

1986

Michael Baum, Baumwear by Michael Baum v. Dean Knight, The Fashion Corner : Brief of Respondent

Utah Supreme Court

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BRIEF
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DOCKET NO. 860102-CA

IN THE SUPREME COURT OF THE STATE OF UTAH

MICHAEL BAUM d/b/a	:	
BAUMWEAR BY MICHAEL BAUM	:	
	:	
Plaintiff-Appellee,	:	860102CA
	:	Case No. 20493
vs.	:	
	:	
DEAN KNIGHT, d/b/a	:	
THE FASHION CORNER,	:	
	:	
Defendant-Appellant.	:	

BRIEF OF PLAINTIFF-RESPONDENT MICHAEL BAUM
d/b/a BAUMWEAR BY MICHAEL BAUM

APPEAL FROM A JUDGMENT OF THE THIRD JUDICIAL
DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH,
THE HONORABLE LEONARD H. RUSSON PRESIDING

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FILED
SEP 30 1985

Clerk, Supreme Court, Utah

PARTIES

A. Plaintiff and Respondent: Michael Baum, d/b/a Baumwear by Michael Baum, was the owner of a manufacturing company located in New York and brought the case on an alleged breach of contract.

B. Defendant and Appellant: Dean Knight, d/b/a The Fashion Corner, against who Judgment was rendered in the lower Court.

C. Seymour Baum is the administrator of the Estate of Michael Baum, Deceased. Seymour Baum as administrator has been substituted for the Plaintiff/Respondent.

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BAUMWEAR BY MICHAEL BAUM	:	
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BRIEF OF PLAINTIFF-RESPONDENT MICHAEL BAUM
d/b/a BAUMWEAR BY MICHAEL BAUM

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the Court below properly find that Mark Grayson was not an agent of respondent but more closely allied to the appellant, Knight.
2. Did the lower Court properly find that written authorization was required before goods could be returned and that the appellant Knight returned the goods without authorization.
3. Whether the appellant Knight was entitled to reject the goods as failing to conform to the contract.
4. Whether the goods failed to conform to express or implied warranties.

5. Whether the appellant made a timely or seasonable rejection of goods.

6. Whether the lower Court properly assessed damages.

STATEMENT OF THE CASE

The appellant appeals from a money judgment entered the 10th day of January, 1985, for the respondent and against the appellant on a contract of sale of certain merchandise.

RELIEF SOUGHT ON APPEAL

The respondent seeks to have this Court uphold the judgment entered by The Honorable Leonard H. Russon in the Third Judicial District Court, in and for Salt Lake County, State of Utah.

CONSTITUTIONAL PROVISIONS AND STATUTES
WHOSE INTERPRETATION IS DETERMINATIVE

1. Utah Code Ann. § 70A-1-204(2)(3) (1953) provides:

"(2) What is a reasonable time for taking any action depends on the nature, purposes and circumstances of such action.

(3) An action is taken 'seasonably' when it is taken at or within the time agreed or if no time is agreed at or within a reasonable time."

2. Utah Code Ann. § 70A-2-316(3)(b) (1953) provides:

"(b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard

to defects which an examination ought in the circumstances to have revealed to him; and"

3. Utah Code Ann. § 70A-2-326(1)(a)(b) (1953) provides:

"Sale on approval and sale or return--Consignment sales and rights of creditors.--(1) Unless otherwise agreed, if delivered goods may be returned by the buyer even though they conform to the contract, the transaction is

(a) a 'sale on approval' if the goods are delivered primarily for use, and

(b) a 'sale or return' if the goods are delivered primarily for resale."

4. Utah Code Ann. § 70A-2-601 (1953) provides:

"Buyer's rights on improper delivery.--Subject to the provisions of this chapter on breach in installment contracts (section 70A-2-612) and unless otherwise agreed under the sections on contractual limitations of remedy (section 70A-2-718 and 70A-2-719), if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may

(a) reject the whole; or

(b) accept the whole; or

(c) accept any commercial unit or units and reject the rest."

5. Utah Code Ann. § 70A-2-602(1) (1953) provides:

"Manner and effect of rightful rejection--(1) Rejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller."

6. Utah Code Ann. § 70A-2-602(2)(a) (1953) provides:

"(a) after rejection any exercise of ownership by the buyer with respect to any commercial unit is wrongful as against the seller; and . . ."

EXPLANATION OF ABBREVIATIONS

"Tr." shall refer to the specific page in the record of the lower Court.

"Ex." will refer to an Exhibit introduced into evidence at trial and there will also be reference to the Deposition of Mark Grayson by specific page. The parties stipulated that the deposition could be used at trial since Mr. Grayson was not within the jurisdiction of the Court at time of trial.

STATEMENT OF FACTS

At the time of trial the respondent, Michael Baum, was the self-employed owner of two related businesses in Ithaca, New York. The first, known as "High Gear" was a retail clothing store. The second, was a wholesale tee-shirt imprinting business known as the "Printers Galary." (Tr. 225)

Respondent was educated in various facets of the garment business and graduated from Cornell University with a BS in print making and silk screen printing. (Tr. 225)

In 1980, the respondent and his father formed a partnership called Baumwear, which manufactured women's apparel for wholesale distribution. In 1982, "Baumwear"

became respondent's sole proprietorship. (Tr. 226; Ex. 1)

Baumwear was a one-man operation with respondent designing the look of the garment, securing the subcontractors to produce the garments, selling to the stores, shipping the goods, and billing and collecting the accounts. (Tr. 227)

Respondent sold his goods in two ways. Either through personal contact with various buyers or through the use of sales representatives who would display Baumwear samples and sell through the use of said samples. (Tr. 227) Sales representatives represented from ten to fifteen different manufacturers. The reps generally maintained showrooms where buyers could view the Baumwear merchandise. Orders received by the reps were then forwarded to respondent to fill. (Tr. 228, 229)

Customers of Baumwear ranged from small boutiques to large department stores such as Macys. (Tr. 228)

In 1982, the respondent manufactured a fall line of merchandise. The merchandise consisted of four or five styles which would be categorized as contemporary junior sportswear and was constructed of two-tone plaid sweatshirt fabric. The garment itself had panels sewn into them which

had been printed at Baumwear's shop in Ithaca. (Tr. 229, 230)

Because of a serious medical problem the respondent ceased doing business in October, 1982, and just prior to the cessation of business was looking to sell off the remainder of the fall inventory since his lease was up at the end of the month. (Tr. 232; Tr. 234)

In the process of selling the remaining merchandise, respondent on or about the 26th day of October, 1982, met with a man by the name of Mark Grayson who indicated to the respondent that he was doing research for a friend in the clothing business out west and was interested in respondent's goods. That day Mark Grayson inspected the goods, in fact, "[h]e went over them with a fine tooth comb, so to speak." (Tr. 233) Respondent then told Grayson that he would be willing to make a very large discount off the original line price because he was getting out of the business, had to get rid of the merchandise and his lease would expire at the end of the month. (Tr. 234) After the inspection, Mr. Grayson called the appellant, Dean Knight, at his business, The Fashion Corner, in Utah giving him a description of the merchandise. Subsequently, the respondent spoke to appellant by phone giving him a

detailed description of the merchandise as to construction, quality and sizing. (Tr. 235)

Mr. Grayson then prepared an invoice reflecting the agreed terms so that the respondent could begin to prepare the goods for shipment. Mr. Grayson signed as buyer. The terms of sale included that there would be no returns without written authorization. (Tr. 236, Ex. 3-P)

The next day after checking the appellant's credit worthiness the respondent once again called the appellant in Utah and explained that he (appellant) was getting the merchandise at a cutthroat price because respondent was going out of business and that respondent had no intention of taking the merchandise back under any circumstances. Respondent was then informed by appellant, that Mark Grayson was basically his eyes and ears in New York City, that he had worked closely with Mark for many years and that if Mark said the merchandise was okay, then respondent should not worry. (Tr. 238)

On October 28, 1982, the respondent prepared an invoice and shipped the goods. In the body of the document the following appeared:

SHIPPED FREIGHT COLLECT

Terms Net 10 Days E.O.M. -- No discounts

Amount due in full by 12-10-82 or earlier.

Please note new address above.

ORDER COMPLETE -- THANK YOU

(Tr. 239, Ex. 4-P)

The unit prices of the merchandise reflected a substantial discount from the prices at which the same merchandise had been previously sold. (Tr. 239, Ex. 2-P & Ex. 4-P) The total cost of the goods shipped was \$13,392.50, which was never paid by the appellant to respondent. (Tr. 239, 266, Ex. 4-P)

The respondent then had no additional contact with either appellant or Mr. Grayson until the 7th day of December, 1982, when respondent called appellant to remind him that a check was due in a couple of days. It was at that time that the respondent for the first time heard that appellant had a problem with the goods and wanted to return the goods. (Tr. 241) During that conversation respondent once again reiterated that the goods were not returnable and would not be accepted. (Tr. 241)

On the 21st day of December, 1982, the appellant sent the goods freight collect to Ithaca, New York. The goods arrived in Ithaca on January 11, 1983 but were refused by respondent. (Tr. 242, Ex. 6-P)

By January, when the goods arrived in Ithaca, they were worthless since they were seasonal goods (fall to winter) which should have been sold to retail stores no later than the end of October to meet the Thanksgiving and Christmas selling season. In January, stores typically begin to sell their spring lines and since the subject goods were sweatshirt fabric with dark colors, they obviously would not sell as spring merchandise. (Tr. 243, 244)

Although appellant called Mr. Grayson about the problem with the goods, Grayson did not call respondent and, in fact, told appellant that respondent's company was no longer at the address in New York and further told him it was not a good idea to send the goods back without trying to sell them. (Deposition of Grayson at page 38) Grayson did, however, testify contrary to appellant that he had the Ithaca address and respondent's phone number. (Deposition of Grayson at page 35) Grayson then offered to sell the goods for appellant and was told to sell the goods for \$5.00. (Deposition of Grayson at page 38) Grayson and appellant then undertook to attempt to sell the goods through jobbers in Florida and California but at no time did Grayson have authority to do anything for appellant in regard to the merchandise. (Deposition of Grayson at page 36)

Only after the Florida and California jobbers had rejected the merchandise, did appellant send the goods to Ithaca. (Tr. 282) The appellant testified that Grayson had to secure the Ithaca address for the appellant so that he would be able to return the merchandise, however, the Ithaca address was on the invoice sent to appellant's address in October, and as indicated Grayson testified in his deposition that he had had both respondent's address and phone number.

At the conclusion of the trial counsel submitted trial briefs. On the 18th day of December, 1984, the Court Memorandum Decision, which included the following findings:

A. That the appellant offered to sell the appellant going-out-of-business discount, the goods in question.

B. That the appellant, Knight, knew that the respondent was going out of business, that the respondent was required to vacate his premises immediately and that respondent was moving out of the city of New York City.

C. That the appellant waived the receiving of a sample because of his knowledge of respondent's urgency in disposing of the goods.

D. That appellant accepted the offer and authorized shipment of the goods; that the purchase order was signed by Grayson for appellant and that the purchase order specifically required written authorization for any goods to be returned.

E. That respondent told the appellant at the time of the sale that such sale was final and that he could not take back the goods and that the appellant in response thereto indicated that he had faith in Grayson and could always unload the goods if he did not like them.

F. That the appellant attempted on his own to sell the goods on his own invoice subsequent to receipt of the same in Salt Lake City.

G. That after appellant's failure to sell the goods on his own invoice he then attempted to return the same but was refused but sent the goods anyway without written authorization.

H. That the appellant never attempted to contact the respondent in regards to return of the goods until it was too late for these seasonal goods to be moved.

I. That the appellant knew from the beginning of the respondent's moving from New York City back to Ithaca but made no attempt to locate the respondent in a timely manner.

J. That the appellant admits that some manufacturers require written authorization before goods are returned.

K. That the goods in question were not defective but the appellant simply did not like the aesthetics when receiving the same in Salt Lake City.

L. That the goods were described to the appellant by Grayson and by the respondent prior to and at the time of sale.

M. That the appellant knew the goods were seasonable but made no timely effort to contact the respondent.

N. That Grayson was not an employee or agent of respondent but in fact a freelancer representative who in this case was more allied with the appellant than respondent.

O. That this was not a "approval sale" and Grayson had no authority to bind the respondent. (Tr. 189, 190, 191)

Subsequently, the Court entered its Findings of Fact and Conclusions of Law and Judgment granting judgment to respondent and against appellant in the principal sum of \$13,392.50. (Tr. 196, 197, 198, 199, 202 & 203) No objection was made by the appellant to the entry of the Findings of Fact and Conclusions of Law.

SUMMARY OF AGRUMENT

It is respondent's position that the lower Court properly held that he was entitled to judgment for appellant's failure to pay for goods received and that his attempt to reject the goods was wrongful within the

meaning of the Uniform Commercial Code and that the judgment of the lower Court should be affirmed with costs.

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY HELD THAT THE SUBJECT TRANSACTION WAS NOT AN "APPROVAL SALE" WHICH WOULD ALLOW THE DEFENDANT/APPELLANT TO RETURN THE SUBJECT MERCHANDISE EVEN THOUGH THEY DID NOT NECESSARILY CONFORM TO THE CONTRACT OF SALE.

Utah Code Ann. § 70A-2-326(1)(a)(b) provides:

"Unless otherwise agreed, if delivered goods may be returned by the buyer even though they conform to the contract, the transaction is

(a) a 'sale on approval' if the goods are delivered primarily for use, and

(b) a 'sale or return' if the goods are delivered primarily for resale."

Although the goods were being delivered for resale, the Court nevertheless properly found that the parties had not agreed that the appellant would be receiving the goods on approval or with the right to return the goods even though they may conform to the contract. Both Grayson and respondent explained to the appellant that the respondent was moving and had to get rid of the goods. (Tr. 234, 235) In fact the appellant knew that he was getting such a deep discount because of this fact and actually waived receiving samples. (Deposition of Grayson at pages 24 & 25)

Therefore, any return of the goods was unauthorized and a breach of the sales contract between the appellant and respondent.

POINT II

APPELLANT'S REJECTION OF THE SUBJECT GOODS WAS UNJUSTIFIED SINCE SAID GOODS CONFORMED IN EVERY RESPECT TO THE CONTRACT.

Under most circumstances a buyer has a right to reject goods which do not conform to the contract of sale. Rejection of course is governed by Utah Code Ann. § 70A-2-601, which provides:

"Buyer's rights on improper delivery.--Subject to the provisions of this chapter on breach in installment contracts (section 70A-2-612) and unless otherwise agreed under the sections on contractual limitations of remedy (sections 70A-2-718 and 70A-2-719), if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may

- (a) reject the whole; or
- (b) accept the whole; or
- (c) accept any commercial unit or units and reject the rest."

Of course in appellant's Third Defense to respondent's Complaint appellant raised as defenses nonconformity stating:

"The goods delivered by plaintiff to defendant failed to conform in several material respects to the contract between the parties in that the goods were of extremely poor quality and were otherwise not as represented by plaintiff. [sic] and his agents, and were completely unusable by defendant."

(Tr. 7) Yet, the record is devoid of any evidence whatsoever that the goods were defective and in fact the Court found the goods were not defective but that the appellant simply did not like the aesthetics of the goods when they arrived in Salt Lake City. (Tr. 190-198) Of course, appellant acknowledges that this finding is consistent with the evidence.

Additionally both the respondent and Mark Grayson described the merchandise in detail (Tr. 234, 235, Deposition of Grayson at p. 13) and there was further testimony that the appellant informed the respondent that Mr. Grayson was basically his eyes and ears in New York City, so how could the goods not conform.

As here, when the only evidence is that the subject goods are conforming but buyer returns the goods for the reason that they are not as he perceived them, he is rejecting conforming goods and breaches his contract. R.R. Waites Co. v. E.H. Thrift Air Conditioning, Inc. (1974, MO App.) 510 SW 2d. 759, 15 UCCRS 43. And where there has been a wrongful rejection, Utah Code Ann. § 70A-2-703 applies and provides for seller's remedies, which include an action for the contract purchase price, the remedy respondent chose. See also Cochran v. Horner, (1970) 121 Ga. App. 297, 173 SE 2d. 448, 7 UCCRS 707.

POINT III

THE COURT PROPERLY FOUND THAT MARK GRAYSON WAS NOT THE AGENT OF RESPONDENT.

Appellant takes inconsistent positions that an agency relationship actually existed between respondent and Mark Grayson and also at the same time urge that Mark Grayson had apparent authority from respondent to receive notice of rejection of the goods. The lower Court found that Grayson was not an employee or agent of the respondent but merely a freelancer representative who was actually more allied with the appellant than with the respondent. (Tr. 191 & 198) The evidence, of course, absolutely supports this position.

Under normal circumstances agency is created by agreement of the parties. There must be a meeting of the minds and the consent of both the principal and agent is necessary to create such an agency. Naify v. Pacific Indem. Co. 11 Cal 2d 5, 76 P2d 663, 115 ALR 476; Ruddy v. Oregon Auto. Credit Corp. 179 Or 688, 174 P2d 603; Continental Bank & Trust Co. v. Taylor, 14 Utah 2d 370, 384 P.2d 796 (1963).

A specific definition of agency is found in Restatement (Second) of Agency § 1, and states as follows:

"Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act."

Here, there is no manifestation of consent, in fact the evidence taken strictly from Grayson indicates anything but and is as follows:

(a) That he was a freelance sales rep; (Deposition of Grayson at page 8)

(b) That Grayson had had over 100 transactions with the appellant, only 1 with respondent; (Deposition of Grayson at page 15)

(c) That at the time Grayson was leaving the loft respondent had not unequivocally stated that he was going to ship the order to appellant; (Deposition of Grayson at page 29)

(d) That Grayson had signed the purchase order for buyer (appellant); (Deposition of Mark Grayson at page 34, Ex. 3-P)

(e) Grayson indicated that respondent gave him no instructions on what do to if appellant called him; and (Deposition of Mark Grayson at page 39)

(f) That he (Grayson) had no authority to bind the manufacturer (respondent) to a contract. (Deposition of Mark Grayson at page 66)

As can be seen, if there is any manifestation of consent, the manifestation would indicate that as the Court properly found Grayson was more closely allied to appellant and was not the agent of the respondent.

Apparent authority is a principal of law which is an exception to the requirement that there be an agreement of the parties to establish agency. Mailia v. Giles, 100 Utah 562, 114 P.2d 208 (1941). The doctrine of apparent authority creates agency where no agreement exists where the principal permits the agent to exercise authority allowing third parties to rely on such authority. Apparent authority is determined from the facts and circumstances surrounding each individual situation. United States Bank & Finance Corp. v. National Building & Loan, 80 Utah 62, 12 P.2d 758 (1932).

The burden of proof here rests with the appellant since it is he that has raised apparent authority of the Mark Grayson. Southern Surety Co. v. Gilkey-Duff Hardware Co., 166 Okla. 84, 26 P.2d 144. The appellant must also prove not only that there is apparent authority or agency

but what the nature and extent of the agency is. Butinel v. Nygren, 17 Ariz. 491, 154 P. 1042. Where the existence of agency depends on the acts of the parties, as is the case here, the law makes no presumption of agency. It is a fact that must be proven. Fox v. Lavendar, 89 Utah 115, 56 P.2d 1049; and also Smith v. Leber, 34 Wash. 2d 211, 209 P.2d 297.

Here, of course, there is no question that there was no formal agency relationship and, therefore, appellant can only prevail if agency can be implied from the course of dealing and the facts surrounding the transaction. The facts are that respondent and Mr. Grayson had had only one contact, that being the subject transaction. On the other hand, Grayson had had hundreds of contacts with the appellant. The facts are also that the respondent negotiated the contract, while Grayson only made the initial contact with appellant. Grayson, in fact, had no further contact with the appellant until appellant called complaining about the goods, at which time appellant was told by Grayson that it was not a good idea to return the goods and that appellant should attempt to sell them. (Deposition of Grayson at page 38) Subsequently, appellant exercised total control of the goods and authorized Grayson to sell them for him

for \$5.00. Based on the foregoing the Court properly found that Grayson was not respondent's agent and certainly it is apparent from the facts and circumstances of the transaction that Mark Grayson was not respondent's agent for the purpose of accepting appellant's alleged rejection of the goods.

POINT IV

APPELLANT WAIVED THE DEFENSE OF BREACH OF IMPLIED WARRANTY.

Appellant has raised as a defense, breach of implied warranties of merchantability. The evidence, however, is limited on this point and it would seem that appellant's only objection to the goods was some type of objection as to the aesthetics of the goods. Torturing this to be merchantability the Uniform Commercial Code provides for the exclusion of such warranties, under certain circumstances. Utah Code Ann. § 70A-2-316(3)(b) provides as follows:

"when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no warranty with regard to defects which an examination ought to in the circumstances to have revealed to him; and"

The buyer therefore waives any implied warranty by making an examination or by refusing to examine the goods.

Durbano Metals, Inc. v. A & K R.R. Materials, 574 P.2d 1159 (1978). Here, Grayson, appellant's eyes and ears in New York City actually examined the goods and certainly any problems of merchantability should have been discovered. Even if the examination of Grayson is found not to constitute examination by the appellant, the appellant waived examining a sample and, therefore, waived any implied warranties including merchantability.

Utah Code Ann. § 70A-2-316(3)(c) provides as follows:

"(c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade."

The course of dealing as relates to this respondent and this appellant was a one-time transaction. Buyer was told by both Grayson and the respondent that the goods could not be returned which certainly modifies any implied or express warranty and although there is no writing relating to the disclaimer, the Courts are giving effect to oral disclaimers of warranties when knowingly made by the buyer as was the case here. Robinson v. Branch Moving & Storage Co., (1976) 28 NC App. 244, 221 SE 2d. 81, 18 UCCRS 896.

Notwithstanding the foregoing, the goods were shipped pursuant to the condition that there would be no returns

without written authorization. (Ex. 3-P) When appellant contacted Grayson, Grayson said to keep the goods and try to sell them and gave no written authorization to return them. Subsequently, appellant talked directly with the respondent, who told him that he would not accept the goods and certainly he gave no written authorization. The appellant then waited an even longer time before arbitrarily returning the goods without any authorization whatsoever, which of course was a breach of the sales contract entitling respondent to move forward with the suit as he did.

POINT V

APPELLANT DID NOT MAKE TIMELY OR SEASONABLE REJECTION OF THE SUBJECT GOODS.

The Court found that the appellant knew the goods were seasonable but made no timely effort to contact the respondent for the purposes of rejection. (Tr. 190) Even if this Court were to find that the appellant had the right to reject the goods, it must find that the appellant failed to properly reject the merchandise. Utah Code Ann. § 70A-2-601 provides that if goods fail to conform to the contract, the buyer may:

- "(a) reject the whole; or
- (b) accept the whole; or
- (c) accept any commercial unit or units and reject the rest."

Further, Utah Code Ann. § 70A-2-602 provides the manner in which rightful rejection may be accomplished, to wit:

"(1) Rejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller."

Utah Code Ann. § 70A-1-204(2)(3) defines both reasonable and seasonably as follows:

"(2) What is reasonable time for taking any action depends on the nature, purpose and circumstances of such action."

"(3) An action is taken 'seasonably' when it is taken at or within the time agreed or if no time is agreed, at or within a reasonable time."

Both definitions require reasonableness to be looked at by the trier of fact in view of the circumstances surrounding the transaction. The goods were themselves seasonable. They had to be on the shelves by mid-November. The only notice of rejection that appellant gave was a telephone conversation with Mark Grayson. The respondent did not know of any such rejection until sometime in December and the goods were not actually returned until several days after that time arriving in Ithaca, New York in January, long after the goods could be sold. Additionally, after notifying Grayson, appellant sent samples in an attempt to sell the goods to other individuals. If appellant was

attempting rejection as he indicated in his testimony by calling Grayson, then the rejection, was wrongful because the requirements of Utah Code Ann. § 70A-2-602(2)(a) which states:

"after rejection any exercise of ownership by the buyer with respect to any commercial unit is wrongful as against the seller; and . . ."

In exercising the ownership, appellant withdrew any rejection or at the very least wrongfully rejected. After appellant was unable to sell the goods to the third parties, he made no attempt to contact respondent even through the alleged agent Grayson. After the respondent had called appellant in December, appellant waited an additional two weeks before sending the goods. The appellant knew the goods were seasonal and that the delay made them valueless.

POINT VI

THE LOWER COURT PROPERLY ASSESSED DAMAGES.

The appellant would have this Court believe that the respondent failed to mitigate his damages and failed to introduce evidence relative to the market value of the goods. This could not be further from the truth. In the first place appellant returned the goods freight collect on December 21, 1982. They did not arrive in Ithaca, New York until January 11, 1983. (Tr. 242, Ex. P-6) Subsequently,

the goods were sold to cover the freight charges. So if mitigation was necessary by respondent, the sale to cover the freight costs constitute any required mitigation on the part of respondent.

With reference to the introduction of evidence relative to the market value, if such a burden exists, the respondent met that burden in his testimony at trial wherein he indicated that by January the goods were worthless. (Tr. 4, 244) The record is totally devoid of any other evidence that would indicate that the goods had a market value and, therefore, the \$13,000 + judgment should stand.

CONCLUSION

Based on the foregoing, respondent urges this Court to affirm the judgment entered in the lower Court with costs.

RESPECTFULLY SUBMITTED this 30th day of September, 1985.

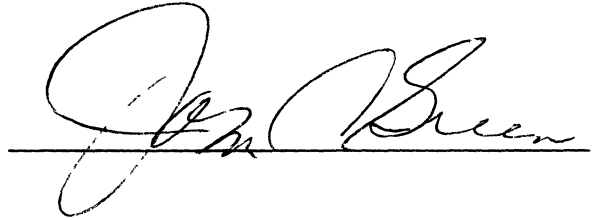
A handwritten signature in cursive script, appearing to read "John C. Green", written over a horizontal line.

JOHN C. GREEN
Attorney for Plaintiff/
Respondent

CERTIFICATE OF MAILING

I hereby certify that I mailed four copies of this Brief of Responsent, postage prepaid, this 30th day of

September, 1985, to J. Keith Adams and R. Stephen Marshall of Van Cott, Bagley, Cronwall & McCarthy, Attorneys for Appellant, 50 South Main, Suite 1600, P. O. Box 45340, Salt Lake City, Utah 84145.

A handwritten signature in cursive script, appearing to read "J. Keith Adams", is written over a horizontal line.