

1997

Larry H. Miller Leasing Group v. Karl E. Jorgenson : Reply Brief

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

LARRY H. MILLER LEASING COMPANY,
a corporation,

Plaintiff / Appellee

vs.

KARL E. JORGENSEN,
Defendant / Appellant

Appeal No. ~~970445~~ 970603-CA
(Civil No. 970000647cv)

Priority No. 15

APPELLANT'S REPLY BRIEF

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
DIVISION II, STATE OF UTAH,
THE HONORABLE L. A. DEVER, DISTRICT JUDGE

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ARGUMENT

POINT I: APPELLEE HAS FAILED TO OFFER PERSUASIVE EVIDENCE OR ARGUMENT TO PROVE THAT AN AUTO AUCTION IS A 'RECOGNIZED MARKET' FOR THE COMMERCIALLY REASONABLE SALE OF A VEHICLE.

Appellant's position that Appellee's sale of the vehicle was commercially unreasonable has not been disproven by Appellee. Appellee's response to Appellant's brief is basically in two parts. First, Appellee argues that the sale of the repossessed vehicle at a wholesalers-only auto auction was a commercially reasonable sale through a recognized market and thus Appellee claims to be entitled to a deficiency from this sale. Second, Appellee argues that governing law should hold that, because a wholesalers-only auction is a recognized market for the sale of a repossessed vehicle, the methods of dealers in used vehicles should be ignored, and that the Appellant, therefore, failed to raise a genuine issue of material fact precluding summary judgment. Both of Appellee's arguments fail for lack of support from the Uniform Commercial Code and the case law interpreting it.

As the Appellant argued in his Brief, the law does not support Appellee's notion that a wholesalers-only auto auction is a "recognized market" for disposing of a vehicle. Appellee's Brief cited to several cases as evidence of this position. However these cases are distinguishable and fail on their own grounds.

Appellee relies upon Chrysler-Dodge Country v. Curley, 782 P.2d 536 (Utah App. 1989). Chrysler-Dodge involves the private sale of a repossessed vehicle. At first, the dealer attempted to make a public sale: "the dealer repaired and cleaned the truck and placed it on its car lot for sale. The truck was advertised and shown on the retail lot with little interest from prospective purchasers. Chrysler Dodge then solicited bids for the truck from other dealers." Chrysler-Dodge at 537. Eventually, the dealer sold the vehicle to another Chrysler dealership for a price higher than any other dealership had bid.

These facts alone support Appellant's position that this case is distinguishable from the cases cited by Appellee. The dealer first marketed the vehicle retail to the general public to obtain the best price possible for the sale of the vehicle and only resorted to a wholesale private sale after its attempt at obtain a retail price failed. The Chrysler-Dodge opinion states,

"It is the duty of the secured party to obtain the best price possible for the benefit of the debtor. However, the secured party does not have to use extraordinary means. There is no requirement or prohibition that the dealer must sell at wholesale or retail, but only that the secured party obtains the best possible price under the circumstances."

Id. At 541-542 (internal citations omitted).

While a retail sale is not required, it is required that the best possible price be obtained, which indicates that a wholesale price or less only be accepted after a retail sale was attempted.

The conduct of the several parties in Chrysler-Dodge is precisely the same procedure which the Appellant has advocated below. Contrary to this procedure, Appellee here made absolutely no effort to sell the vehicle for anything more than a wholesale price. Appellee cannot rely upon Chrysler-Dodge to support its claim that the auto auction is a recognized market for obtaining the best price for a used vehicle.

In fact, the court notes in Chrysler-Dodge that the authorities are split as to whether repossessed vehicles are even included in the "recognized market" exception of the U.C.C. The court therein cites one case which holds that an auto auction is a recognized market under the U.C.C. and two cases which hold that a used vehicle is not customarily sold in such a market. See Chrysler-Dodge, p.540, fn.6. Our own practical observation should guide us here. If an auto auction is a "recognized market" for the disposition of used cars, why do we have such a large number of used car sales lots? This case fails to support Appellee's position that the auction is a recognized market and that the sale was commercially reasonable.

The Appellee also relies upon Cotton v. Heppner, 777 P.2d 468 (Utah 1989), a case involving the sale of repossessed cattle at a livestock auction. As with Chrysler-Dodge, the court in Cotton noted a split of authority over the reasonableness of a livestock auction as a recognized market, though the court eventually took

the position that under the facts of that particular case, the jury's special verdict that the auction was a recognized market would not be overturned. Such a holding was not a blanket endorsement of all auctions, but under the facts of that particular case, the special verdict was upheld.

However, the distinction between the trade of livestock and the trade of used vehicles was not ignored by the court. The court reviewed the fact that the auction was well advertised, there was enthusiastic bidding, and the methods of sale were such as to obtain the best price possible for the cattle. Accordingly, Cotton offers no more support for Appellee's position than Chrysler-Dodge.

Failing to find support from cases in this jurisdiction, Appellee looks to other states. In both Ford Motor Credit Co. v. Mathis, 660 So.2d 1273 (Miss. 1995) and Daniel v. Ford Motor Credit Co., 612 So.2d 483 (Ala.Civ.App. 1992), the respective courts concluded that wholesale auto auctions were recognized markets for the sale of repossessed vehicles based upon the testimony of expert witnesses of the secured party. Such testimony was uncontested by the debtor. In neither case was an opposing affidavit filed as evidence or produced at trial to show that auto auctions were not customarily used as the first resort for selling a used motor vehicle. These cases, in addition to being from other states, stand for the proposition that if the non-moving party failed to file a counter-affidavit to a motion for summary judgment supported

by affidavits, or failed to offer opposing testimony, that party would lose, and are clearly distinguishable from the instant case.

Appellee does not even dispute some of the cases and arguments cited by Appellant. Appellant argued in his Brief that "Affidavits which raise specific evidentiary facts create genuine issues which preclude an order of summary judgment." Brief of Appellant, p. 11. Appellant cited to Treloggan v. Treloggan, 699 P.2d 747 (Utah 1985) for support of this statement. Only generally did Appellee respond to this statement with no response to the case cited.

Further, Appellee ignored Appellant's citation from Utah case law that "The purpose of the 'commercially' reasonable requirement is 'to get the best price obtainable for the truck'." Brief of Appellant, p. 13, Mass v. Allred, 577 P.2d 127, 128 (Utah 1978). Appellee argues generally that there is no specific requirement in the statute that the vehicle be sold at a retail price. However, as noted above, a retail price would clearly be a better price than a wholesale price which is the highest that could have been obtained at the auto auction in this case. Thus, the purpose of the 'commercially reasonable' requirement, to obtain the best price reasonable for a repossessed vehicle, would indicate that selling the vehicle wholesale at auction with no attempt to sell it at a retail price would not be commercially reasonable. This is another case and another argument which the Appellee has completely ignored and which must be decided in Appellant's favor.

Finally, Appellee ignored the point that is really determinative in this appeal: Whether an auto auction is a recognized market for the sale of a repossessed vehicle and is thus a commercially reasonable means of disposing of such a vehicle is a question of substantive fact which must be determined on a case by case basis with regard to the surrounding circumstances of the situation. This is a rule of law laid out by both the Utah Supreme Court and the Utah Court of Appeals. If there is any 'governing law' on this point, it is this: "In dealing with the issue of commercial reasonableness, the Utah Supreme Court has concluded that the issue of commercial reasonableness is fact sensitive and is thus dependent on the totality of the commercial context" Chrysler-Dodge Country v. Curley, 782 P.2d at 539.

Appellee's claim boils down to this: because Appellee, Larry H. Miller Leasing, disposes of used cars through the auto auction with no attempt to sell the vehicle at the best possible price, which would be retail, the auto auction should be a 'recognized market'. This only proves that the auto auction is a recognized market for Larry H. Miller Leasing. This is far too arbitrary a basis for determining what legally constitutes a recognized market. It allows a used car seller to rely on any means, whether or not a fair price is obtained for the vehicle, to dispose of a car as long as they consistently use the same means. This cannot be the basis for determining the commercial reasonableness of a sale.

It was therefore inappropriate for the trial court to decide the matter of commercial reasonableness based only on precedence of Appellee's stated procedure and distinguishable cases and this Court should overturn the summary judgment of the trial court.

POINT II: THE CONFLICT BETWEEN THE PARTIES AFFIDAVITS BELOW CONCERNED THE SUBSTANTIVE FACTS OF THE SUIT AND THUS CREATED A GENUINE ISSUE OF MATERIAL FACT WHICH SHOULD NOT HAVE BEEN DECIDED ON SUMMARY JUDGMENT.

Appellee's position that the conflict between the parties' affidavits did not concern substantive governing law must also fail. As argued above, the governing law in this matter is to be determined on a case by case basis where the affidavits are in conflict, which in and of itself precludes summary judgment. The commercial reasonableness of the sale of a vehicle through a wholesalers-only auto auction which would only bring a wholesale price or less is the point that liability for the deficiency is centered upon. There is no more substantive issue in a deficiency case. Accordingly, Appellee's argument fails and the summary judgment must be overturned.

Both parties submitted affidavits concerning the Utah Auto Auction as a recognized market for the disposal of a repossessed vehicle and whether that was commercially reasonable. However, Appellee argued in its Brief that the governing law is such that a wholesalers-only auto auction is a recognized market for the sale of a used vehicle and is thus a commercially reasonable means for

disposing of a repossessed vehicle, and thus, Appellant's Brief did not raise any genuine issues of material fact under governing law and that summary judgment was therefore appropriate.

The governing law should first be clarified. As shown above, Appellee has failed to prove that the governing law supports its position that a wholesaler-only auto auction is a recognized market for the commercially reasonable disposition of used cars. In fact, the governing law is that such a determination can only be made on a case by case basis.

"In dealing with the issue of commercial reasonableness, the Utah Supreme Court has concluded that the issue of commercial reasonableness is fact sensitive and is thus dependant on the totality of the commercial context. 'Whether any particular sale is commercially reasonable is to be determined on a case-by-case basis. That determination depends on whether the circumstances of the sale and the manner and business context in which it occurred support a conclusion that the sale was conducted in a commercially reasonable manner.'"

Chrysler-Dodge County v. Curley, 782 P.2d 536, 539 (Utah App. 1989), citing Scharf v. BMG Corp., 700 P.2d 1068, 1070-1071 (Utah 1985).

Instead of relying upon such a case-by-case analysis, Appellee turned the Court's attention to Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), which clarified the grounds for summary judgment (though the case is based on defamation and is otherwise irrelevant to the case at Bar). As Appellee quoted,

[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact.

Id. at 247-248 (emphasis in original).

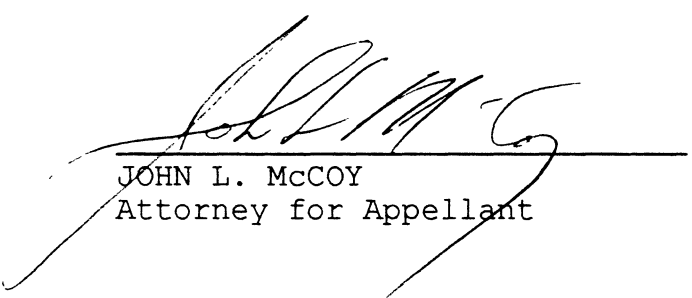
Appellee failed to mention that the Supreme Court went on to note that "summary judgment will not lie if the dispute about a material fact is 'genuine', that is, if the evidence is such that a reasonable jury could return a favorable verdict for the nonmoving party." Id. at 248. The Court has not required that the disputed fact prove the nonmoving party's case, but only that "sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." Id. at 248-249, citing First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 288-289 (1968).

Accordingly, the plaintiff's Affidavit of Gary Giffen, a sixteen year dealer in used vehicles, which stated that a repossessed vehicle would only be sold at auction after all other attempts to sell the vehicle at a retail price had been exhausted, was sufficient evidence to support the dispute over the commercial reasonableness of selling a car at auction which should have been resolved by the judge or jury, not on summary judgment. The case should have been decided on its facts alone, and thus this Court should overturn the trial court's Order of Summary Judgment.

CONCLUSION

For the reasons and on the grounds set forth above, the Appellee, Larry H. Miller Leasing Co., has failed to show that the trial court was correct to order summary judgment against the Appellant, Karl E. Jorgenson. As the Appellant has attested, the parties' conflicting affidavits created a genuine issue of material fact thereby precluding summary judgment. Therefore, this Court should reverse the Order of Summary Judgment and any judgment resulting therefrom.

RESPECTFULLY SUBMITTED this 5th day of February, 1998.

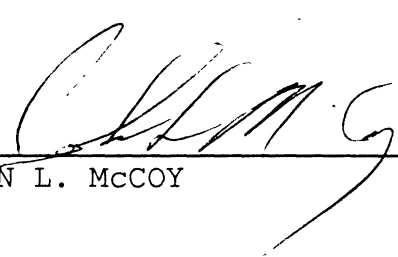


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CERTIFICATE OF MAILING

I HEREBY CERTIFY that on February 5th, 1998 I had two true and correct copies of the Appellant's Reply Brief mailed to the following by first class U.S. Mail, postage prepaid:

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