1981

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

Utah Supreme Court


Wayne G. Petty; Moyle & Draper; Attorneys for Plaintiffs;
James R. Brown; Bryce K. Bryner; Attorneys for Appellants;

IN THE SUPREME COURT OF THE STATE OF UTAH

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CENTURIAN CORPORATION,

Plaintiff and Appellant,

vs.

A. L. CRIPPS and WALTER CRIPPS,

Defendants and Respondents.

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PETTY MOTOR LEASE, INC.,

Plaintiff In Intervention and Respondent,

vs.

CENTURIAN CORPORATION, RICHARD K. NICKLES and MARGARET K. NICKLES,

Defendants in Intervention and Appellants.

SUPREME COURT NO. 16971

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# BRIEF OF RESPONDENT PETTY MOTOR LEASE, INC. IN ANSWER TO PETITION FOR REHEARING

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

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# BRIEF IN ANSWER TO PETITION FOR REHEARING

## NATURE OF CASE

Centurian Corporation ("Centurian") brought a action against A. L. Cripps and Walter A. Cripps ("Cripps"), claiming amounts due under an agreement wherein Centurian Corporation had given possession of a tank trailer to Cripps. Petty Motor

Lease, Inc. moved to intervene in the action claiming an interest in the tank trailer by having entered into agreements with Centurian and Richard and Margaret K. Nickles ("Nickles"). The motion was granted and trial was held with all parties, including Petty Motor Lease, Inc., present. Following trial, the trial court held that it was without jurisdiction of the complaint in intervention of Petty Motor Lease, Inc. against Centurian and Nickles. This Court reversed and remanded with instructions that the trial court enter judgment in accordance with the evidence presented at trial. Centurian Corporation v. A. L. Cripps, et. al., Petty Motor Lease, Inc. v. Centurian Corporation, et. al., 577 P. 2d 955 (Utah 1978).

## DISPOSITION IN LOWER COURT

Following remand from this Court, judgment was entered in favor of Petty Motor Lease, Inc., against Centurian and Nickles. Petty Motor Lease, Inc., Centurian and Nickles sought additional relief from the trial court by way of motions to amend but such motions were denied.

## RELIEF SOUGHT ON APPEAL

Petty Motor Lease, Inc., sought the affirmation by this Court as to the liability of Centurian and Nickles. Petty Motor Lease, Inc. cross-appealed as to the amount due, the rate of interest and for an award of attorney's fees, including fees

on appeal. In its decision, this court addressed all the issues presented to it, including those raised by Centurian and Nickles in their appeal, and awarded Petty Motor Lease the amount claimed and attorneys fees, but denied Petty Motor's claim regarding interest. Centurian and Nickles have petitioned for rehearing from this Court's decision filed January 19, 1981. Petty Motor Lease, Inc. submits that the Petition for Rehearing should be denied.

## STATEMENT OF FACTS

Petty Motor Lease, Inc. refers to the Statement of Facts contained in its Brief of Respondent, pages 3 through 6. In addition, it is pertinent to note certain provisions of the Lease and Agreement of Sale and Purchase. The Lease called for 32 monthly payments of $580.00, a total of $18,560.00, plus use tax. In addition, Centurian deposited with Petty Motor Lease, Inc., at the inception of the agreement the sum of $3,594.63.

Paragraph two of the Agreement of Sale and Purchase provides as follows:

> It is agreed that the user [Centurian] will pay to the owner [Petty Motor Lease, Inc.] the sum of Six Hundred Twenty-One and 00/100 Dollars plus applicable sales tax and interest at six percent per annum (6%), plus any deposits or advance payments made and owner shall keep all payments made or monies paid or deposited under the terms of the lease referred to above.

The total amount contemplated to be paid under the Agreement of Sale and Purchase is $18,560 by monthly payments,

$3,594.63 by deposit or a total sum of $22,154.63, and $621.00 plus interest.

## ARGUMENT

POINT I. THE SUPREME COURT SUFFICIENTLY ADDRESSED THE ISSUE OF MARGARET K. NICKLES' LIABILITY; THE AGREEMENT BETWEEN PETTY MOTOR LEASE, INC. AND CENTURIAN, GUARANTEED BY MARGARET NICKLES INVOLVED A SECURITY INTEREST SUBJECT TO THE LAW OF SALES.

This Court clearly dealt with the issue Centurian and Nickles raise in their Petition for Rehearing regarding Margaret Nickles' liability. In considering the issue of whether the agreements between Petty Motor Lease, Inc. and Centurian constituted a lease or a sale, this Court stated, in part:

> Under Utah law, when a transaction purports on its face to be a lease, but is in fact a sale with reservation of a security interest in the vendor, it becomes subject to the law of sales. "Whether a lease is intended as security is to be determined by the facts of each case. . ." Litigation relevant to the determination of the nature of an agreement under this provision has been profuse, and the test formulated thereby numerous. It has been suggested that a lease agreement is actually a purchase and sale agreement if the "lease payments" are clearly designed to establish an ownership interest in the "lessee;" if the "lessee" treats the payments as building up equity in the property concerned; or if the "lessee" is constrained to become the owner of the property at the termination of the lease, either by contractual agreement or as a matter of economic compulsion. (Footnotes omitted.)

The agreement between Petty Motor Lease, Inc. and Centurian is subject to the law of sales under all of the foregoing criteria. Margaret Nickles is liable to Petty Motor Lease, Inc., the same as Centurian, having guaranteed the obligation of Centurian. This conclusion is required because of the trial court's determination that the agreement between Petty

Motor and Centurian was a purchase and sale agreement ab initio, or from the beginning; it is therefore of no consequence that Margaret Nickles did not sign the Agreement of Purchase and Sale Agreement. The only relevant inquiry is what was Margaret Nickles' guarantee when she guaranteed the written lease agreememt. The evidence is clear that the arrangement between Petty Motor and Centurian was that of sale and purchase from the inception and Nickles understood the arrangement to be a purchase. Richard Nickles testified:

> I purchased on the first day of February. This is when we negotiated the agreement when we bought the equipment.(Tr 12, 13, R. 244, 245.)

The cases as cited by the Court in its opinion constitute conclusive authority that the agreement between Petty Motor and Centurian was subject to the law of sales, since delivery and possession of the trailer to Centurian passed the risk of loss to Centurian, and Margaret Nickles, having guaranteed the performance of Centurian Corporation, is liable to the full extent that Centurian is liable.

The Lease itself, even without the Agreement of Purchase and Sale, constitutes a security interest to Petty Motor. The definition of "security interest" is as follows:

> "Security interest" means an interest in personal property or fixtures which secures payment or performance of an obligation. The retention or reservation by a seller of goods notwithstanding shipment or delivery to the buyer (Section 70 A-2-401) is limited in effect to a reservation of a "security interest." . . . Whether a lease is intended as security is to be determined by the facts of each

case; however, (a) the inclusion of an option to purchase does not of itself make the lease one intended for security, and (b) an agreement that upon compliance with the terms of the lease the lessee shall become or has the option to become the owner of the property for no additional consideration or for a nominal consideration does make the lease one intended for security. (Emphasis added.) 70A-1-201(37)

The analysis of the facts of each case to determine whether a lease is intended as security is purely objective. The objective analysis in this case, as to Margaret Nickles, should be: If Centurian had made all the payments contemplated by the Lease, (and had the trailer not been stolen), would Centurian be constrained to become the owner of the trailer at the termination of the Lease as a matter of economic compulsion? See White and Summers, Uniform Commercial Code, §22-3, pp. 759-765 (West 1972). The answer is clearly "Yes." By a nominal payment, the trailer could be purchased. The amount Centurian would pay to purchase the trailer was substantially less than the fair market value of the trailer. Had the trailer not been stolen, Margaret Nickles would certainly have asserted, after payment of all monthly installments that Centurian was entitled to pay the $621 and interest to buy the trailer.

Even in absence of any agreement for purchase of the trailer at the end of the lease term, the Lease constitutes a "security agreement." This is because the Lease agreement, and the disparity between the payments required under the Lease and

those that would be required under a "true lease", secures payment of the obligation.

POINT II. IF THE AGREEMENT BETWEEN PETTY MOTOR AND CENTURIAN IS CONSTRUED AS A LEASE AS ASSERTED BY MARGARET K. NICKLES, THE MEASURE OF DAMAGES AGAINST MARGARET NICKLES WOULD EXCEED DAMAGES AWARDED TO PETTY MOTOR.

Even if the Agreement of Sale and Purchase is disregarded as to Margaret Nickles, Centurian is responsible for the safe-keeping and return to Petty Motor Lease, Inc. of the trailer under the Lease. This obligation and liability arises because of the express provisions of the Lease, which was guaranteed by Margaret Nickles.

The Lease between Petty Motor Lease, Inc. and Centurian provides, in part as follows:

> 3. User agrees to continually maintain said property in good condition . . .
>
> 7. Upon expiration or termination of this Agreement, User shall surrender the unit to Owner in good mechanical condition and repair, with tires having at least 50 percent of original tread and free from body damage, scratched or stripped paint or torn or faded upholstery. Any expense by Owner to bring unit to the above described condition shall be paid for by User.

Considering the Lease only, the foregoing provisions clearly indicate that Centurian was responsible for the care, maintenance and return of the trailer. By agreement, Centurian agreed to be responsible for the return of the trailer. A lessee is not an insurer of safety of goods delivered to him, un-

less made so by statute or by express contract. 8 Am.Jur.2d (1980), Bailments, § 215. As stated at 8 Am.Jur.2d (1980), Bailments, § 150:

> As a general rule, if there is an express or implied agreement by the bailee which clearly goes beyond its ordinary obligation as implied by law, he will be held to this agreement. In such cases the bailment contract is controlling and must be enforced according to its terms, irrespective of the fact that a less onerous liability is imposed by law on bailees of the same class generally. For such an undertaking, the bailment itself or the compensation to be paid for it is a sufficient consideration. (Footnotes omitted.)

See Sumsion v. Streator-Smith Inc., 103 Utah 44, 132 P.2d 680 (1943).

The agreement of the parties may result in the lessee becoming an insurer. This rule is stated at 8 Am Jur.2d (1980), Bailments, § 153:

> An express agreement by the bailee, not merely to return the subject of the bailment in good condition, but to repair all damages occasioned by accident or casualty, or to be "responsible" for, or to repair any loss or damage, barring ordinary wear and tear, creates an unconditional obligation, and for loss or damage not excepted the bailee is liable irrespective of his negligence or fault. The bailee becomes an insurer also where he enters into a special contract to return the property in good condition or pay its value and is liable for any loss which occurs while it is in his possession even though without his fault. And where he contracts specially to return the bailed property in as good condition as when received saving some other exception or exceptions than ordinary wear and tear, such exceptions may be regarded as exclusive, and he may be liable as an insurer for loss from other causes, although without his fault.

> The view is generally taken that the fact that the bailee deposits a sum of money or gives a bond as security for the return for the bailment in good condition evidences an intension to extend his common law liability. There is,

> moreover, authority for the view that whenever the bailee is deemed to have entered into a special engagement to return the property at a certain time in good order he will not be released therefrom even where it appears that the property was damaged or destroyed without his fault. . . . (Emphasis added; footnotes omitted.)

The Lease clearly places on Centurian the obligation of returning the trailer and, therefore, assuming the risk of loss of the trailer prior to its return.

Margaret Nickles asserts that her liability under the lease is limited to an amount less than $2,000. The contention is based upon the provision in the Lease that provides that if the Lease is terminated or expires, the lessee shall pay 45% of the monthly rental multiplied by the number of months remaining on the lease, plus the final lease payment. However, Margaret Nickles totally ignores the Lease provision requiring the return of the equipment. Thus, even accepting Margaret Nickles argument as far as it goes, she would be liable for something less than $2,000, plus the value of the trailer since she is unable to perform the obligation of returning it to Petty Motor because of the loss by theft.

Richard Nickles testified that the value of the trailer at the time of the theft was $22,000 (Tr.14). Walter A. Cripps testified that the value of the trailer was between $14,500 and $15,000 (Tr.38). Neuman C. Petty, President of Petty Motor Lease, Inc. testified that the value of the trailer was between $15,000 and $16,000 (Tr.47). Assuming the trial

court were to find a favorable value to Margaret Nickles of $15,000 at the time of loss, she would be obligated to Petty Motor for approximately $17,000, exclusive of sales tax and interest. This amount is in excess of the amount for which Centurian is obligated as a result of this Court's decision in this case.

This Court is entitled to adopt as the measure of damages awarded against Margaret Nickles the lesser amount which will compensate Petty Motor under the provisions of the Lease and Agreement of Sale and Purchase.

POINT III. THE LEASE AGREEMENT MAKES CENTURIAN RESPONSIBLE FOR THE RETURN OF THE TRAILER AND FOR FAILURE TO RETURN THE TRAILER CENTURIAN IS LIABLE FOR ITS VALUE; MARGARET NICKLES AS GUARANTOR OF THE LEASE, IS LIABLE UNDER THE LEASE INCLUDING THE VALUE OF THE TRAILER.

Counsel for Margaret Nickles relies on the common law rule that in the absence of negligence a lessee is not liable for an act of the third party intervenor, such as a theft. However, as indicated in Point II of this brief, counsel for Margaret Nickles totally ignores the express provisions of the Lease which abrogates the common law rule. See 8 Am.Jur.2d (1980) § 150 and 153, 214 and 215. The Lease required Centurian to return the trailer. For failure to do so, under the Lease, Centurian would be liable for the value of the trailer.

Margaret Nickles, as guarantor of the Lease, is similarly liable.

POINT IV. NO ELECTION OF REMEDIES IS NECESSARY OR REQUIRED BY PETTY MOTOR LEASE.

Appellants' Brief in Support of Petition for Rehearing asserts an election of remedy was required, was made, and bars the claim of Petty Motor Lease against Margaret Nickles. As indicated in Point I, above, Margaret Nickles' liability is identical to Centurian's, as determined by this Court.

Counsel for Centurian and Nickles misconstrues or seeks to have this Court misapply the rule of election of remedies. "The doctrine of election of remedies does not apply where the available remedies are concurrent, or cumulative, and consistent." 25 Am. Jur. 2d (1966), Election of Remedies, § 12. The Lease and Agreement of Sale and Purchase, as construed by the trial court, and as affirmed by this court, and as applied to Margaret Nickles in relation to Centurian, are concurrent or cumulative, and consistent. The heart of this case is the risk of loss, as between lessor and lessee (under Margaret Nickles' theory), or seller and buyer. Under either theory, Centurian bore the risk of loss, and Margaret Nickles guaranteed the Lease, if not the agreement of purchase as well. The risk of loss issue is a consistent issue, regardless of the theory. In

addition, the agreement of Purchase and Sale is cumulative, the trial court having found, and this Court having affirmed, that the Lease remains in effect except as modified by the Agreement of Sale and Purchase. It is clear that the Lease and Agreement of Sale and Purchase do not provide inconsistent remedies, a requirement of an election of remedies:

> § 10. Inconsistent remedies.
>
> The doctrine of election of remedies is applicable only where there are two or more coexistent remedies available to the litigant at the time of the election which are repugnant and inconsistent. This rule is upon the theory that, of several inconsistent remedies, the pursuit of one necessarily involves or implies the negation of the others. The rule of irrevocable election does not apply where the remedies are concurrent or cumulative merely, or where they are for the enforcement of different and distinct rights or the redress of different and distinct wrongs.
>
> § 11. -- Test of inconsistency.
>
> It has been said that the so-called "inconsistency of remedies" is not in reality an inconsistency between the remedies themselves, but must be taken to mean that a certain state of facts relied on as the basis of a certain remedy is inconsistent with, and repugnant to, another certain state of facts relied on as the basis of another remedy. For one proceeding to be a bar to another for inconsistency, the remedies must proceed from opposite and irreconcilable claims of right and must be so inconsistent that a party could not logically assume to follow one without renouncing the other. Two modes of redress are inconsistent if the assertion of one involves the negation or repudiation of the other. In this sense, inconsistency may arise either because one remedy must allege as fact what the other denies, or because the theory of one must necessarily be repugnant to the other. More particularly, where the election of a remedy assumes the existence of a particular status or relation of the party to the subject matter of litigation, another remedy is inconsistent if, in order to seek it, the party must assume a different and inconsistent status or relation to the subject matter.
> 25 Am Jur 2d (1966), Election of Remedies. (Footnotes omitted.)

Cases cited in Appellants' Brief in support of the petition for rehearing are consistent with the foregoing and do not stand as a bar as asserted by counsel for Centurian. In Utah Idaho Cent. R. Co. V. Industrial Commission, 86 U. 364, 35 P. 2d 842 (1934), this Court considered whether an employee of the Utah Idaho Central Railroad Company, injured in the course of his employment, was injured while engaged in interstate commerce or intrastate commerce. If injured while engaged in interstate commerce, the legal remedy for the injury was under the Federal Employers' Liability Act ("FELA"), whereas if injured while engaged in intrastate commerce, the remedy was under the Workmen's Compensation Act of Utah. This Court held that the employee's bringing of an action in the Federal District Court under FELA did not constitute an election nor preclude him from thereafter claiming compensation under the Workmen's Compensation Act in state court.

In Farmer & Merch. Bank v. Universal C.I.T. Credit Corp, 4 U. 2d 155, 289 P. 2d 1045 (1955) this court stated:

> The doctrine of election of remedies applies as a bar only where the two actions are inconsistent, generally based upon incompatible facts; the doctrine does not operate as an estoppel where the two or more remedies are given to redress the same wrong and are consistent.

In summary, no election of remedies was required, and reliance on both the Lease and Agreement of Sale and Purchase does not create an inconsistency of remedies.

## CONCLUSION

The decision of this Court is correct and complete. Margaret Nickles is liable as the guarantor of Centurian in the full amount awarded to Petty Motor Lease.

The Petition for Rehearing should be denied.

Dated this 9th day of March, 1981.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of March, 1981, two true and correct copies of the foregoing Brief of Appellant were mailed, postage prepaid, to the following:

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