO- )  
CIATES, A Partnership, )  
 )  
Plaintiff- )  
Appellant, )  
 )  
vs. )  
 )  
M. J. CONOCO DISTRIBUTORS, )  
INC., A Utah Corporation, )  
 )  
Defendant- )  
Respondent. )  
 )

---

Case No. 15501

REPLY BRIEF OF APPELLANT

Appeal from the Judgment of the Third District Court  
in and for Tooele County  
Honorable Peter F. Leary, Judge

THOMAS DUFFIN, ESQ.  
Suite 510  
Ten Broadway Building  
Salt Lake City, Utah 84101

CRAIG STEPHENS COOK, ESQ.  
3645 East 3100 South  
Salt Lake City, Utah 84109

Attorneys for Plaintiff-  
Appellant

ALLEN H. TIBBALS, ESQ.  
400 Chancellor Building  
220 South 200 East  
Salt Lake City, Utah 84111

Attorney for Defendant-  
Respondent

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Case No. 15501

REPLY BRIEF OF APPELLANT

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DIRECTING A  
VERDICT AS TO COUNTS 1 AND 3 OF PLAIN-  
TIFF'S COMPLAINT.

A. There was Ample Evidence to Allow the Jury to Conclude  
that a Breach of Contract Had Occurred by the Closure of the  
Service Station and Sufficient Reliable Evidence was Presented  
to Allow the Jury to Determine Resulting Damages.

The lease involved in this lawsuit provided that rental  
payments would be made based on the real estate itself and also  
upon the number of gasoline gallons sold per month. The lease  
provided that the station would remain open for 24 hours a day.  
It can thus be readily seen that if the station were not open at  
all during a 24-hour day then no gasoline would be sold and  
therefore no gallonage rental would have accumulated.

Respondent in its brief repeatedly states that Appellant was unable to prove "the reasons behind the service station being closed at various times". (Respondent's brief, pp. 7-8). This question of "why" is totally irrelevant to the determination in this case since there is nothing in the lease agreement which justifies closing of the station for any reason. The stipulated judgment provided that the station could be closed if gasoline allotments were not received. Respondent has never contended that the station was closed because of a gasoline shortage--if it were contending such a defense, it was its obligation to prove it not Appellant's.

Thus, once the station was shown to be closed for any period of time the burden shifted to Respondent to prove that such cause was permitted under the terms of the stipulated judgment. The defendant never argued nor attempted to do this but rather complained that Plaintiff was unable to prove the reasons for closure on each and every occasion testified to by the numerous witnesses.

Respondent states that "Plaintiff's witnesses testified that on several unspecified occasions the station was closed". (Respondent's brief, p. 7). To say the least this is a gross understatement of the evidence presented by Plaintiff. As outlined in Appellant's brief in chief (pp. 10-14) numerous witnesses testified that the station was "closed every Thursday morn-

ing", that the "station was usually closed during the weekends", that the station was hardly ever open during the night", and that the station was closed "at least 50 per cent of the time when an employee arrived for work." In addition, random pictures were introduced into evidence showing the condition of the service station during various times throughout the year. (Appellant's brief, p. 11).

Thus, the evidence was clear that the service station was closed periodically throughout the time period when the lease required the station to remain open 24 hours a day. An obvious breach of the lease agreement occurred. The reasons for these closures are irrelevant and if they are relevant it becomes Defendant's obligation to justify them.

Once the fact that the lease had been violated was shown the next question remained as to what damages resulted. In this case the amount of damages resulted from the failure of Respondent to sell gasoline during the periods in which the station was closed. Respondent in its brief refers to American Jurisprudence as an authority stating that the fact of damages cannot be based upon speculation and that no recovery can be made in cases in which it is uncertain whether the plaintiff suffered any damages. (Respondent's brief, pp. 8-9). This statement of the law is correct. And, if it could be reasonably inferred that no gasoline whatsoever would have been sold during the numerous

times the station was closed (as testified to by Plaintiff's witnesses) then a verdict in favor of Defendant should properly have been directed.

However, since the evidence showed that the station was constantly selling gasoline to various customers throughout each 24-hour period the inference exists that at least some unknown number of gallons of gasoline were not sold because the station was closed. This requirement to show the amount of damages has also been well stated by the American Jurisprudence authority. It states:

Courts have stated that only reasonable certainty is required in proving the fact and cause of the injury, but that the amount of damages--once their cause and fact have been shown, need not be proved with the same degree of certainty. This would indicate that courts are more lenient in allowing the jury to speculate as to the amount of damages after their cause has been proved.. . .

Damages are not rendered uncertain because they cannot be calculated with absolute exactness or because the consequences of the wrong are not precisely definite in pecuniary amount. An element of uncertainty in the amount of damages or the fact that they cannot be calculated with mathematical accuracy or with absolute certainty or exactness is not a bar to recovery. Nor is mere difficulty in the assessment of damages a sufficient reason for refusing them when the right to them has been established.. . .

One whose wrongful conduct has rendered difficult the ascertainment of the precise damages suffered by a plaintiff is not entitled to complain that they cannot be measured with the same exactness and precision as would other-



wise be possible. And some cases have further held that when the tort feason or contract breaker has caused the uncertainty, he will not be allowed to complain that the damages cannot be measured with exactness. 22 Am.Jur.2d, Section 23, pp. 42-43. (Emphasis added).

This same authority goes on to state:

Under such circumstances, all that can be required is that the evidence--with such certainty as the nature of the particular case may permit--lay a foundation which will enable the trier of facts to make a fair and reasonable estimate of the amount of damages. The plaintiff will not be denied a substantial recovery if he has produced the best evidence available and it is sufficient to afford a reasonable basis for estimating his loss. Id. at Section 25, p. 45. (Emphasis added).

Since Plaintiff did not maintain a 24-hour log of Respondent's station the best evidence available to prove the damages caused by the closure was first, the prior history of the station itself as shown in Exhibit 35 (to be discussed infra in this brief) and second, the expert testimony of Delbert Taylor as to what he believed that the station should have been able to produce in terms of gallons per day based upon the geographical conditions, his previous studies of that particular station and the number of cars which pass by it during the damage period.

Respondent in its brief repeatedly states that Mr. Taylor's testimony "lacks credibility". (Respondent's brief, pp. 12-13). It should be noted, however, that the testimony was never stricken nor did the trial court hold Mr. Taylor to be incompetent to

testify as an expert witness.

Respondent's opinion that Mr. Taylor's testimony lacked credence was an argument for the jury and not for this court. It goes without saying that the fact finder is the exclusive judge of the credibility of witnesses and evidence. Page v. Federal Security Insurance Company, 332 P.2d 666 (Utah 1958); Shupe v. Menlove, 417 P.2d 246 (Utah 1966).

Mr. Taylor was sufficiently credible to allow submission of his testimony to the jury. Mr. Taylor owned several service stations, attended B.Y.U., and majored in Business Administration, worked for three major oil companies for ten years (Tr., p. 445), and regularly predicted the market potential of numerous service stations in his sales area. (Tr., pp. 449-450). He stated that he was normally accurate in his prediction of sales to a degree of 97 per cent. (Tr., p. 450).

He testified further that he had had personal experience with the Delle Service Station in 1971 to 1973 when he made projections for his company as to the marketability of that area. (Tr., p. 451). He stated that in determining the sales volume of a service station he looked at several factors including location, traffic count, the number of automobiles or trucks that go by the location every day, and the regularity of hours that a station is open. (Tr., pp. 452-462). The witness also examined the competition in the area and the number of miles from

previous gas stations that a motorist would have to travel.  
(Tr., pp. 465-466).

Respondent argues that because Mr. Taylor made one mistake as to an example of traffic count that his entire testimony should be disregarded. (Respondent's brief, pp. 11-12). This "mistake" again went only to the matter of weight and credibility and not to whether the jury should be able to weigh the testimony at all. In any event, this "extremely important error" as stated by Respondent (Respondent's brief, p. 12) was not critical since Mr. Taylor's opinion that a station located in that geographic area should have produced three times the amount of gasoline sales as were actually reported was not based solely on the "error". (Tr., pp. 469-470).

The "error in question" concerns July 10 in which the witness stated that on that day the peak hour of traffic was between 11:00 at night and 12:00 midnight. The correct figure as stipulated by Plaintiff's counsel was 11:00 in the morning to 12:00 noon. (Tr., A-3). However, this error on this one day did not taint Mr. Taylor's entire testimony as to his estimate of yearly gas sales. He stated, for example, that on another day, June 26, that the peak time for automobile traffic was between 5:00 and 6:00 p.m. (Tr., p. 459). He acknowledged that the traffic count varied from a day-to-day basis.

Mr. Taylor based his opinion on a number of factors includ-

ing the fact that the volume of traffic passing by the service station increased from 1974 to 1976. (Tr., p. 460). He also based his opinion on the hypothetical offered by Plaintiff's counsel summarizing the testimony of other witnesses as to various periods of time when the station was closed and stated that based upon those facts the station would probably lose about 70 per cent of its car trade and all of its truck trade. (Tr., pp. 469-470). He based his opinion further on the number of cars which went by the station according to a monthly breakdown as provided by the Utah Highway Department of Transportation. (Tr., p. 502). It was stipulated that these records had been used properly and that they were the official records kept by the State of Utah as to traffic control. (Tr. A-3).

Respondent in its brief states, "The Court, as a matter of law could not submit this testimony, flawed as it was by the error in reading the traffic count upon which Mr. Taylor based his computation and his admitted lack of knowledge of the other factors which he testified were essential to an adequate evaluation." (Respondent's brief, p. 13). This statement flies contrary to the well-established rule that the jury must weigh the credibility of witnesses and also to the rule that upon motions for directed verdict, the trial court is obliged to view the evidence in the light most favorable to the party against whom the verdict is sought to be directed. Anderson v. Gribble, 513

p.2d 432 (Utah 1973). Nor can it be said as a matter of law that reasonable men could not conclude that Mr. Taylor's testimony was credible as to his damage estimates and therefore this Court cannot sustain the granting of a motion for directed verdict. Anderson v. Gribble, supra.

The Kratzers case cited by Respondent (Respondent's brief, p. 14) is not contrary to the position advocated by Appellant. In that case a bakery was wrongfully closed down for a period of time and damages were sought for periods extending beyond the closure. This Court stated:

[I]t is not possible to say with any degree of certainty how much damage was caused to it other than the loss of the sale for that one day. 504 P.2d 40 (1972). (Emphasis added).

In this case, contrary to the assertions made by Respondent, Appellant was only attempting to prove what damages occurred because of the day-to-day failure of the station to be operational and such a calculation is not speculative when it is based upon the station's full-service operation and the testimony of an expert witness.

In summary, there was ample evidence that the station in Delle was closed at various periods of time and for various lengths of time during the years now in dispute. The lease forbade any closure for any reasons and the stipulated judgment allowed closure only for shortages of gasoline. The fact that Plaintiff was unable to prove exact number of days and hours

which the station was closed was immaterial at that point since the lease had, as a matter of law, been breached. The amount of damages suffered because of this breach could only be proved by "the best evidence" available to Plaintiff and the defendant. cannot now complain that mathematical certainty was not shown.

B. There was Ample Evidence to Allow the Jury to Conclude that a Breach of Contract Occurred by the Failure of Defendants to Complete the Lagoon System and Sufficient Reliable Evidence Was Presented to Allow the Jury to Determine Resulting Damages.

Once again, the respondent has completely distorted the language of the 1971 lease agreement and the stipulated judgment of 1974. Respondent argues that while it constructed the lagoon system it was not required to obtain the final approval from the State Department of Health because Plaintiff's restaurant had not been built and therefore the system could not be made operational until that time. (Respondent's brief, pp. 15-21).

This argument completely ignores the clear language in the stipulated judgment which states: "The lagoon system shall be designed and constructed to comply with the minimum requirements of the State of Utah and the County of Tooele." (Ex. P-7). This language does not in any way mention the word "operation" and Respondent's argument that the lagoon could not be fully "operational" is therefore completely without merit. (Respondent's brief, pp. 16-17).

The question was not whether the lagoon could properly operate but whether it had been properly built so that at the appro

priate time it could operate. The evidence clearly showed that the facilities did not meet health specifications because of design and construction defects and not because the facility was not operating at the time.

A letter dated August 14, 1974 from the Division of Health to the defendant clearly shows the construction and design defects:

The inspection has indicated that the treatment works, as constructed, deviate from the approved plans and that the existing facility does not comply with the Utah Code of Waste Disposal Regulations. Therefore, you are hereby requested to cease the discharge of waste water to this treatment works until the following corrections are made.. . .

1. The pump station must be equipped with dual grinder pumps, fan and vent.
2. The section of force main at the ravine crossing must be adequately covered or insulated to prevent freezing.
3. The inlet structure to the primary cell, the transfer structure between the primary and secondary cell, and the emergency overflow structure must be built to conform with approved plans.
4. The lagoon system must be entirely enclosed by a six-foot high chain-link fence. Also, appropriate warning signs should be provided along this fence to designate the nature of the facility and advise against trespassing.
5. The plastic liner in the lagoon cells must be covered by two inches fines as indicated on the plans.

6. The outer slopes of the lagoon dikes must not be steeper than two horizontal to one vertical in order to maintain dike stability and guard against erosion problems. (D-38).

None of these deficiencies resulted because of the lagoon's failure to operate at full capacity. In fact, had the restaurant been present and discharging the required amount of water the State Health Department still would not have passed the lagoon because of these deficiencies.

For Respondent to state that it has "substantially complied" with the agreement to build the lagoon is also a gross misstatement. The plaintiff testified that it would cost him between \$10,000 to \$15,000 to complete the lagoon system according to State Code. (Tr., pp. 152-153). Mr. Art Maxwell, a civil engineer, submitted a June, 1977 estimate that it would cost \$9,300 to "complete construction to meet requirements of State Division of Health". (P-51).

The plaintiff was not required to gamble that upon completion of his \$60,000 or \$70,000 restaurant that Defendant would complete the construction of the lagoon in time to make the restaurant operational. While a seller, under an earnest money agreement, is not required to deliver a clear title until the final payment in a contract has been made, the language contained in the lease agreement and stipulated judgment unmistakably provided that the defendant would "complete the same within one



year from March 8, 1974". (Ex. P-7). Thus Respondent's analogy to real estate transactions is not appropriate. (Respondent's brief, p. 19).

Finally, Respondent's statement, "Until there is a restaurant to use the lagoon system, the lack of final approval of the system is of no consequence to Plaintiff" (Respondent's brief, pp. 21-22) is another example of Respondent's reckless disregard for Plaintiff's rights. Such a statement is equivalent to arguing that a home buyer should purchase a lot and build a home with the hope that a sewer and water line will one day be hooked to the lot to make the home inhabitable. And, the argument would then go, if such a line was not made it would then be the obligation of the homeowner to spend money (if he had it) to put in his own sewer and water system. Obviously, the lack of existing sewer and water lines would be of "great consequence" to the mythical homeowner both as to his decision to build the home and as to his ability to obtain financing.

Respondent's arguments concerning the breach of the lease agreement pertaining to the lagoon system cannot be sustained.

## POINT II

THE TRIAL COURT ERRED IN EXCLUDING EXHIBIT  
35 FROM ADMISSION INTO EVIDENCE WHEN IT WAS  
CLEARLY RELEVANT IN DETERMINING PLAINTIFF'S  
DAMAGES.

Respondent asserts that "Plaintiff cannot have his cake and eat it too". (Respondent's brief, p. 23). Respondent ar-

gues that since the 1974 judgment included a provision requiring Defendant to maintain the station on a 24-hour basis that it must be assumed that Exhibit 35 did not represent a full 24-hour a day annual operation and therefore was not competent evidence.

This argument, however, is invalid. First, Plaintiff never alleged in the previous lawsuit that 1972 was the year in which the 24-hour operating requirements had not been met. The complaint filed on October 3, 1972 in Civil 7761, Tooele County did not allege a failure to maintain the station open on a 24-hour basis. Its provision did not appear until the 1974 stipulated judgment when Defendants had failed to maintain the station during 1973 on a full 24-hour basis.

For the very reason now argued by Respondents the figures for 1973 were never attempted to be introduced into evidence since they were not reliable as to full operational capacity nor could they be used to prove damages after the 1974 stipulation had been entered. The court should note that Exhibits P-32 include gasoline summaries for 1976, that P-33 included summaries for 1975 and that Exhibit 34 included summaries for 1974 and that Exhibit 35 was a proffered summary of 1972. There was no exhibit offered by Plaintiff showing the gasoline sales in 1973.

If, as Respondent argues, 1972 was considered not to be a

fully-operational year it seems highly unusual that the 1972 sales of 452,045 gallons of gasoline" would be used by both parties as the basis to determine when the station was not receiving full gasoline because of shortages as provided in the stipulated judgment, Exhibit P-7, pp. 5-6. (See quotation in Appellant's brief, pp. 9-10).

Finally, Plaintiff testified that 1972 was a 24-hour-a-day year. The following exchange took place between Plaintiff and his counsel:

Q I show you what's been marked for purposes of identification as Plaintiff's Exhibit 35.

A Yes.

Q I will ask you if you can identify it.

A That was our gas sales in 1972.

Q Now, in 1972 was the station operated on a different basis as far as hours are concerned and times than it was in 74? '75? '76?

A Yes, sir.

Q What was the difference?

A They were operating mostly 24 hours a day. (Tr., p. 96).

Quite apart from the obvious fallacious argument of Respondent as to the irrelevancy of Exhibit 35, it should also be observed that this argument was never made at the lower court but that it was always contended that the prior 1974 stipulated

judgment precluded any use of the 1972 figures. (Tr., p. 135). The trial court specifically stated that the exhibit was denied, not because of its incompetency showing a 24-hour basis of operation, but because it predated the 1974 judgment and therefore was barred. (See Appellant's brief, pp. 27, 29).

Finally, Respondent concludes with the statement that "Exhibit 35 lacks credibility for other reasons" and then proceeds to list five such reasons. (Respondent's brief, p. 24). Once again, as noted in the previous section, Respondent makes a jury argument of credibility which is not a proper consideration of this court. Shupe v. Menlove, 417 P.2d 246 (Utah 1966). The record will show that Appellant produced equally credible evidence that conditions had actually improved in the area since 1972 and that more gas should have been sold. (See e.g., Tr., pp. 96, 239).

It will serve no useful purpose to argue the merits of the evidence to this Court and therefore the arguments of Respondent concerning the alleged lack of credibility of Exhibit 35 need no further comment.

#### CONCLUSION

Respondent attempts to confuse the proof required as to the fact of damages with the quantum of damages. There was sufficient evidence to show that the service station was closed during long periods of time and that the closures were not "occasional."

al" as Respondent views the evidence. Since gasoline could obviously not be sold during the time the station was closed some damages were suffered during the days and nights the station remained closed.

The testimony of Mr. Taylor was competent to give the jury a basis for determining what the damages should be. This testimony, in conjunction with the testimony of numerous witnesses as to the time period and days the station was closed would have given the jury a sufficient foundation as required by law to determine the amount of damages. Had Exhibit 35, the prior history of the station itself during a full operating year, been admitted into evidence the jury would have had the best evidence obtainable for making a reasonable calculation as to damages.

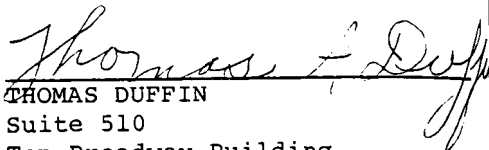
Unfortunately, however, the trial court refused to admit this valuable piece of evidence because of its predating of the 1974 judgment and now Respondent attempts to taint the offered exhibit as not being indicative of a full operating period even though the evidence in the record is to the contrary.

Finally, the trial court erred in not submitting the question of the lagoon construction to the jury since the lease agreement never required Plaintiff's restaurant to be built but did require that the lagoon meet construction and design standards of the applicable health codes.

For these reasons, a new trial should be ordered so that a

jury can properly decide the numerous issues of fact and credibility raised in this dispute.

Respectfully submitted,

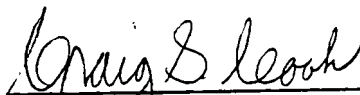


THOMAS DUFFIN

Suite 510

Ten Broadway Building

Salt Lake City, Utah 84101



CRAIG STEPHENS COOK

3645 East 3100 South

Salt Lake City, Utah 84109

Attorneys for Plaintiff-  
Appellant