1970

John W. Christensen v. Lelis Automatic Transmission Service, Inc. : Respondent's Petition For Rehearing

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

RESPONDENT'S PETITION FOR REHEARING

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

Joseph J. Palmer of
WORSLEY, SNOW & CHRISTENSEN
Seventh Floor
Continental Bank Building
Salt Lake City, Utah
Attorneys for Respondent

J. Lambert Gibson
174 East 8th South
Salt Lake City, Utah
Attorney for Appellant

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Respondent petitions the Court for rehearing of this matter upon the grounds that the newly raised theories relied upon in the Court's opinion of April 3, 1970, are barred by limitations, and upon the three grounds stated in the dissenting opinion herein.

FACTS

Reference is made to the statement of facts in respondent's original brief herein. Additionally, according to the allegations of the complaint, plaintiff in reliance upon defendant's advertising, had his vehicle repaired by defendant in February, 1966. At that point in time

plaintiff knew exactly what the terms of defendant's written guarantee were and how they differed from his understanding of the newspaper advertising terms. He then knew that he had been charged for towing contrary to the free towing he expected from the advertisement.

This action was not commenced until July 22, 1963, a period of more than three years.

ARGUMENT

ANY CLAIM OTHER THAN ONE BASED ON CONTRACT IS BARRED BY LIMITATIONS.

Plaintiff pleaded and relied upon the claim of breach of contract, both in the District Court and on appeal. These claims would be governed by the four or six year periods of limitation applicable to oral or written contracts respectively and hence not barred, but the complaint fails to state a claim for breach of contract for the reasons raised in respondent's brief.

Although not mentioned or raised at any point in the record or argument, the majority opinion raised a tort non-contract theory, stating:

> "Plaintiff has alleged certain tortious conduct on the part of the defendant (*false, deceptive or misleading advertising*), which has proximate

caused harm to plaintiff, and the nature and amount of the damages sustained." (Emphasis supplied.)

The Court then quotes § 76-4-1, U.C.A. 1953, a criminal statute for fraudulent advertising and holds that a violation of the statute may give rise to civil liability.

Any claim not based upon an oral or written contract under the facts pleaded would be barred by the limitations prescribed in § 78-12-26 (2), (3) or (4), U.C.A. 1953. If the action is viewed as one of fraud, then the cause of action arose when the plaintiff discovered the facts constituting the fraud. That would be when plaintiff found defendant's advertising to be false, in February, 1966, according to the complaint, more than three years before the commencement of the action. If the action is viewed as one based on liability created by the statutes of the state, that is upon § 76-4-1, or as an action for injury to personal property, then the action is similarly barred by the three year lapse.

While limitations is ordinarily a matter of defense, when the lapse appears on the face of the complaint, it may be raised by motion to dismiss the complaint. Rules 8(c) and 9(f) U.R.C.P. *Layton vs. Union Pacific Railroad Co.* (1968) 21 Utah 2d 374, 445 P.2d 988; *Johanson vs. Cudahy Packing,* (1944) 107 Utah 114, 152 P.2d 98; *Fullerton vs. Bailey,* (1898) 17 Utah 85, 53 Pac. 1020; *Anderson vs. Linton,* (7th Cir., 1949) 178 F2d. 304, 309.

The unpleaded theory here is particularly subject to the bar of limitations, even though raised on motion at the time.

Any claim based upon contract, while not barred by limitations, would have to be based upon the written warranty subscribed by plaintiff and plaintiff has failed to state a claim for breach of the written contract, as held by the trial court, for the reasons indicated in respondent's original brief. Plaintiff signed the written warranty and it said "there are no guarantees and warranties expressed or implied except this guarantee and warranty" (R. 9). In *Redmond vs. Petty Motor Co.*, (1952) 121 Utah 370, 242 P.2d 302, and in *Landes and Company vs. Follows,* 81 Utah 432, 19 P.2d 389, it was held that where the written contract provided there was no other warranty, express or implied, the plaintiff could not rely upon an oral warranty given before the execution of the contract or an implied warranty of fitness. So here plaintiff cannot rely upon the prior advertising or oral statements to claim breach of warranty.

CONCLUSION

This is not a typical petition for rehearing. The court's opinion was based on an entirely new theory never before submitted or argued by counsel, and it appears from the face of the complaint that the theory is barred by limitations. Rehearing should also be granted for the

reasons stated in the dissenting opinion herein. Under these extraordinary circumstances it is submitted the court should grant rehearing.

Respectfully submitted,

WORSLEY, SNOW & CHRISTENSEN
BY JOSEPH J. PALMER
Attorneys for Respondent