

2000

Joseph R. Boud v. SDNCO Inc., dba Wasatch Marine; and KCS International Inc., dba Cruisers Yachts : Reply Brief

Utah Supreme Court

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Recommended Citation

Reply Brief, *Boud v. SDNCO*, No. 20001020.00 (Utah Supreme Court, 2000).

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JUL 11 2001

PAT BARTHOLOMEW
CLERK OF THE COURT

IN THE SUPREME COURT FOR THE STATE OF UTAH

JOSEPH R. BOUD, Trustee of the :
Diane Mansell Boud Revocable Trust, :

Plaintiff and Appellant, :

vs. :

SDNCO, INC., dba Wasatch Marine; :

Defendant, :

and KCS INTERNATIONAL INC., :
dba CRUISERS YACHTS; :

Defendant and Appellee. :

Supreme Court Case No. 20001020

Priority Number: 15

REPLY BRIEF OF APPELLANT

APPEAL

From The Third Judicial District Court, Salt Lake Department
Judge J. Dennis Frederick, Trial Court Case No. 990910029

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JOSEPH R. BOUD, Trustee of the
Diane Mansell Boud Revocable Trust,

VS.

Defendant,

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“FACTS” MISREPRESENTED BY CRUISERS FROM THE RECORD

Cruisers Yachts, the Appellee, in its submitted brief, presented a section entitled “FACTS” (Cruisers Brief Pg. 5-8) which contained several misrepresentations or mischaracterizations of the Record upon which it based its Argument. As several of these misrepresentations potentially play a pivotal role in responding to the Brief, they are addressed here as follows:

1. (Cruisers Brief Pg. 5) - Cruisers asserts that, “*Sales personnel at Wasatch Marine told Mr. Boud of the manufacturer’s limited warranty*” claiming that this statement is supported by Pages 275-276 of the Record.

Correct Record Statement (A Direct Contradiction):

“During negotiations preceding Plaintiff’s December 23, 1998, agreement to purchase the yacht, and as an inducement to Plaintiff to purchase the yacht, Defendant Wasatch Marine, through Stuart Nelson, represented to Plaintiff that the yacht was covered under a comprehensive warranty by Defendant Cruisers Yachts, the manufacturer, and by Defendant Wasatch Marine for a period of at least one year with certain components, such as the hull, being covered for a more extensive period of time.

At no time preceding Plaintiff’s December 23, 1998, agreement to purchase the yacht, did Defendant Wasatch Marine or Defendant Cruisers Yachts show Plaintiff or the Boud family any of the warranty documentation or reference that the warranty was exclusive in nature or limited (other than the length of time of the coverage represented to Plaintiff as previously detailed).”

(Record Page 275). Plaintiff was told the manufacturer’s warranty was “comprehensive” and was not told that any such warranty was exclusive in nature or limited.

2. (Cruisers Brief Pg. 5) - Cruisers asserts that, “*The trial court found that Mr. Boud had read the brochure before he agreed to buy the boat from Wasatch Marine*” claiming that this statement is supported by Page 446 of the Record (Final Order).

Correct Record Statement (Corrects an Inaccurate and Misleading Claim):

The Final Order referenced by Cruisers in fact stated that the Court found, “*for purposes of Cruiser’s motion, that the Plaintiff read the referenced portion of the sales brochure [Page 30] prior to his purchase of the subject model 3375 boat.*” The Court never found that Plaintiff read the entire sales brochure or that Plaintiff ever noticed the reference to a Limited Warranty buried on the back cover in extremely small print. The record, as set forth in the preceding correction of fact clearly contradicts any such assertion.

3. (Cruisers Brief Pg. 6) - Cruisers asserts that, “*When the yacht arrived, Boud apparently waived his prior testing condition by making payment in full before taking delivery of the yacht*” claiming that this statement is supported by Page 278 of the Record.

Correct Record Statement (Corrects an Inaccurate and Misleading Claim):

There is no indication anywhere in the Record that Plaintiff actually took “delivery” of the yacht [Plaintiff has claimed Rejection of the yacht and that any “delivery” of the yacht to Lake Powell (not Plaintiff) was done without Plaintiff’s approval]. (See Page 282, ¶ 60 and Page 295, ¶ 119 of the Record). Furthermore,

“waiver,” in Utah, is the “*intentional relinquishment of a known right.*” Barnes v. Wood, 750 P.2d 1226, 1230 (Utah App. 1988). Furthermore, “[t]o waive a right there must be an existing right, benefit or advantage, a knowledge of its existence, and an intention to relinquish it.” Id. Additionally, “*The party’s actions or conduct must evince unequivocally an intent to waive or must be inconsistent with any other intent.*” Id. Finally, “[w]hether a right has been waived is generally a question of fact and therefore we accord considerable deference to the finder of fact’s determination.” Id. Neither the trial judge nor the requested Jury has made any finding on this claim for waiver.

The undisputed facts (for purpose of this appeal) on this issue are as follows:

“Despite Defendant Wasatch Marine’s agreement at the time of the December 23, 1998, contract, to allow Plaintiff to test drive the yacht before taking delivery thereof and before making final payment thereon, when the yacht arrived at Defendant Wasatch Marine’s dealership, Defendant Wasatch Marine, through Stuart Nelson, demanded full payment of the balance owing in advance of taking delivery.

Defendant Wasatch Marine, through Stuart Nelson, refused to allow Plaintiff to take the yacht out onto Utah Lake for a test drive until Plaintiff made full payment of the balance owing.

As a result, on or about May 10, 1999, and prior to any test drive or delivery of the yacht, Plaintiff caused to be paid to Defendant Wasatch Marine the remaining balance owed on the yacht and accessories in the form of a Deseret Credit Union Check drawn on the funds and account of said financial institution (rather than Plaintiff’s own account) in the sum of \$156,046.33.”

2nd Am. Cmpl. ¶ 35-37 (Record Page 278). Given that Plaintiff had already provided

Defendant Wasatch Marine with a Deposit of \$15,000.00 (Record Page 277, ¶ 27), these

assertions directly, or by reasonable inference, provide a sufficient basis to show that there was no intentional relinquishment and that Plaintiff was under duress and that Defendant Wasatch Marine was in breach of its duty of good faith and fair dealing as plead by Plaintiff. 2nd Am. Cmpl. ¶ 136-137 (Record Pages 297). Any such determination should go to the Jury, as factfinder, where there is any reasonable dispute.

4. (Cruisers Brief Pg. 6) - Cruisers asserts that Plaintiff only found one problem during the test drive on Utah Lake on May 20, 1999 (the lift mechanism for raising the yacht's engines), that Wasatch Marine agreed to immediately repair the problem, and that following this test drive, Plaintiff "*signed a 'Motor Vehicle Contract of Sale' which completed his purchase of the boat.*" Cruisers asserts that these claims are supported by Pages 279, 280-281, and 67 of the Record.

Correct Record Statement (Omitted Facts Shed New Light on These Claims):

It is true that Plaintiff has asserted that, "*During the test drive, the mechanism for raising the yacht's engines malfunctioned*" and that "*the outdrives could not be raised remotely as they were designed to be, and had to be hot-wired.*" 2nd Am. Cmpl. ¶ 45 (Record Page 279). An important factor omitted by Cruisers was that, despite Plaintiff's concerns over the outdrives, Wasatch Marine represented to Plaintiff that "*the malfunction involving the inability to raise them was a very minor problem resulting from a loose wire, was the only problem the yacht had, and that once repaired, would result in a yacht without defects.*" 2nd Am. Cmpl. ¶ 46 (Record Page 279). Plaintiff later

learned this representation to have been false and that the problem was not a minor problem at all -- it required that all of the gears and wiring be replaced. 2nd Am. Cmpl. ¶ 55 (Record Page 281). At Plaintiff's insistence, Wasatch Marine represented to Plaintiff that Plaintiff "*could have another test drive on Utah lake prior to delivery of the yacht to Lake Powell for the planned Boud family vacation around Memorial Day.*" 2nd Am. Cmpl. ¶ 47 (Record Page 280).

While it is true that Plaintiff did, under duress and based upon misrepresentations, cause the "Motor Vehicle Contract of Sale" to be signed, Cruisers has omitted important details relating to the circumstances surrounding its execution. As previously identified, at the time of the test drive of the yacht on Utah Lake on May 20, 1999, Plaintiff had already paid for the yacht in full, as Wasatch Marine had demanded prior to permitting a test drive (despite an earlier promise to permit a test drive prior to payment of the balance in excess of the \$15,000.00 Deposit). 2nd Am. Cmpl. ¶ 37 (Record Page 278). Prior to the full payment by Plaintiff and the test drive on May 20, 1999, Wasatch Marine had also represented to Plaintiff, "*that the yacht had been inspected by Defendant Wasatch Marine and was in top condition.*" 2nd Am. Cmpl. ¶ 39 (Record Page 278). Prior to the test drive, a detailed contract in writing for the purchase of the yacht had already been entered into between Plaintiff and Wasatch Marine on December 23, 1998. 2nd Am. Cmpl. ¶ 23-28 (Record Pages 276-277). Plaintiff has clearly plead the following additional facts and circumstances surrounding the signing of the Motor Vehicle

Contract of Sale:

“After the test drive on Utah Lake, on the highway just outside of the gate to the boat park, as the Boud family was driving out of the parking lot behind them, Defendant Wasatch Marine, through Stuart Nelson, suddenly stopped the Boud’s and presented Mr. Joseph Boud with a ‘Motor Vehicle Contract of Sale’ claiming that Mr. Joseph Boud had to sign it.

Mr. Joseph Boud responded that he did not want to consider signing any such document until the yacht was working properly.

Defendant Wasatch Marine, through Stuart Nelson, insisted that the ‘Motor Vehicle Contract of Sale’ was a standard sales contract, that any mechanical problem with the yacht was minor but would not be fixed until Mr. Boud signed, promised that a test drive would occur before delivery of the yacht to Lake Powell, and unduly pressured Mr. Joseph Boud to sign it without providing Mr. Boud with time to read the document thoroughly in a proper location not located on the highway and despite the fact that Plaintiff had already paid in full for the yacht and that the parties already had a valid contract.

Plaintiff did not negotiate with Defendant Wasatch Marine concerning the terms of the document entitled ‘Motor Vehicle Contract of Sale’ based upon the representations of Defendant Wasatch Marine, through Stuart Nelson, as to the nature of the document, due to the location and circumstances, and Plaintiff’s reliance upon the representations of Defendant Wasatch Marine and its employees, as set forth in the preceding five (5) paragraphs.

Wanting to test drive the yacht before accepting delivery of the yacht, reasonably believing that only minor repairs were needed and that Defendant Wasatch Marine would not repair it nor allow Plaintiff to test drive it unless Mr. Joseph Boud signed, and based upon the representations of Defendant Wasatch Marine, through Stuart Nelson, concerning the document, Mr. Joseph Boud for Plaintiff, under duress, signed the ‘Motor Vehicle Contract of Sale’ without reading it.

Had Plaintiff and the Boud family know the true extent of the damage to the yacht, as the subsequently learned, Plaintiff and Mr. Boud would not have signed the ‘Motor Vehicle Contract of Sale.’

Neither Plaintiff nor the Boud family received any consideration, benefit, or thing of value for the signing of the 'Motor Vehicle Contract of Sale' additional to that to which Plaintiff was already entitled."

2nd Am. Cmpl. ¶ 48-54 (Record Pages 280-281). These facts provide a sufficient basis for the identified Motor Vehicle Contract of Sale to be voided based upon tortious misrepresentation, duress, lack of consideration, bad faith and unfair dealing, mistake, and unconscionability. Given the circumstances of it being presented to Plaintiff for signature on the highway when there already was a written contract signed by the parties with no additional benefit to Plaintiff, where Wasatch Marine already had all of the funds, and where Wasatch Marine had represented that repairs would not be made without execution of the Motor Vehicle Contract of Sale, it would be particularly appropriate for this document to be invalidated based upon unconscionability, a cause of action specifically asserted by Plaintiff. 2nd Am. Cmpl. ¶ 108G and 138 (Record Pages 290-291 and 297).

5. (Cruisers Brief Pg. 7) - Cruisers asserts that, "*After completing repairs Wasatch Marine delivered the yacht to lake Powell, as requested by Mr. Boud, on or about May 27, 1999*" claiming that this statement is supported by Pages 69 and 283 of the Record.

Correct Record Statement (A Direct Contradiction):

"When Mrs. Boud called Defendant Wasatch Marine, mid-day on or about May 26th or 27th of 1999, she was told that Stuart Nelson was due to arrive at Bullfrog at noon with the yacht and wanted to know where Plaintiff and the Bouds were going to store the yacht.

The employee to whom Mrs. Boud spoke, after being questioned about the test drive, indicated that he did not know anything about it.

Plaintiff and the Bouds were upset that without Plaintiff's authorization or prior inspection, Defendant Wasatch Marine delivered the yacht to Lake Powell, against Plaintiff's specific instructions and the agreement that there was to be another test drive on Utah Lake before Plaintiff took delivery."

2nd Am. Cmpl. ¶ 58-60 (Record Pages 281-282). Clearly, the Record, which must be interpreted in favor of Plaintiff on appeal, establishes that the delivery of the yacht to Lake Powell was not requested by Mr. Boud or otherwise authorized by Plaintiff.

Plaintiff was fully expecting a second test drive at Utah Lake prior to Plaintiff potentially taking delivery of the yacht. Furthermore, the problems experienced at the Utah Lake test drive required replacement of all of the gears and wiring. 2nd Am. Cmpl. ¶ 55 (Record Page 281). These repairs were never properly "completed" during any test by Plaintiff. 2nd Am. Cmpl. ¶ 62A and 70B (Record Pages 282-283).

6. **(Cruisers Brief Pg. 7)** - Cruisers asserts that, *"Throughout the proceedings below, aside from the repairable problems with the yacht, Plaintiff's primary complaint about the 'performance' of the yacht has been that the boat will not plane at a speed of 20 miles per hour with a full load and thus, its is not able to tow younger water skiers at this speed."* No record citation is provided for this claim.

Correct Record Statement (A Direct Contradiction):

As previously identified in the present Brief, the initial problem experienced with the yacht required the gears and wiring to be replaced. Unfortunately, as previously

asserted, the problem with the gears was never corrected during any of Plaintiff's tests of the yacht. While Plaintiff acknowledges that the planing of the yacht at a speed of 20 miles per hour with a full load is one of Plaintiff's claims, the ongoing problems with the gear performance and problems with engine overheating, generator malfunction and smoke, problematic air conditioning, latches for child safety on doors, anchor malfunction, and alarms sounding were also of great importance to Plaintiff. With regards to the asserted express warranty at issue, the engine, electrical, and gear problems are asserted to have directly affected the promised "performance."

This poor performance is aptly set forth in the record as follows:

"Each time Plaintiff and Plaintiff's agents went to the time and expense of traveling to Lake Powell to use the yacht, it manifested different and substantial defects and mechanical malfunctions, would not plane at slow speeds for towing children water skiers, as promised, and was generally not fit or useable for pleasure boating, or use for transportation and accommodations while on vacation."

2nd Am. Cmpl. ¶ 75 (Record Page 285). The Record also contains other claims as to the severity of the defects encountered and asserted by Plaintiff, including the following assertion:

"Following the second repair attempt of the yacht by Defendant Wasatch Marine's mechanics [at Lake Powell], Defendant Wasatch Marine, through Stuart Nelson, called to inform Plaintiff that the mechanics felt current conditions were serious, that Defendant Wasatch Marine agreed with Plaintiff that Plaintiff's complaints were valid, that Defendant Wasatch Marine apologized profusely for the defects concerning the yacht and the burden they were to Plaintiff and to the Boud family, and said the yacht's defects required return of the yacht to Salt Lake City, Utah, for more substantial service and repairs."

2nd Am Cmpl. ¶ 72 (Record Pages 284-285).

7. (Cruisers Brief Pg. 7-8) - Cruisers asserts that, “*Plaintiff has not complained about the ‘performance’ of the yacht at higher speeds.*” No record citation is provided for this claim.

Correct Record Statement (A Direct Contradiction):

As previously identified in the present Brief, such an assertion is just not true. For instance, Plaintiff has consistently complained of gear problems (which are not limited to just lower speeds). Additionally, the engines have experienced overheating and the yacht has had generator trouble.

ARGUMENT

Plaintiff, in the initial Brief, has aptly set forth the basis why this Court should find that the language and photograph contained on Page 30 of the Cruisers Yachts Promotional Material (attached to Plaintiff’s initial Brief as “**Appendix C**”) could be held to be an express warranty by a jury of reasonable persons. Plaintiff, in conformity with the Rules of Appellate Procedure, will attempt to avoid repetition of prior argument and focus this argument solely on points raised by Cruisers Yachts.

A. Standard of Review for Determination of Express Warranty and Summary Judgment

Under Point I of Cruisers Yachts’ Argument, Cruisers has stated that Plaintiff argues “*that a trial judge’s ‘specialized knowledge of the law’ disqualifies him or her from applying*” the “reasonable person” standard used to determine whether an express

warranty has been made. (See Cruisers Brief Page 11). This is not what Plaintiff stated. (See Plaintiff's Brief Page 25). Plaintiff recognizes that trial courts may issue Summary Judgment on express warranties when it finds that reasonable minds would not differ as to the existence or absence of an express warranty. Plaintiff simply made the valid point that express warranties are to be determined based upon a "reasonable person" standard and not, for example, the "reasonable judge" or "reasonable trial lawyer" standard, where such professionals are likely to be more sophisticated with regards to the law. Plaintiff further made the point that a Jury, as requested by Plaintiff in the relevant Complaint, is a suitable forum ideally composed of "reasonable persons" and that this decision should be made by the Jury unless there can be no doubt that reasonable minds would not differ.

Cruisers has stated that, "*Plaintiff's self-serving declaration that reasonable minds could differ on the interpretation of the facts in this case does not make it so.*" (See Cruisers Brief Page 11). Cruisers then proceeds in its Brief to take essentially the same tenor claiming the trial court made the "correct conclusion" by not finding an express warranty and issuing Summary Judgment in favor of Cruisers. The decision of the trial court and the parties' respective positions carry no weight at this stage in the appeal since entitlement to summary judgment is a question of law and the Supreme Court accords no deference to the trial court's resolution of the legal issues presented. The review of the issues is de novo with facts and all reasonable inferences drawn therefrom in the light most favorable to Plaintiff. Glover v. Boy Scouts of America, 923

P.2d 1383, 1384-1385 (Utah 1996).

B. The GAF Standard for Determining Reasonableness

Cruisers Yachts, like Plaintiff, has acknowledged that the Utah Supreme Court, in Rawson v. Conover, 2001 UT 24 § 55, 20 P.3d 876, has recently reaffirmed the process for determining the existence of an express warranty as follows:

“§ 55 A reasonable-person standard is used to determine whether the language of the seller is an affirmation of fact, promise, or description as opposed to the seller's opinion or commendation. *See* State Div. of Consumer Prot. v. GAF Corp., 760 P.2d 310, 315 (Utah 1988). “If it is reasonable to conclude that a reasonable person would have ventured into the transaction on the basis of a particular statement,” an express warranty was made.” *Id.* (quoting 3 R. Anderson, *Anderson on the Uniform Commercial Code*, § 2-313:50, at 44 (3d ed.1983)).”

Cruisers Yachts also acknowledged that the Utah Supreme Court has given guidance for determining “reasonableness” with regards to whether an express warranty has been made in State By and Through Div. of Consumer Protection v. GAF Corp., 760 P.2d 310, 315 (Utah 1988) (quoting in part 3 R. Anderson, *Anderson on the Uniform Commercial Code*, § 2-313:50, at 44 (3d ed. 1983)), which states,

“An affirmation of fact, a promise, or a description of the goods must be judged objectively against the meaning that a reasonable person would have taken from the statement . . . In determining reasonableness, a court should consider such factors, among others, as ‘(1) the ability of the buyer to see and understand for himself, (2) the vagueness of the statement, and (3) the incredibility of the statement.’”

(Underline Emphasis Added)

Plaintiff agrees with Cruisers that this is the appropriate standard of review.

Cruisers, in its Brief, limited its review to the three enumerated factors listed in GAF and

studiously ignored discussing the “other factors” provided for in GAF, some of which were addressed by Plaintiff in Plaintiff’s initial Brief – *Money Expended, Hedging, Vendor Assumption of Fact Upon Which Buyer is Ignorant, Determinable Representations, Surrounding Brochure Information, and Seller Bears the Risk.*

1. Consumer’s ability to see and understand for himself

Cruisers makes two extremely weak arguments to support its claim that Plaintiff had the ability to see and understand for itself. First, Cruisers claims that Plaintiff is “an experienced buyer of multiple boats” and had previously been a customer of Wasatch Marine. No Record citation provided. A review of the Record shows that,

Mr. Joseph Boud had previously purchased a boat from Defendant Wasatch Marine and believed the Defendant Wasatch Marine to be knowledgeable in the sale and operation of yachts of the type in question.

(Underline Emphasis Added)

2nd Am. Cmpl. ¶ 7 (Record Page 273). It is upon the purchase of the yacht at issue and one prior boat that Cruisers makes its claim that Plaintiff is “an experienced buyer of multiple boats.” If the stakes were not so high, such a claim would be laughable. The only definition for the word “experienced” in THE RANDOM HOUSE DICTIONARY 314 (1st ed. 1978), defines “experienced” as “*skillful in a particular field through experience.*” Involvement in two boat purchases – one being the yacht at issue – is not a sufficient basis to qualify Plaintiff as “an experienced buyer of multiple boats.” This is particularly true where Cruisers then proceeds to make claims such as, “*Boud clearly knew the world*

of boat purchases and had the experience and ability to evaluate the statements in the sales brochure for himself.” (Cruisers Brief Page 15). Such claims continue throughout Cruisers’ Brief. Plaintiff did not even see the yacht (except in the promotional materials) until after he had signed a contract and paid a \$15,000.00 deposit. Furthermore, Plaintiff was not permitted to go for a test drive until the balance had been paid in full (despite earlier promises by Wasatch Marine).

The second asserted “point” which Cruisers uses as a basis to assert that Plaintiff had the ability to see and understand for himself is its claim that Plaintiff insisted on a test drive of the yacht as a condition of purchase. Plaintiff does not dispute that a satisfactory test drive was a condition of the purchase of the yacht. What Plaintiff does dispute is the claim by Cruisers that Plaintiff voluntarily abandoned or waived this claim. *See Disputed Fact No. 3, Pages 2-4 of the present Brief for Plaintiff’s position.*

2. Vagueness of the Statement

Plaintiff does not dispute the general rule that the more specific the statement, the more likely it is to be determined to be an express warranty. Plaintiff does dispute that this factor is determinative and functions independent of all other GAF factors. It is Plaintiff’s position that this factor must be considered in conjunction with the other factors and the surrounding circumstances. Plaintiff believes that the photograph and statements on Page 30 of the Sales Brochure (attached to Plaintiff’s initial Brief as “Appendix C”) are sufficiently definite to be susceptible to the formation of an express

warranty, despite claims to the contrary by Cruisers. In support of this assertion, Plaintiff, in the initial Brief, has referred this Court to Summers v. Provo Foundry & Machine Co., 178 P. 916 (Utah 1919). This Utah case is the case most similar to Plaintiff's claims identified by either party. Despite its age, this case is good law [though based upon the substantial similar predecessor to the Utah Commercial Code] and has not been overruled. In that case, the Utah Supreme Court held that, "*the statement that the car would do whatever any other Super-Six would do as also amounting to an express warranty, and not mere 'seller's talk,' or an expression of opinion.*" Id. at 917. In its Brief, Cruisers, quite naturally (since it does not favor its position), has omitted any reference to this case. Instead, Cruisers has spewed out case law, such as Hirschberg Optical Co. v. Dalton, Nye & Cannon Co., 27 P.83 (Utah Terr. 1891), supporting the proposition that Utah recognizes "Puffing" or "Seller's Talk." This claim is not disputed by Plaintiff. Plaintiff does, however, assert that a seller does not have the "*privilege to lie his head off.*" PROSSER, LAW OF TORTS, § 109 at 723 (4th ed. 1971). Furthermore, such talk must be "*kept within reasonable bounds*" and should not be "*a positive affirmation of a specific fact affecting quality, so as to be an express warranty.*" Hirschberg at 83.

This was what occurred in Summers and what occurred with regards to the yacht at issue. Cruisers unqualified, written statement represented that the yacht had the "best performance and cruising accommodations in its class" and "superior handling." These

statements were immediately below a photograph of the yacht moving at a good clip and apparently consistent with the “performance” claims.

Cruisers’ citation of a Utah stock case is of little use in comparison to Summers. Likewise, Cruisers seems to focus the heart of its argument on a Texas case, Autohaus, Inc. v. Aguilar, 794 SW.2d 459 (Tex. Ct. App. 1990), which seems to stand for the proposition that statements comparing one product to another claiming superiority cannot be warranties. Such an assertion seems to fly in the face of Summers, as well as other cases around the country like Lovington Cattle Feeders, Inc. v. Abbott Laboratories, 642 P.2d 167, 170 (N.M. 1982), 97 N.M. 564, 33 U.C.C. Rep. Serv. 522 [representation that a vaccine was superior to the product then being used by the buyer] and Federal Signal Corp. v. Safety Factors, Inc., 886 P.2d 172, 178 (Wash. 1994), 125 Wn.2d 413, 25 U.C.C. Rep. Serv.2d 765 [where the Court held that the alleged verbal representation that Night Warrior light towers were comparable to and of higher quality than TPME model, if proved on remand, could be an express warranty]. The express warranties claimed by Plaintiff are sufficiently explicit to convey a distinct, factual representation to the reasonable person.

Cruisers, in Pages 21-22 of its Brief, claims that Plaintiff has misstated that sales opinions must be labeled as such, that Plaintiff has failed to address the GAF factors, and that Plaintiff’s Brief contains “a smattering of cases from around the country” which “create a patchwork of ‘factors’” which it seems to feel would not be considered or

accepted by this Court and which it claims contain little guidance. Plaintiff did, in fact, specifically respond to each of the three enumerated “factors” under the GAF test. (See Pages 29-36 of Plaintiff’s Initial Brief). Each of the remaining claims is to some degree interrelated in Plaintiff’s suggestion of appropriate “other factors” for this Court to consider, as provided for in GAF. One of these factors was “hedging.” Plaintiff never claimed that an opinion had to be stated as such. Plaintiff, in its initial Brief, has simply provided Utah case law indicating that where an opinion is not stated as such, that is one factor this Court may consider. See Hirschberg Optical Co. v. Dalton, Nye & Cannon Co., 27 P. 83, 83-84 (1891). See Also 1 J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE § 9-4 (4th ed. 1995) [this same treatise also recognizes (1) the relative knowledge of the seller and buyer, as set forth in Plaintiff’s initial Brief as “Vendor Assumption of Fact Upon Which Buyer is Ignorant”; (2) the seriousness of the plaintiff’s injury, as set forth in Plaintiff’s initial Brief as “Money Expended”; (3) a written statement is less likely to pass as a puff than an oral one, as set forth in Plaintiff’s initial Brief as “Surrounding Brochure Information” and “Plaintiff’s Ability to See and Understand”]. Clearly, “other factors” than the three specifically enumerated by GAF are appropriately considered by other appellate courts, by authors of recognized treatises, and should be considered by this Court where these “other factors” provide some understanding of the totality of the circumstances under which the warranty is claimed..

3. The Incredibility of the Statement

Cruisers makes essentially three claims under this prong. Plaintiff has already addressed Cruiser's flawed contention that Plaintiff is "an experienced buyer of multiple boats" in Pages 13-14 of the present Brief. Cruisers' second claim is that the nature of the statements would cause a "reasonable person similarly situated" to see them as "Sales Talk" and not a warranty and a restatement of its claim that they are too vague to form a warranty. This claim has been adequately addressed by Plaintiff in Page 36 of Plaintiff's Initial Brief. The third claim is an apparent assertion that statements as to product quality in a brochure cannot be relied upon. This assertion is directly contradicted and adequately addressed in Page 30 of Plaintiff's Initial Brief. Such statements can be warranties. Furthermore, the Utah Consumer Sales Practices Act, Utah Code § 13-11-14(2)(b), specifically provides that a knowing or intentional misrepresentation that the "*subject of a consumer transaction is of a particular standard, quality, grade, style, or model*" is a deceptive act or practice. (See Page 4 of Plaintiff's Initial Brief).

C. "Part of the Basis of the Bargain" Test (Pages 23-24 Cruisers' Brief)

Plaintiff has clearly established and adequately briefed the fact that the identified statements and photograph from Page 30 of the Sales Brochure (attached to Plaintiff's initial Brief as "**Appendix C**") were part of the basis of bargain of Plaintiff's purchase of the yacht. (See Pages 40-42, Plaintiff's Initial Brief). Cruisers has failed to provided any directed rebuttal on this issue other than to claim that the sales brochure was too

general or vague (its common theme) to form part of the basis of the bargain.

Specifically, Cruisers asserts that “class” is too vague a term to be enforceable. It is a well-established principle that “[t]he ordinary meaning of contract terms is often best determined through standard, non-legal dictionaries.” Warburton v. Virginia Beach Federal Sav. & Loan Ass’n, 899 P.2d 779, 782 (Utah App. 1995). THE RANDOM HOUSE DICTIONARY 168 (1st ed. 1978), defines “class” in the first definition as “*a number of persons or things forming a group by reason of common traits or attributes.*” It is logical to presume that a “reasonable person” would have a similar understanding of this word. The “class” itself would be presumptively knowable since they would be yachts containing “common traits or attributes” to the yacht at issue. Plaintiff, contrary to another of Cruisers’ claims in this section, has asserted that the handling was poor. (See Page 44, Plaintiff’s Initial Brief).

D. Cruisers’ Assertion that any Express Warranties are Disclaimed by Reference to Limited Warranty on the Back of the Sales Brochure

See Disputed Facts No. 1 and 2, Pages 1-2 of the present Brief, which clearly establish in the record, for purposes of this appeal, that Plaintiff was not told about any limited warranty by the dealer, as Cruisers claims. Furthermore, there is no indication in the record that Plaintiff ever reviewed the fine print notation on the back side of the Sales Brochure referencing a limited warranty. As this Court has previously held, it is the policy of law to look with disfavor upon semiconcealed or obscure self-protective provisions in contract prepared by one party, which other party is not likely to notice.

Christopher v. Larson Ford Sales, Inc., 557 P.2d 1009 (Utah 1976). Plaintiff has disputed having agreed to any "limited" warranty. (See Page 233 of the Record). Certainly, the Sales Brochure, referenced on the back cover, does not state that Plaintiff's claims are solely and exclusively under any limited warranty. As a result, it is appropriate that Cruisers' Express Warranties, as provided on Page 30 of the Sales Brochure, be construed harmoniously with any other warranty ("comprehensive" or otherwise) available to Plaintiff on the yacht, as provided for in Utah Code § 70A-2-316(1). As a result, Plaintiff should receive the benefits of both and is likewise entitled to make his claims for Rejection and/or Revocation in the alternative to a claim for damages for breach of warranty.

It appears that Cruisers would improperly have this Court believe that a "limited warranty" (even if it does not fail of its essential purpose and is upheld as valid and conspicuous) may eliminate Plaintiff's right under the U.C.C. to Reject or Revoke Acceptance of the goods. Plaintiff has clearly plead these claims and that Cruisers and the dealer have failed to comply. 2nd Am. Cmpl. ¶ 94, 119, 134, and 13575 (Record Pages 288, 295, and 297). This argument has been soundly rejected by the vast majority of all Courts which have considered it, including this Court and the United States Supreme Court.¹ In Studebaker Bros. Co. of Utah v. Anderson, et al., 167 P. 663, 665

¹ Studebaker Bros. Co. of Utah v. Anderson, et al., 167 P. 663,665 (Utah 1917); East River Steamship Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 872, 106 S.Ct. 2295, 2303 (U.S. 1986); Murray v. D & J Motor Co., Inc., 958 P.2d 823

(Utah 1917), for instance, this Court held that, “*‘For a breach of warranty the vendee has the right to rescind the contract and recover back the purchase price, or he may retain the vehicle and hold the vendor for his damages.’*” *Id.* (quoting BERRY, LAW AUTOMOBILES, § 226).

E. Cruisers’ Assertion that Plaintiff Waived or Disclaimed Any Express Warranty

In Pages 25-28 of its Brief, Cruisers mistakenly claims that even if an express warranty was created by the Sales Brochure, the warranty would no longer be available based upon waiver and the disclaimer of the warranty. Cruisers’ claim that “*because Boud insisted on a test cruise before paying for and accepting the boat, he waived any express warranty since he clearly wanted to be the judge of whether it exhibited ‘superb handling’ or offered the ‘best performance and cruising accommodations in its class’*” is just plain hogwash. Cruisers has not cited any case law or statutory authority for such an assertion. To so find, would be to invalidate the warranty on every new car based upon a consumer’s test drive. Furthermore, Cruiser’s “Red Herring” argument on “mutuality of

(Okla.Civ.App. Div.4 1998); Seekings v. GMC of Tucson, Inc., 638 P.2d 210 (Arizona 1981); Beneficial Commercial Corp. v. Cottrell, 688 P.2d 1254 (Montana 1984); Shelton v. Farkas, 635 P.2d 1109 (Wash.App. 1981); Page v. Dobbs Mobile Bay, Inc., 599 So.2d 38 (Ala.Civ.App. 1992); Blankenship v. Northtown Ford, Inc., 420 N.E.2d 167 (Ill.App. 1981); O’Neal Ford, Inc. v. Earley, 681 S.W.2d 414 (Ark.App. 1985); Frantz Lithographic Service, Inc. v. Sun Chemical Corp., 38 U.C.C. Reporting Service 485 (U.S. Dist.Ct., E.D. PA 1984); Barry & Sewall Indus. Supply v. Metal-Prep, 912 F.2d 252 (8th Cir. 1990); *See also* Manning G. Warren, *The Effect of Warranty Disclaimers on Revocation of Acceptance Under the Uniform Commercial Code*, 37 Ala.L.Rev. 307 (1986).

assent” is for the most part irrelevant since this Court has held that “a consumer can recover for breach of an express warranty despite a lack of privity” with a manufacturer. GAF at 315. *See Also* Disputed Fact No. 3, Pages 2-4 of the present Brief.

As to Cruiser’s second argument, that the express warranty was invalidated by the execution of the Motor Vehicle Contract of Sale (the second written contract the dealer insisted Plaintiff execute on the highway when the dealer had the full purchase price, misrepresented the condition of the yacht, and asserted that it would not repair the yacht until the document was signed), this argument is also without merit. *See* Disputed Fact No. 4, Pages 4-7 of the present Brief, which sets forth the circumstances surrounding its execution. This Court has clearly established that an unconscionable agreement is not enforceable. Sosa v. Paulos, 924 P.2d 357, 359 (Utah 1996). This Court has also held that while a party generally has a duty to read and understand terms of contract before signing it, this duty is obviated when a party’s failure to read agreement result from procedurally unconscionable behavior by a party in a stronger bargaining position. Sosa v. Paulos, 924 P.2d 357, 363 (Utah 1996). While not relating to medical surgery in this case, the circumstances surrounding the execution are ripe for a finding of procedural unconscionability. Plaintiff was not presented with the Motor Vehicle Contract of Sale (despite a previously existing written contract) until after the yacht’s purchase price of over \$150,000.00 had been paid in full. Likewise, the printed document was presented to Plaintiff by the dealer, Wasatch Marine, on the highway exiting Utah Lake after a test

drive on the lake where the yacht had experienced mechanical problems. The dealer was in a significantly stronger bargaining position given that it had already been paid in full, given that it had represented it would not fix the yacht unless the document was signed, given that the document was explained without disclosing the disclaimer of express warranties under the Sales Brochure, given that the dealer had not explained or offered to Plaintiff that Plaintiff could have its money back, and given that it had represented that the mechanical problem was minor (which turned out not to be the case). To paraphrase this Court's comments in Sosa,

“Under these circumstances, [it cannot be concluded] that the [Motor Vehicle Contract of Sale] was negotiated in a fair manner and that the parties had a real and voluntary meeting of the minds. Nor can [it be concluded] that [Plaintiff] had a meaningful choice with respect to signing the agreement.”

Id. In conjunction with the procedural unconscionability, the dealer has placed itself and Cruisers in a position to attempt to disclaim the dealer's verbal express warranties and the express warranties contained in the Cruisers' Promotional Literature relating to the yacht. This could potentially eviscerate Plaintiff's ability to enforce the original contract and terms and is also substantively unconscionable.

Contrary to Cruiser's assertion, Plaintiff takes the position that the facts set forth in this section and in the Disputed Fact No. 4, Pages 4-7 of this Brief, also qualify as duress, breach of the duty of good faith and fair dealing, tortious and deceptive misrepresentation, failure of consideration, and mistake. This Court should unwind the

“Motor Vehicle Contract of Sale” (the 2nd Contract) if only for mistake since the record clearly demonstrates (when view in the light most favorable to Plaintiff) that the dealer represented to Plaintiff “*that any mechanical problem with the yacht was minor but would not be fixed until [The Motor Vehicle Contract of Sale] was signed*” and that Plaintiff relied upon this assertion as a basis for executing the document and would not have executed it had Plaintiff known of the true extent of the damage to the yacht (which damage was to continue in some form throughout each attempt to use it). 2nd Am. Cmpl. ¶ 50, 54, and 75 (Record Pages 280-281, and 285).

In addition to those arguments already presented in an attempt to disclaim the express warranties provided by the Cruisers Promotional Literature, Plaintiff has specifically claimed that the giving of express warranties and then the attempt to void or dishonor them through a limited warranty and improper attempts to disclaim them are violative of the Utah Consumer Sales Practices Act, Utah Code §§ 13-11-4 and 13-11-5. 2nd Am. Cmpl. ¶ 109B-D (Record Page 193). This claim also played a central issue in GAF, which claim this Court ultimately upheld. See GAF at 314. Another basis for not finding for Cruisers under any Limited Warranty, is that the Limited Warranty, itself (Addendum D to Cruiser’s Brief), states on its face that the “*LIMITED WARRANTY CAN BE ACTIVATED ONLY BY SUBMITTING THE ‘LIMITED WARRANTY REGISTRATION CARD’ TO CRUISERS YACHT WITHIN THIRTY (30) DAYS OF THE DATE OF PURCHASE.*” This Limited Warranty, even if it were otherwise valid, must

fail since the Record clearly establishes that Plaintiff never activated or caused it to be activated by sending in the “Limited Warranty Registration Card.” 2nd Am. Cmpl. ¶ 97-99 (Record Pages 188-189).

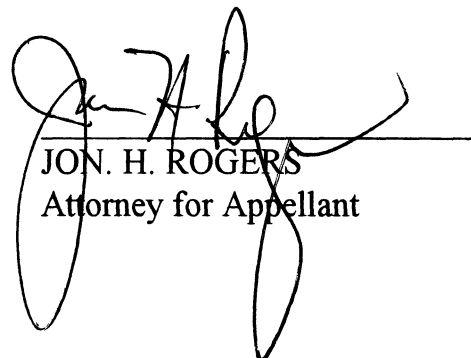
F. Plaintiff's Claims for UCSPA Violations and Negligent Misrepresentation

Plaintiff's claims on these issues are sufficiently briefed in its initial Brief. Plaintiff would simply point out that Cruisers has continued to make unsubstantiated and inaccurate claims that Plaintiff was “an experienced boat buyer,” that Plaintiff read the entire Sales Brochure (record only establishes Page 30 of the Brochure), and that Plaintiff was told about a limited warranty in its response in this area.

CONCLUSION

Plaintiff specifically requests that this Court reverse paragraphs two and three under “*Conclusions of Law*” of the trial court's Final Order (Record Page 447 and Page 3 of “**Appendix A**” to Plaintiff's initial Brief), as well as reversing the “ORDER OF DISMISSAL” contained in the trial court's Final Order and reinstating Plaintiff's claims against Cruisers Yachts. Plaintiff also requests any other beneficial relief which this Court might choose to award.

SUBMITTED This 10th day of July, 2001


JON. H. ROGERS
Attorney for Appellant


CERTIFICATE OF SERVICE

On the 10th day of May, 2001, I certify that two copies of the foregoing "REPLY BRIEF OF APPELLANT" were mailed by first class mail and postage prepaid to the office of counsel for the Appellee at the following address:

Mr. John W. Call, Esq.
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Attorneys for Defendant/Appellee KCS International, Inc.
333 North 300 West
Salt Lake City, Utah 84103

On the 10th day of May, 2001, I certify that ten copies with at least one Original signature of the foregoing "REPLY BRIEF OF APPELLANT" were mailed by first class mail and postage prepaid to the Supreme Court of Utah at the following address:

Supreme Court of Utah
P.O. Box 140210
Salt Lake City, Utah 84114-0210


JON H. ROGERS