

1997

Edward Doyle v. Newby Buick, Oldsmobile, Pontiac, GMC, Suzuki, Inc. : Reply Brief of Appellant

Utah Court of Appeals

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ORAL ARGUMENT REQUESTED

IN THE UTAH APPELLATE COURT

EDWARD D. DOYLE,

Plaintiff - Appellee,

vs.

NEWBY BUICK, OLDSMOBILE,
PONTIAC, GMC, SUZUKI, INC.,

Defendant - Appellant.

Appellate Court No.: 970718-CA
Priority No. 15

ON APPEAL FROM THE FIFTH DISTRICT COURT, WASHINGTON COUNTY, UTAH

Judge: G. Rand Beacham

APPELLANT'S REPLY BRIEF

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**UTAH COURT OF APPEALS
BRIEF**

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IN THE UTAH COURT OF APPEALS

No. 970718-CA
Priority No. 15

EDWARD D. DOYLE,
Plaintiff-Appellee,

v.

NEWBY BUICK, OLDSMOBILE, PONTIAC, GMC, SUZUKI, INC.,
Defendant-Appellant.

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Judge: G. Rand Beacham

APPELLANT'S REPLY BRIEF

I. ARGUMENT

Plaintiff fails in his appellate brief to contradict Defendant's assertion that the trial court improperly based its decision in this case on a dead issue.

Plaintiff makes two arguments to suggest that the validity of the parties' agreement regarding the 1996 truck was properly before the trial court for resolution. First, Plaintiff argues that validity was put at issue by the pre-trial order. Specifically, Plaintiff argues validity was put at issue by the following three questions:

- (a) Whether Plaintiff is excused from performing under the contract when the parties have agreed that Plaintiff will purchase a vehicle for a certain price and the vehicle is, thereafter delivered?
- (b) Whether, after contracting to purchase the vehicle, Plaintiff may set an arbitrary date after which the contract will be voided?
- (c) Whether, after contracting to purchase the vehicle, Plaintiff's impairment of his ability to obtain financing excuses non-performance under the agreement?

Plaintiff's App. Brief, at 7. This first argument does not withstand scrutiny.

The issues framed for resolution by the parties in the pre-trial order clearly accept the validity of the contract. Nowhere does the pre-trial order remotely suggest that the validity of the parties' agreement was at issue. The parties chose to limit the scope of this litigation to performance issues regarding their modified agreement for the purchase of the 1996 truck.

Next, Plaintiff argues that validity of the parties' agreement was put at issue during the trial. Although this point is not entirely clear, it appears that Plaintiff argues that Defendant somehow challenged the validity of the parties' agreement or at least opened up the issue for determination, by submitting into evidence the Vehicle Buyer's Order for the 1996 truck. Plaintiff's App. Brief, at 5. The Buyer's Order was introduced to help show the terms of the parties' undisputed agreement. *See, e g*, Trial Transcript, at pp. 183-187, 196-197, 210.

All evidence shows that both parties accepted the validity of the substitute agreement and merely challenged performance under that agreement. *See, e g*, Plaintiff's Testimony, Trial Transcript, at p. 185, lines 9-10 ("I *agreed* to have a trade-in of 26,178 and pay difference of approximately \$1,500.") (emphasis added); p. 186, line 25- p.67, line 9 (Q: "When you signed *the agreement* on September 12th, '95, . . .;" Q: "[W]hat was your understanding as to how all *this deal* was supposed to be . . .;" A: "The contract was going to be *carried forward* with a difference of \$1,500.") (emphasis added); Defendant's Testimony, Trial Transcript, at p. 194, lines 8-10 (Q: "So

you made an agreement that the would – to settle these differences, he would take a ‘96 pickup truck?" A: "Yes. . . ."); Plaintiff’s Cross-examination of Rick Harper, Trial Transcript, at p. 215, lines 3-8 (Q: "Mr. Harper, are you sure that when Mr. Doyle first entered *this agreement* – the vehicle buyer’s guide which has been marked D-7 – that he wanted the black truck?" A: "[Yes].") (emphasis added); *see also* Plaintiff’s App. Brief, at 7 ("The second agreement, or Buyer’s Order, was *merely a modification* of the first contract.") (emphasis added).

Plaintiff has shown nothing to suggest that validity of the parties’ agreement was at issue in this case. To the contrary, Plaintiff admits that the trial court raised the issue of the validity of the parties’ agreement. Plaintiff’s App. Brief, at 6 ("*The issue brought up by the trial court* was not wholly inconsistent [with the controversy at hand]."). The issue brought up by the trial court was wholly inconsistent with the advocacy and testimony of the parties.

As cited in Defendant’s Opening Brief, the law in this state is clear that parties may limit the scope of the litigation if they choose. *Combe v. Warren’s Family Drive-Inns, Inc.*, 680 P.2d 733, 736 (Utah 1984). If an issue is withheld, the court cannot adjudicate it and grant corresponding relief. *Id.* Thus, by raising the validity issue, which was withheld, the trial court erred, and its ruling must be set aside.

Plaintiff’s brief attempts to raise a collateral issue regarding the applicability of Utah R. Civ. P. 15(b). Since it only applies to issues actually tried, Rule 15(b) is inapplicable to the present appeal. As explained above, the validity of the parties’ agreement was never tried. Although Plaintiff states a number of times in his brief, in conclusory fashion, that the validity issue was tried by implied consent of the parties, he fails entirely to provide any reference to the record where such issue was raised by the parties or the testimony. Although liberal, the state’s pleading rules do not

allow pleadings to be amended to conform to evidence and arguments that were never presented by the parties and to which Defendant had no notice or opportunity to defend against.

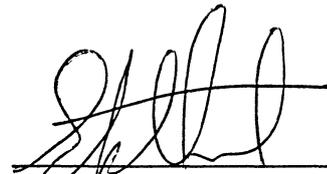
II. CONCLUSION

For the reasons stated above and in Defendant's Appellate brief, Defendant requests that the appellate court set aside the trial court's ruling, since it was based on improper sua sponte consideration of an issue that was not in dispute.

DATED this 26th day of March, 1998.

ADDENDUM

No Addendum is required, pursuant to Utah R. App. P.24(a)(11).



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CERTIFICATE OF SERVICE

I hereby certify that two copies the above and foregoing **APPELLANT'S REPLY BRIEF** were placed in the United States mail at St. George, Utah, with first-class postage thereon fully prepaid on this 26th day of March, 1998, addressed to:

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