1978

Craig Mecham and John Hedman v. Myron L. Benson and Ellen Benson : Brief of Respondents

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

CRAIG MECHAM and JOHN HEDMAN, Plaintiffs-Appellants, vs. MYRON L. BENSON and ELLEN BENSON, his wife, Defendants-Respondents.	Case No. 15649

BRIEF OF RESPONDENTS

Appeal from District Court of Salt Lake County, State of Utah, Honorable James S. Sawaya, Judge

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TABLE OF CONTENTS

CASES CITED

RULES

TEXTS

TABLE OF CONTENTS--(continued)

page

STATUTED CITED

PRELIMINARY STATEMENT

The parties will be referred to as in the case below.

STATEMENT OF THE KIND OF CASE

Craig Mecham and John Hedman brought suit against Myron L. Benson and Ellen Benson, his wife, to recover $3,275.42, plus costs and interest for breach of contract. Myron L. Benson and Ellen Benson counterclaimed against Craig Mecham and John Hedman for fraudulently selling them the mobile home which was represented to be:

a. new when it was used;

b. it was represented never to have been wrecked, when in truth and in fact, it had been wrecked in that the mobile home had been blown over in a wind storm;

c. that the mobile home was rampant with latent defects;

d. in addition thereto, the contract had been unlawfully filled in, and the Bensons were fraudulently charged a $32,137.12 finance charge which resulted in the Bensons pay $60,497.12 for a $27,000.00 mobile home on which the unpaid balance was $19,600.00.

DISPOSITION IN LOWER COURT

Case was tried before the Honorable James S. Sawaya, District Judge, sitting with a Jury. The Jury unanimously rendered a verdict in favor of the

defendants and against the plaintiffs as follows:

a. No cause of action on plaintiffs' Complaint.

b. And a verdict of:

"We, the jurors impaneled in the above-entitled case find on defendants' Counterclaim, the issues in favor of the defendants and against the plaintiffs, and award the following damages: compensatory damages, $7,400.00; punitive damages, $000.00; attorney fees, $1,680.00.

c. Plaintiffs' Motion for a new trial was subsequently denied.

RELIEF SOUGHT ON APPEAL

Myron L. Benson and Ellen Benson seek to have the Jury verdict affirmed.

STATEMENT OF FACTS

In view of the fact that plaintiffs' Statement of Facts is not completely correct, Myron L. Benson and Ellen Benson, his wife, deem it helpful to restate the facts.

On the 29th day of October, 1975, the plaintiffs did come to Myron L. Benson and Ellen Benson, his wife, and represent that they had for sale a new 1974 Silvercrest Chalet mobile home, serial number WS-747-X4, and that they would sell the mobile home to the Bensons for the sum of $27,000.00. Mecham and Hedman did represent to the Bensons that the mobile home was a new home; that said mobile home had never been wrecked or blown over, when in truth and in fact, it had been wrecked and it had been blown over. It was further

represented by Mecham and Hedman that upon the Bensons paying a cash down payment of $7,400.00, that the unpaid balance of $19,600.00 would be financed at the rate of eight and one-half per cent (8½%). That Craig Mecham did unlawfully and fraudulently change the interest rate and fill in the contract a rate which was not agreed upon, to-wit: an add-on rate of thirteen and six-tenths per cent (13.6%) (TR-266), that this unauthorized interest rate resulted in the Bensons being charged $60,197.12 for a $27,000.00 mobile home which at the closing of the contract only had an unpaid cash balance price of $19,600.00 (TR-266) (TR-305).

In addition to the foregoing fraudulent acts, the Bensons alleged in their Counterclaim, and further alleged that the mobile home was full of latent defects by reason of it having been wrecked in a wind storm (TR-313). These defects included the following proven facts:

a. the mobile home could not be leveled (TR-306);

b. the roof leaked (TR-306);

c. the appliances were defective (TR-306);

d. the wall subsequently cracked (TR-327);

e. the cabinets were not square (TR-326);

f. the doors would not close (TR-327).

That by reason of the foregoing unlawful acts

of fraud that had been perpetuated upon the Bensons by Mecham and Hedman, the Bensons did lose the equity in their trade in family home for which they had been given a down payment credit of $7,400.00. In addition thereto, the Bensons did further suffer damages of $1,680.00 for attorney fees which Mecham and Hedman stipulated in Open Court was fair and reasonable (the Jury adopted their stipulation) (TR-293).

The installment sale and security agreement (see P-1) was executed by Craig Mecham, personally, and showed Majestic Mobile Homes as sellor. An alleged copy of (P-1) installment sale (see D-9) and security agreement was delivered to the Bensons some months after the sale was such that you could not read the finance charge (TR-267), nor the percentage rate (TR-268), nor could you read the number of the monthly payments or monthly installments (TR-268). In addition thereto, the payment schedule, and the deferred payment price were illegible.

Plaintiffs admit and allege that Craig Mecham and John Hedman both sued in their personal capacity. The Bensons in their Counterclaim (see paragraph 8) allege:

> Majestic Homes, Inc., was the alter ego of Craig Mecham and John Hedman, and because they operated under an alter ego, and because they have brought a Complaint herein in their own name, they are estopped from asserting any defense on behalf of the corporation; also that any Judgment that is rendered herein will be rendered personally against the plaintiffs, and any acts of Majestic Homes, Inc., are binding upon Craig Mecham and John Hedman, personally (TR-37).

Defendants generally deny paragraph 8 as aforesaid, so, the following Demand for Admission was submitted (TR-56):

7. Admit or deny that Craig Mecham and John Hedman are both bound individually and as a corporation on the contract and agreement sued upon herein.
ANSWER: ADMITTED (see TR-56).
10. Admit or deny that Majestic Homes, Inc., has no interest whatever in the contract sued upon herein between plaintiffs and defendants.
ANSWER: ADMITTED.

The foregoing admissions are made under oath before a Notary Public on the 11th day of October, 1977 (TR-56).

POINT I

APPELLANTS CRAIG MECHAM AND JOHN HEDMAN ARE PERSONALLY LIABLE.

POINT II

MYRON L. BENSON'S AND ELLEN BENSON'S, RESPONDENT'S, COUNTERCLAIM WAS NOT BARRED BY THE CONTRACTS' EXPRESS PROVISIONS.

ARGUMENT

POINT I

APPELLANTS CRAIG MECHAM AND JOHN HEDMAN ARE PERSONALLY LIABLE.

Mecham and Hedman for the first time on appeal assert as their first point in argument that:

"They are not liable for claim brought against them as agents of Majestic Homes, Inc."

This assertion is shocking in that during sixteen months of litigation; 223 pages of Court pleadings and documents; two days of trial by Jury which included 133 pages of evidence. Mecham and Hedman have always

maintained that they are the real parties in interest and that they are both bound individually on the contract and agreement sued upon herein (TR-56).

Craig Mecham and John Hedman commenced this action via a Complaint and Summons filed March 3, 1977, in which they personally, as plaintiffs, allege:

a. (see paragraph 2) (TR-2) That defendants on or about the 29th day of October, 1975, entered into a contract with plaintiffs for the purchase of a * * * new 1974 Silvercrest Chalet mobile home * * *

b. (see also paragraph 4) (TR-2) That the plaintiffs in accordance with their rights and duties under said contract * * *

On April 20, 1977, an Amended Complaint was filed (TR-8) in which the above allegations were again set forth re-affirming the fact that Mecham and Hedman were the real parties in interest.

Defendants both in their Counterclaim and in their Answer alleged that Mecham and Hedman were personally liable (TR-37) (TR-50). The issue was squarely put before the Court.

The issue was settled once and for all on October 11, 1977, when Craig Mecham and John Hedman under oath made the following admission (TR-56):

7. Admit or deny that Craig Mecham and John Hedman are both bound individually and as a corporation

on the contract and agreement sued upon herein.
ANSWER: ADMITTED.
10. Admit or deny that Majestic Mobile Homes, Incorporated, has no interest whatsoever in the contract sued upon herein between the plaintiffs and defendants.
ANSWER: ADMITTED (TR-56).

STATE OF UTAH)
:ss
COUNTY OF SALT LAKE)

CRAIG MECHAM, and JOHN HEDMAN, being first duly sworn on oath deposes and says: That he is the Plaintiff in the above entitled action. That he has read and executed the foreoing answers and that he knows the contents therein to be true to the best of his knowlege and belief.

/s/ CRAIG W. MECHAM
/s/ JOHN S. HEDMAN

SUBSCRIBED AND SWORN to before me this 11th day of October, 1977.

/s/ SHIRELY J. MITCHELL
NOTARY PUBLIC
Residing at: Salt Lake City

My Commission Expires:
March 26, 1980

All pleadings; all interrogatories; and all admissions represented that Mecham and Hedman had sued personally and were personally liable. As late as November 30, 1977, plaintiffs represented to the Court in a brief in support of a Summary Judgment the following undisputed Facts (TR-69):

1. On October 16, 1975, defendants entered into an agreement with plaintiffs * * * copy of which is annexed hereto.
2. At that time, plaintiffs were doing business as Majestic Mobile Homes, Incorporated, now a defunct Utah Corporation.
3. October 29, 1975--Defendants entered into the contract for sale with plaintiffs entitled installment sale and security agreement--annexed hereto--WHEREBY PLAINTIFFS AGREED TO SELL AND DEFENDANTS AGREED

TO BUY THE AFORESAID MOBILE HOME.

Plaintiffs (TR-70) then set forth: Issues to be resolved!!

Ten issues are set forth--none of which included or mentioned plaintiffs' Point I, to-wit:

"Appellants are not liable for claims brought against them as agents of Majestic Homes, Inc."

Plaintiffs throughout have claimed all the benefits of the Contract, including attorney fees (P-1) (also see TR-145, TR-67 to and including TR-70), in which Steven F. Alder, plaintiffs' attorney testified, stipulated, and agreed that under the contract, Mecham and Hedman were entitled to $1,680.00 should they prevail.

THE COURT: Let me explain the significance of that stipulation. Ladies and Gentlemen, that means that the parties have agreed between them that on the issue of attorney fees the sum of sixteen hundred and eighty dollars is a reasonable fee to be awarded the prevailing party in this matter (TR-293).

(P-1) was signed by Craig Mecham personally. No corporation was mentioned therein. In accordance with Rule 17, Utah Rules of Civil Procedure, plaintiffs and their attorney, by their Complaint and subsequent pleadings, represented to the Court that Craig Mecham and John Hedman were the real parties in interest.

It has long been the rule of this Court: "That a matter not raised at the trial Court could not be raised on appeal." See Edgar v. Wagner 572 Pac. 2nd 405;

see also First Equity Corporation of Florida v. Utah State University 544 P. 2nd 887 which involved a similar situation this Court citing Davis v. Mulholland 25 Utah 2nd 56; 475 P. 2nd 834 (1970) held: "Ordinarily an appellant cannot raise a theory on appeal for the first time different from that presented to the Court below." See also 5 Am. Jur. 2nd appeal and error Sec. 546; Pettingill v. Perkins 2 Utah 2nd 26; 272 P. 2nd 185.

Plaintiffs sued personally. The case was tried by plaintiffs on the theory that they were bound individually and as a corporation by virtue of the contract (P-1) sued upon herein. Having by their own pleadings, evidence and instructions tried and rested the case on the theory that Mecham and Hedman are the real parties in interest; they are personally liable and bound by their own theory. Plaintiffs cannot on appeal shift their theory and position. See Pettingill v. Perkins, supra 2 Utah 2nd 266-269.

POINT II

MYRON L. BENSON'S AND ELLEN BENSON'S, RESPONDENT'S, COUNTERCLAIM WAS NOT BARRED BY THE CONTRACTS' EXPRESS PROVISIONS.

As a matter of law, respondents' Counterclaim was not barred by the contracts' express provisions and

and by failure to give notice of rejection.

On September 8, 1977, the Bensons filed a Counterclaim alleging:

a. Fraudulent alteration of contract with regard to interest rates, finance charge; number of monthly installments; deferred payment price.

b. Fraudulent misrepresentations:

1. That mobile home was new when plaintiffs knew it had been used as a demonstrator.

2. That mobile home had not been wrecked when in truth and in fact it had been blown over and wrecked in a wind storm (TR-313).

3. Home could not be leveled.

4. Doors were not squared; roof leaked; appliances were defective; appliances were not new, but were used.

5. Walls cracked; cabinets were not square (TR-40). After proper motion and hearing the Counterclaim was ordered filed by the Court (TR-52).

Plaintiffs Craig Mecham and John Hedman replied to Counterclaim as follows:

1. Admits paragraph one (residency).

2. Denies paragraphs two through eight.

Thus the issues were framed. On proper trial and after proper instructions were given, the matter was submitted to a Jury. The Jury found the issues in

favor of defendants on their Counterclaim.

Now for the first time on appeal, plaintiffs claim that Counterclaim was barred by express provisions of the contract by failure of respondents to give notice of rejection.

The Bensons' Counterclaim was ordered filed by the Court. Plaintiffs, generally denied all allegations with the exception of residency. Defendants' specific allegations of fraud were put in issue. Plaintiffs, for the first time since the filing of the action, have now attempted to assert a new issue of rejection. This issue was never mentioned at the trial. The plaintiffs offered no instructions to the Court on this issue, and although the plaintiffs mention it in their Second Point, they cite no cases nor any facts in support thereof.

In regard to plaintiffs' allegation that the Complaint was barred by the express provisions of the contract, the Court's attention is called to the fact that the issue of fraud was pled with particularity, proven by clear and convincing evidence submitted to the Jury on proper instructions. After weighing the evidence, the Jury found that the Bensons' allegations of fraud were proven by clear and convincing evidence, and rendered a verdict accordingly. The only real

disputed fact that was placed before the Jury was whether or not the plaintiffs gave the defendants a Xerox copy of plaintiffs' Exhibit 1. The defendants testified that the only contract that they received was defendants' Exhibit 9. A cursory comparison of (P-1) and (D-9) will indicate that the Jury's verdict was correct in that (D-9) substantiates defendants' position that the finance charge; annual percentage rate; payment schedule; and deferred payment price were absent from defendants' copy of the contract. The evidence clearly shows that (D-9) was not delivered to the defendants for some months after the sale was completed by reason of the fact that all contracts were sent to the bank and the bank mailed defendants' copy (D-9) to them with the payment book. Defendants honestly believed that the original contract had been filled in properly at the proper rate of interest, and upon learning that they were being charged 13.6% instead of the agreed 8½%, promptly repudiated the contract. Craig Mecham acknowledged on cross-examination that the add-on rate of 13.6% was different than the 8½% which had been represented to the defendants (TR-266) (TR-305).

The other issues of fraud properly submitted and resolved by the Jury and complained of in plaintiffs' brief were as follows: Craig Mecham, on cross-examination, denied that the mobile home had ever been

blown over and wrecked. Howard Maki, a security guard of Mr. Hedman and Mr. Mecham, testified that when they brought in the mobile home in three (3) sections, the wind blew the middle section over (TR-311). The testimony of the security guard was never rebutted or questioned. The evidence is clear that the mobile home was then repaired and sold to the Bensons as a new home (see P-1, top left-hand corner, where in Craig Mecham's handwriting "new" was written in, on the 29th of October, 1975). In view of this testimony, the Bensons testimony, that the house could not be leveled; the cabinets were crooked; that the roof leaked; that the walls and doors could not be squared, certainly amounted to clear and convincing evidence upon which the Jury could fact their verdict.

Defendants did not deny that they inspected the mobile home prior to purchasing it. In this regard, plaintiffs admit that the mobile home had been set up, prepared, and placed on the lot for sale. In light of this, it could be reasonably assumed that the defects were covered over and patched up and concealed so that a reasonable prudent person could not and would not see them on a reasonable inspection. It wasn't until after the home was bought and after several attempts to level the mobile home and correct certain items, that the defects came to light. This evidence was presented to the Jury, and the Jury found by clear

and convincing facts that the Bensons had been defrauded.

The defendants', the Bensons', Counterclaim was stated with reasonable certainty and clarity, the plaintiffs had ample notice of what they were obligated to meet. The issue was actually tried in all respect under these facts and circumstances, the plaintiffs should be precluded from complaining about it.

The plaintiffs, for the first time on appeal, allege in their brief that Section 70A-2-606 (1 UCA) and Section 70A-2-607 (C) as a matter of law, barred defendants' Counterclaim. Although this matter was argued on plaintiffs' Motion for Summary Judgment (which was denied), the issue was never presented to the trial Court; nor mentioned during the trial; nor was any such defense asserted upon conclusion of the evidence--when PLAINTIFFS MADE THEIR MOTION FOR A DIRECTED VERDICT. (see TR-348).

The Court's attention is also called to the fact that when plaintiffs submitted to the Court, their instructions, numbered 1 through 9 (TR-143 to TR-152), not one requested instruction was requested concerning the defense of reasonable notice of rejection. Nor did the plaintiffs, throughout the entire trial ever assert the defense of sellors warranties, which was concealed on the reverse side of the contract (see

reverse side of D-9). At this late date, the plaintiffs, now on page 6 of their brief, now seek to assert this defense. With regard to the provisions concerning warranties on the reverse side of the contract, plaintiffs now claim that this concealed provision barred the defendants' right to recover on their Counterclaim. Concerning this late defense, the Court's attention is called to the established law of this state. As is set down in Christopher v. Larson Ford Sales, 557 Pac. 2nd 1009, in which this Court stated:

"SECTION 70A-2-316, UCA 1953, REQUIRES THAT TO EXCLUDE AN IMPLIED WARRANTY OF MERCHANTABILITY, A DISCLAIMER MUST BE CONSPICUOUS, I.E. IN LARGER OR CONTRASTING TYPE OR COLOR. THE REASON FOR THIS PROVISION IS THAT IT IS THE POLICY OF THE LAW TO LOOK WITH DISFAVOR UPON SEMI-CONCEALED OR OBSTRUCTED SELF-PROTECTED PROVISIONS OF A CONTRACT, PREPARED BY ONE PARTY TO WHICH THE OTHER PARTY IS NOT LIKELY TO NOTICE. WE THINK IT IS A CORRECTIVE SALUTARY RULE, THAT WHERE THERE ARE PROVISIONS OF THIS CHARACTER IN A CONTRACT, EITHER BURIED IN OTHER PROVISIONS, IN FINE PRINT OR OTHERWISE SEMI-CONCEALED, OR SECRETED IN SOME MANNER, SUCH AS BEING FOUND ONLY BY REFERENCE TO THE BACK SIDE OF THE DOCUMENT. THEY SHOULD NOT BE BINDING UPON THE SIGNER (BUYER), UNLESS IT IS SHOWN THAT THE PROVISION WAS ACTUALLY CALLED TO HIS ATTENTION."

The Court will note that the installment sale and security agreement, on its face, makes no reference to merchantability. The actual disclaimer is placed on the back among other fine print provisions (see D-9).

Under the law and doctrine set forth and prescribed in Christopher v. Larson Ford Sales, supra, Craig Mecham and John Hedman should not be permitted to insist that this concealed provision be effective as a waiver (see also Seal v. TAYCO, Inc., 16 Utah 2nd 323, 400 Pac. 2nd 503).

Although Section 70A-2-607 (3A, UCA 1953) was neither presented, argued, or asserted during the trial or in plaintiffs' Motion for Directed Verdict, the plaintiffs now seek to urge this defense on appeal. In this regard, the Court's attention is called to Craig Mecham's testimony (TR-262), in which he admitted that he guaranteed and warranted the home to be fit for the purpose for which it was sold. He also told them that it was a nice, beautiful, livable home, and that if they had any problems with it, he would fix them, maintain them, and take care of them. It was further admitted that several attempts were made to patch up the defects. As was previuosly stated, the contract (D-9) was not mailed out to the Bensons for several months, this coupled with the fact that they

(the Bensons) firmly believed they were doing business with respectable, honest people, and it was not until they obtained a copy of (P-1) from the State Tax Commission that they became aware of the fact that the interest rates had been changed; and upon further learning that the house had been wrecked and blown over in a wind storm and was incapable of being repaired; that the Bensons promptly brought suit herein. There was no showing at the trial by the plaintiffs that the Bensons failed to act within a reasonable time. On the contrary, the plaintiffs, in their brief, failed to analyze the evidence in the light favorable to plaintiffs' contention, as it should be by reason of the Jury verdict. In Christopher v. Larson for Sales, supra, this Court stated that what constituted a reasonable time for return and request for recision under the statute, quoted above, it is usually a question of fact to be determined from the circumstances in each case; and a finding thereon is subject to the standard rule of review which will not be upset if there is a reasonable basis in the evidence to sustain it.

The plaintiffs tendered no instructions, no interrogatories, nor did they at any time throughout the trial claim that the Bensons failed to act within a reasonable time. On the contrary, the evidence shows that the defendants' delays were the result of the

plaintiffs' failure to deliver to them a readable contract and their further attempts to patch up a wind-blown mobile home that was rampant with latent defects (see instruction 13) (TR-166).

CONCLUSION

The above-entitled cause was tried and submitted to the Jury on the basis of a written contract, for and on behalf of the plaintiff, and on the basis of fraud, by reason of the Counterclaim of the defendant. These issues were submitted to the Jury after the Court had instructed the Jury on each and all of the necessary elements of fraud, and more particularly: The defendants' requirement of proving fraud by clear and convincing evidence. The Jury accepted the defendants' version and found that the representations were material to the transaction, and that they were false and fraudulent as to the defendants. The defendants respectfully urge the Court to sustain Jury's verdict in that it is amply supported by clear and convincing evidence.

Respectfully submitted,

Mark S. Miner

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