

1981

Centurian Corporation v. A. L. Cripps and Walter Cripps et al : Brief of Respondents Petition for Rehearing

Utah Supreme Court

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Recommended Citation

Petition for Rehearing, *Centurian Corp. v. Cripps*, No. 16971 (Utah Supreme Court, 1981).
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IN THE SUPREME COURT OF THE STATE OF UTAH

CENTURIAN CORPORATION,)
Plaintiff and Appellant,)

v.)

A. L. CRIPPS and WALTER CRIPPS,)
Defendants and Respondents,)

PETTY MOTOR LEASE, INC.)
Plaintiff in Intervention)
and Respondent)

v.)

CENTURIAN CORPORATION, RICHARD)
NICKLES AND MARGARET K. NICKLES,)
Defendant in Intervention)
and Appellants.)

SUPREME COURT

No. 16971

BRIEF OF RESPONDENTS

PETITION FOR REHEARING

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FILED

MAR - 4 1981

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Defendant in Intervention)
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No. 16971

BRIEF OF DEFENDANTS AND RESPONDENTS, CRIPPS, UPON PETITION
FOR REHEARING

NATURE OF CASE

In February of 1984 Centurian Corporation filed suit against A.L. Cripps and Walter Cripps seeking a Writ of Replevin for the return of a tank trailer together with monies claimed due under a lease agreement. Petty Motor Lease, Inc. moved to intervene in the action as owner of the tank trailer. The trial court, after a remand from the Supreme Court, eventually ruled in favor of Petty as against Centurian and held that Centurian was not entitled to indemnification from Cripps. A timely appeal was then taken by Centurian.

RELIEF SOUGHT ON APPEAL

Defendants, Cripps, seek to have the decision of the Trial Court affirmed in denying Centurian's claim for indemnification against Cripps and in construing the Agreement between Centurian and Cripps as a lease rather than a contract of sale.

STATEMENT OF FACTS

On or about May 21, 1973, Centurian and Cripps entered into an Agreement (Exhibit I-P) for the lease of the tank trailer. Attached to the Agreement was Exhibit A, a lease agreement between Petty Motor Lease, Inc., and Centurian Corp. (Exhibit 7-I). It did not include an Agreement of Sale and Purchase as claimed by Centurian. (Record 106)

Cripps used the trailer until December 19, 1974 at which time Centurain "grounded" the trailer by requesting PIE to impound the trailer. (Record 255 & 256) Cripps were unable to lease or register the trailer for the year 1974.(Finding 11, Record 196-197) On or about March 29, 1974. Walter Cripps reported that the trailer had been stolen. (Exhibit 4-P) (Finding 10, Record 196).

The trial court granted judgment in favor of Centurian against Cripps only as to the past due installments per Exhibit I-P, interpreting the agreement as a lease. The Court further found that no evidence was introduced of Cripps' negligence or that Cripps had failed to properly take care of the trailer.

On remand the trial court ruled that Centruian was not entitled to indemnification against Cripps even though Petty and Centurian had entered into a purchase agreement.

POINT I

THE UTAH SUPREME COURT ERRED IN **RULING** THAT THE AGREEMENT BETWEEN CRIPPS AND CENTURIAN CONSTITUTED A SALE INSTEAD OF A LEASE.

Defendant Cripps respectfully assert that the Supreme Court of the State of Utah erred in concluding that Exhibit I-P represented a sale of the tank trailer rather than a lease.

The Trial Court correctly found that the agreement between Centurian and Cripps consisted of the Agreement dated May 21, 1973 and the attached Exhibit A which was the lease between Centurian and Petty dated February 1, 1973. It did not include the Agreement of Sale and Purchase identified as Exhibit 8-I.

The language of Exhibit I-P makes no reference whatsoever to an attachment other than Exhibit A. Exhibit A is defined by paragraph 2 of Exhibit I-P as "...that certain lease agreement dated the 1st day of February, 1973, between the seller and Petty Motor Lease, Inc...." No mention is made of an Agreement of Sale and Purchase being attached to Exhibit A.

Defendants Cripps further assert that the transcript of the trial does not reveal that Agreement of Sale and Purchase was attached to Exhibit I-P. The questioning of Richard Nichols at page 236 of the Transcript leaves the impression that Exhibit I-P consisted only of the Agreement dated May 21, 1973:

Q. I show you what's been marked for identification as Exhibit I-P and ask you if you can identify that, sir?

A. Yes, this is an agreement we entered into with Walter Cripps and his dad.

Q. And does that bear their signature?

A. Yes, it does.

Q. Are you familiar with their signatures?

A. Yes, I am.

Q. And did you see them execute that particular document?

A. Yes, I did.

Q. Does it bear your signature also?

A. Yes, it does.

Q. And--okay. I would ask for the admission of I--

THE COURT: Any objection?

MR. BRYNER: No objection, your Honor.

THE COURT: Exhibit IP is admitted. (Record 106)

Note also that the original complaint filed in this action in the court below consisted only of Exhibit I-P. (Record 2-5). The Agreement of Sale and Purchase was not attached to the complaint filed. Defendants are of the opinion that the Agreement of Sale and Purchase was not attached to the Exhibit I-P on the date of trial but that through the lengthy process of this case inadvertently became attached to Exhibit I-P through administrative error at some point.

The trial court also found that no negligence of Cripps had been shown in the theft of the trailer:

"The record is absolutely devoid of any evidence that defendants were negligent or failed to take proper care to the tank trailer so as to prevent it from being stolen"
(Record 109)

Absent any negligence on the part of Cripps they cannot be liable for an act of an intervening party, to-wit: the theft of the trailer. This position is supported by the following Utah cases: Barlow Upholstery & Furniture Co. v. Emmel, 533 P.2d 900 (1975); Romney v. Covey Garage, 111 P.2d 545 (1941); Clack -Nomah Flying Club v. Sterling Aircraft Inc., 408 P.2d 904.

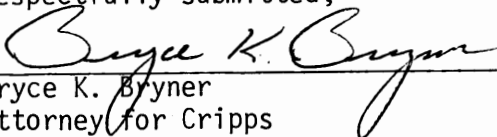
Since the agreement between Cripps and Centurian should be construed as a lease and not one of sale, the risk of loss remained with

Centurian. And in the absence of negligence on the part of Cripps they are not liable for the purchase price of the trailer.

CONCLUSION

The Defendants Cripps respectfully submit that the Court should reverse its holding that the agreement between Cripps and Centurian is an agreement of sale and that Centurian is entitled to indemnification against Cripps. The record does not contain sufficient evidence to disturb the lower court's finding that Exhibit 8-I was not contemplated as part of the agreement between Cripps and Centurian.

Respectfully submitted,

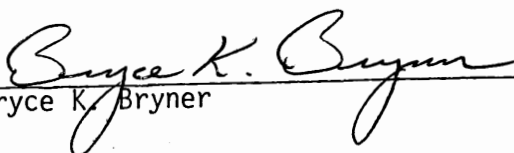

Bryce K. Bryner
Attorney for Cripps

CERTIFICATE OF MAILING

I hereby certify that two copies of the foregoing Brief of Defendants and Respondents, Cripps, upon Petition for Rehearing were mailed this 4th day of March, 1981 to:

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Bryce K. Bryner

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FILED

DEC - 5 1980

Clark, Supreme Court, Utah

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The following newly uncovered case is submitted as an addition to the Brief of Petty Motor Lease, Inc. on page 23, regarding attorney's fees:

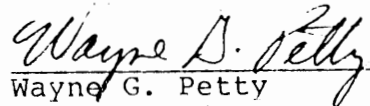
In the recent case of Management Services Corp v. Development Associates, No. 16341, filed September 11, 1980, this Court adopted the rule of law that "a provision for payment of attorney's fees in a contract includes attorney's fees incurred by the prevailing party on appeal as well as at trial, if the action is brought to enforce the contract . . ." Petty Motor Lease submits that it is entitled to an award of attorney's

fees to compensate it for the employment of its attorney in these proceedings, including all proceedings since the trial, the previous appeal, and the present appeal. The case should be remanded to the District Court for its determination of reasonable attorney's fees to be granted to Petty Motor Lease for its involvement in these proceedings.

DATED this 4th day of December, 1980.

Respectfully submitted,

MOYLE & DRAPER



Wayne G. Petty
Attorneys for Petty Motor
Lease, Inc.