

1978

Polyglycoat Corporation v. Steven Holcomb dba Steve Holcomb Distributing : Brief of Appellant

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.

Wendell E. Bennett; Attorney for the Appellant;

Verl C. Ritchie; Raymond Child; Attorneys for the Respondent;

Recommended Citation

Brief of Appellant, *Polyglycoat Corp. v. Holcomb*, No. 15779 (Utah Supreme Court, 1978).
https://digitalcommons.law.byu.edu/uofu_sc2/1248

This Brief of Appellant 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 THE STATE OF UTAH

POLYGLYCOAT CORPORATION,	:	
	:	
Plaintiff-Respondent,	:	
	:	
vs.	:	
	:	No. 15779
STEVEN HOLCOMB, dba	:	
STEVE HOLCOMB DISTRIBUTING,	:	
	:	
Defendant-Appellant.	:	

APPELLANT'S BRIEF

Appeal from a Judgment of Directed Verdict
of the Third Judicial District Court of Salt Lake County
The Honorable Bryant H. Croft, Judge

WENDELL E. BENNETT
370 East 500 South
Salt Lake City, Utah

Attorney for the Appellant

VERL C. RITCHIE
RAYMOND CHILD
5366 Northwood Road
Salt Lake City, Utah

Attorneys for the Respondent

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	i
NATURE OF THE CASE	1
DISPOSITION BELOW	1
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF THE FACTS	2
ARGUMENT	
I. THE TRIAL COURT ERRED IN GRANTING PLAINTIFF- RESPONDENT'S MOTION FOR A DIRECTED VERDICT WHERE THERE WAS SUBSTANTIAL EVIDENCE OF DEFENDANT-APPELLANT'S GOOD FAITH	6
II. THE TRIAL COURT ERRED IN GRANTING PLAINTIFF- RESPONDENT'S PROCEDURAL REQUESTS WHICH PREJUDICED THE DEFENDANT-APPELLANT IN PREPARING HIS CASE	10

TABLE OF AUTHORITIES

	Page
<u>Anderson v. Gribble</u> 30 Utah 2d 68, 513 P.2d 432 (1973)	9
<u>Balone v. Cadillac Automobile Co.</u> 113 N.H. 108, 303 A.2d 194 (1973)	6
<u>Bunge Corp. v. Recker</u> 519 F.2d 449 (8th Cir. 1974)	12
<u>Cheever v. Schramm</u> No. 15147 (Utah Mar. 16, 1978)	12
<u>Eldon's Super Fresh Stores, Inc. v. Merrill Lynch, Pierce, Fenner & Smith</u> 296 Minn. 130, 207 N.W.2d 282 (1973)	7
<u>Elster v. Alexander</u> 75 F.R.D. 458 (N.D. Ga. 1977)	12
<u>Farmers Cooperative Elevator, Inc. v. State Bank</u> 236 N.W.2d 674 (Iowa 1975)	6
<u>Finlayson v. Brady</u> 121 Utah 204, 240 P.2d 491 (1952)	9
<u>Fort Knox National Bank v. Gustafson</u> 385 S.W.2d 196 (Ky. 1964)	8
<u>Gromacki v. Armour & Co.</u> 76 F.Supp. 752 (W.D. Mo. 1948)	12
<u>In re National Student Marketing Litigation</u> 413 F.Supp. 1156 (D.C. 1976)	12
<u>Rhiness v. Dansie</u> 24 Utah 2d 375, 472 P.2d 428 (1970)	10
<u>Smith v. Thornton</u> 23 Utah 2d 110, 485 P.2d 870 (1969)	9
<u>Tumber v. Automation Design & Mfg. Corp.</u> 130 N.J. Super. 5, 324 A.2d 602 (1974)	6

<u>Walter E. Heller & Co., Inc. v. Convalescent Home</u> <u>49 Ill.App. 3d 213, 265 N.E.2d 1285 (1977)</u>	8
<u>Webb v. Olin Mathieson Chemical Corp.</u> <u>9 Utah 2d 275, 342 P.2d 1094 (1959)</u>	10
<u>Wirtz v. Savannah Bank & Trust Co.</u> <u>362 F.2d 857 (5th Cir. 1966)</u>	11

IN THE SUPREME COURT
OF THE STATE OF UTAH

POLYGLYCOAT CORPORATION,	:	
	:	
Plaintiff-Respondent,	:	
	:	
vs.	:	
	:	No. 15779
STEVEN HOLCOMB, dba	:	
STEVE HOLCOMB DISTRIBUTING,	:	
	:	
Defendant-Appellant.	:	

NATURE OF THE CASE

This is an action brought by the plaintiff to collect on an account for goods sold; and a counterclaim by the defendant-appellant for damages resulting from the breach of a distributorship contract.

DISPOSITION BELOW

Immediately prior to the commencement of the trial, the trial court granted plaintiff's Motion for Summary Judgment on its claim which was unopposed by the defendant-appellant. Following a two and one-half day trial on the defendant's Counterclaim to a jury, the Hon. Bryant H. Croft, one of the judges of the Third Judicial District Court of Salt Lake

County, granted a judgment of directed verdict in favor of plaintiff-respondent on defendant-appellant's Counter-claim for breach of a distributorship contract.

RELIEF SOUGHT ON APPEAL

Defendant-appellant seeks a reversal of the trial court's judgment of directed verdict, and an order remanding the case for a trial on defendant-appellant's claim for breach of contract.

STATEMENT OF THE FACTS

In the spring of 1975 as a distributor of various automobile products, defendant-appellant was approached by the plaintiff-respondent and was offered an exclusive distributorship for Polyglycoat products (R.P. 496). Defendant-appellant accepted the offer, and the parties came to an oral agreement that defendant-appellant would distribute Polyglycoat products in the states of Utah, Colorado, New Mexico, Nevada and Arizona (R.P. 497). The products to be distributed were Polyglycoat, a sealer-wax type substance that was applied to automobiles to allegedly enhance and protect the paint finish (R.P. 553). In addition, Polyglycoat carried a maintenance product that was used on the car to maintain the original finish following the initial treatment with the sealant-wax product.

Subsequent to his being made a distributor, defendant-appellant hired salesmen and established sub-distributors to market the product and establish permanent customers (R.P. 565,566,587). Following efforts by the defendant-appellant as a distributor Polyglycoat began to gain in popularity and defendant-appellant desired that the oral distributorship agreement be incorporated into a writing. On February 7, 1976, the parties entered into a written agreement setting out minimum purchase requirements, territory, and duration (Exhibit 3-D). The contract was silent as to payment terms and standards of performance (Exhibit 3-D).

In the course of business dealings between the parties, defendant-appellant would order Polyglycoat on a per case basis, with a case consisting of two quart cans of Polyglycoat sealant and twelve maintenance kits (one kit per car) (R.P. 497). The case was designed to service twelve automobiles with an initial treatment of product from the quart cans. Maintenance kits were used for their care in the future. In addition, a card warranting the life of the finish was included (Exhibit 8-D). Plaintiff-respondent found that this packaging design had to be changed as the two quart cans of sealant proved to be too much product for twelve cars (R.P. 525). As such, each

distributor was told to remove a quart can from each case (R.P. 525, Exhibit 6-B). Still, this did not remedy the excess, and the distributors were told to remove the other quart can, replacing it with a small tube (R.P. 526). After following plaintiff-respondent's directions and removing the cans from the cases, defendant-appellant was faced with a surplus of Polyglycoat product for which he had already been billed (R.P. 597, Exhibit 1-D). As the sole distributor of Polyglycoat in the area of Utah, Colorado, New Mexico, Nevada and Arizona, defendant-appellant decided to utilize the excess product by marketing it through a service center-detail shop, and through the customers that he had already established (R.P. 753). To facilitate such, defendant-appellant had bottles manufactured in which he was going to market the excess product (Exhibit 18-P). In addition, the defendant-appellant had warranty cards printed (Exhibit 11-P). The warranty cards were needed for two reasons: (1) Defendant-appellant was short of warranty cards for the maintenance kits as dealers would fill them out under the name of a prospective new car buyer, and if the sale subsequently fell through the card was wasted, leaving the dealer with one card short for every such occurrence. Defendant-appellant had requested replacements from the plaintiff-respondent, to no avail (R.P. 592, 593);

(2) As the distributor and the representative of Polyglycoat, defendant-appellant wanted to warrant any product sold, including the excess product. At the time the warranty cards were completed defendant-appellant had spoken with his accountant who advised against their use (R.P. 633). After reflection and outside advice, defendant-appellant abandoned any plan to use the bottles, and never marketed any product in them as he realized for the first time to do so might be unethical or unfair (R.P. 591, 592, 753). Prior to abandoning the above plan, defendant-appellant had never received any written instruction on how to dispose of the excess Polyglycoat product, and as the distributor for Utah, Colorado, New Mexico, Nevada and Arizona, he felt his responsibility and authority was to sell and distribute Polyglycoat products in a manner using his best judgment (R.P. 530).

Defendant-appellant continued to perform under the distributorship contract, and had ordered the required product for the first quarter of the agreement term, which plaintiff-respondent refused to ship (Exhibit 9-D).

Plaintiff-respondent established another distributor who has utilized many of the same customers and sub-distributors that the defendant-appellant established (R.P. 675).

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING PLAINTIFF-RESPONDENT'S MOTION FOR A DIRECTED VERDICT WHERE THERE WAS SUBSTANTIAL EVIDENCE OF DEFENDANT-APPELLANT'S GOOD FAITH

In the case below, the trial court granted a directed verdict against defendant-appellant on the basis that defendant-appellant failed to exercise good faith in entering into and performing the contract of February 7, 1976. Since good faith is a subjective test and because there was abundant evidence that defendant-appellant acted in good faith, the trial court erred in directing the verdict.

The issue of good faith under the UCC is a subjective test. In Balone v. Cadillac Automobile Co., 113 N.H. 108, 303 A.2d 194 (1973) the Supreme Court of New Hampshire discussed the issue of good faith by applying it to the circumstances of a purchaser.

By its terms this is a subjective standard of good faith, that is whether the particular purchaser believed he was in good faith, not whether anyone else would have held the same belief. The test is what the particular person did or thought in the given situation and whether or not he was honest in what he did. (emphasis added)

See Farmers Cooperative Elevator, Inc. v. State Bank, 236 N.W.2d 674 (Iowa 1975); Tumber v. Automation Design & Mfg. Corp., 130 N.J. Super. 5, 324 A.2d 602 (1974); Eldon's

Super Fresh Stores, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 296 Minn. 130, 207 N.W.2d 282 (1973).

In determining the issue of good faith, therefore, it is critical to know whether defendant-appellant was honest in what he did. There was credible evidence at trial which if believed, would have demonstrated that defendant-appellant acted in good faith. The evidence showed that although defendant-appellant had a large supply of excess product that had to be disposed of, he did not have enough warranties for the product. Defendant-appellant had requested additional warranties from plaintiff-respondent, but they were never sent. In deciding what to do with the excess product and lack of warranties, defendant-appellant considered selling the excess product in his own bottles and printing the warranties himself. In doing this he would be able to get rid of his excess product and also have warranties for those bottles and also for others.

In pursuit of this plan, defendant-appellant had some bottles manufactured and some warranties printed. However, before the plan was ever put into effect, defendant-appellant spoke with his accountant, who advised him that the plan would possibly not be a good business practice. After receiving this advice, and deliberately considering the plan, defendant-appellant decided not to pursue the

idea. At that point nothing more was done.

At the time the idea was conceived, defendant-appellant honestly believed that he would not be sacrificing his performance under the contract. When he made a more careful consideration and had a feeling that the plan was not ethically proper, he immediately abandoned it. From this evidence presented at trial it was apparent that what defendant-appellant thought and did was honest and therefore in good faith.

In addition to being a subjective matter, the issue of good faith is particularly a jury issue. In Walter E. Heller & Co., Inc. v. Convalescent Home, 49 Ill.App. 3d 213, 265 N.E.2d 1285 (1977) the Illinois Appellate Court stated that

the test of good faith is a subjective standard to be determined by the facts of each case. Consequently, the defense of lack of good faith by plaintiff presents a factual issue which cannot be resolved purely as a matter of law

The Court of Appeals of Kentucky in Fort Knox National Bank v. Gustafson, 385 S.W.2d 196 (1964), construed the UCC provision on good faith as "requiring the submission to the jury of the issue of good faith unless the evidence relating to it is no more than a scintilla, or lacks probative value having fitness to induce conviction in the minds of reasonable men."

As previously discussed, there was considerable evidence presented at trial, far more than a scintilla, on the issue of defendant-appellant's good faith. Because there was contradictory evidence on the issue of good faith and since good faith is a jury issue, the trial court erred in not allowing the good faith issue to go to the jury.

From the evidence presented at trial it is clear that the trial court did the very opposite of what this Court declared in Finlayson v. Brady, 121 Utah 204, 240 P.2d 491 (1952).

In directing a verdict, this court has held, as the authorities generally hold, that the evidence is to be examined in a light most favorable to the party against whom the verdict is intended, and that it is not the province of the court to weigh or determine the preponderance of the evidence.

Also, Anderson v. Gribble, 30 Utah 2d 68, 513 P.2d 432 (1973); Smith v. Thornton, 23 Utah 2d 110, 485 P.2d 870 (1969).

Had the trial court viewed the evidence as instructed by this Court in Brady, a directed verdict would never have been granted against defendant-appellant. By granting a directed verdict against defendant-appellant, the trial court violated this Court's declared policy "to zealously protect the right of trial by jury and not to take issues from them and rule as a matter of law except

in clear cases." See Webb v. Olin Mathieson Chemical Corp., 9 Utah 2d 275,342 P.2d 1094 (1959).

This was definitely not a clear case. The evidence was such that reasonable men could and would have arrived at different conclusions. See Rhiness v. Dansie, 24 Utah 2d 375,472 P.2d 428 (1970). The directed verdict must therefore be reversed.

II. THE TRIAL COURT ERRED IN GRANTING PLAINTIFF-RESPONDENT'S PROCEDURAL REQUESTS WHICH PREJUDICED THE DEFENDANT-APPELLANT IN PREPARING HIS CASE

On March 15, 1977, plaintiff-respondent filed its Reply to Counterclaim (R.P. 19). In that Reply, plaintiff-respondent admitted entering into a contract with defendant-appellant on February 7, 1976. As a defense, plaintiff-respondent alleged that defendant-appellant had breached the contract and started an illicit business in competition with plaintiff-respondent.

Nearly a year later on January 30, 1978, and after all discovery had been completed and a pre-trial conference had been held, plaintiff-respondent filed its Motion to Amend Reply to Counterclaim (R.P. 71) and also its Amended Reply to Counterclaim (R.P. 68-69). The Motion was scheduled to be heard on February 6, 1978, the morning of trial. In the Amended Reply to Counterclaim plaintiff-respondent denied entering into the contract. It also raised a new

defense of fraud. The trial court allowed the plaintiff-respondent to amend its reply, after hearing the Motion in chambers on February 6, 1978.

Such a motion should have been denied because of the prejudice it created against the defendant-appellant. To allow plaintiff-respondent to deny entering into the contract and to allow it to raise an entirely new defense on the day of trial was unconscionable. It forced defendant-appellant to enter the trial with no knowledge of what was going to be presented by plaintiff-respondent. The granting of plaintiff-respondent's Motion conflicted with one of the major purposes of the Utah Rules of Civil Procedure, that of preventing surprise at trial.

In dealing with a similar problem, the Fifth Circuit Court of Appeals in Wirtz v. Savannah Bank & Trust Co., 362 F.2d 857 (1966), denied such an amendment. In that case the court stated:

This motion on appeal in the guise of a Rule 15(b) amendment seeks not only to nullify an earlier admission but also to assert a new defense not previously pleaded. This cannot be done.

So also below, the trial court should not have allowed the Amended Reply. It erred by doing so.

The trial court erred further, assuming that it was proper to allow plaintiff-respondent to amend its Reply.

If it was proper to allow the Amended Reply, its form was improper. As was stated in Gromacki v. Armour & Co., 76 F.Supp. 752 (W.D. Mo. 1948), "the essential elements of fraud must be alleged and strictly proved." Also Elster v. Alexander, 75 F.R.D. 458 (N.D. Ga. 1977); In re National Student Marketing Litigation, 413 F.Supp. 1156 (D.C. 1976).

The nine essential elements necessary to prove fraud cited by this Court in Cheever v. Schramm, No. 15147 (March 16, 1978) were never alleged or proven by plaintiff-respondent. Hence, in addition to improperly allowing the Amended Reply, the trial court also allowed a pleading averring fraud which failed to state the circumstances constituting fraud with particularity as required by Rule 9(b), Utah Rules of Civil Procedure and the above cited cases.

Much of the evidence at trial dealt with the alleged bad faith on the part of defendant-appellant. In neither the Reply to Counterclaim or the Amended Reply to Counterclaim did plaintiff-respondent plead the affirmative defense of good faith. In Bunge Corp. v. Recker, 519 F.2d 449 (1974), the Eighth Circuit Court of Appeals stated that lack of good faith was akin to fraud and fell under Rule 8(c) which required it to be plead as an affirmative defense.

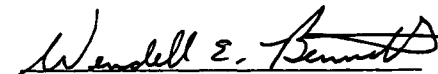
Since plaintiff-respondent failed to plead the

issue of lack of good faith as an affirmative defense, it should have been barred from using that defense inasmuch as defendant-appellant was never put on notice of such a defense.

CONCLUSION

It is respectfully submitted that, inasmuch as there was substantial evidence of defendant-appellant's good faith in the trial below and since the granting of plaintiff-respondent's procedural requests on the day of trial resulted in procedural unfairness to defendant-appellant, the trial court's decision be reversed and the case remanded for a new trial.

Respectfully submitted,


Wendell E. Bennett