

1980

# Centurian Corporation v. A. L. Cripps and Walter Cripps et al : Brief of Defendants and Respondents

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

CENTURAIN CORPORATION,

Plaintiff and Appellant,

-vs-

A. L. CRIPPS and WALTER  
CRIPPS,

Defendants and Respondents

SUPREME COURT NO. 16971

PETTY MOTOR LEASE, INC.,

Plaintiff in Intervention,  
Respondent,

-vs-

CENTURAIN CORPORATION,  
RICHARD NICKLES and  
MARGARET K. NICKLES,

Defendants in Intervention,  
Appellants,

BRIEF OF DEFENDANTS AND RESPONDENTS

APPEAL FROM THE JUDGMENT OF THE THIRD DISTRICT COURT FOR SALT LAKE  
COUNTY, STATE OF UTAH, HONORABLE PETER F. LEARY, JUDGE

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Defendants in Intervention )  
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BRIEF OF DEFENDANTS AND RESPONDENTS

NATURE OF CASE

Defendants-Respondents adopt the statement of the Nature of the case as set forth on page 2 of Appellant's Brief and incorporate the same herein.

RELIEF SOUGHT ON APPEAL

Defendants seek to have the decision of the Trial Court Affirmed in rejecting Plaintiff's claim for indemnification against Defendants as set forth in Point IV of Plaintiff's Brief.

Defendants have not responded to the issues raised by Plaintiffs and Plaintiff's in Intervention, except for responding to POINT IV of Plaintiff's Brief, for the reason that those issues were litigated between Plaintiffs and Plaintiffs in Intervention. Nevertheless, Defendants support the POINTS made in Plaintiffs' brief, except for POINT IV, for the reason that the liability of Plaintiff Centurian to Petty under the decision of the Trial Court could be imputed to Defendants Cripps if the Court were to reverse and grant Plaintiffs the relief requested in its POINT IV.

#### STATEMENT OF FACTS

Defendants-Respondents adopt the Statement of Facts set forth in the Brief of Plaintiff In Intervention-Respondent.

Defendants-Respondents do not agree with the second paragraph of the Statement of Facts in the Brief of Appellant wherein it alleged that Cripps admitted at trial that they were in default of the payments as required by Exhibit 1-F. Defendants allege that they did not admit they were in "default", but that they were "Delinquent" in certain of their payments. (Record 264.)

#### ARGUMENT

##### POINT I

CENTURIAN/NICKLES IS NOT ENTITLED TO INDEMNIFICATION FROM CRIPPS  
Plaintiff Centurian/Nickles is not entitled to indemnification from Defendants Cripps for the reason that Plaintiff breached the lease by grounding the tank trailer on December 19, 1973. This conduct on the part of Plaintiff caused Defendants to lose their lease with PIE and effectively prevented Defendants from using said trailer to obtain earnings from which to pay plaintiff pursuant to the Agreement. The Trial Court correctly held

that the action of Plaintiff Centurian in grounding the tank trailer on December 19, 1973 was a breach of the agreement and that defendants were not bound by the terms of the lease. (Record 109, 191, 198, 200).

Plaintiff incorrectly asserts in POINT IV of its Brief that the following clause in the lease is sufficient to justify indemnification:

"Purchaser agrees that he will hold seller harmless from and does hereby assume and agree to pay Exhibit "A" attached hereto." (Exhibit 1-P, paragraph 3)

The effect of such provision, however, was abrogated at the time plaintiff breached the lease on December 19, 1973.

Plaintiff further claims in its POINT IV that Defendants Cripps defaulted before the lease was breached by Plaintiff Centurian for the months of October and November of 1973. This position is untenable since the conduct of Plaintiff's agent, Richard Nickles, shows that delinquencies were not treated as "default" by Plaintiff. Payments of \$200.00 in October 1973 and \$360.00 in November 1973 were accepted by Plaintiff. (Record 108). The testimony of Mr. Nickles also shows that even though he felt the Defendants were not current in their account he permitted them to continue in the lease without claiming they were in default:

BY MR. BROWN:

Q. Mr. Nickles, in addition to--well, did you ever make oral requests of the defendants or either of them to bring current the payments?

A. Yes, we did; almost every month.

Q. And what response did you receive in that regard?

A. Well, he was having trouble with his truck or he had wrecked his truck or the payments on the new truck were more than he anticipated, and there was always some problem that--why he didn't have the money.

He had a fuel bill to pay or repairs to pay or something; tires to buy or something.

Q. Did he ever bring the account current?

A. No, he never did. (Record 241)

In view of the pattern of conduct of Plaintiff Centurian of accepting payments less than that required by the lease, and in treating the Defendants as though they were delinquent but not in default, and continually encouraging Defendants to bring the account current, the Plaintiff waived strict compliance with the payment provision of the lease. Prior to terminating the lease (grounding the trailer) Defendants were entitled to a formal notice of delinquency together with a reasonable time within which to cure any delinquency.

The Utah Supreme Court in Williamson v. Wanless, 545 P.2d 1145 (1976), in viewing similar conduct in a real estate transaction, held:

The imposition of such severe conditions is not favored in the law; and one who seeks to impose them must not, either by acts or omissions permit another to assume that the covenant will not be strictly enforced, then "crack down" on the obligor by rigidly insisting on enforcement, without giving some reasonable notice and opportunity to comply. This is a doctrine of equity which is firmly established in our law by numerous decisions. A foundational case is Christy v. Guild to the effect that when one has accepted overdue payments so that the payor has reasonably relied on such course of conduct and been led to believe that the payee will tolerate a failure of strict performance, the latter cannot abruptly change course and insist upon strict adherence to the covenant imposed and enforce a harsh forfeiture. 545 P.2d at 1147

Although Williamson dealt with a forfeiture provision and was concerned with real estate, the dicta of the Court is significant:

We can see no reason why the doctrine we have just spoken of as being rooted in equity and good conscience should have any affinity for, or limitation in application to, any particular type of conduct or controversy. The principles of equity and justice are universal; they apply wherever appropriate and necessary to enforce rights or to prevent oppression and injustice. 545 P.2d at 1148.



Clearly, the Plaintiff breached the lease by wrongfully grounding the trailer and is thus precluded from asserting the benefit of the hold harmless clause.

Plaintiff also asserts in its POINT IV the Exhibit "A" to P-1 is the combination of the Lease and Agreement of Sale and Purchase. Defendants contend that the said Exhibit "A" consists only of the Lease. The lease between Cripps and Centurian dated February 21, 1973, had only one attachment to it, to-wit: the lease agreement dated Feb. 1, 1973 between Petty Motor Lease and Centurian. (Exhibit 7-1).

The lease between Cripps and Centurian (Exhibit 1-P) itself at paragraph 2 states:

"Seller further does hereby assign to purchaser all of its right, title, and interest in and to that certain lease agreement dated the 1st day of February, 1973, between the seller and Petty Motor Lease, Inc., attached hereto and marked Exhibit "A"."

Note that the above excerpt makes no reference at all to the February 6, 1973 agreement (Exhibit 8-1). Further, the trial court in its memorandum opinion stated:

No evidence was introduced that the Agreement of sale and Purchase dated the 6th day of Feb. 1973, was incorporated into the lease between plaintiff and Petty Motor dated Feb. 1, 1973. No evidence was introduced as to the assignment of the Agreement of Sale and Purchase by Plaintiff to Defendants. (Record 106). Emphasis added.

Accordingly, it is clear from the record that the only agreements between Plaintiff and Defendants consist of the lease dated Feb. 21, 1973, and the lease dated Feb. 1, 1973, but not the Agreement of Sale and Purchase dated Feb. 6, 1973.

CONCLUSION

The Trial Court correctly ruled that Centurian breached its lease by grounding the trailer on December 19, 1973, and Defendants Cripps were therefore not bound by the terms of the lease. As a result the indemnification clause is inoperative. The Court should affirm the decision of the Trial Court in denying plaintiffs request for Indemnificati

Respectfully submitted,



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CERTIFICATE OF MAILING

I hereby certify that two copies of the foregoing Brief of Defendants-Respondents were mailed this 2nd day of September, 1980 to:

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