

1980

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

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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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.

PLAINTIFF - RESPONDENT'S BRIEF

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WALTER D. DEVORE,)	
dba WALT'S AMOCO,)	
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Plaintiff - Respondent,)	
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vs.)	CASE NO. 17066
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LAYTON FORD, E & M FORD)	
SALES, a Utah Corporation,)	
and FORD MOTOR COMPANY, a)	
Delaware Corporation,)	
)	
Defendants - Appellants.)	

PLAINTIFF - RESPONDENT'S BRIEF

STATEMENT OF THE KIND OF CASE

This is an action for rescission of an automobile purchase contract entered into on April 10, 1979, between respondent and appellant, or in the alternative, for breach of contract, breach of warranty or specific performance, plus incidental and consequential damages.

DISPOSITION IN LOWER COURT

The case was tried to the Court, the Honorable George E. Ballif, District Judge, presiding, sitting without a jury and from a judgment for the plaintiff - respondent, defendant - appellant appeals those portions of the judgment awarding incidental and consequential damages, including attorney's fees.

RELIEF SOUGHT ON APPEAL

Plaintiff - respondent seeks affirmance of the trial court's judgment in all its particulars.

STATEMENT OF FACTS

On April 10, 1979, respondent entered into a written contract with appellant for the purchase of a new 1979 Ford LTD automobile and took possession of the car on that date. On April 11, 1979, respondent paid appellant \$8,145.09 for the automobile. That night, as respondent was washing the car, he noticed that the car had been damaged in certain areas, including the right rear door, the frame, rear fenders, rear bumper, the shield below the left front head light, the trunk lid, the roof and the right front door. (R. Pp. 127, 128.)

Thereafter, on April 12, 1979, respondent called Bill Gibson, appellant's salesman who had sold him the automobile and was told by him that respondent would receive a discount on the purchase price or a new, replacement automobile. (R. P. 128.)

For approximately the next two months, the parties discussed the matter several times, seeking to resolve it, but failed to do so. On June 13, 1979, respondent gave appellant formal written notice that respondent was rescinding the contract. In the notice, respondent offered to return the automobile to appellant in return for appellant refunding the purchase price, with interest, plus paying respondent his incidental and consequential damages. Appellant refused to do these things and suit was subsequently brought. (R. P. 128.)

The case then proceeded to trial and at the conclusion thereof, the Court found for respondent and awarded him the purchase price with interest thereon and incidental and consequential damages including compensation for lost work, car insurance, license plates and attorney's fees. (R. P. 129, 130.)

POINT ONE

THE AWARD OF INCIDENTAL AND
CONSEQUENTIAL DAMAGES WAS PROPER.

Appellant claims that the trial court's award of incidental and consequential damages was improper because the written contract between the parties limited respondent's remedy to recovery of the purchase price and because respondent's offer to return the vehicle was conditioned upon impermissible damage claims. This argument fails to take into account the applicable statute and the pertinent facts of this case.

It is true that under Section 70A-2-719, Utah Code Annotated (1953, as supp.), a contract can limit the damages which a buyer can recover. However, that statute also provides as follows:

"(2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, recovery may be had as provided in this Act."

The argument that, under the contract, respondent was limited to recovering the purchase price paid for the automobile fails to account for the fact that it is uncontroverted that the appellant refused to return the purchase price paid

by appellant or any portion thereof, thus causing the contract's remedy to fail of its essential purpose because of appellant's failure to abide by its terms. Appellant cannot now use this very provision which it failed to honor as a reason for limiting the trial court's award to respondent.

Since the limited remedy failed of its essential purpose, respondent was entitled to recover incidental and consequential damages. See AES Technology Systems, Inc. v. Coherent Radiation, 583 F.2d 933 (7th Cir. 1978), a case involving a breach of warranty action brought under the Uniform Commercial Code which states that:

"When a provision in a sales contract limiting the remedies fails of its essential purpose, remedy may be had as provided by the Uniform Commercial Code, including recovery of direct damages as well as incidental and consequential damages." 583 F.2d at 940.

The applicable statute is 70A-2-715, Utah Code Annotated (1953, as supp.), not 70A-2-711. According to Lloyd v. Classic Motor Coaches, Inc., 388 F. Supp. 785 (N.D. Ohio, 1974), wherein an automobile buyer brought a rescission action against an automobile dealer, the court there, in interpreting the Ohio code section corresponding to Section 70A-2-715 of the Utah Code Annotated, stated that the buyer was entitled to the following incidental damages: repair charges, storage charges, delivery expenses, insurance costs, taxes, license plates, title, telephone charges, interest on the purchase price and any other reasonable expense incident to the delay or other

Continental M.D.M., Inc., 434 F. Supp. 596 (N.D. Pa., 1977).

The items listed in respondent's Notice of Rescission are all subsumed within the above-mentioned categories. Hence, all items therein listed were proper items of damages which respondent was entitled to recover from appellant, which the trial court so found. Therefore, there was nothing defective in respondent's Notice of Rescission which precludes the awarding of these damages.

POINT TWO

THE AWARD OF ATTORNEY'S FEES
TO RESPONDENT WAS PROPER.

Appellant states that respondent is not entitled to attorney's fees for three reasons; first, because they cannot ask for rescission of the contract but at the same time claim the benefit of a provision concerning attorney's fees; second, because an award of attorney's fees is not allowed unless authorized by statute or contractual provision; and third, because the cases interpreting the Uniform Commercial Code's provisions on consequential damages do not allow attorney's fees.

The first argument ignores the statute by which this lawsuit is governed. Under Section 70A-2-711, Utah Code Annotated (1953 as supp.) a buyer may rescind a transaction and in addition to recovering the purchase price paid, he may also recover such damages as he has sustained. See various cases cited in 65 ALR 3d 388 and Lloyd v. Classic Motor

Coaches, Inc., supra. Thus, the Uniform Commercial Code changes pre-code law in that it does not preclude a buyer from recovering damages sustained in addition to the purchase price paid in a rescission cause of action. Stubbs v. Hemmert, 567 P.2d 168 (Utah, 1978), B.L.T. Investment Co. v. Snow, 586 P.2d 456 (Utah, 1978) and Bodenhammer v. Patterson, 563 P.2d 1212 (Ore., 1977), the cases cited by appellant, are inapplicable in that they do not deal with sales governed by the Uniform Commercial Code.

In response to the second argument, appellant's reliance on Mecham v. Benson, 590 P.2d 304 (Utah, 1979) is misplaced. That case involved a breach of contract, which is a law case, while the one at hand is one for rescission, which is a case in equity. Hence, the Mecham case is not applicable to respondent's award of attorney's fees by the trial court. Further, it is respondent's position, as stated below, that attorney's fees were awarded to him in this case pursuant to statutory provision.

As to appellant's third argument, the cases dealing with the Uniform Commercial Code's provisions on consequential damages are in conflict when it comes to the question of whether or not attorney's fees are such damages. The better reasoned cases follow the Code's obvious intent that all damages or costs sustained by a buyer because of seller's breach of a contract should be recoverable by the buyer. In Morris v. Chevrolet Motor Division of General Motors Corp., 39 Cal. App. 3d

917, 114 Cal. Rptr. 747 (1974), wherein an automobile buyer sued to rescind a purchase contract, the court there stated:

"Attorney's fees are an additional item of damage, a consequence of Chevrolet's breach of warranty. While it results from the contract not executed by Chevrolet, it is a damage which Chevrolet caused by the breach of warranty and Chevrolet should indemnify Guaranty for this loss." 39 Cal. App. 3d at 921, 114 Cal. Rptr. at 751. In accord Gates v. Abernathy, 43 Okla. Bar Ass'n. Journal 2632, 11 U.C.C.R.S. 491.

Hence, as can be seen from the above-mentioned cases, attorney's fees are awarded to respondent by statute, 70A-2-715, Utah Code Annotated (1953, as supp.) as part of his incidental and consequential damages. Lastly, the purported limitation of remedies on the sales contract does not preclude the award of attorney's fees to respondent for the same reasons as outlined in Point One above.

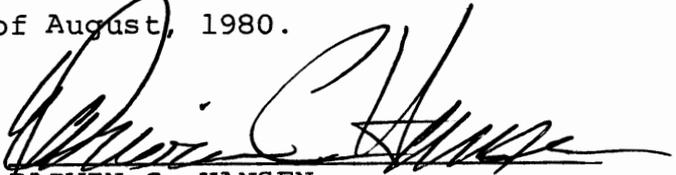
CONCLUSION

1. The award of incidental and consequential damages to respondent was proper in that the sales contract's limited remedy failed of its essential purpose, thus entitling respondent to all recovery allowed by the Uniform Commercial Code, including incidental and consequential damages. Further, the items of damage listed in respondent's Notice of Rescission were proper ones which are allowed under the Uniform Commercial Code and which respondent was entitled to claim from appellant before returning the automobile. This being the case, the award of incidental and consequential damages to the respondent was proper.

2. The award of attorney's fees to respondent as part of his incidental and consequential damages is proper because the Uniform Commercial Code allows recovery of such costs in a contract rescission case and because the applicable cases on this point demonstrate the Uniform Commercial Code's intent that a buyer such as respondent be compensated by a seller for all the damages or costs he has sustained as a result of the seller's breach of contract.

Based upon the foregoing, respondent respectfully submits that the trial court's judgment should be upheld in all its particulars.

DATED this 14 day of August, 1980.


DARWIN C. HANSEN
Attorney for Respondent

CERTIFICATE OF MAILING

I hereby certify that on the 14 day of August, 1980, I mailed two copies of respondent's brief, postage prepaid to David E. Bean, Attorney for Appellant, 190 South Fort Lane, Suite 2, Layton, Utah 84041.

