

1986

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

Utah Supreme Court

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UTAH COURT OF APPEALS
BRIEF

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IN THE SUPREME COURT OF THE STATE OF UTAH

MICHAEL BAUM d/b/a
BAUMWEAR BY MICHAEL BAUM,

Plaintiff-Appellee,

vs.

DEAN KNIGHT, d/b/a
THE FASHION CORNER,

Defendant-Appellant,

860102-CA
Case No. 20493

BRIEF OF DEFENDANT-APPELLANT DEAN KNIGHT
d/b/a THE FASHION CORNER

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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JUL 31 1985

CLERK OF THE COURT, UTAH

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BRIEF OF DEFENDANT-APPELLANT DEAN KNIGHT
d/b/a THE FASHION CORNER

ISSUES PRESENTED FOR REVIEW

1. Was Mark Grayson an agent of Baum or of Knight?
2. Did Mark Grayson have apparent authority from Baum to receive notice from Knight of the rejection of the goods?
3. Did Knight give Baum timely notice of his rejection of the goods under Utah Code Ann. § 70A-2-602(1)?
4. Was Knight entitled to reject the goods as failing to conform to the contract under Utah Code Ann. § 70A-2-601?
5. Did the goods fail to conform to express or implied warranties?

6. Did the lower court properly consider the usage of trade as giving meaning to the agreement between the parties as required by Utah Code Ann. §§ 70A-1-205(3) and -208(2)?

7. Did the lower court err in failing to construe the contract as consistent with the usage of trade?

8. Did Mark Grayson have actual, implied, or apparent authority from Baum to act in accordance with the usage of trade in receiving notice of rejection by Knight and in giving further instructions regarding the disposition of the goods?

9. Did the lower court err in failing to hold that Baum failed to mitigate his damages?

STATEMENT OF THE CASE

A. Nature of the Case.

This is an appeal from a Judgment against Knight on a contract alleged to exist between Baum and Knight.

B. Disposition of the Case Below.

The case was tried to the court on November 28, 1984. The court issued a Memorandum Decision in Baum's favor (R. 189-92) on which Findings of Fact and Conclusions of Law were entered (R. 196-99).

C. Statement of Facts.

Plaintiff-appellee Michael Baum ("Baum") designed and manufactured wearing apparel in New York City, New York, and

did business as Baumwear by Michael Baum from 1980 to 1982.

(Tr. 11.) Since 1974, defendant-appellant Dean Knight ("Knight") has done business as The Fashion Corner in Salt Lake City, Utah, as a wholesaler of manufactured apparel goods.

(Tr. 55-56.) This action was commenced by Baum against Knight for an alleged breach by Knight of a contract by which Knight ordered certain apparel goods from Baum. After receiving the goods, Knight inspected them and rejected them because they did not conform to the representations made by the sales representative, Mark Grayson.

Knight purchases apparel goods from numerous manufacturers. (Tr. 75.) Over 95 percent of his purchases are negotiated through sales or manufacturers representatives. One such sales representative who had represented manufacturers who had sold goods to Knight was Mark Grayson. (Tr. 58.) Knight testified that it is the usage of trade and standard practice in the wholesale apparel goods industry for goods to be returned by the buyer if, after receipt and inspection, the goods are not merchantable or as represented. In virtually all such cases when a rejection has been made and the buyer desires to return the goods, the buyer contacts the sales representative who thereupon makes the arrangements with the manufacturer for the goods to be returned. In his entire business experience as a wholesaler of apparel goods, Knight

has returned goods 50 to 75 times per year, which have always been accepted back by the manufacturer. (Tr. 76-78.)

Knight was first contacted by Baum on or about October 26, 1982 through Mark Grayson, who was acting as sales representative for Baum. Baum and Grayson had met at Baum's place of business in New York City. Grayson agreed to call Knight and to make an effort to sell Baum's goods to Knight. (Tr. 19-21, 59-62, 83-84.) Baum authorized Grayson to call Knight and to solicit Knight to purchase the goods. (Tr. 39-40.) Baum agreed to pay Grayson a commission for his services of \$1.00 per garment sold. (Tr. 37-39.) When Grayson first contacted Knight about Baumwear, he made certain representations about the style and quality of the clothing that Baum manufactured. For example, Grayson stated that the goods had the look of fashion designer Norma Kamali and that they were high fashioned fleece wear. (Tr. 44, 82.) Knight requested that Baum send samples of the clothing, but was told by Grayson that there was not enough time since Baum was going out of business. (Tr. 62, 83-84.) Based upon Grayson's representations concerning the clothing manufactured by Baum, Knight ordered the goods. (Tr. 62, 83-84.)

Baum made appropriate credit checks and called Knight back to confirm the order. Although Knight did not intend to return the goods at the time he ordered them, it was part of

the agreement between the parties that if the goods were not as represented Knight would be entitled to reject them and return them to Baum. (Tr. 89-91.) This was consistent with the standard usage of trade under which goods purchased by wholesalers sight unseen can return them if they are not as represented or are unmerchantable. (Tr. 78, 90.)

Prior to the time that Knight ordered the goods from Baum through Grayson, Knight had dealt with Grayson on a number of other occasions where Grayson represented other clothing manufacturers. Knight had rejected and returned goods on several such occasions when, after receipt and inspection, Knight determined that the goods were not as represented. In each such case Knight contacted Grayson who made the arrangements with the manufacturer for the goods to be returned. Knight's practice of contacting Grayson regarding the return of goods was consistent with the usage of trade. (Tr. 80-81, 96-97, 113.)

Knight received the goods that he had ordered from Baum during the first two weeks of November, 1982. Immediately upon receiving the goods, Knight and his brother, David, inspected them and determined that the goods were not as had been represented and were not sellable. Specifically, the style was not a Norma Kamali or Betsy Johnson, as had been represented. Mark Grayson had also described the goods as a

"missy fleecy," which turned out not to be the case on defendant's inspection of the goods. Knight further made an aesthetic judgment regarding the merchantability of the goods, based upon his experience in the industry in this particular market area, and determined that the goods were not as represented and would have to be returned. (Tr. 64-65, 76, 71-72, 84-85, 106-07.)

Having made the determination to reject the goods, Knight communicated with Mark Grayson within the day or two of the receipt of the shipment. Knight told Grayson the goods were unacceptable and that he wanted to return them to Baum. Grayson indicated that Baum was out of business and had moved to up-state New York and requested that Knight cooperate in attempting to find another buyer for the goods on Baum's behalf. At Grayson's request, Knight sent samples of the goods to jobbers in Florida and California. Grayson's intent was apparently to attempt to sell the entire shipment of goods to one of the jobbers. (Tr. 66-68, 86, 97.) Had a sale been made, the sale would have been for Baum's benefit. (Tr. 97.) The goods were rejected by both the jobbers in California and in Florida. (Tr. 66-68, 86, 97.) Upon receiving notification of that fact, Knight had another conversation with Grayson in which Knight requested the address to which the goods should be sent. Grayson subsequently obtained the address and informed

Knight whereupon Knight returned the goods to the address given, which was in Ithaca, New York. (Tr. 98.)

Prior to returning the goods, Knight had a telephone conversation with Baum on or about December 7, 1982, in which he informed Baum of his rejection of the goods. (Tr. 26-27, 98.) Knight subsequently received a call from Baum's brother, Andrew, in which Knight stated again his dissatisfaction with the goods and his intent to return them. (Tr. 98-99.)

Knight shipped the goods were shipped to Baum's address in Ithaca, New York, by Consolidated Freightways. Baum testified that he was given notice of the shipment by Consolidated Freightways, but that he refused to accept it. (Tr. 28.) The goods have since been liquidated by Consolidated Freightways for storage and freight charges.

SUMMARY OF ARGUMENT

Knight's notice to Baum was timely when given to Baum's agent, Mark Grayson, who was not only vested with actual authority by Baum to act as his agent but, consistent with the usage of trade, had apparent authority to receive Knight's notice of rejection. Knight justifiably rejected the goods since they did not conform to the contract.

ARGUMENT

I.

KNIGHT GAVE A VALID AND TIMELY
NOTICE OF REJECTION.

A. Knight gave timely notice of rejection.

Following his inspection of the goods and determination that they were not as had been represented, and that they were unsellable, Knight immediately communicated with Baum's sales representative, Mark Grayson, and informed him that the goods were rejected and would be returned. Grayson requested Knight to send samples to two other jobbers in an attempt to market the goods. Knight followed that request as he was required to do under the provisions of Utah Code Ann. § 70A-2-603(1), which requires a merchant buyer who has rejected goods "to follow any reasonable instructions received from the seller with respect to the goods." Had a sale resulted, it would have been for Baum's account. (Tr. 97.)

Knight's notification of Grayson of the rejection of the nonconforming goods was timely under the provisions of the Utah Uniform Commercial Code, Utah Code Ann. § 70A-2-602(a), which states:

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

The UCC defines what is meant by the term "notifies," at Utah Code Ann. § 70A-1-201(26), as follows:

A person "notifies" or "gives" a notice or notification to another by taking such steps as may be reasonably required to inform the other in ordinary course which or not such other actually comes to know of it. A person "receives" a notice or notification when

- (a) it comes to his attention;
- (b) it is duly delivered at the place of business through which the contract was made or at any other place held out by him as the place for receipt of such communications.

(Emphasis added.)

Section 70A-1-201(26) does not require that the seller receive actual notice. It is sufficient that the buyer take "such steps as may be reasonably required to inform" the seller. As argued below, the uncontroverted evidence at trial demonstrated that a wholesaler in the apparel industry who desires to reject a shipment does so by notifying the sales representative rather than the manufacturer. The sales representative thereafter makes arrangements with the manufacturer regarding the return of the goods. The lower court erred in not construing the oral contract between the parties as consistent with the usage of trade. By informing Grayson of the rejection of the goods, Knight did "notify" Baum within the meaning of sections 70A-1-201(26) and 70A-2-602(1). Grayson was Baum's agent possessed of apparent, if not actual authority, to receive notice of Knight's rejection.

B. An agency relationship existed between Baum and Mark Grayson.

The lower court found that "Grayson was not an employee or agent of the plaintiff but, in fact, a freelancer representative who, in this case, was more allied with the defendant than the plaintiff . . . and that Grayson had no authority to bind the plaintiff." (R. 190-91.) This finding, however, is not supported by the evidence or the law. The Utah Supreme Court, in the case of Continental Bank & Trust Co. v. Taylor, 14 Utah 2d 370, 1384 P.2d 796 (1963), defined agency, following the Restatement (Second) of Agency, 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.

Id. at 800 (quoting Restatement (Second) of Agency § 1 (1958)). See Mountain States Moving & Storage Co. v. Suhr Transport, Inc., 29 Utah 2d 295, 508 P.2d 812, 814 (1973) (court identified the standard in the Continental Bank case as the "traditional concept of agency").

Thus, where the principal intends that the agent shall act for him and where the agent intends to accept the authority and to act pursuant to the authority on behalf of the principal, they have mutually consented to the creation of an agency relationship. See, e.g., Wilkerson v. Stevens, 16

Utah 2d 424, 403 P.2d 31, 32 (1965). Mutual consent may be either express or implied.

The uncontroverted evidence in the present case demonstrated that Baum and Grayson entered into an oral agreement that Grayson act on Baum's behalf in locating a buyer for Baum's goods and in negotiating the terms of the sale. According to Baum's testimony, he agreed to pay Grayson a commission of \$1.00 per garment, in return for which Grayson agreed to find a buyer and to arrange the sale of Baum's goods. (Tr. 37-39.) With the exception of details regarding price, the negotiations regarding the sale were between Grayson and Knight. (Tr. 83.) Baum admitted at the trial that he authorized Grayson to call Knight from Baum's place of business in New York City. (Tr. 39-40.) Grayson was thus an agent by actual authority to represent Baum in the transaction and, being so, was authorized to receive notice of Knight's rejection of the goods. That notice was seasonable since it was given within a day of receipt of the goods. The lower court erred in holding that Knight's notice of rejection to Grayson was ineffective.

The evidence also supports the implication of an agency relationship between Baum and Grayson. The existence of implied consent may be proved by deductions or inferences from the facts and circumstances of the particular situation,

including the words and conduct, of the parties. See Forsyth v. Pendleton, 617 P.2d 358, 360-61 (Utah 1980) (Court upheld finding of implied agency between party and her attorney based on evidence that the attorney had been earlier involved in executing the contract at issue and that the party had forwarded to the attorney a letter pertaining to the default under the contract to the attorney).

Mark Grayson's deposition was introduced in its entirety as evidence at the trial. (Exhibit 7-P.) In his deposition, Grayson testified that he was a sales representative and that he had a "representative relationship" with fifty or sixty manufacturers. (Grayson Deposition, at 7-10.) Grayson testified that he was initially contacted by Baum in response to one of Grayson's advertisements in a trade publication. (Grayson Deposition, at 19.) Grayson thereafter met with Baum at his place of business, examined the goods, and stated that he thought Knight might be interested in purchasing them. Grayson thereupon made a telephone call to Knight. Baum testified at the trial that he was present during the conversation and was able to hear what Grayson said and that he did not object to Grayson's actions. (Tr. 40, 44.) Grayson testified that Knight agreed to accept the merchandise and order the goods while speaking with Grayson on the telephone and before Baum ever spoke with Knight. (Grayson Deposition,

at 26-27.) Knight similarly testified that he determined to buy the goods based on his conversation with Grayson. (Tr. 83-84.) Grayson testified further that Baum agreed to compensate him for his services by paying "eight percent or one dollar per garment when he was paid by Fashion Corner." (Grayson Deposition, at 36.) The next question and answer in the Grayson deposition indicate that Baum had in fact authorized Grayson to perform the services on Baum's behalf in soliciting Knight to purchase the goods and in preparing the purchase order:

Q. Did Mr. Baum give you any authority to do anything for him in connection with any deal other than this particular sale to Fashion Corner?

A. No.

(Grayson Deposition, at 36.)

Grayson's relationship to Baum as an agent was clarified in the following testimony by Grayson:

Q. Let me make it more specific. Again, this is in terms of the industry. Would you characterize the relation as, you were acting as a broker for Mr. Baum, or agent?

A. I was a sales rep, a sales representative for Mr. Baum.

Q. In connection with being a sales representative, generally, what sorts of powers do you generally have?

A. Calling up potential customers who could perhaps use some of the merchandise owned by the company who wants me to sell for them, or who I

approach to sell for them and they agree that I perhaps can do some business for them.

Q. Do you or do you not have authority to bind the manufacturer to a contract?

A. I have no authority to do that.

Q. Everything must ultimately be approved by the manufacturer?

A. They approve the credit and the prices and the general order that goes out.

Q. And your role is basically to negotiate with the prospective buyer?

A. I would say my role is generally to describe the merchandise to the prospective buyer and discuss prices, original prices, current prices, where I think the merchandise fits into the configuration of the merchandising concept of the particular store or retail chain.

(Grayson Deposition, 66-67.)

The evidence was uncontroverted that Grayson was Baum's sales representative and that, acting in that capacity and in consideration of the commission that Baum agreed to pay him, Grayson located a buyer, Dean Knight, and negotiated the transaction with him. Since he was thus authorized to deal with Knight on behalf of Baum, this Court must hold that the lower court's finding that Grayson was not Baum's agent was erroneous and not supported by the evidence.

C. Mark Grayson had apparent authority from Baum to receive notice of rejection of the goods.

Apparent authority is that which, though not actually granted, the principal permits the agent to exercise or on which third persons are entitled to rely based upon the acts of the principal. Mailia v. Giles, 100 Utah 562, 114 P.2d 208, 211 (1941). See Hobart v. Hobart Estate Co., 26 Cal.2d 412, 159 P.2d 958, 979 (1945) (The essential elements of apparent or ostensible authority are representation by the principal, justifiable reliance thereon by the third party, and change of position or injury resulting from such reliance). Apparent authority must be determined from the facts and circumstances of the transaction. United States Bond and Finance Corp. v. National Building and Loan Association, 80 Utah 62, 12 P.2d 758, 760 (1932).

The lower court ignored the issue whether Grayson had apparent authority to receive notice of rejection of the goods. The evidence was clear that Grayson had apparent authority from Baum to receive notice of the rejection of goods based on Baum's manifestation to Knight that Grayson had authority to act on Baum's behalf. This manifestation was given by Baum to Knight in the two telephone conversations between them prior to the shipment of the goods in which Baum confirmed or ratified the negotiations that Grayson had had with Knight regarding the sale of the goods. Baum made no objection to the statements made by Grayson. (Tr. 40-46.)

Knight acted in good faith, had reason to believe, and did actually believe that Grayson possessed authority from plaintiff. Relying on the appearance of authority in Grayson, Knight continued to deal with Grayson regarding the rejection and return of the goods. The facts of the present case raise an estoppel against Baum to deny that Grayson had authority from him to deal with Knight regarding the rejection and return of the goods. This is particularly so in light of the evidence that it was the standard practice in the industry for a buyer, such as Knight, to notify the sales representative, rather than the manufacturer, of the rejection of goods purchased. Knight did exactly what he had always done in rejecting goods in hundreds of transactions. He contacted the sales representative.

D. The lower court erred in not considering the usage of trade under which wholesale buyers communicate with the sales representative in giving notice of rejection.

The lower court held that Knight's notice of rejection to Grayson was not valid since Grayson was not Baum's agent. In so ruling, the court refused to consider the relevant usage of trade, which, according to the Utah Uniform Commercial Code, should be considered in construing a sale's contract between merchants. The UCC, Utah Code Ann. § 70A-1-205 states:

- (3) A course of dealing between parties and any usage of trade in the vocation or trade in which they

are engaged or which they should be aware give particular meaning to and supplement or qualify terms of an agreement.

- (4) The express terms of an agreement and an applicable course of dealing or usage of trade shall be construed wherever reasonable as consistent with each other; but when such construction is unreasonable express terms control both the course of dealing and usage of trade and course of dealing controls usage of trade.¹

(Emphasis added).

An agent's apparent authority must thus also be seen in light of the standard practices of the trade. The commentators in Restatement (Second) of Agency § 49, comment c, state:

Inferences from agent's position.
Acts are interpreted in the light of ordinary human experience. If a principal puts an agent into, or knowingly permits him to occupy, a position in which according to the ordinary habits of persons in the locality, trade or profession, it is usual for such an agent to have a particular kind of authority, any one dealing with him is justified in inferring that he has such authority in the absence of reason to know otherwise. The content of such apparent authority is a matter to be determined from the facts.

¹ "Usage of trade" is defined by the UCC as "any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage are to be proved as facts." Utah Code Ann. § 70A-1-205(2). See also Utah Code Ann. § 70A-2-208(2) (express terms of an agreement, course of performance, and usage of trade shall be construed whenever reasonable as consistent with each other).

(Emphasis added).

The present case falls precisely within the purview of the foregoing comment from the Restatement. Baum retained Grayson as his representative, agreeing to pay him a commission, and allowed him to deal with Knight in negotiating a sale of the goods. This was the customary function of a sales representative in the wholesale apparel goods industry. (Tr. 58.) The evidence was uncontroverted that it is also the function of a sale representative in the industry to receive notice of a rejection of goods by a buyer and to make arrangements with the manufacturer for their return. (Tr. 76-77.) That being the case, Knight was entitled to infer that Grayson had authority to accept notice of rejection in the absence of any reason to know otherwise.

In the case of Vickers v. North American Land Developments, Inc., 94 N.M. 65, 607 P.2d 603 (1980), the court considered a suit by a purchaser seeking specific performance of a land sales contract which they claimed they had entered into with the agent of the seller. The seller denied that the alleged agent had any authority to enter into the contract. The court held that, while the agent lacked actual authority to buy the seller, he did have apparent authority, having been placed in a position by the principal "which would lead a reasonably prudent person to believe that the agent did indeed

possess that apparent authority." Id. at 605. The court relied on Restatement (First) of Agency § 49, comment b, which was substantially identical to comment c of the Second Restatement quoted above, and held that the agent was possessed of apparent authority which the principal was estopped to deny. Id. at 605.

The Restatement (Second) of Agency § 34 suggests circumstances to be considered in interpreting an authorization, including "the general usages of business, the usages of trades or employments of the kind to which the authorization relates, and the business methods of the principal." Id. § 34(b) (emphasis added). Section 36 of the Second Restatement provides further that, unless otherwise agreed, "an agent is authorized to comply with the relevant usages of business if the principal has notice that usages of such nature may exist." Notice to Baum of the relevant usage of trade may be inferred, according to comment c:

A person carrying on business has reason to know, and hence has notice of, the usages of the place in which he does business with respect to the type of business he conducts. If both principal and agent are in the same locality and are engaged in the same kind of business, it is inferred that the authorization is to act in accordance with such usages.

Mark Grayson's dealings with Baum and with Knight must not be viewed in a vacuum. Knight had previously rejected and

returned the goods in hundreds of purchase transactions, (Tr. 76), including many in which Grayson had acted as the sales representative of the manufacturers. (Tr. 97.) In nearly every such instance, Knight communicated with the sales representative when giving notice of the rejection rather than the manufacturer. (Tr. 76-77.) Knight's practice was consistent with the standard practice in the industry. (Tr. 76.) Consistent with that usage of trade, Knight testified, Grayson was to take care of all of the arrangements to have the goods returned, as he had in the past on every one of the thirty or so occasions when he had represented manufacturers who had sold to Knight. (Tr. 80-81.)

Pursuant to Utah Code Ann. § 70A-1-205(3), the usage of trade gives "particular meaning to and supplements or qualifies" the terms of the agreement between Baum and Knight. By authorizing Mark Grayson, as a sales representative, to contact Knight and to negotiate the sale, Baum thereby put Grayson in a position of apparent authority upon which Knight justifiably relied in giving notice of the rejection. Knight acted as he had in the vast majority of situations where he had determined to return goods -- he gave notice to the sales representative. That notice was effective and seasonable under Utah Code Ann. § 70A-2-602(1) and the lower court erred in not so finding.

Moreover, the usage of trade must be construed as consistent with the oral agreement between the parties if at all possible, pursuant to Utah Code Ann. §§ 70A-1-205(4) and 70A-2-208(2). Because the usage of trade recognizes that sales representatives have authority to receive notice of rejection, (Tr. 76), construction of the oral agreement in this case consistent with that usage must result in a finding of apparent, if not actual, authority by Baum to Grayson to continue to act on his behalf insofar as necessary to receive the notice of rejection from Knight.

E. Grayson was not Knight's agent.

The lower court, while it did not specifically find that Grayson was Knight's agent, found that Grayson was "more closely allied with the defendant." (R. 198.) Although the effect of this finding is not apparent in the record, it is contrary to the uncontroverted evidence. As shown in subpart B above, Grayson's relationship was with Baum. Grayson was to receive his compensation from Baum and it was on Baum's behalf that Grayson contacted Knight and arranged the sale of the goods. Grayson represented many manufacturers in selling goods to numerous buyers including Knight. Grayson's conduct in contacting Knight and negotiating the sale of goods to him from Baum's place of business does not meet the elements necessary to establish an agency relationship. Grayson himself testified

he was Baum's representative. (Grayson Deposition, at 66-67.) Although Grayson signed Baum's purchase order, as buyer, there was no evidence that he was authorized by Knight to sign. The lower court's finding that the purchase order was "signed by Mark Grayson for the defendant," (R-197) was unsupported by any evidence. Knight testified that he had never authorized Grayson to sign any purchase order. (Tr. 81, 91.) There was certainly no mutual consent between Knight and Grayson that Grayson act as Knight's agent, nor did Knight exercise any degree of control over Grayson's activities. To the contrary, Knight testified that he followed Grayson's directions concerning the disposal of the goods after the rejection. (Tr. 97.) Again, this was consistent with the standard practice in the industry, and the lower court committed error in not so construing the contract between the parties.

F. In the alternative, Knight's notice to Baum personally was sufficient.

Even if Knight's notice of rejection to Mark Grayson was inadequate, Knight argues in the alternative that the requirements of Section 70A-2-602(1) were satisfied when Knight spoke with Baum on the telephone on or about December 7, 1982. It is undisputed that Knight personally told Baum at that time that he was rejecting the goods. Shortly after, Knight also told Baum's brother, an attorney, the same thing. (Tr.

101-02.) Those communications were sufficient to satisfy the notice requirements of section 70A-2-602(1), which requires only that the notice be "seasonable." Section 70A-1-204 states:

- (2) What is a 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.

Thus, Knight notified Baum "seasonably" because the notice was given within a reasonable time. Again, the oral agreement between the parties must be construed as consistent with the usage of trade, under Sections 70A-1-205(3), (4) and 70A-2-208(2). Knight acted consistent with the usage of trade in giving notice to Baum personally in their telephone conversation of December 7, 1982, particularly in light of his efforts to contact Baum through Grayson. The UCC does not require that a buyer return rejected goods within a reasonable time, only that he notify the seller within a reasonable time. Utah Code Ann. § 70A-2-602(1). According to the uncontroverted evidence, whenever Knight returned goods he purchased from Grayson, it sometimes would be more than a month before the goods would be shipped back. (Tr. 81.) If the notice requirement was not satisfied by Knight's communication with Mark Grayson it was certainly satisfied when he spoke with Baum personally on or about December 7, 1982.

II.

KNIGHT'S REJECTION OF THE GOODS WAS VALID AND
JUSTIFIED UNDER THE UNIFORM COMMERCIAL CODE.

As demonstrated at trial, Knight was justified in rejecting the apparel goods that he had ordered from Baum. A buyer's right to reject goods is governed by Utah Code Ann. § 70A-2-601 (1981), 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.

(Emphasis added.)

By allowing a rejection of the whole shipment if the tender of delivery fails "in any respect to conform to the contract," Section 70A-2-601 codifies the "perfect tender rule" applied by the courts prior to the adoption of the UCC. See Moulton Cavity & Mold, Inc. v. Lyn-flex Industries, Inc., 396 A.2d 1024, 1027 (Me. 1979) (UCC § 2-601 represents a continuation of the perfect tender rule). As the court in Carter Hawley Hale Stores, Inc. v. Conley, 372 So. 2d 965 (Fla. App. 1979), stated:

The statutory scheme leaves no doubt that, when non-conforming tender is delivered, it is the buyer's choice whether to reject the goods and cause a rescission [sic] of the contract, suing for their purchase price, or whether to accept the goods and receive . . . damages for breach of warranty

Id. at 969.

Defendant Dean Knight and his brother, David Knight, each testified that the goods ordered from Baum did not conform to the agreement; were not as represented; and were generally not merchantable in their market area.

After inspecting Baum's apparel goods, Mark Grayson called Knight on the telephone and described the goods to him. In his description, Grayson identified the goods with the styles of fashion designer Norma Kamali. Knight testified as follows regarding Gray's representations concerning the goods:

Q. Now, you have already testified today about your first conversation with Mark Grayson, but I would like to ask you if you can tell me everything that you remember Mark Grayson saying to you about these particular goods that were being sold by Baumwear.

A. Well, as I remember, he called me from Baumwear and said they were a Norma Kamali look, that they were quite high fashioned fleece goods. There was a good breakdown, that the sizes were good and there weren't many of them. He did say it was quite a bit off the normal wholesale price. I don't know if 70 percent was ever mentioned, and I don't know if it is 70 percent off. He did mention there was quite a discount.

Q. I think you used the term "fleece." Can you tell me what that means?

A. "Fleece wear" is basically a material and at that particular point in time, Norma Kamali was dealing quite a bit in these goods with ruffles, and so forth and so on, and that is what we pictured and envisioned the goods to be.

Q. Did you use the term "breakdown" also?

A. Yes, I did.

Q. What does that mean?

A. I thought the breakdown was going to be a certain number of tops, with a certain number of bottoms, and that was going to be, if not perfect, good.

Q. Do you remember whether he said it was perfect or good?

A. I don't. I think he said it was a good breakdown.

(Tr. 81-82.)

Knight's testimony was uncontroverted. Baum admitted that Grayson described the goods as being like the style of Norma Kamali. (Tr. 44.)

Knight testified that it is the standard practice in the wholesale apparel industry for wholesalers who purchase goods sight unseen to be able to return the goods if they are unsatisfactory. (Tr. 90.) In his first conversation with Grayson, Knight stated he would keep the goods if they were as represented. (Tr. 89.) Knight testified that the practice in the industry is to protect the buyer because, as he stated, "[m]ost of the salesmen always have floating terms, and my perception is not always what their perception is. And so,

consequently, when the goods arrive they are totally different than what we had thought they would be. And so we call up and express that fact and return them." (Tr. 78-79.) David Knight, defendant's partner, testified that it is normal to return goods that are aesthetically unsatisfactory. (Tr. 113.)

The lower court found that "the goods were not defective but that defendant simply did not like the aesthetics of the goods when they arrived." (R. 198.) This finding, while consistent with the evidence, underplays the importance of aesthetics in the apparel market. Consumers only buy what is aesthetically pleasing. Hence the importance to a wholesaler such as Knight to be able to purchase goods that are attractive from an aesthetic point of view. Knight purchased Baum's goods sight unseen based on Grayson's representations. Knight inspected the goods after receiving them and found them not to be as represented. The goods did not look like Norma Kamali's style, and could not have been marketed in the area in which Knight sells apparel goods. (Tr. 64-65, 71-72, 85, 106-107.) Knight would have sold the goods ordered from Baum to small stores mainly in the Rocky Mountain States. (Tr. 74-75.) David Knight testified that because of the lack of aesthetic value of the goods

they would be very difficult to market, if they were marketable at all, particularly in the area that we sell . . . I think that when you purchase over the years, and I have been a buyer for a

number of years, I just think some things are instinctive and I felt that they were ugly, when I say 'poor esthetic [sic] value.' I thought, personally, we would have a very, very difficult time in marketing. I thought they were very forward fashions. They would be very difficult to market in our area, if at all possible.

(Tr. 106-07.)

Baum's representations concerning the goods, made through his sales representative, Mark Grayson, constituted express warranties about the goods within the meaning of Utah Code Ann. § 70A-2-313(1). The goods were further subject to implied warranties of merchantability, under Section 70A-2-314, which states:

- (1) Unless excluded or modified (section 70A-2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.
- (2) Goods to be merchantable must be at least such as
 - (a) pass without objection in the trade under the contract description;

. . . .
- (3) Unless excluded or modified (section 70A-2-316) other implied warranties may arise from course of dealing or usage of trade.

The evidence was virtually undisputed that the goods did not conform to the representations and generally were not saleable. Baum thus breached the express and implied

warranties as to the quality of the goods, and defendant was entitled to reject.

III.

BAUM FAILED TO MITIGATE HIS DAMAGES

Following presentation of Baum's case, Knight moved the Court to dismiss the action for failure of Baum to prove any specific damages. (Tr. 94-95) which the Court erroneously denied. The remedies available to a seller were "the buyer wrongfully rejects" are generally itemized in Utah Code Ann. § 70A-2-703. If the court determines that Knight wrongfully rejected in this case, then Baum must look to the remedies enumerated in that section. Although Baum did not specifically elect which remedy he intended to pursue, his argument at the trial suggested his reliance on Section 70A-2-706 (damages for nonacceptance) or Section 70A-2-709 (action for the price).²

² The other remedies listed in section 70A-2-703 are inapplicable under the facts of this case. They provide that a seller may:

- (a) withhold delivery of such goods;
- (b) stop delivery by any bailee as hereafter provided (section 70A-2-705);
- (c) proceed under the next section respecting goods still unidentified to the contract;
-
- (f) cancel.

Under either section Baum had a duty to mitigate his damages by selling the goods or by subtracting the market value of the goods from the contract price. Baum did not meet this duty. Rather, he testified that when the goods were returned to him he refused to accept delivery from the carrier. (Tr. 28.) The goods were subsequently sold by the carrier to cover its costs. Baum failed to introduce evidence of the market value of the goods, and the lower court erred in not holding that Baum failed to meet his burden of proving damages. The seller has the burden of proving his damages by a preponderance of the evidence. 4 R. Anderson, Uniform Commercial Code § 2-708:15 (3d ed. 1983).

A. Damages for nonacceptance or repudiation.

Section 70A-2-708 provides for seller's damages for nonacceptance or repudiation, as follows:

- (1) Subject to subsection (2) and to the provisions of this chapter with respect to proof of market price (section 70A-2-723), the measure of damages for nonacceptance or repudiation by the buyer is the difference between the market price at the time and place for tender and the unpaid contract price together with any incidental damages provided in this chapter (section 70A-2-710), but less expenses saved in consequence of the buyer's breach.
- (2) If the measure of damages provided in subsection (1) is inadequate to put the seller in as good a position as performance would have done then the measure of damages is the profit (including reasonable overhead) which the seller would have made

from full performance by the buyer, together with any incidental damages provided in this chapter (section 70A-2-710), due allowance for costs reasonably incurred and due credit for payments or proceeds of resale.

(Emphasis added.)

Baum is precluded from recovering damages under this section because he failed to put on evidence of the market price of the goods in November of 1982. There is no evidence in the record that the formula in subparagraph (1) would not put plaintiff in as good a position as performance. "When lost profits are awarded, it is necessary that the record show why the contract price-market price formula was not appropriate."

4 R. Anderson, Uniform Commercial Code § 2-708:21.

The "lost profits" provisions of subparagraph (2) of section 70A-2-708 are inapplicable in the present case. That section was intended to compensate a seller such as a dealer or volume seller who, even though he has been able to resell the goods, has suffered a loss of profit because the person to whom he resold the goods would have bought the item in any event. Thus, the seller obtained only one sale when he could have had two. See 4 R. Anderson, Uniform Commercial Code § 2-708:21; J. White & R. Summers, Uniform Commercial Code 226 (1972).

Because Baum has failed to prove the elements of damages, including market value of the goods, he cannot recover under section 70A-2-708. That section contemplates a

mitigation of damages by the seller--which Baum failed to do when he allowed the goods to be liquidated by the carrier rather than to accept delivery and resell them.

B. Action for the price.

Section 70A-2-709 provides by the seller of the price, as follows:

- (1) When the buyer fails to pay the price as it becomes due the seller may recover, together with any incidental damages under the next section, the price
 - (a) of goods accepted or of conforming goods lost or damaged within a commercially reasonable time after risk of their loss has passed to the buyer; and
 - (b) of goods identified to the contract if the seller is unable after reasonable effort to resell them at a reasonable price or the circumstances reasonably indicate that such effort will be unavailing.
- (2) Where the seller sues for the price he must hold for the buyer any goods which have been identified to the contract and are still in his control except that if resale becomes possible he may resell them at any time prior to the collection of the judgment. The net proceeds of any such resale must be credited to the buyer and payment of the judgment entitles him to any goods not resold.
- (3) After the buyer has wrongfully rejected or revoked acceptance of the goods or has failed to make a payment due or has repudiated (section 70A-2-610), a seller who is held not entitled to the price under this section shall nevertheless be awarded

damages for nonacceptance under the preceding section.

(Emphasis added.)

This section appears to be inappropriate in the present case in governing the measure of damages. It allows a seller to recover the price of the goods if the goods were accepted, lost, or damaged, or if the seller has not been able to resell at a "reasonable price or the circumstances reasonably indicate that such effort will be unavailing." In the present case the evidence showed that defendant did not "accept" the goods.³ He rejected them and returned them to Baum, who allowed them to be liquidated. Therefore, Baum's claims for the price must fail, not having satisfied the requirements of Section 70A-2-709.

CONCLUSION

Knight urges this Court to hold in his favor and to reverse the judgment of the lower court on the basis that he justifiably rejected the goods shipped by Baum and gave effective notice thereof to Baum by communicating both with Mark Grayson and with Baum himself within a reasonable time after receipt of the goods. Knight's rejection and motive was

³ "Acceptance" is a term of art under the UCC, and is defined in section 70A-2-606, and includes situations where the buyer "fails to make an effective rejection." Defendant did not "accept" the goods, having made an effective rejection.

consistent with the usage of trade. Even if the Court upholds the finding that Knight's rejection was wrongful, the lower court must be reversed because Baum failed to put on evidence as to damages. Baum refused to receive the goods back and so failed to mitigate his damages by allowing them to be liquidated.

ADDENDUM

The following statutes from the Utah Uniform Commercial Code are relevant to the issues in this appeal:

Utah Code Ann. § 70A-1-201(26):

(26) A person "notifies" or "gives" a notice or notification to another by taking such steps as may be reasonably required to inform the other in ordinary course whether or not such other actually comes to know of it. A person "receives" a notice or notification when

(a) it comes to his attention; or

(b) it is duly delivered at the place of business through which the contract was made or at any other place held out by him as the place for receipt of such communications.

Utah Code Ann. § 70A-1-204(2), (3):

(2) What is a reasonable time for taking any action depends on the nature, purpose and circumstance 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.

Utah Code Ann. § 70A-1-205(3):

(3) A course of dealing between parties and any usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware give particular meaning to and supplement or qualify terms of an agreement.

(4) The express terms of an agreement and an applicable course of dealing or usage of trade shall be construed wherever reasonable as consistent with each other; but when such construction is unreasonable express terms control both course of dealing and usage of trade and course of dealing controls usage of trade.

Utah Code Ann. § 70A-2-208(2):

(2) The express terms of the agreement and any such course of performance, as well as any course of dealing and usage of trade, shall be construed whenever reasonable as consistent with each other; but when such construction is unreasonable, express terms shall control course of performance and course of performance shall control both course of dealing and usage of trade (section 70A-1-205).

Utah Code Ann. § 70A-2-313(1):

(1) Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

Utah Code Ann. § 70A-2-314:

(1) Unless excluded or modified (section 70A-2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the servicing for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(2) Goods to be merchantable must be at least such as

(a) pass without objection in the trade under the contract description; and

(b) in the case of fungible goods, are of fair average quality within the description; and

(c) are fit for the ordinary purposes for which such goods are used; and

(d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

(e) are adequately contained, packaged, and labeled as the agreement may require; and

(f) conform to the promises or affirmations of fact made on the container or label if any.

(3) Unless excluded or modified (section 70A-2-316) other implied warranties may arise from course of dealing or usage of trade.

Utah Code Ann. § 70A-2-601:

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.

Utah Code Ann. § 70A-2-602:

(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.

(2) Subject to the provisions of the two following sections on rejected goods (sections 70A-2-603 and 70A-2-604).

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

(b) if the buyer has before rejection taken physical possession of goods in which he does not have a security interest under the provisions of this chapter (subsection (3) of section 70A-2-711), he is under a duty after rejection to hold them with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them but

(c) the buyer has no further obligations with regard to goods rightfully rejected.

(3) The seller's rights with respect to goods wrongfully rejected are governed by the provisions of this chapter on seller's remedies in general (section 70A-2-703).

Utah Code Ann. § 70A-2-603:

(1) Subject to any security interest in the buyer (subsection (3) of section 70A-2-711), when the seller has no agent or place of business at the market of rejection a merchant buyer is under a duty after rejection of goods in his possession or control to follow any reasonable instructions received from the seller with respect to the goods and in the absence of such instructions to make reasonable effort to sell them for the seller's account if they are perishable or threaten to decline in value speedily. Instructions are not reasonable if on demand indemnity for expenses is not forthcoming.

(2) When the buyer sells goods under subsection (1), he is entitled to reimbursement from the seller or out of the proceeds for reasonable expenses of caring for and selling them, and if the expenses include no selling commission then to such commission as is usual in the trade or if there is none to a reasonable sum not exceeding ten percent on the gross proceeds.

(3) In complying with this section the buyer is held only to good faith and good faith conduct hereunder is neither acceptance nor conversion nor the basis of action for damages.

Utah Code Ann. § 70A-2-703:

Where the buyer wrongfully rejects or revokes acceptance of goods or fails to make a payment due on or before delivery or repudiates with respect to a part or the whole, then with respect to any goods directly affected and, if the breach is of the whole contract (section 70A-2-612), then also with respect to the whole undelivered balance, the aggrieved seller may

- (a) withhold delivery of such goods;
- (b) stop delivery by any bailee as hereafter provided (section 70A-2-705);

(c) proceed under the next section respecting goods still unidentified to the contract;

(d) resell and recover damages as hereafter provided (section 70A-2-706);

(e) recover damages for nonacceptance (section 70A-2-708) or in a proper case the price (section 70A-2-709);

(f) cancel.

Utah Code Ann § 70A-2-706:

(1) Under the conditions stated in section 70A-2-703 on seller's remedies, the seller may resell the goods concerned or the undelivered balance thereof. Where the resale is made in good faith and in a commercially reasonable manner the seller may recover the difference between the resale price and the contract price together with any incidental damages allowed under the provisions of this chapter (section 70A-2-710), but less expenses saved in consequence of the buyer's breach.

(2) Except as otherwise provided in subsection (3) or unless otherwise agreed resale may be at public or private sale including sale by way of one or more contracts to sell or of identification to an existing contract of the seller. Sale may be as a unit or in parcels and at any time and place and on any terms but every aspect of the sale including the method, manner, time, place and terms must be commercially reasonable. The resale must be reasonably identified as referring to the broken contract, but it is not necessary that the goods be in existence or that any or all of them have been identified to the contract before the breach.

(3) Where the resale is at private sale the seller must give the buyer reasonable notification of his intention to resell.

(4) Where the resale is at public sale

(a) only identified goods can be sold except where there is a recognized market for a public sale of futures in goods of the kind; and

(b) it must be made at a usual place or market for public sale if one is reasonably available and except in the case of goods which are perishable or threaten to decline in value speedily the seller must give the buyer reasonable notice of the time and place of the resale; and

(c) if the goods are not to be within the view of those attending the sale the notification of sale must state the place where the goods are located and provide for their reasonable inspection by prospective bidders; and

(d) the seller may buy.

(5) A purchaser who buys in good faith at a resale takes the goods free of any rights of the original buyer even though the seller fails to comply with one or more of the requirements of this section.

(6) The seller is not accountable to the buyer for any profit made on any resale. A person in the position of a seller (section 70A-2-707) or a buyer who has rightfully rejected or justifiably revoked acceptance must account for any excess over the amount of his security interest, as hereinafter defined (subsection (3) of section 70A-2-711).

Utah Code Ann. § 70A-2-708:

(1) Subject to subsection (2) and to the provisions of this chapter with respect to proof of market price (section 70A-2-723), the measure of damages for nonacceptance or repudiation by the buyer is the difference between the market price at the time and place for tender and the unpaid contract price together with any incidental damages provided in this chapter

(section 70A-2-710), but less expenses saved in consequence of the buyer's breach.

(2) If the measure of damages provided in subsection (1) is inadequate to put the seller in as good a position as performance would have done then the measure of damages is the profit (including reasonable overhead) which the seller would have made from full performance by the buyer, together with any incidental damages provided in this chapter (section 70A-2-710), due allowance for costs reasonably incurred and due credit for payments or proceeds of resale.

Utah Code Ann. § 70A-2-709:

(1) When the buyer fails to pay the price as it becomes due the seller may recover, together with any incidental damages under the next section, the price

(a) of goods accepted or of conforming goods lost or damaged within a commercially reasonable time after risk of their loss has passed to the buyer; and

(b) of goods identified to the contract if the seller is unable after reasonable effort to resell them at a reasonable price or the circumstances reasonably indicate that such effort will be unavailing.

(2) Where the seller sues for the price he must hold for the buyer any goods which have been identified to the contract and are still in his control except that if resale becomes possible he may resell them at any time prior to the collection of the judgment. The net proceeds of any such resale must be credited to the buyer and payment of the judgment entitles him to any goods not resold.

(3) After the buyer has wrongfully rejected revoked acceptance of the goods or has failed to make a payment due or has repudiated (section 70A-2-610), a seller who is held not entitled to the price under this section shall nevertheless

be awarded damages for nonacceptance under the preceding section.

Knight has further appended hereto copies of the following documents:

1. Memorandum Decision. (R. 189-92.)
2. Findings of Fact and Conclusions of Law. (R. 196-99.)

DATED THIS 30th day of July, 1985.

VAN COTT, BAGLEY, CORNWALL & McCARTHY
J. Keith Adams
R. Stephen Marshall

By RS Stephen Marshall
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CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed four true and correct copies of the foregoing Appellant's Brief, postage prepaid, this 30TH day of July, 1985, to:

John C. Greene, Esq.
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311 South State Street, Suite 280
Salt Lake City, Utah 84111

RS Stephen Marshall

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FILED

FILED IN CASE NO. 83-401
COUNTY OF SALT LAKE

DEC 18 1984

H. D. J. 3
By A. J. Sundberg

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

MICHAEL BAUM, dba	:	MEMORANDUM DECISION
BAUMWEAR BY MICHAEL BAUM,	:	
	:	CIVIL NO. C-83-401
Plaintiff,	:	
	:	
vs.	:	
	:	
DEAN KNIGHT, dba THE	:	
FASHION CORNER,	:	
	:	
Defendant.	:	

Trial in the above matter was held on November 30, 1984. The Court having heard testimony, received evidence and exhibits, took the matter under advisement, and now renders its decision.

The Court finds as follows: That the plaintiff offered to sell to the defendant at "going out of business" discount the goods in question; that defendant knew that the plaintiff was going out of business, and that the plaintiff was required to vacate his premises immediately, and that the plaintiff was moving out of New York City; that the defendant waived the receiving of a "sample" because of his knowledge of plaintiff's urgency in disposing of the goods; that defendant accepted the offer and authorized shipment of the goods; that the purchase order was signed by Grayson for the defendant, and that the purchase order specifically required "written authorization" for any goods to be returned; that the plaintiff told the defendant

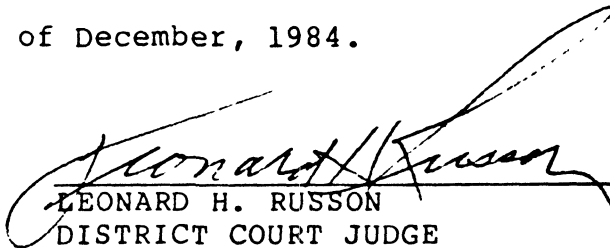
at the time of sale that such sale was final, and that he could not take back the goods, and that the defendant in response thereto indicated he had faith in Grayson, and could always unload the goods if he did not like them; that the defendant attempted on his own to sell the goods on his own invoice subsequent to his receipt of the same in Salt Lake City; that after the defendant's failure to sell the goods on his own invoice, he then attempted to return the same, but was refused; that defendant sent the goods anyway, without written authorization; that the defendant never attempted to contact the plaintiff in regards to return of the goods until it was too late for these seasonal goods to be moved; that defendant knew from the beginning of the plaintiff moving from New York City back to his home in Ithaca, New York, but made no attempt to locate the plaintiff in a timely manner; that the defendant testified that he would have contacted the plaintiff if he had known his address; that the defendant admits that some manufacturers require written authorization before goods are returned; that the goods in question were not defective, but defendant simply did not like the aesthetics when receiving the same in Salt Lake City; that the goods were described to the defendant by Grayson and by the plaintiff prior to and at the time of the sale; that defendant knew the goods were seasonable, but made no timely effort to contact the plaintiff; that Grayson was not an employee or agent of the plaintiff but,

in fact, a freelancer representative who, in this case, was more allied with the defendant than the plaintiff; that this was not an "approval sale"; and that Grayson had no authority to bind the plaintiff.

Based upon the above findings, it is the conclusion of this Court that plaintiff is entitled to Judgment in the amount of \$13,392.50, plus the legal rate of interest from October 28, 1982 until paid. Each party will bear his own attorney's fees.

Plaintiff's attorney will prepare the Findings of Fact, Conclusions of Law, and Judgment.

Dated this 18th day of December, 1984.


LEONARD H. RUSSON
DISTRICT COURT JUDGE

ATTEST
H. DIXON HINDLEY
Clerk

By A. J. Sundberg
Deputy Clerk

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, postage prepaid, to the following this 18 day of December, 1984:

John C. Green
Attorney for Plaintiff
311 South State, Suite 280
Salt Lake City, Utah 84111-2377

J. Keith Adams
R. Stephen Marshall
Attorneys for Defendant
P. O. Box 3400
Salt Lake City, Utah 84110-3400

DL Sundberg

JAN 10 1985

H. Dixon Hirdley, Clerk of Dist. Court
By R. A. Lundberg

JOHN C. GREEN, No. 1242
Attorney for Plaintiff
311 South State, Suite 280
Salt Lake City, Utah 84111-2377
Telephone: (801) 531-1300

IN THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

MICHAEL BAUM, d.b.a.	:	FINDINGS OF FACT
BAUMWEAR BY MICHAEL BAUM,	:	CONCLUSIONS OF LAW
	:	
Plaintiff,	:	Civil No. C83-401
	:	
vs.	:	
	:	Judge Leonard H. Russon
DEAN KNIGHT, d.b.a. THE	:	
FASHION CORNER,	:	
	:	
Defendant.	:	

The above-entitled matter having come on regularly for trial on the 30th day of November, 1984, before The Honorable Leonard H. Russon, Judge of the above-entitled Court. The plaintiff Michael Baum was represented by his counsel of record, John C. Green, the defendant Dean Knight was represented by his counsel, R. Steven Marshall. And the witnesses having been sworn and having testified and the Court having heard the argument of counsel and having taken the matter under advisement and having issued its Memorandum Decision and being fully advised in the premises, the Court now makes these its

FINDINGS OF FACT

1. That the defendant is a resident of Salt Lake County, State of Utah, and operates a business known as The Fashion Corner located at 6825 South 400 West, Midvale, Utah.

2. That on or about the 28th day of October, 1982, the plaintiff delivered to the defendant goods on open account for the sum of \$13,392.50.

3. That the plaintiff had offered to sell defendant at "going out of business" discount the goods in question. That the plaintiff was going out of business, that he was being required to vacate his premises immediately and that he was moving from New York City, New York.

4. That defendant waived the right to receive a "sample" of the goods because he knew of plaintiff's urgency in disposing of the goods.

5. That the defendant accepted the offer and authorized shipment of the goods.

6. That a purchase order was prepared and signed by Mark Grayson for the defendant and that the purchase order specifically required "written authorization for any goods to be returned."

7. That plaintiff told defendant at the time of the sale that such sale was final and that he "plaintiff" could

not take back the goods and that the defendant in response indicated he had faith in Grayson and could always unload the goods if he did not like them.

8. That the defendant attempted to sell the goods on his own invoice after receipt of said goods.

9. That after defendant's failure to sell the goods on his own invoice he attempted to return the same but was refused in a telephone conversation with the plaintiff but sent the goods anyway without any written authorization.

10. The defendant in regards to the return of the goods until it was too late for the seasonal goods to be moved and further made no attempt to locate the plaintiff in a timely manner even though he knew he was moving to Ithaca, New York.

11. Defendant indicated that some manufacturers require written authorization before goods are returned but testified that the goods were not defective but that defendant simply did not like the aesthetics of the goods when they arrived even though the goods were described to the defendant by Mark Grayson and by plaintiff.

12. The defendant knew the goods were seasonable but made no timely effort to contact plaintiff.

13. Grayson was not an employee or agent of the plaintiff but was more closely allied with the defendant.

14. The defendant knew that the sale was not an "approval sale."

FROM THE FOREGOING THE COURT NOW MAKES THESE, ITS
CONCLUSIONS OF LAW

Plaintiff is entitled to Judgment in the amount of \$13,392.50 plus the legal rate of interest from October 28, 1982, until paid, together with his costs.

DATED this 10th day of JAN, 1985.

ATTEST
H. DIXON HINDLEY
Clerk

BY THE COURT:

By L. Lundberg
Deputy Clerk

Leonard H. Russon
JUDGE LEONARD H. RUSSON

CERTIFICATE OF HAND DELIVERY

I hereby certify that I hand delivered a copy of the foregoing Findings of Fact and Conclusions of Law to Mr. R. Stephen Marshall of Van Cott, Bagley, Cornwall & McCarthy, Attorneys for Defendant, at 50 South Main Street, Suite 1600, Salt Lake City, Utah 84144, on this 28th day of December, 1984.

Chris Dan