

1980

Miller Pontiac, Inc., A Utah Corporation, D/B/A Laury Miller Pontiac v. Janet S. Osborne : Brief of Respondent

Utah Supreme Court

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CARMAN E. KIPP, THOMAS N. ARNETT, JR.; Attorneys for Respondent; DAVID S. DOLOWITZ; Attorney for Appellant

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SUPREME COURT OF UTAH

STATE OF UTAH

MILLER PONTIAC, INC.,)	
a Utah corporation, d/b/a)	
LAURY MILLER PONTIAC,)	
)	
Plaintiff-Respondent,)	
)	
-vs-)	Case No. 16847
)	
JANET S. OSBORNE,)	
)	
Defendant-Appellant.)	

BRIEF OF RESPONDENT

Appeal from a Judgment of the
Third Judicial District Court
Salt Lake County, State of Utah
Honorable Peter F. Leary, Judge, Presiding

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FILED

MAY 30 1980

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SUPREME COURT OF UTAH

STATE OF UTAH

* * * * *

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a Utah corporation, d/b/a)
LAURY MILLER PONTIAC,)
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Plaintiff-Respondent,)
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-vs-)
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JANET S. OSBORNE,)
)
Defendant-Appellant.)

Case No. 16847

* * * * *

BRIEF OF RESPONDENT

* * * * *

NATURE OF THE CASE

This is an action by plaintiff to recover damages as a result of defendant's breach of contract.

DISPOSITION IN LOWER COURT

The trial court determined that plaintiff and defendant had entered into a conditional sale contract and that plaintiff met and complied with the terms of the contract. The Court further held that the defendant breached the terms of the contract and rendered

Judgment in favor of plaintiff and against the defendant for plaintiff's damages resulting from the defendant's breach.

NATURE OF RELIEF SOUGHT ON APPEAL

Plaintiff-respondent seeks affirmation of the trial court's Judgment in favor of plaintiff and against defendant-appellant.

STATEMENT OF FACTS

The defendant's son, Don Osborne, came to plaintiff's place of business on March 20, 1978, and looked at a Pontiac automobile known as a "Macho". He returned later the same day with the defendant and the defendant entered into a conditional sale contract to purchase the vehicle from plaintiff. (R. 98, 105) The vehicle which defendant purchased was characterized as a "high performance car" (R. 98) and a "hot car". (R. 19) Defendant's son gave plaintiff a check for the sum of \$1,500.00 but later stopped payment on the check (R. 124, 125) due to certain problems with insurance which are not relevant to this appeal. Defendant later

signed a second conditional sale contract with plaintiff which is the subject matter of this action. (R. 127) Defendant and her son took possession of the vehicle and gave plaintiff a second check for the sum of \$1,500.00, but payment was also stopped on this check. (R. 127)

Defendant's son drove the car for the period of approximately March 20, 1978 to April 15, 1978, during which time 3,500 miles were put on the odometer. (R. 127) Defendant's son then testified that the engine blew up and he called plaintiff to come tow the vehicle away. (R. 214) Plaintiff's employees performed repairs to the vehicle and found that the rear wheels were worn quite a bit more than the front wheels (R. 151, 152, 170), the clutch plate had heat cracks and was excessively burnt (R. 152, 170), the push rods were bent (R. 143, 144, 171), and the lifters were bent (R. 143, 144). The testimony of plaintiff's employees indicated that the damages they found were caused by "popping the clutch" (R. 152) and "excessive r.p.m." (R. 170).

After notifying plaintiff to come and pick up the vehicle, defendant's son told plaintiff that he

would take the vehicle back if plaintiff would put a new engine in the vehicle. (R. 218) Plaintiff responded that repairs would have to be made at the expense of defendant and her son. (R. 219) Plaintiff's employees repaired the vehicle and subsequently resold the vehicle and brought this action. (R. 149, 150)

The trial of this matter was ultimately set for June 11, 1979, after several continuances. (R. 50) On the day of trial, defendant's counsel moved the Court for a continuance on the basis that his client was not present. (R. 92) However, defendant's counsel indicated that he had sent a letter to defendant, advising her of the trial setting. (R. 92) No reason was given for the defendant's failure to appear for trial. Thereafter, the Court denied defendant's Motion and the trial proceeded, with defendant's counsel calling four witnesses, including defendant's son, introducing documentary evidence, and arguing the case to the Court. The trial court entered Judgment in favor of plaintiff and against defendant.

ARGUMENT

POINT I

THE GRANTING OR DENYING OF A MOTION
FOR CONTINUANCE IS LEFT TO THE SOUND
DISCRETION OF THE TRIAL COURT AND
SHOULD NOT BE OVERTURNED ON APPEAL
ABSENT A STRONG SHOWING OF ABUSE.

The appellant argues that the trial court abused its discretion when it denied appellant's Motion for Continuance and required appellant's counsel to proceed to trial in her absence. Rule 40(b) of the Utah Rules of Civil Procedure states that postponement of a trial or proceeding is left to the discretion of the Court and should be granted for good cause shown. This statutory principle is reiterated in Griffith v. Hammon, 560 P.2d 1375 (Utah, 1977) wherein the Supreme Court held that:

"A party is not granted a continuance
as a matter of right, but rather as
an act of discretion by the court . . . "

In that case, the matter was set for trial and the defendants promptly objected based upon their counsel's inability to appear on the date set because of a previously scheduled appearance in another District Court on the same day. There were no Law & Motion days held from the date of filing of the objection and the trial date and, subsequently, the objection was never

heard. Defendants did not appear at trial and the Court entered the defendants' default and awarded Judgment to the plaintiffs. On appeal, this Court reversed, finding that the defendants had made timely objection, given necessary notice, and had made a reasonable effort to have the trial date changed for good cause. In the instant case, however, appellant made no objection to the trial setting, did not give notice, and made no reasonable effort to have the trial date changed until the morning of the trial. Even at that late hour, appellant's counsel provided no explanation for appellant's absence, nor did he proffer any evidence which would be had should appellant be present. In fact, appellant's son was present, was knowledgeable concerning the facts of the matter, and testified on behalf of the appellant.

Appellant relies on the case of Bairas v. Johnson, 13 U.2d 269, 373 P.2d 375 (1962), in which this Court reversed a denial of a Motion for Continuance. However, the facts of that case are clearly distinguishable from the instant case.

In Bairas, the plaintiff was confined to a hospital following an automobile accident. Trial was set for June 28, 1961, and on June 22, plaintiff's

counsel filed a Motion to Vacate the Trial Setting for the reason that plaintiff was hospitalized in California and unable to travel to Utah. The Motion was accompanied by an Affidavit of plaintiff's attending physician, that plaintiff was not physically able to make the trip to Utah at this time, but that the physician believed that plaintiff would be able to do so in approximately three months. The Motion was argued to the Court on June 26. The Court granted a continuance to September 20, 1961, and further ordered that should the plaintiff be unable to appear for trial at that date, his deposition will be taken by his counsel for use at the trial. Plaintiff was subsequently unable to attend the trial on September 20, and his counsel moved for a continuance. The Motion was supported by another Affidavit from plaintiff's attending physician and one from plaintiff's California counsel to the effect that it was believed plaintiff could attend the trial up until three days prior to trial. The trial court denied plaintiff's Motion for Continuance, proceeded to trial, and entered a Judgment of Dismissal With Prejudice. On appeal, this Court reversed and remanded for a new trial, stating:

"The reviewing court should not reverse the trial court's continuance ruling without a showing that the

trial court has abused its discretion."

In the instant case, no reason was ever provided for the absence of the appellant at trial. Moreover, appellant's counsel made no Motion for a Continuance nor gave any Notice thereof until the morning of trial. Furthermore, appellant's counsel did not indicate any evidence which would be forthcoming had appellant been present at trial, while in Bairas, one of the underlying reasons for the Court's reversal was the finding that the plaintiff's testimony was essential to his case. Here, the appellant's son was present and testified at trial and had as much knowledge, if not more, concerning the facts of this matter, as the appellant.

The rule that a Motion for Continuance is in the sound discretion of the trial court is followed in other jurisdictions. In Security National Bank v. City of Olathe, 589 P.2d 589 (Kans., 1979), the Kansas Supreme Court on appeal refused to disturb the trial court's holding absent a clear sign of abuse. In McCrary v. Bill McCarty Construction Co., Inc., 591 P.2d 683 (N.M. App., 1979), the court held that a grant

or denial of a Motion for Continuance is within the discretion of the trial court and would only be reviewed for an abuse of discretion. Finally, In The Matter of Swartzfager, 595 P.2d 508 (Ore. App., 1979), the court stated that a Motion for Continuance is addressed to the sound discretion of the trial court and its action thereon will not be reviewed except for a clear abuse of discretion. That case concerned an adoption proceeding and, as in Bairas, one party's physical inability to attend trial established a right to the continuance. In the present case there was no physical inability to attend trial, no apparent conflict of dates, and no other reason given which would constitute "good cause" for permitting a continuance. In Mahoney v. Linder, 514 P.2d 901, (Ore. App., 1973), the court held that a denial of continuance of a hearing on the merits of an adoption petition was not error, where the father had failed to keep his attorney, who had notice of the hearing, advised of his whereabouts. The appellant in this case was aware of the proceedings against her and counsel had sufficient notice of the trial date. From the Statement of Facts contained in appellant's Brief, it appears that her counsel was unable to locate her in order to notify her of the trial date, although he did send a letter to her

advising her of the trial setting. This would seem to be the same fact situation dealt with by the Oregon Court in Mahoney and the same rule of law applied, as previously enunciated by this Court.

POINT II

APPELLANT MAY NOT RAISE THE ISSUE OF FAILURE TO COMPLY WITH THE PROVISIONS OF SECTIONS 70A-9-501 AND 504, UTAH CODE ANNOTATED (1953, AS AMENDED) FOR THE FIRST TIME ON APPEAL.

The Utah Supreme Court has long held that it will not review a matter raised for the first time on appeal. In Edgar v. Wagner, 572 P.2d 405 (Utah, 1977), the Court held that a matter not raised at trial cannot be raised on appeal. In that case, the appellant in a Motion for a New Trial asserted that the trial court had erred in not allowing a set-off for the value of certain improvements. On appeal, this Court held that the matter had not been raised at trial and there was no abuse of discretion in denying the Motion for a New Trial as the evidence had not been newly discovered as required under Rule 59, Utah Rules of Civil Procedure. In an earlier case, Wagner v. Olsen, 25 U.2d 366, 482 P.2d 702 (1971), this Court stated:

"Matters neither raised in the pleadings nor put in issue at trial cannot be raised for the first time on appeal."

Appellant first raised the issue of failure to comply with Section 70A-9-501 and 504 in her Objections to Proposed Findings of Fact and Conclusions of Law and Judgment submitted after the trial court entered Judgment in favor of the respondent. This issue was not set forth in the pleadings nor was it put at issue during the trial. As in Edgar, appellant made her objections pursuant to the provisions of Rules 59 and 60. After the entry of Judgment those objections were denied by the trial court. Clearly the matter was not raised in the trial and thus may not be asserted on appeal.

American States Insurance Co. v. Miller, Adams and Crawford, 557 P.2d 756 (Utah, 1976) appears dispositive here. In that case, the trial court granted defendants Motion to Compel Satisfaction of a Default Judgment. The basis of the Motion was an alleged agreement entered into between the plaintiff and defendants after the Judgment had been entered, and made reference to certain notice provisions of the Utah Uniform Commercial Code. This Court found that the issue had not been raised prior to trial and that it:

" . . . [C]ame as an afterthought and showed up first in the memorandum of authorities after change of counsel, and in the briefs on appeal."

The Supreme Court cited the provisions of Rule 8(c) of the Utah Rules of Civil Procedure, which Rule requires that affirmative defenses be set forth in the pleadings.

Zions First National Bank v. Hurst, 570 P.2d 1031 (Utah, 1977) is also controlling. In that case the defendant-appellant argued that the plaintiff had failed to notify him of the time and place of the sale of five airplanes used as collateral for a loan. This Court found that Section 70A-9-504, Utah Code Annotated (1953, as amended), requires that the secured party shall give notice to the debtor. However, the matter had not been raised in the pleadings, there was no trial of the issue, nor a showing of any damage or disadvantage to the defendant. This Court further stated:

More importantly, the usual rule is that failure to so notify does not release the debtor from a deficiency that may arise; but upon such failure he may get credit for (or recover) only for any loss caused by the failure to so notify. [(Section 70A-9-507, Utah Code Annotated, (1953, as amended)]

In the present case, as in Hurst, there was no substantial or prejudicial error or any injustice resulting from the failure to notify appellant of the sale. Even if appellant could raise this issue on appeal, the failure to notify is not fatal and would not release appellant-debtor from the deficiency arising from sale of the car. In Commercial Credit Corporation v. Wollgast, 521 P.2d 1191 (Wash. App., 1974), the Court held that the only penalty for failure to give proper notice of the sale of collateral is the debtor's right to recover from the creditor any loss caused by the failure to give such notice. The Court determined that the failure to give proper notice did not deprive the creditor of its right to a Deficiency Judgment especially since the sale was made in a commercially reasonable manner and the debtor had failed to establish any damage by virtue of method, manner, time and terms of the sale. Similarly, in this case, the failure to give notice is irrelevant where the sale of the automobile was made in a commercially reasonable manner pursuant to established procedures in the used car business. Appellant makes no allegation that the resale of the vehicle was not made in a commercially reasonable manner and has made no showing of damages resulting from respondent's resale of the automobile.

POINT III

THE TRIAL COURT PROPERLY AWARDED DAMAGES TO RESPONDENT FOR APPELLANT'S BREACH OF CONTRACT.

In breach of contract cases, it is the general rule that the non-breaching party should receive an award which will put him in as good a position as he would have been had there been no breach of contract. Keller v. Deseret Mortuary Co., 23 U.2d 1, 455 P.2d 197 (1969). In order to return respondent to the position in which it would have been had there been no breach of contract, appellant must pay the damages incurred by respondent.

Appellant cites errors in the trial court's award of damages which are not supported by the record. Appellant alleges in her Brief that the trial court awarded respondent lost profits which were not lost. However, the testimony at trial indicated that respondent would have earned a profit of \$829.00 on the contract between respondent and appellant had appellant not breached the contract. (R. 148). The testimony further indicated that the profit received by respondent on the resale of the automobile was the sum of \$150.00, which was off set by storage costs, interest fees, advertising, and other charges. (R. 166).

Appellant also cites error in the award of the sum of \$100.00 for "expense of processing". However, the evidence at trial was that this represented respondent's expenses incurred in the processing of each sale of a vehicle and was incurred in the sale to respondent, as well as in the resale of the vehicle. (R. 148).

Appellant cites error in the award of commissions in the sum of \$392.01, but appears to be only contesting \$88.00 of that sum. This amount was earned by one of respondent's salesman but was never paid due to the breach of the contract by appellant. However, it was a damage suffered by respondent due to appellant's breach and, as such, was recoverable in order to place respondent in the position it would have been but for the breach of contract.

Appellant cites error in the award of profit from a service contract in the sum of \$260.00 and alleges that the record is that only 35% of this would have been lost had the second purchaser on resale not taken a service contract. The fact that a subsequent purchaser on resale elected to purchase a service contract has no bearing on the damages suffered by the respondent due to appellant's breach of contract. Respondent earned a new profit on a service contract on

that sale which is irrelevant to the issue of damages in this case.

Finally, appellant complains of the trial court's award of the sum of \$1,018.56 for repairs respondent made to the vehicle, alleging that the cost of those repairs to respondent was only the sum of \$778.91. Appellant ignores the fact that, but for the breach of contract, appellant would have paid the retail cost of the repairs in the sum of \$1,018.56 and this is the amount of damages suffered by respondent.

The trial court heard the evidence and carefully considered the proper amount of damages to be awarded to respondent for appellant's breach of the conditional sale contract and did not abuse its discretion in awarding Judgment to the respondent herein. There is sufficient evidence to support the trial court's decision and this Court should not disturb the amount of the Judgment.

POINT IV

APPELLANT COULD NOT PROPERLY REVOKE
HER ACCEPTANCE OF THE AUTOMOBILE
UNDER SECTION 70A-2-608, UTAH CODE
ANNOTATED (1953, AS AMENDED) OR
RESCIND THE CONTRACT WHERE THERE
WAS NO DEFECT IN THE AUTOMOBILE.

Appellant's assertion is correct that Utah law allows the purchaser of defective goods to revoke acceptance or rescind a contract where a defect exists and is not discovered at the time of sale. However, this provision is based on the premise that the buyer receives an item whose defect substantially impairs its value. In other words, the buyer may revoke acceptance within a reasonable time after discovering a defect and before any substantial change in the goods occurs which is not caused by the defect. In the present case, there was no unknown or discoverable defect in the automobile. Rather, it suffered a substantial change in condition as a result of the abusive driving habits of appellant's son. Appellant asserts that there was apparently some defect in the car which caused its demise other than the damages caused by the driver. The appellant offers no explanation as to what the "other defect" might have been and offers no proof as to its existence. On the contrary, testimony at the trial clearly indicated that the untimely demise of the automobile engine resulted from bad driving practices. (R. 169 - 176)

The value of the car was substantially impaired not by any hidden defect but by its use in the three weeks following the agreement to purchase.

Appellant's son, the principal driver of the automobile, had driven the car some 3,500 miles between March 20 and April 15 of 1978. (R. 217) Upon discovering that the automobile would no longer run, appellant's son abandoned it. Respondent was forced to pick up the car, return it to the garage, and attempt to repair it. Thereafter, appellant's son offered to resume ownership or resume the contract if respondent would agree to put a new engine in the car at no expense to appellant. Respondent was under no obligation to repair the automobile and violated no warranty duty in refusing to repair or replace an engine that was of fit and merchantable quality at the time of sale.

POINT V

THE TRIAL COURT PROPERLY AWARDED ATTORNEY'S FEES TO RESPONDENT.

The trial court awarded attorney's fees to respondent on the basis of the contract between the parties which provided for an award of attorney's fees upon a breach of contract. Appellant has cited this as error but seems to argue that the award of attorney's fees is improper only because appellant should have prevailed on the merits. However, appellant did not prevail on the merits, the trial court found in favor

of respondent, and the award of attorney's fees was based on the provisions of the contract between the parties.

The case of Fullmer v. Blood, 546 P.2d 606 (Utah, 1976), is not applicable to the instant case. In Fullmer, the trial court awarded Judgment to plaintiffs, although ruling against plaintiffs on one of the main issues involved in the lawsuit. The trial court then declined to award attorney's fees to either party, and both parties appealed. This Court held that the trial court had not abused its discretion in failing to award attorney's fees, where each party had justification for making their respective claims to the real property involved, and each party prevailed on one or more issues at trial. The facts of the instant case are clearly distinguishable in that the appellant failed to prevail on any issue at trial and had no reasonable justification for her breach of the contract between the parties, other than her reluctance to pay for the automobile after her son had damaged it.

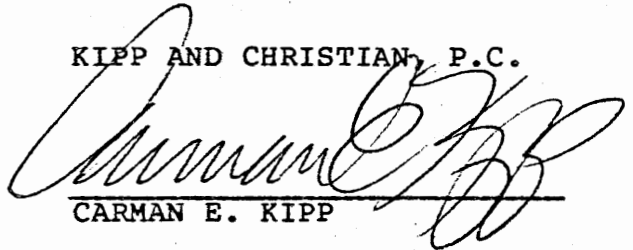
CONCLUSION

Under Rule 40B of the Utah Rules of Civil Procedure, a grant or denial of a Motion for Contin-

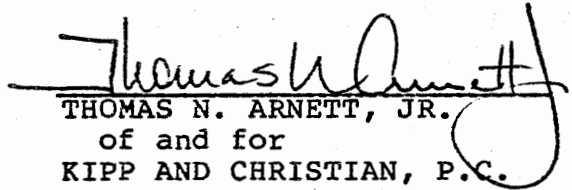
uance is discretionary with the trial court and can be granted only where good cause is shown. In the present case, the trial court exercised its discretion to deny the Motion. The denial was reasonable and there was no substantial injustice to appellant. Appellant may not raise the issue of failure to comply with the notice provisions of the Uniform Commercial Code on appeal where she failed to raise that issue in her pleadings or during trial. Further, the failure to notify appellant of the sale does not release the debtor from damages for the breach of contract and as appellant suffered no loss through failure to notify, there is no reason to overturn the Judgment. Damages awarded to the respondent consisted of full and fair relief for breach of the contract calculated to return respondent to the position in which it would have been had appellant not breached the agreement. Appellant may not revoke acceptance of the automobile or rescind the contract where there was no defect in the automobile. The trial court's Judgment was proper and its award of attorney's fees to the respondent was justified.

RESPECTFULLY SUBMITTED this 30th day
of May, 1980.

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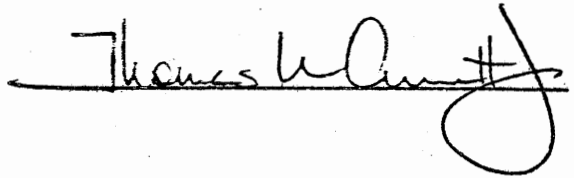
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CERTIFICATE OF DELIVERY

I hereby declare that I delivered two copies of the foregoing Brief of Respondent in Case No. 16847, this 30th day of May, 1980, to David S. Dolowitz, Parsons, Behle & Latimer, Attorney for Appellant, 79 South State Street, P. O. Box 11898, Salt Lake City, Utah 84147.

A handwritten signature in black ink, appearing to read "Thomas W. Amundson", written over a horizontal line.