

1980

Walter D. Devore dba Walt's Amoco v. Alf L. V. Bostrom et al : Defendant-Brief of Appellant

Utah Supreme Court

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Recommended Citation

Brief of Appellant, *Devore v. Bostrom*, No. 17066 (Utah Supreme Court, 1980).
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IN THE SUPREME COURT OF THE STATE OF UTAH

WALTER D. DEVORE,
dba WALT'S AMOCO,

Plaintiff-Respondent,

vs.

Case No. 17066

ALF L. V. BOSTROM, dba LAYTON
FORD, E & M FORD SALES, a
Utah Corporation, and FORD
MOTOR COMPANY, a Delaware
Corporation.

Defendants-Appellants.

DEFENDANT-APPELLANT'S BRIEF

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FILED

JUL 2 1980

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MOTOR COMPANY, a Delaware	:	
Corporation.	:	
	:	
Defendants-Appellants.	:	

DEFENDANT-APPELLANT'S BRIEF

STATEMENT OF THE KIND OF CASE

This is an action for rescission of a Vehicle Purchase Agreement dated the 10th day of April, 1979 based on breach of implied warranty, for return of the purchase price, incidental and consequential damages, and attorney's fees.

DISPOSITION ON LOWER COURT

The case was tried to the Court, the Honorable George E. Ballif, District Judge, sitting without a jury and from a

verdict and judgment for the plaintiff, defendant appeals only from the judgment for incidental and consequential damages and for attorney's fees.

RELIEF SOUGHT ON APPEAL

Defendant seeks reversal of the judgment for incidental and consequential damages in the sum of \$946.00 and the judgment for attorney's fees in the sum of \$1,735.00.

STATEMENT OF FACTS

On the 22nd day of January, 1979, respondent ordered a new Ford automobile from appellant and appellant submitted the order to Ford Motor Company. The vehicle was delivered to appellant's premises April 10, 1979 at approximately 1:30 p.m. and the vehicle was delivered to respondent between 2:30 and 3:00 p.m. the same date without any dealer preparation pursuant to the previous agreement of the parties. On the same date, respondent executed a Vehicle Purchase Agreement (R. P.27) and the following day, April 11, 1979, respondent paid for the vehicle in full and later that evening while washing the vehicle, discovered defects that made the vehicle unacceptable and respondent thereafter negotiated with Layton Ford and Ford Motor Company for a substantial reduction in the purchase price, or alternatively, another vehicle.

(R. P.45) During these negotiations, Bill Gibson, the salesman for appellant, Layton Ford involved in the transaction, died. (R. P.51) The negotiations did not produce satisfactory results for respondent and under date of June 13, 1979 respondent submitted his Notice of Rescission to appellant (R. P. 9) and appellant refused to pay the amounts demanded including attorney's fees and respondent retained possession of the vehicle and filed his Complaint, amending to join Ford Motor Company and then settling with Ford Motor Company and dismissing them from the lawsuit just prior to trial.

POINT I

THE AWARD OF INCIDENTAL OR CONSEQUENTIAL DAMAGES CONTRARY TO CONTRACT AND AFTER RESCISSION WAS IMPROPER.

When negotiations between the parties broke down, and respondent sent his letter dated June 13, 1979, he was complying with the provisions of the Uniform Commercial Code in revoking a previous acceptance and setting forth the terms upon which the automobile purchased would be returned to appellant. The last paragraph of that letter (R. P.9) reads as follows:

The undersigned, Mr. Walder D. DeVore, hereby offers to restore said automobile which was received by him, to you, in return for which you will restore and refund to Mr. DeVore all monies paid by him to you under the above-

mentioned contract in the sum of \$8,145.96, representing the cost of the car, license plates in the sum of \$8.50, insurance premium for six months in the sum of \$78.00, together with inconvenience, attorney's fees and other incidental costs in the sum of \$900.00 for a total sum of \$9,132.46. Said monies must be paid to the office of HANSEN & SPRATLEY, P. O. Box 113, 110 West Center, Bountiful, Utah, 84010, within ten days of your receipt of this notice. If you do not make said restoration to Mr. DeVore within the allotted time through his counsel, Mr. DeVore will immediately commence legal action.

70A-2-711(3) U.C.A. 1953 as amended specifically itemizes the kinds of damage for which the goods in the possession of the buyer may act as security and they are:

- (1) The price of the goods.
- (2) Expenses reasonably incurred for inspection.
- (3) Expenses reasonably incurred in receipt.
- (4) Expenses reasonably incurred in transportation.
- (5) Expenses reasonably incurred in care and custody.

The code does not allow respondent to condition the return of the goods upon the payment of other incidental or consequential damages nor the payment of attorney's fees. Appellant should not be forced to capitulate to demands of respondent for "attorney's fees and other incidental costs" to get the car back, repair it, and sell it to mitigate its damages. Because the offer to return the vehicle contained in the notice of rescission was conditioned upon impermissible damage claims, all

incidental and consequential damages incurred by respondent after the 13th day of June, 1979 must be disallowed. If the declared rescission is not within the Code provisions, such damages cannot be allowed in any event.

Further, the Vehicle Purchase Agreement signed by respondent on the 10th day of April, 1979 provides in bold type immediately above respondent's signature the following (R. P.27):

NOTICE TO BUYER: RECOVERY HEREUNDER BY THE DEBTOR SHALL BE LIMITED TO AMOUNTS PAID BY THE DEBTOR HEREUNDER.

This contract provision is consistent with the code philosophy of allowing a contractual modification or limitation of remedies as set forth in 78-2-719(3) U.C.A. which states:

Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

There is no finding by the trial court that the limitation on damages was unconscionable and no basis for such a finding in the evidence. The court simply ignored the contract provision and granted the damages regardless of the contract.

POINT II

THE TRIAL COURT ERRED IN AWARDING ATTORNEY'S FEES TO RESPONDENT.

The trial court justifies its refusal to give effect to the limitation on warranties contained on the reverse side of the Vehicle Purchase Agreement on the ground that the salesman did not point out such limitations to respondent, but of course the salesman was dead at the time the parties found that they were not going to settle their differences. However, respondent justifies the granting of attorney's fees on the ground that a provision on the reverse side of the contract would give appellant attorney's fees in enforcing its rights had the decision in the trial court been in favor of the appellant. The fact that such a provision was not pointed out by the salesman doesn't seem to matter when we talk about attorney's fees because the doctrine of Christopher v. Larsen Ford, 557 P.2d 1009 (Utah 1976) has not yet been extended beyond limitation of warranties.

However, the court has recently dealt with contract provisions for attorney's fees, in Stubbs v. Hemmert, 567 P.2d 168 (Utah, 1978) and in B.L.T. Investment Company v. Snow, 586 P.2d 456 (Utah 1978). In adopting the rationale of Bodenhammer v. Patterson, 563 P.2d 1212 (Or. 1977) the court quoted as follows:

Finally, Pattersons contend that the trial court erred in denying their request for attorney's fees. This was not error. Their claim for attorney's fees is based upon a provision in the contract of sale. By asking for rescission of the contract, they disaffirmed it in its entirety. They may not avoid the contract and, at the same time, claim the benefit of the provision for attorney's fees.

In Mecham v. Benson, 590 P.2d 304 (Utah 1979) this court summarily dealt with the attorney's fee clause consistent with the provisions of the U.C.C. as adopted by Utah and said at page 309:

The attorney for the seller stipulated that the prevailing party could recover an attorney fee in the amount found by the court. There is no basis in the record for an award of counsel fees and no basis for the stipulation. The contract of sale contains no provision for an award of counsel fees to the buyers, and our law is well settled to the effect that in a law case, such as this, counsel fees can only be awarded where the contract so provides or where there is some statutory provision permitting it.

Virtually all of the jurisdictions have held that consequential damages as provided in the Uniform Commercial Code do not include attorney's fees. See for example Murray v. Holliday Rambler, 83 Wis. 2d 406, 265 N.W. 2d 513 (1978). Respondent relies on a case noted in the annotation at 85 A.L.R. 3d 393 titled Gates v. Abernathy, an intermediate appellate decision in Oklahoma in 1972 apparently reported at 11 U.C.C.R.S. 491.

In light of the decision in Mecham vs. Benson, *supra*.

it appears that the State of Utah has firmly adopted the position that consequential damages do not include attorney's fees unless the contract specifically provides attorney's fees for the party claiming them.

Finally, the contract provision alluded to under Point I limiting the buyer's remedy to recovery of the sums paid under the contract would also bar respondent's claim to attorney's fees.

CONCLUSION

The demand for attorney's fees and other damages not allowed by the code as a condition for the return of the car, precludes a claim for incidental and consequential damages thereafter incurred by respondent. The good faith provisions of the code do not permit the respondent to incur further damages upon appellant's refusal to accede to unconscionable and unjustified damage claims. If respondent didn't want to sell the vehicle as authorized by the code and thus mitigate his damages, that's his decision but he cannot lay further damages to appellant's doorstep.

By far the majority of jurisdictions support the proposition that consequential damages do not include attorney's fees and this court has already ruled unequivocally that attorney's fees may not be awarded unless the contract specifically provides and there is no pro-

vision in the contract executed by respondent for the payment of attorney's fees to respondent as buyer and appellant respectfully submits that the trial court should be reversed as to its award of attorney's fees and its award of incidental and consequential damages.

DATED this 1st day of July, 1980.

BEAN, BEAN & SMEDLEY


DAVID E. BEAN
Attorneys for Appellant

CERTIFICATE OF DELIVERY

I certify that on this 2nd day of July, 1980,
I delivered two copies of appellant's brief to Darwin C.
Hansen, Attorney at Law, 110 West Center Street, Bountiful,
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