

1980

Johnson Tire Service Inc. v. Thorn, Inc. : Brief of Respondent

Utah Supreme Court

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Layne T. Rushforth; Jackman & Associates; Attorney for Appellant;

Steven E. Stewart; Attorney for Respondent;

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IN THE SUPREME COURT OF THE STATE OF UTAH

* * * * *

JOHNSON TIRE SERVICE, INC., *
a Utah corporation,

Plaintiff, *
Appellant and
Respondent, *

vs.

THORN, INC., a Utah *
corporation,

Defendant, *
Respondent and
Cross-Appellant. *

* * * * *

BRIEF OF RESPONDENT AND CROSS-APPELLANT
THORN, INC.

* * * * *

APPEAL FROM THE JUDGMENT OF THE
THIRD DISTRICT COURT IN AND FOR SALT LAKE COUNTY
THE HONORABLE DAVID SAM

* * * * *

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Service, Inc.

FILED

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Affidavit of Dennis D. Weir.

Ruling of the Honorable David Sam dated 12 June 1979.

IN THE SUPREME COURT OF THE STATE OF UTAH

* * * * *

JOHNSON TIRE SERVICE, INC.,
a Utah corporation,

Plaintiff and
Appellant,

vs.

THORN, INC., a Utah
corporation,

Defendant,
Respondent and
Cross-Appellant.

* * * * *

BRIEF OF RESPONDENT AND CROSS-APPELLANT

THORN, INC.

* * * * *

DESIGNATION OF PARTIES

For convenience, and because the defendant Thorn, Inc., has cross-appealed, the plaintiff, appellant, and cross-respondent Johnson Tire Service, Inc. will be designated throughout this brief as "Johnson"; and the defendant, respondent, cross-appellant Thorn, Inc. as "Thorn".

NATURE OF THE CASE

This action was commenced by Johnson against Thorn to collect \$7,168.09 allegedly due Johnson from Thorn for purchases of tires and other goods.

DISPOSITION IN LOWER COURT

The lower court's disposition of this case is somewhat unusual. Both Johnson and Thorn filed Motions for Summary Judgment. The lower court initially granted partial summary judgment in favor of Johnson in the amount of \$7,168.09, together with interest at eighteen percent (18%) per annum from and after February 10, 1979. The lower court also entered an order denying Johnson's claim for attorneys fees; denied Thorn's Motion for Summary Judgment on the issue of attorneys fees; and reserved for trial the issue of whether Thorn was contractually obligated to pay attorneys fees. Thereafter, counsel for Johnson stipulated that summary judgment could be entered against Johnson on the

issue of attorneys fees and judgment was entered accordingly. (R. 31-36)

RELIEF SOUGHT ON APPEAL

Johnson seeks reversal of the summary judgment denying Johnson's claim for attorneys fees. Thorn seeks affirmance of the summary judgment denying attorneys fees to Johnson; and, in a cross-appeal, seeks reversal of the lower court's entry of summary judgment finding as a matter of law that Thorn was obligated to pay interest at eighteen percent (18%) per annum on the judgment.

STATEMENT OF MATERIAL FACTS

Thorn does not materially dispute the statement of facts contained in Johnson's brief, with the exception of certain statements made in Paragraphs 12, 13, 14 and 16 thereof, which Thorn deems either to be inconsistent with the actual facts or self-serving conclusions. Thorn also deems the following facts, not stated in Johnson's brief, to be material:

On or about May 17, 1978, Thorn, Inc., through its agent Reece Allan, ordered four (4) tires from Johnson. The contract between the parties is evidenced by a "purchase order" number 34682, a copy of which appears in the Appendix to this brief as an exhibit. The purchase order contains no provision for the payment of interest at 18%, costs or attorneys fees. When the tires were delivered to Thorn

the delivery slip contained "fine print" at the bottom stating, among other things, that if payment were not made in thirty days from the date thereon, the buyer agreed to pay interest at 18%, costs of collection, and reasonable attorneys fees. (R. 4) The delivery slip was not signed by an officer, director, or other person in authority of Thorn, Inc.; nor were the provisions relating to interest, costs, and attorneys fees discussed with any corporate officer before the tires were delivered. (R. 21) The affidavit of Dennis D. Weir, Executive Vice-President of Thorn, states that "while Affiant admits that Thorn, Inc., ordered tires from Plaintiff on open account, the extent of the contract between Plaintiff and Defendant was that Defendant would pay a quoted price for the tires but not interest at 18%, costs, or attorney's fees." (Although designated, Mr. Weir's affidavit is not found in the record on appeal; but a copy of the affidavit appears in the Appendix hereto as an exhibit.) Furthermore, the affidavits of Ed and Mike Johnson state that Jerry Thorn, President of Thorn, Inc., ". . . also objected to the 18% interest rate being charged by us (Johnson)." (R. 18, 19)

On June 12, 1979, the Honorable David Sam issued a ruling, a copy of which appears in the Appendix hereto, which states in part:

"Defendants (sic) motion for summary judgment is denied it appearing to the Court that there is an issue in dispute as to whether the

customers (sic) signature blank which was signed by Byron Hobbs binds the Defendant for payment of attorneys fees. Plaintiff is awarded partial summary judgment in the sum of \$7,168.09 which includes interest at the rate of 1.5% per month to and including February 10, 1979. The Court awards interest at the same rate until judgment is paid in full. The Court is of the opinion that the Defendant has established a course of conduct with Plaintiffs (sic) credit terms which binds the Defendant to the same with respect to the monthly service charge of 1.5% per month on all unpaid balances due Plaintiff. The Court finds that such course of conduct was not established with respect to the attorneys fee claimed by the Plaintiff. Accordingly, said issue is reserved for trial and will be placed on the trial calendar for setting upon notice of readiness for trial being filed."

Thereafter, Johnson and Thorn, through their counsel, entered into a stipulation to the effect that Byron Hobbs, the employee of Thorn and who acknowledged receipt of the Michelin tires, was not an agent of Thorn; that ". . . the additional terms of credit in such invoice as relating to interest and attorneys fees are not binding on the Defendant where they are not signed by an authorized agent of the Defendant; that §70A-2-207 of the Utah Uniform Commercial Code does not extend to attorneys fees without a specific signed writing or other evidence of consent; and that Defendant is entitled to partial summary judgment denying Plaintiff's claim for attorneys fees." (R. 35, 36) Thus, even though the lower court found initially that there remained an issue of material fact with respect to whether the signature of Byron Hobbs bound Thorn for payment of attorneys fees, rather

than try that issue, Johnson's counsel stipulated to the entry of summary judgment in favor of Thorn on the issue of attorneys fees.

ARGUMENT

POINT I

PROCEDURALLY, JOHNSON CANNOT STIPULATE TO THE ENTRY OF SUMMARY JUDGMENT THEN SEEK ON APPEAL TO REVERSE THE ENTRY OF SUMMARY JUDGMENT.

From a procedural standpoint, Johnson's appeal is defective as a matter of law and subject to dismissal on motion. It is undisputed that the lower court determined that there remained an issue of material fact with respect to whether the signature of Byron Hobbs bound Thorn for payment of attorneys fees. While Thorn does not necessarily agree with the Court's initial finding, it is clear that neither party may appeal from the denial of a motion for summary judgment. For that reason, counsel for Johnson decided, fatally, to stipulate that the trial court was incorrect in holding that there remained an issue of material fact with respect to the award of attorneys fees and that the Court could enter judgment as a matter of law in favor of Thorn on that issue. Now Johnson seeks in this appeal to reverse the stipulated entry of summary judgment. Thorn respectfully submits that procedurally, Johnson cannot stipulate to the entry of summary judgment on an issue which the Court initially found to be an issue of material fact then seek on appeal to reverse the entry of summary judgment.

POINT II

ATTORNEYS FEES ARE NOT A PROPER ELEMENT OF "SELLERS INCIDENTAL DAMAGES" UNDER §70A-2-710 OF THE UTAH UNIFORM COMMERCIAL CODE.

In 2 Anderson, Uniform Commercial Code, §§2-710:3 and 2-710:4, the following statements are found:

"It is also to be noted that Section 2-710 relates only to incidental damages. It does not extend the consequential damages, and, accordingly, the recoverability of such damages, if recoverable at all, is governed by the principles of prior law¹." Footnote 1 states:

"It is to be noted that attorney's fees may not be recovered as consequential damages.

Quattlebaum v. Schutt, 27 AGRIC DEPT 242."

2 Anderson Uniform Commercial Code, Sales, §§2-710:3 and 2-710:4 at page 407.

In Florida National Bank vs. Alfred and Ann

Goldstein Foundation, Inc., 327 So.2d 110 (Fla. 1976), the

Court stated:

"The right to recover attorneys' fees as part of costs did not exist at common law. (Dodomo v. Emanuel, Sup. Ct. Fla. 1953, 91 So.2d 653) Attorneys' fees may not be taxed as costs unless provided for by statute or contract. (Shavers v. Duval County, Sup.Ct.Fla. 1953, 63 So.2d 684) The award for attorneys' fees being in derogation of the common law, any statute providing for an award thereof must be strictly construed. (Great American Indemnity Company v. Williams, Sup.Ct.Fla. 1953, 85 So.2d 619; Gullette v. Ochoa, Fla.App.1st, 1953, 194 So.2d 799) However, in appropriate cases attorneys' fees may constitute an element of recoverable damages. (Glusman v. Lieberman, Fla.App.4th, 1973, 285 So.2d 29, and cases therein cited.)

Construing F.S. 675.115 and F.S. 672.710 in the light of the facts of this case and in the light of F.S. 671.103 and F.S. 671.106(1) we hold that those statutes were not intended to

afford a vehicle for the award of attorneys' fees either as costs nor as "commercially reasonable charges, expenses or commissions." (See Neri v. Retail Marine Corporation, 30 N.Y.2d 393, 334, N.Y.S.2d 165, 285 N.E.2d 311)." (Emphasis added)

In Bossier Bank & Trust Company vs. Union Planters National Bank of Memphis, 550 F.2d 1077 (6th Cir. 1977), the Court construed §2-710 of the Tennessee Uniform Commercial Code as not authorizing a break with the traditional American rule concerning the award of attorneys fees with damages. The Court stated:

"T.C.A. 47-5-115 says that when an issuer wrongfully dishonors a letter of credit the beneficiary may recover "the face amount of the draft or demand together with incidental damages under § 47-2-710 on seller's incidental damages and interest but less than any amount realized by resale or other use or disposition of the subject matter of the transaction". T.C.A. 47-2-710 provides the following:

Sellers incidental damages. --Incidental damages to an aggrieved seller include any commercially reasonable charges, expenses or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the buyer's breach, in connection with return or resale of the goods or otherwise resulting from the breach. (sic)

The official comment to 47-2-710 says this:

Purposes: To authorize reimbursement of the seller for expenses reasonably incurred by him as a result of the buyer's breach. The section sets forth the principal normal and necessary additional elements of damage flowing from the breach but intends to allow all commercial reasonable expenditures made by the seller. (sic)

Nowhere in either of these statutes are attorneys' fees specifically mentioned. I cannot read T.C.A. 47-2-710 as authorizing a break with the traditional American rule concerning the award of attorneys' fees as damages. Had the drafters of the Uniform Commercial Code intended attorneys' fees to be included as incidental damages, they could easily have mentioned them--and no doubt would have, since the exclusion of attorneys' fees is such a well known exception to the general rule of damages.

In Point 1 of its brief and the argument thereunder, Johnson asserts that notwithstanding the language found in Spanish Fork Packing Company vs. House of Fine Meats, Inc., 29 Utah 2d 312, 508 P.2d 1186 (1973), and having stipulated that Byron Hobbs ". . . was found not to be an agent of the Defendant (Thorn). . . ." (R. 35), this Court should construe §§70A-2-207 and 70A-2-710 of the Utah Uniform Commercial Code as authorizing the award of attorneys fees under the facts of the instant case. In the Spanish Fork Packing case, supra, plaintiff sued defendant to recover an amount owed on an open account for the purchase of meat and meat products. Plaintiff asserted in its pleadings that the purchases were evidenced by seven invoices attached to the complaint; that the invoices provided that plaintiff was entitled to a reasonable attorneys fee, and that a reasonable fee was \$1,070.50. The trial court granted plaintiff partial summary judgment for the amount defendant conceded that it owed on the open account. The issue of whether defendant was contractually obligated to pay attorneys fees was reserved for

trial. Upon trial before the Court, judgment was rendered decreeing that plaintiff's claim for attorneys fees was denied. Plaintiff appealed from the order denying attorneys fees.

In affirming the trial court, this Court, citing the case of B & R Supply Company vs. Bringhurst, stated:

". . . The creation of a contract requires a meeting of the minds of the parties; and the burden of so proving is upon the party who claims there was a contract. This Court observed (in the B & R Supply Company case) that the evidence indicated that the defendant had never authorized any of the persons who signed the invoices to contract on its behalf other than as an open account. This Court stated:

There is no affirmative showing to the contrary, nor that any contractual terms or conditions on the invoice were called to their attention, nor that they were aware of them, nor that they did anything other than to initial the invoices acknowledging the receipt of the merchandise. Under those circumstances we can see no basis for a conclusion that the defendant entered a contract to pay attorney's fees.

This court further observed in footnote 4 at page 1218 of 503 P.2d that if one ordered merchandise, which was agreed to be delivered for a requested price, that would be the extent of both the contract and the purchaser's obligation. If upon receipt of the merchandise, the invoice or delivery slip, the purchaser signed, purported to impose further conditions or covenants, a serious question would arise as to the question of whether there was any consideration for such further obligation.

508 P.2d at 1187, 1188, citing B & R Supply Company vs. Bringhurst, 28 Utah 2d 442, 503 P.2d 1216, 1217 (1972).

Analyzing the facts of the instant case in light of the applicable law, the agreement between Thorn and Johnson was for the purchase of tires for a specified amount. When the tires were delivered to Thorn, additional terms and conditions were imposed, including the payment of interest at 18% per annum and attorneys fees. The fact that an agent of Thorn, Inc., may have acknowledged receipt of the tires does not, under the cases cited above, create a binding obligation on behalf of the buyer to pay interest at 18% per annum or attorneys fees. Johnson, by having stipulated that Byron Hobbs could not bind Thorn to pay attorneys fees, cannot now claim a meeting of the minds on that issue or that §70A-2-207 should be construed to require Thorn to pay attorneys fees. Johnson cites no case authority under Point 1 of its brief specifically construing §70A-2-207 of the Uniform Commercial Code as requiring the purchaser of goods to pay attorneys fees. Research by Thorn's counsel revealed no such case authority.

Thorn, therefore, respectfully submits that the reasoning of the Sixth Circuit Court of Appeals in the Bossier case, supra, is sound:

"Had the drafters of the Uniform Commercial Code intended attorneys' fees to be included as incidental damages, they could have easily mentioned them--and no doubt would have, since the exclusion of attorneys' fees is such a well known exception to the general rule of damages." 550 F.2d at 1083.

POINT III

TRIAL COURT ERRED IN CONCLUDING AS A MATTER OF LAW THAT JOHNSON WAS ENTITLED TO INTEREST AT 18% PER ANNUM.

The affidavits in support of both Johnson's and Thorn's Motions for Summary Judgment clearly raise an issue of disputed material fact with respect to whether there was an agreement between Johnson and Thorn that Thorn would be liable for interest at 18% per annum on any overdue balance with Johnson. The affidavit of Dennis D. Weir in support of Thorn's Motion for Summary Judgment, a copy of which (except for signatures and notarization) appears in the Appendix section of this brief, states:

"While affiant (Dennis D. Weir, Executive Vice-President of Thorn) admits that Thorn, Inc., ordered tires from Plaintiff on open account, the extent of the contract between Plaintiff and Defendant was that Defendant would pay a quoted price for the tires but not interest at 18%, costs, or attorneys fees."

The affidavits of Ed and Mike Johnson (R. 18, 19) further state that Jerry Thorn, President of Thorn, Inc., ". . . also objected to the 18% interest rate being charged by us (Johnson)."

It is respectfully submitted that the trial court could not, without an evidentiary hearing, conclude as a matter of fact or law "that the defendant's course of conduct in dealings with the plaintiff established a contractual agreement binding the defendant to pay a monthly financing or service charge (i.e., "interest") of 1.5% per month

where the defendant was regularly sent a monthly statement of its account showing charges for interest and principal, where payments made by the defendant were consistently applied first to current interest and then to principal, and where said interest, when unpaid, was consistently added to principal." (R. 35)

CONCLUSION

Thorn respectfully submits that the legal argument set forth in Johnson's brief is inconsistent with the conclusion reached in every reported opinion wherein the issue of whether attorneys fees are includable as "seller's incidental damages" under §70A-2-710 of the Uniform Commercial Code was raised. Thorn further submits that the trial court, without an evidentiary hearing, erred in deciding as a matter of law that there was a course of dealing between Johnson and Thorn which required Thorn to pay interest at 18% per annum on delinquent unpaid amounts owed to Johnson.

Respectfully submitted,

STEWART, YOUNG, PAXTON & RUSSELL

By 

Steven H. Stewart
Attorneys for Respondent and
Cross-Appellant
220 South 200 East, Suite 450
Salt Lake City, Utah 84111
531-7670

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief of Respondent and Cross-Appellant were served upon the Appellant by mailing the same, postage prepaid, to Layne T. Rushforth, Attorney for Appellant, 1325 South 800 East, Suite 300, Orem, Utah 84057, this 31st day of January, 1980.

A handwritten signature in black ink, appearing to read "Steven H. Stewart", written over a horizontal line.

Steven H. Stewart

HORN, INC.

PURCHASE ORDER

No. 34682

BOX 102 - PROVO, UTAH 84601 • PHONE 373-6100 • PLANT: 1425 EAST 900 SOUTH PROVO, UTAH

TO

SHIP TO

PLEASE ENTER OUR ORDER FOR THE FOLLOWING:

DATE	SHIP VIA	TERMS	JOB NO. OR EQUIP. NO.	ITEM NO.
5-17-78				
QUANTITY	DESCRIPTION	PRICE	AMOUNT	
4	23.5 X 25 Lvs			

cc: Layne T. Rushforth
Steve Stewart

DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief of Respondent and Cross-Appellant were served upon the Appellant by mailing the same, postage prepaid, to Layne T. Rushforth, Attorney for Appellant, 1325 South 800 East, Suite 300, Orem, Utah 84057, this 31st day of January, 1980.



Steven H. Stewart

tires from plaintiff on open account, the extent of the contract between plaintiff and defendant was that defendant would pay a quoted price for the tires but not interest at 18%, costs, or attorney's fees.

DATED this _____ day of March, 1979.

Dennis D. Weir

QUANTITY		DATE	
5-17-78		5-17-78	
SHIP VIA		TERMS	
JOB NO. OR EQUIP. NO. ITEM NO.		PRICE	
AMOUNT		DESCRIPTION	
4		23.5 X 25 1/2	

PLEASE ENTER OUR ORDER FOR THE FOLLOWING:

SHIP TO

PROVO, UTAH 84601 • PHONE 373-6190 • PLANT: 1525 EAST 900 SOUTH PROVO, UTAH

PURCHASE ORDER

HORN, INC.

No. 34682

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief of Respondent and Cross-Appellant were served upon the Appellant by mailing the same, postage prepaid, to Layne T. Rushforth, Attorney for Appellant, 1325 South 800 East, Suite 300, Orem, Utah 84057, this 31st day of January, 1980.

A handwritten signature in black ink, appearing to read "Steven H. Stewart", written over a horizontal line.

Steven H. Stewart

HORN, INC.

PURCHASE ORDER

No. 34682

1, BOX 102 • PROVO, UTAH 84601 • PHONE 373-6100 • PLANT: • 1425 EAST 900 SOUTH PROVO, UTAH

TO

SHIP TO

PLEASE ENTER OUR ORDER FOR THE FOLLOWING:

[illegible]

PURCHASING AGENT

VENDOR COPY

STEVEN H. STEWART
STEWART, YOUNG, PAXTON & RUSSELL
Attorneys for Defendant
220 South Second East, Suite 450
Salt Lake City, Utah 84111
Telephone: 531-7670

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY,

STATE OF UTAH

* * * * *

JOHNSON TIRE SERVICE, INC.,
a Utah corporation,

Plaintiff,

vs.

THORN, INC.,
a Utah corporation,

Defendant.

AFFIDAVIT

Civil No. 50946

STATE OF UTAH)
 : ss.
COUNTY OF UTAH)

DENNIS D. WEIR, being first duly sworn upon oath, dep
and says:

1. Affiant is Executive Vice President of the defend
Thorn, Inc., a Utah corporation; is competent to testify to the
matters stated herein; and is duly authorized to make this
affidavit on behalf of the defendant corporation.

2. Affiant admits that Thorn, Inc. owes to plaintiff
the principal sum of \$6,086.65.

3. Affiant never discussed with any representative
plaintiff the matters of payment of counsel fees, interest,
the time in which plaintiff expected the bill to be paid.

SUBSCRIBED and sworn to before me this ____ day of
March, 1979.

NOTARY PUBLIC
Residing at _____

My Commission Expires:

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was
served upon the plaintiff by mailing the same, postage prepaid,
to Layne T. Rushforth, Attorney for Plaintiff, 930 South State
Street, Suite 10, Orem, Utah 84057, this ____ day of March,
1979.

Steven H. Stewart

IN THE FOURTH JUDICIAL DISTRICT COURT
OF THE STATE OF UTAH
IN AND FOR UTAH COUNTY

JOHNSON TIRE SERVICE, INC.)	
Plaintiff,)	
vs)	R U L I N G
THORN, INC.)	
Defendant,)	# 50,946
)	
)	

This matter is before the court on Motions filed by both the plaintiff and defendant for Summary Judgment and is considered pursuant to Rule 2.8 of the Rules of Practice of the District Courts.

R U L I N G

Defendants Motion for Summary Judgment is denied it appearing to the court that there is an issue in dispute as to whether the customers signature blank which was signed by Byron Hobbs binds the defendant for payment of attorneys fees. Plaintiff is awarded partial Summary Judgment in the sum of \$7,168.09 which includes interest at the rate of 1½% per month to and including February 10, 1979. The court awards interest at the same rate until said judgment is paid in full. The court is of the opinion that the defendant has established a course of conduct with the plaintiffs credit terms which binds the defendant to the same with respect to the monthly service charge of 1½% per month on all unpaid balances due the plaintiff. The court finds that such course of conduct was not established with respect to the attorney fee claimed by the plaintiff. Accordingly, said issue is reserved for trial and will be placed on the trial calendar for setting upon a notice of readiness, also filed by the State Library.