

1970

**John W. Christensen v. Lelis Automatic Transmission Service, Inc.
: Respondent's Brief**

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IN THE SUPREME COURT
OF THE STATE OF UTAH

JOHN W. CHRISTENSEN,

Plaintiff-Appellant,

- vs. -

LELIS AUTOMATIC
TRANSMISSION SERVICE, INC.,

Defendant-Respondent.

Case No.

11847

FILED
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RESPONDENT'S BRIEF

Clerk, Supreme Court, Utah

Appeal from Judgment of the Third Judicial District
Court in and for Salt Lake County
Honorable Emmett Brown, District Judge

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TABLE OF CONTENTS

	Page
STATEMENT OF THE KIND OF CASE.....	1
DISPOSITION IN LOWER COURT	1
RELIEF SOUGHT ON APPEAL.....	1
FACTS	2
ARGUMENT	4
 POINT I. THE NEWSPAPER ADVERTISEMENTS WERE TOO INDEFINITE AND INCOMPLETE TO BE, AND WERE NOT INTENDED TO BE, OFFERS.....	 4
 POINT II. THE WRITTEN WARRANTY, BY ITS TERMS, INTEGRATED THE PRIOR DEALINGS IN- TO THE AGREEMENT AND AVOIDS ALL PRIOR CONFLICTING ORAL STATEMENTS.	 6
 POINT III. PLAINTIFF IS NOT ENTITLED TO FREE TOWING.	 7
CONCLUSION	7

AUTHORITIES

Redmond v. Petty Motor Co., 121 Utah 370, 242 P.2d 302 (1952)	7
17 Am. Jur. 2d, Contracts, Sec. 33.....	4

TABLE OF CONTENTS—(Continued)

40 Am. Jur., Payment, Sec. 157.....	P.
70 C.J.S., Payment, Sec. 133.....	
Restatement of Contracts, Sec. 25.....	
Restatement of Contracts, Sec. 26.....	
Restatement of Contracts, Sec. 237.....	

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RESPONDENT'S BRIEF

STATEMENT OF THE KIND OF CASE

Plaintiff claims defendant breached its warranty.

DISPOSITION IN LOWER COURT

The Third Judicial District Court in and for Salt Lake County, the Honorable Emmett Brown, dismissed the complaint for failure to state a claim upon which relief can be granted against defendant.

RELIEF SOUGHT ON APPEAL

Defendant-respondent prays the judgment be affirmed.

FACTS

Defendant's business is repairing and rebuilding automobile transmissions. Plaintiff read defendant's newspaper ads (R-6) and on February 17, 1966, when his 1959 Lincoln developed transmission trouble, he let defendant tow it in for repair. The complaint specifically alleges that prior to the commencement of the work, plaintiff inquired and was told as to the expense involved for a 100 percent guaranteed transmission replacement (R-2, para. 6). Thereupon, plaintiff signed the work order (R-7). Immediately below the signature line in large bold print are the words "guarantee" on the reverse side. . . ." The written guarantee is in fact on the reverse side of the work order (R-3) and appears at R-9 in the record. It provides:

"A. This transmission is guaranteed for 180 months or 12,000 miles whichever occurs first, subject to the following provisions:

1. This transmission guaranteed to be free from defects as to workmanship and materials and to give satisfactory service for a period of 180 days or 6,000 miles, whichever occurs first.

2. An additional 180 days or 6,000 miles guarantee period shall remain in effect at a cost of 65% to the purchaser of prevailing retail price on repairs or replacement should this transmission become defective after the period covered in provision one.

3. Upon expiration of guarantee period an additional warranty of 12,000 miles is in effect to original purchaser. This warranty good only at our plant. Cost to be based at 75% of prevailing retail prices on repairs or replacement. . . .

"It is expressly agreed that there are no guarantees or warranties expressed or implied except this guarantee and warranty against defective materials or workmanship as follows: . . . Exceptions: This Certificate must be filled out completely and all rechecks made as prescribed or Guarantee becomes void."

The repair work was completed and on February 24, 1966, defendant accepted plaintiff's note in payment therefor including the towing charge (R-3, 8). Prior to leaving, plaintiff asked for a certificate of the guarantee. It was explained to him, completed ("plaintiff further pressed for full execution of said guarantee") and the parties each executed the written guarantee on the back of the repair order (R-3).

Eleven months later, after traveling 11,583 miles, the automobile was returned with transmission trouble. Though the written warranty signed and agreed to by plaintiff provides that he is to pay 65 percent of the repair price in the last 6,000 miles of the 12,000 mile guarantee period, the complaint does not allege plaintiff offered to pay his portion of the repairs and plaintiff claims the transmission should be wholly repaired at defendant's expense (R-4, Brief page 3).

Taking all facts in the complaint as true, the District Court granted defendant's motion to dismiss the complaint for failure to state a claim, subject to plaintiff's amending the complaint in 10 days. Plaintiff declined to amend and took this appeal.

ARGUMENT

POINT I.

THE NEWSPAPER ADVERTISEMENTS WERE INDEFINITE AND INCOMPLETE TO BE, AND WERE NOT INTENDED TO BE, OFFERS.

Plaintiff claims defendant's newspaper advertisements required defendant to guarantee its transmission forever against all contingencies and risks.

The authorities are replete that newspaper advertisements usually are invitations for ~~further~~ offers and negotiations and are not intended as fixed expressions of purpose. See numerous cases cited in 17 Am Jur 2d Contracts, Section 33. Thus, Comment a to Section 33 of the *Restatement of Contracts* provides:

"Besides any direct language indicating intent to defer the formation of a contract, the definiteness or indefiniteness of the words used in opening the negotiation must be considered as well as the usages of business and indeed the accompanying circumstances. Illustrations:

"1. A., a clothing merchant, advertises overcoats of a certain kind for sale at \$50.00. This is not an offer, but an invitation to the public to come and purchase.

"2. A write to B, 'I can quote you flour at \$5.00 a barrel in carload lots.' This is not an offer. The word 'quote' and the incompleteness of the terms indicate that the writer is simply naming a current price which he is demanding."

Obviously, newspaper advertisements could constitute an offer, if complete and so intended, as plaintiff argues, but here the ads are clearly invitations for further dealing. The ads do not say how long the guarantee runs, against what risks or contingencies it applies, where the guarantee will be made good, and in the case of "free towing," whether it applies before or in advance of repairs and whether it applies to rebuilt transmissions at all. (The ad in which free towing appears pertains to band and custom linkage adjustment). The most important term, price, is left for negotiation and the ads specifically invite further inquiry and dealing when they say "set price quotation." The words "we can't be beat on guarantee" certainly denote *some* limitation on guarantee.

That plaintiff himself did not treat the ads as a binding offer but as an invitation for further dealings is shown by the complaint itself. In paragraph 6 plaintiff pleads "prior to the commencement of any

work . . . , plaintiff inquired as to the expense involved” In paragraph 10 plaintiff pleads he “requested certificate of guarantee for the transmission. . . .” If the ads been complete offers in themselves, plaintiff could only say “I accept.” No further price quotation nor reduction of the guarantee to a written certificate would have been necessary or requested by plaintiff.

While plaintiff was entitled to and did receive 100 percent labor and parts guarantee during the first 6,000 miles, his claim that the 100 percent guarantee continues forever by virtue of the advertisements obviously fails as a matter of law and under the facts stated in the Complaint.

POINT II.

THE WRITTEN WARRANTY, BY ITS TERMS, INCORPORATED THE PRIOR DEALINGS INTO THE AGREEMENT AND AVOIDS ALL PRIOR CONFLICTING ORAL STATEMENTS.

By the allegations of the complaint, paragraphs 9 and 11, the parties each subscribed to the warranty (R-9), “as plaintiff pressed for full execution.” If there are no other guarantees or warranties expressed or implied. Plaintiff’s claim that he is entitled to 100 percent guarantee beyond the written 6,000 mile 100 percent guarantee contravenes the written contract and is barred by the parol evidence rule. See Sections 261-237, *Restatement of Contracts*.

POINT III.

PLAINTIFF IS NOT ENTITLED TO FREE TOWING.

Plaintiff's claim on appeal seems to indicate his complaint is that he did not receive free towing. Below, plaintiff complained only that defendant would not repair the transmission after 11,583 miles at its sole expense and demand was made for \$430.08 cost of the repairs (includes interest on the note) and general and exemplary damages.

Further, the facts pleaded show plaintiff did not complain about the charge for towing when he paid the original bill, including the repair costs in February 1966 (R-3). Any claim with respect to the \$6.00 towing charge would be for return of the funds voluntarily paid. However, it is the universally held rule that money voluntarily paid under claim of right to the payment, and with full knowledge of the facts by the person making payment, cannot be recovered back on the ground there was no liability to pay in the first instance (in the absence of fraud, duress or coercion, which are not pleaded here with particularity or at all). 40 Am Jur, Payment, Section 157; 70 C.J.S., Payment, Section 133; *Redmond v. Petty Motor Co.*, 121 Utah 370, 242 P.2d 302. (1952)

CONCLUSION

The newspaper ads here were intended and treated by the parties as mere invitations for further dealing

rather than specific offers to plaintiff, as shown by the indefinite, incomplete terms and by the conduct of plaintiff when he further inquired about the price and asked for a specific written guaranty. A specific written warranty was given plaintiff at his special request and insistence and agreed to by him as shown by his signature thereon. The written warranty requires plaintiff to pay 65 percent of the costs of repairs to the transmission in the second 6,000 miles after its installation. Plaintiff refused to pay that. He therefore has not pleaded a breach of the contract by defendant and the District Court properly dismissed the action for failure of the complaint to state a claim. The judgment should be affirmed.

Respectfully submitted,

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