

1978

Instant Housing et al v. Sebrite Corporation et al : Brief of Plaintiff in Intervention-Respondent

Utah Supreme Court

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INSTANT HOUSING, MARK SQUIRES
and MARGARET SQUIRES, his wife,

Plaintiffs,

-vs-

SEBRITE CORPORATION and
UTAH STATE TAX COMMISSION,

Defendants and
Third Party Plaintiffs,

-vs-

Case No. 15784

ALF BOSTRUM and STAKER OLSEN,

Third Party Defendants.

and

ZIONS FIRST NATIONAL BANK,
a national banking association,

Plaintiff in Intervention
and Respondent,

-vs-

TULOKA AFFILIATES, INC.
(formerly SEBRITE CORPORATION)
and THE UTAH STATE TAX COMMISSION,

Defendants in Intervention
and Appellants.

FILED

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Clerk, Supreme Court, Utah

BRIEF OF PLAINTIFF IN INTERVENTION-RESPONDENT

Appeal from the Judgment of the
Third District Court for Salt Lake County
Honorable David K. Winder, Judge

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IN THE SUPREME COURT OF THE STATE OF UTAH

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TABLE OF CONTENTS

| | <u>Page</u> |
|---|-------------|
| STATEMENT OF KIND OF CASE | 1 |
| DISPOSITION IN THE DISTRICT COURT | 1 |
| RELIEF SOUGHT ON APPEAL | 1 |
| IDENTIFICATION OF THE PARTIES | 1 |
| STATEMENT OF FACTS | 1 |
| ARGUMENT | 4 |
| <p>THE SQUIRES HAVE CLEAR TITLE TO THE MOBILE HOME SUBJECT ONLY TO THE PURCHASE MONEY SECURITY INTEREST OF ZIONS FIRST NATIONAL BANK.</p> | |
| <p>A. ZIONS FIRST NATIONAL BANK'S PURCHASE MONEY SECURITY INTEREST TAKES PRIORITY OVER ANY AND ALL CLAIMS ON BEHALF OF SEBRITE TO THE SQUIRES MOBILE HOME BY VIRTUE OF THE PROVISION OF U.C.A. §70A-2-403 (1953).</p> | 4 |
| <p>B. ZIONS FIRST NATIONAL BANK'S PURCHASE MONEY SECURITY INTEREST TAKES PRIORITY OVER ANY AND ALL CLAIMS ON BEHALF OF SEBRITE AND THE SQUIRES' MOBILE HOME UNDER THE PROVISIONS OF U.C.A. §70A-9-307 (1953).</p> | 11 |
| CONCLUSION | 15 |

| | <u>Page</u> |
|--|-------------|
| <u>CASES CITED</u> | |
| <u>Adams v. City National Bank and Trust Co. of Norman,</u> <u>Oklahoma, 565 P.2d 26, 21 U.C.C. Rep. 1026 (Okla. 1977) . .</u> | 8, 14 |
| <u>American Nat. Red Cross v. Brandeis Machinery & Supply Co.,</u> <u>286 Ky. 665, 151 S.W. 2d 445 (1941)</u> | 8 |
| <u>Correria v. Orlando Bank and Trust Co., 235 So.2d</u> <u>20, 7 U.C.C. Rep. 937 (Fla. Dist. Ct. App., 1970)</u> | 13 |
| <u>Godfrey v. Gilsdorf, 86 Nev. 714, 476 P.2d</u> <u>3 (1970)</u> | 9 |
| <u>Gudger v. Manton, 134 P.2d 217 (Cal. 1943)</u> | 7 |
| <u>Humphrey Cadillac and Oldsmobile Company Inc. v.</u> <u>Sinard and Humphrey Cadillac and Oldsmobile Company</u> <u>Inc. v. Arkema, 85 Ill. App. 2d 64, 229 N.E. 2d</u> <u>365 (1967)</u> | 10 |
| <u>Kranich and Bach v. Miller, 3 U.C.C. Rep. 499,</u> <u>(N.Y. Sup. Ct., 1976)</u> | 13 |
| <u>Morthland v. Ute Liner, Inc., 28 Utah 2d 154,</u> <u>499 P.2d 842 (1972)</u> | 5, 8, 9 |
| <u>Nauman v. First National Bank of Allen Park,</u> <u>50 Mich. App. 41, 212 N.W. 2d 760, 13 U.C.C. Rep. 1191</u> <u>(1973)</u> | 12 |
| <u>Northwestern Union Packet Co. v. Clough,</u> <u>20 Wall (U.S.) 528, 22 L ed 406</u> | 7 |
| <u>Palmer v. Booth and Cowley, Ltd., 7 U.C.C. Rep.</u> <u>182 (N.Y. Sup. Ct., 1970)</u> | 10 |
| <u>Texas National Bank of Houston v. Aufderheide,</u> <u>235 F. Supp. 599 (Ed Ark 1964)</u> | 13 |
| <u>Williams v. Western Surety Company, and Sherwood</u> <u>and Roberts v. Williams, 10 U.C.C. Rep. 122</u> <u>(Wash. Ct. App., 1972)</u> | 9 |

AUTHORITIES CITED

Utah Code Annotated (1953) as amended:

| | |
|------------------------------|---------------------------|
| Section 70 A-2-403 | 4,5,6,7,8,9,10,1 12,16 |
| 70 A-9-307 | 11,12,13,14,15,1 |

| | <u>Page</u> |
|---|-------------|
| 3 AM JUR 2nd, Agency 420 §2 | 7 |
| <u>Restatement of Agency 2d</u> | |
| 8A | 7 |
| 8B | 8 |
| 175 | 7 |
| 201 | 7 |
| Comment 2 Official Comments, U.C.C. 2-403 | 6 |
| Comment 2 Official Comments, U.C.C. 9-307 | 13 |

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Case No. 15784

BRIEF OF PLAINTIFF IN INTERVENTION-RESPONDENT

STATEMENT OF THE KIND OF CASE

This is an action to determine which party has a superior interest in a Mobile Home: Sebrite, who placed the mobile home for sale on consignment with a mobile home dealer, or Zions, who financed the purchase of the mobile home by a buyer in the ordinary course of business.

DISPOSITION IN THE DISTRICT COURT

The case came before the Honorable David K. Winder, District Judge, on Zion's Motion for Summary Judgment. From Summary Judgment in favor of Zions, Sebrite appealed. Sebrite Corporation has never affected service of process on Alf Bostrum and Staker Olsen on its third party complaint.

RELIEF SOUGHT ON APPEAL

The Supreme Court should affirm the judgment of the District Court.

IDENTIFICATION OF THE PARTIES

Zions First National Bank, Plaintiff in Intervention—Respondent, is referred to herein as "Zions". Plaintiff, Instant Housing, is referred to as "Instant Housing". Plaintiffs, Mark Squires and Margaret Squires, are referred to as the "Squires". The Defendants and Defendants in Intervention, Tuloka Affiliates, formerly Sebrite Corporation, are collectively referred to herein as "Sebrite".

STATEMENT OF FACTS

The Statement of Facts set forth in Appellants' brief (pp 2-3) is inadequate in detail to present a clear understanding of the case. Respondents, therefore, present this additional statement.

Prior to October, 1974, Sebrite, pursuant to a loan guarantee arrangement with Commercial Security Bank obtained certain mobile homes from Mobile Estates, Inc. Sebrite paid Mobile Estates' obligation to Commercial Security Bank and received full title to and possession of the

mobile homes (See Appellants' brief at page 2).

Sebrite placed several of these mobile homes, including the mobile home purchased by the Squires, on consignment with Instant Housing for sale to the public (R-67). Instant Housing, being a dealer in mobile homes, sold the mobile homes, including the Squires' mobile home, for Sebrite out of inventory and as a part of and in the ordinary course of its business and with no control over the sales being retained by Sebrite (R-68).

On or about October 5, 1976, the Squires executed and delivered to Instant Housing a Retail Installment Contract and Security Agreement for the purchase of the 1973 Ramada Mobile Home from Instant Housing (R-73). The Squires purchased the mobile home in the ordinary course of business (R-68). Upon execution of this Retail Installment Contract, the Squires took possession of the mobile home and have retained possession to the present time.

On occasion, some of the contracts for the sale of mobile homes by Instant Housing to third parties were presented to Sebrite for the purpose of Sebrite's financing the purchase. This was one of those occasions in which the contract for the purchase of the mobile home by the Squires was submitted to Sebrite Corporation to be purchased by Sebrite as described above. However, Sebrite initially by telephone in early January 1975, and subsequently by letter dated January 17, 1975, informed Instant Housing that they were returning the Squires Contract and would not purchase the same (R-78). Sebrite directed Instant Housing to either return the mobile home or to finance the unit elsewhere and if Instant Housing elected to finance the purchase elsewhere to pay Sebrite the net sales price determined after Instant Housing had deducted its sales commissions and costs of sale (R-78).

At no time between October 5, 1974, and January, 1975, did Sebrite purchase the Squires contract. However, during this period of time, the officers of Instant Housing were under the mistaken assumption that Sebrite would ultimately purchase the Squires contract. Instant Housing, acting under this mistaken assumption, submitted the necessary documents and papers to the Utah State Tax Commission in order to have title issued on the mobile home (R-69). In making this application to the Utah State Tax Commission, Instant Housing named Sebrite as the lien holder thereon under the mistaken assumption that ultimately Sebrite Corporation would accept the purchase of the contract. The fact that Sebrite was mistakenly named as lien holder on the title is undisputed in the record (R-68-69).

Upon receipt of Sebrite's direction to Instant Housing that they would not purchase the Squires contract and that Instant Housing at its option may finance the sale of the Squires mobile home elsewhere, Instant Housing engaged the services of an agent, House of Compacts, for the purpose of assisting with financing the Squires' purchase of the mobile home through Zions First National Bank. The principal managers of Instant Housing were also principal owners and managers of the House of Compacts. The House of Compacts had previously established a dealer relationship with Zions First National Bank and had signed Dealer Agreements and related documents in connection therewith. Therefore, for convenience in financing the transaction, an arrangement was made between Instant Housing and the House of Compacts whereby the House of Compacts would become the agent of Instant Housing for the purpose of handling the sale of the mobile home to the Squires and financing the sale with Zions through the dealer arrangement previously established between Zions and the House of Compacts (R-69).

Pursuant to this agency arrangement between Instant Housing and the House of Compacts, the House of Compacts then entered into the Installment Sale and Security Agreement with the Squires for the purchase of the mobile home under the dealer arrangement established by the House of Compacts with Zions (R 5A-61, 75-76). Zions then paid the House of Compacts the purchase price for the mobile home, which funds were then delivered by the House of Compacts to Instant Housing and subsequently tendered to Sebrite (R-70-71). Sebrite retained the check which paid the Squires' contract for in excess of one month without cashing the check. Subsequently, a dispute arose between Instant Housing and Sebrite as to a claimed offset by Instant Housing and a stop payment order was placed on the check.

The Installment Sale and Security Agreement entered into by and between the Squires and the House of Compacts was duly assigned to Zions. Zions accepted and purchased the Installment Sale and Security Agreement without knowledge of or notice of any claim on the part of Sebrite to the mobile home (R-70).

ARGUMENT

THE SQUIRES HAVE CLEAR TITLE TO THE MOBILE HOME SUBJECT ONLY TO THE PURCHASE MONEY SECURITY INTEREST OF ZIONS FIRST NATIONAL BANK.

- A. ZIONS FIRST NATIONAL BANK'S PURCHASE MONEY SECURITY INTEREST TAKES PRIORITY OVER ANY AND ALL CLAIMS ON BEHALF OF SEBRITE TO THE SQUIRES MOBILE HOME BY VIRTUE OF THE PROVISIONS OF U.C.A. §70A-2-403 (1953).

It is submitted that Sebrite has no right, title or interest in the mobile home purchased by the Squires. U.C.A. §70A-2-403 (1953) controls:

"70A-2-403. Power to transfer--Good faith purchase of goods--"Entrusting."--(1) A purchaser of goods acquires all title which his transferor had or had

power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase, the purchaser has such power even though

- (a) the transferor was deceived as to the identity of the purchaser, or
 - (b) the delivery was in exchange for a check which is later dishonored, or
 - (c) it was agreed that the transaction was to be a "cash sale", or
 - (d) the delivery was procured through fraud punishable as larcenous under the criminal law.
- (2) Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entrustor to a buyer in ordinary course of business.
- (3) "Entrusting" includes any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor's disposition of the goods have been such as to be larcenous under the criminal law.
- (4) The rights of other purchasers of goods and of lien creditors are governed by the chapters on Secured Transactions (chapter 9), Bulk Transfers (chapter 6) and Documents of Title (chapter 7)."

There is no dispute that Sebrite entrusted the mobile home to Instant Housing to sell on consignment, that Instant Housing is a merchant dealing in mobile homes, and that the Squires were buyers in the ordinary course of business. The requisite elements of U.C.A. §70A-2-403(2) are met. See Morthland v. Ute Liner, Inc., 28 Utah 2d 154, 499 P.2d 842 (1972).

Under this section of the code, innocent members of the public

who buy in the ordinary course of business from dealers in goods of that kind are protected against claims of sellers who entrusted the purchased goods into the hands of the dealer for the purpose of sale. The mobile home was placed on consignment with Instant Housing by Sebrite for the purpose of sale to the public. Sebrite can have no reason to complain since this purpose was accomplished when the mobile home was sold to the Squires.

The enactment of the Uniform Commercial Code, §2-403, codified the established principle that the buying public must be protected against the reservation of hidden interests in goods sold by dealers in goods of that kind. See Comment 2 of Official Comments, Uniform Commercial Code, §2-403. Certainly Mark Squires and Margaret Squires, his wife, should be able to purchase a mobile home from a dealer in mobile homes with assurance that the dealer was selling the mobile home free and clear of all hidden interests. Consequently, the sale of the mobile home to the Squires cut off any right to the mobile home that Sebrite may have had. The interest of Sebrite in the mobile home having been terminated as of the time the Squires entered into a contract for the purchase of the mobile home, the Squires then ultimately granted Zions a purchase money security interest therein. Full title to the mobile home now belongs to the Squires free and clear of all claims on the part of Sebrite and subject only to the purchase money security interest of Zions who ultimately financed the purchase.

Sebrite argues it had terminated its agency with Instant Housing and that it had never given authority to Instant Housing to seek the assistance of an agent to assist in financing the sale. The natural extension of this argument is that the Squires have no valid contract for the purchase of:

mobile home and consequently have no right thereto. Sebrite is mis-directed in its arguments. These arguments ignore the existence of U.C.A. §70A-2-403 and the protections afforded thereby to innocent purchasers. The questions of agency and lack of authority are totally immaterial. Subsection (3) of §70A-2-403 indicates that innocent purchasers are protected even if the seller on consignment obtains possession in a manner "such as to have been larcenous under the criminal law." The issue is "entrustment" not existence or non existence of agency.

Nevertheless, it is clear from the record that Sebrite retained no control over the manner or method of selling the mobile home. That was left totally to Instant Housing (R-67-68). It is a fundamental concept of agency law that whatever an agent does in the lawful prosecution of the transaction entrusted to him is the act of the principle. Northwestern Union Packett Co. v. Clough, 20 Wall (U.S.) 528, 22 L ed 406; Gudger v. Manton, 134 P.2d 217 (Cal. 1943); 3 AM JUR 2nd, Agency 420 §2.

Further, Instant Housing had inherent authority to do whatever was necessary to accomplish the purpose of the consignment: sell the mobile home. This included the utilization of Instant Housing in order to finance the purchase through Zions. Restatement of Agency 2d §§ 8A, 175 and 201.

Moreover, Sebrite through its employee, Larry Glad, by his letter of January 17, 1975, (R-70A), the import of which is undisputed, refused to finance the Squires' contract, returned the contract to Instant Housing and directed Instant Housing to either return the mobile home or finance the unit elsewhere. Pursuant to this direction, Instant Housing took the steps necessary to obtain financing from other sources. Financing was finally obtained through Zions with the assistance of the House of

Compacts' dealer arrangement previously established with Zions. The House of Compacts' relationship with Instant Housing was solely for the purpose of financing the sale of the mobile home to the Squires in furtherance of the direction given by Sebrite to Instant Housing. All of these facts are undisputed. The very purpose for which Sebrite placed the mobile home with Instant Housing was accomplished by the sale to the Squires. The Squires in reliance on the authority of Instant Housing signed the Installment Sale and Security Agreement and Zions financed the purchase. In addition to the protections afforded by Section 2-403, Sebrite is now estopped to assert lack of authority. Morthland v. Ute Liner, Inc., Supra; Adams v. City National Bank and Trust Co. of Norman, Oklahoma, 565 P.2d 26, 21 U.C.C. Rep. 1026 (Okla. 1977); Americ Nat. Red Cross v. Brandeis Machinery & Supply Co., 286 Ky. 665, 151 S.W. 2d 445 (1941); Restatement of Agency 2d § 8B.

Furthermore, any claims Sebrite may have against Instant Housing for failure to ultimately deliver to Sebrite the money Instant Housing has paid by Zions for the mobile home, and any claims Instant Housing may have against Sebrite based on an accounting of funds, can be resolved between these parties if they choose to pursue a lawsuit on these issues. Had Sebrite timely cashed the check tendered by Instant Housing to pay for the Squires' mobile home, or had the accounting dispute between Instant Housing and Sebrite not arisen, this lawsuit would not have been brought. In the equity and conscience of the court, Sebrite should not be allowed to rectify their own failure to cash the check which would have paid for the mobile home in full by subjecting two innocent parties, Squires and Zions, to this lawsuit.

Nevertheless, the purchase of the mobile home by the Squires terminates

all of Sebrite's rights to the mobile home under U.C.A. §70A-2-403. The Squires now hold title to the mobile home free and clear of all claims on the part of Sebrite subject only to the security interest the Squires granted ultimately to Zions. Sebrite cannot now be heard to complain as against the Squires and Zions.

Courts throughout the country have had little difficulty protecting buyers in the ordinary course of business.

This court in Morthland v. Ute Liner, Inc., Supra, correctly concluded, based upon principles of estoppel and U.C.A. §70A-2-403, that the buying public is protected from hidden interests of sellers who entrust or allow to be entrusted the purchased goods into the hands of a dealer for the purpose of sale.

The Nevada Supreme Court in Godfrey v. Gilsdorf, 86 Nev. 714, 476 P.2d 3 (1970) applied §2-403 of the Uniform Commercial Code in holding that the original owner of an automobile was estopped from ascertaining title to the automobile he placed for sale with a used car dealer who sold the car to a buyer in the ordinary course of business. Section 2-403 was applied notwithstanding the Nevada Motor Vehicle Code which required transfers of ownership take place only by the owners signing and delivering title to the vehicle to the purchaser.

Likewise, in the consolidated cases of Williams v. Western Surety Company, and Sherwood and Roberts v. Williams, 10 U.C.C. Rep. 122 (Wash. Ct. App., 1972), once again the court found that innocent purchasers of a mobile home from a mobile home dealer took free and clear of any claims to the mobile home on the part of the original owner. As between the buyers in the ordinary course of business and the finance company which financed their purchase of the mobile home, the court below entered

judgment for the financing company. No appeal was taken from that judgment.

In the case of Palmer v. Booth and Cowley, Ltd., 7 U.C.C. Rep. 182 (N.Y. Sup. Ct., 1970) the New York court protected the buyer in the ordinary course of business even though, as in our case, there is a claim of lack of authorization for the sale. In so holding, the court stated:

"The only issue in dispute is in reference to the authority of defendant corporation to make the "sale", and this issue is resolved in favor of the plaintiff as a matter of law. Plaintiff has been able to establish that he was a buyer in the ordinary course of business (UCC § 1-201 [9]), and therefore is entitled to be treated as such (UCC § 2-403 [2]). Defendant Hazlett, having invested the corporation with apparent authority to dispose of the automobile, and plaintiff, in good faith, having dealt on the face of such apparent authority, is estopped from asserting title as against plaintiff. (Zendman v. Harry Winston, Inc., 305 N.Y. 180)." Id. at 183.

In the consolidated cases of Humphrey Cadillac and Oldsmobile Company Inc. v. Sinard and Humphrey Cadillac and Oldsmobile Company Inc. v. Arkema, 85 Ill. App. 2d 64, 229 N.E.2d 365 (1967) the court was again confronted with the application of §2-403 of the Uniform Commercial Code in light of the claim of lack of authority to consummate a sale. The original owner of the automobiles in question claimed the dealer had exceeded his authority in making the sales which were the subject of the lawsuit. In so holding, the court stated:

"In view of the facts in this case, for us to hold that the plaintiff had a right to replevy and to retain the automobiles purchased by the defendants would be neither in the spirit nor the letter of Chap 26 § 2-403, Supra."

The present case involves a married couple, innocent purchasers

of a mobile home who have been placed in the awkward, indeed frightening situation of being unable to obtain clear title to their mobile home through no fault of their own. The Squires purchased their mobile home from Instant Housing, a dealer in mobile homes, through the House of Compacts and became contractually bound to pay Zions the purchase price. The Squires had every right to assume that in so doing they were purchasing the mobile home free and clear of any interest in an unknown third party, and Zions had a similar right in financing the Squires' purchase of the mobile home.

This case is exactly the kind of case the drafters of the Uniform Commercial Code envisioned when they drafted Section 2-403. To hold for Sebrite under the facts of this case would clearly frustrate the purpose of the Code.

Based upon U.C.A. §70A-2-403 and principles of equity and estoppel, the Squires hold clear title to their mobile home free and clear of all claims thereto on the part of Sebrite and subject only to the purchase money security interest of Zions First National Bank.

The judgment of the District Court in granting Zions motion for summary judgment was proper and should be affirmed.

B. ZIONS FIRST NATIONAL BANK'S PURCHASE MONEY
SECURITY INTEREST TAKES PRIORITY OVER ANY
AND ALL CLAIMS ON BEHALF OF SEBRITE AND THE
SQUIRES' MOBILE HOME UNDER THE PROVISIONS
OF U.C.A. § 70A-9-307.

Sebrite may attempt to assert a security interest in the Squires' mobile home. Any such claim, if made, would also be without merit. U.C.A. § 70A-9-307 in part provides:

"70A-9-307. Protection of buyers of goods.--(1) A buyer in ordinary course of business (subsection (9) of section 70A-1-201) other than a person buying farm products from a person engaged in farming operations

takes free of a security interest created by his seller even though the security interest is perfected and even though the buyer knows of its existence.

(2) In the case of consumer goods, a buyer takes free of a security interest even though perfected if he buys without knowledge of the security interest, for value and for his own personal, family or household purposes unless prior to the purchase the secured party has filed a financing statement covering such goods.

As has been indicated, there is no dispute that Sebrite entrusted the mobile home to Instant Housing to sell on consignment, that Instant Housing is a merchant dealing in mobile homes, and that Squires were buyers in the ordinary course of business. Section 2-403 and Section 9-307 are often used interchangeably depending upon the commercial setting in order to achieve the same results: protection of buyers in the ordinary course of business. Nauman v. First National Bank of Allen Park, 50 Mich. App. 41, 212 N.W.2d 760, 13 U.C.C. Rep. 1191 (1973).

Any claim Sebrite may have to a security interest would have to be based upon the undisputed fact that Instant Housing submitted lien documents to the Department of Motor Vehicles based upon the mistaken assumption that Sebrite would ultimately purchase the Squires contract (R-69).

There is no evidence that there was ever a written security agreement between Sebrite and Instant Housing covering the mobile homes placed by Sebrite with Instant Housing for sale on consignment; nor is there any evidence that Sebrite ever filed a financing statement covering these mobile homes. Sebrite simply did not have, and under the facts of this case cannot claim, a security interest in the Squires' mobile home.

Sebrite may attempt to claim the Squires were on notice of the lien placed on the title to their mobile home by mistake. Disregarding the

mistake, Sebrite still cannot prevail. Simple knowledge of the security interest is not sufficient. The operation and effect of Section 9-307(1) & (2) were stated by the Federal District Court in Arkansas in the case of Texas National Bank of Houston v. Aufderheide, 235 F. Supp. 599 (Ed Ark 1964) wherein the court cited a portion of the Official Comments to Section 9-307 as follows:

"Reading the two provisions together, it results that the buyer takes free if he merely knows that there is a security interest which covers the goods but takes subject if he knows, in addition, that the sale is in violation of some term in the security agreement not waived by the words or conduct of the secured party.

The limitations which this Section imposes on the persons who may take free of a security interest apply of course only to unauthorized sales by the debtor. If the secured party has authorized the sale in the security agreement or otherwise, the buyer takes free without regard to the limitations of this Section.

Similarly, in the case of Kranich and Bach v. Miller, 3 U.C.C. Rep. 499, (N.Y. Sup. Ct., 1976), the court held that Section 9-307 protected a purchaser in the ordinary course of business in circumstances where there was a consignment agreement between the consignor and consignee wherein the consignor retained title but authorized the consignee to sell a piano. The court concluded that the purchaser was protected even if the security interest had been perfected by filing and the purchaser had knowledge of its existence.

Further, the Florida District Court in the case of Correria v. Orlando Bank and Trust Co., 235 So.2d 20, 7 U.C.C. Rep. 937 (Fla. Dist. Ct. App., 1970), held that a purchaser of an automobile in the ordinary course of business from an automobile dealer's inventory takes free of a security interest held by the financing bank, even though the security

interest is perfected and although the purchaser knows the security

interest exists. In so holding the court stated:

"Thus it is obvious from the trust agreement that Mr. Hooker did exactly what was expected of him by the bank, i.e., he sold a car to a buyer (the plaintiff, Mr. Correria) in the ordinary course of business out of an inventory of goods in which kind Mr. Hooker dealt. Any security interest of the bank is thereafter cut off. This determination enjoys support in the majority of jurisdictions.

Finally, Sebrite may attempt to assert that the lien noted on the title to the Squires' mobile home by mistake was not created by the House of Compacts, the entity selling the mobile home to the Squires. Again disregarding the fact that this lien was placed on the title by mistake, the fact that mere notation of a lien does not create a security interest, and that under Section 9-307 knowledge of a lien is insufficient to protect the secured party, Sebrite still does not prevail.

It is a fundamental principle with universal application that the acts of an agent are considered to be the acts of its principle. Accordingly, Instant Housing sold the mobile home to the Squires and it was Instant Housing who mistakenly made application to have Sebrite's name placed as the lien holder on the title to the Squires' mobile home.

The Oklahoma Supreme Court in the recent 1977 decision in Adams v. City National Bank and Trust Company of Norman, Oklahoma, Supra, directly addresses the issue of the meaning of the words in Section 9-307 "created by his seller." In that case, the court was confronted with the question of whether under 9-307 a bank who claimed a security interest in an automobile prevailed over a buyer in the ordinary course of business. The facts of the case are that a car dealership held title to a used car and assigned this title to one of its employees for purposes of its employ-

pledging the car as collateral for a personal loan. Thereafter, the car dealership sold the same automobile to a purchaser in the ordinary course of business. Inasmuch as it was the car dealer's employee that created the security interest in favor of the defendant bank, the bank argued that Section 9-307 did not protect the purchaser in the ordinary course of business because the outstanding security interest was not "created by his seller." The Oklahoma Supreme Court concluded that under principles of estoppel and the underlying purpose of Section 9-307, that even though the security interest was created by the salesman for his own private purposes, that under Section 9-307 the car dealership and the salesman were deemed to be the same for purposes of determining the protections afforded buyers in the ordinary course of business under Section 9-307. In so holding, the court stated:

"For the purpose of this decision under § 9-307, we find the same entity created the security interest and sold the Ford.

Accordingly, we hold Bank's security interest in the Ford terminated upon its sale to Adams as a buyer in the ordinary course of business."

Under no stretch of the imagination can Sebrite claim a security interest in the Squires' mobile home. Not only is there no security interest existing in the mobile home under U.C.A. §70A-9-307, the Squires and Zions First National Bank take free and clear of any interest Sebrite may claim therein.

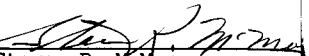
CONCLUSION

Because of its own actions and omissions Sebrite has attempted to place both the Squires and Zions, two innocent parties, in the unconscionable position of challenging their respective interests in the mobile home. As the district court below concluded, based on

principles of estoppel and justice as codified by Sections 2-403 and 9-307, Sebrite cannot and should not prevail. The decision of the district court should be affirmed.

Respectfully submitted this 17th day of November, 1978.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I hand delivered two true and correct copies of the foregoing brief to James A. McIntyre, attorney for Sebrite Defendant and Defendant in Intervention, at his offices at 2525 South Main Street, #2, Salt Lake City, Utah 84115, this 17th day of November, 1978.

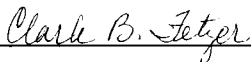


TABLE OF CONTENTS

| | Page |
|---|------|
| NATURE OF THE CASE | 1 |
| DISPOSITION IN THE LOWER COURT | 1 |
| RELIEF SOUGHT ON APPEAL | 1 |
| STATEMENT OF FACTS | 2 |
| ARGUMENT | |
| THE UNCORROBORATED TESTIMONY OF A MINOR, AGE SIXTEEN AT THE TIME OF THE ALLEGED OFFENSE, WAS LEGALLY INSUFFICIENT TO CONVICT THE APPELLANT OF INCEST WHEN THE MINOR VOLUNTARILY AND KNOWINGLY PARTICIPATED IN THE UNLAWFUL ACT | 4 |
| CONCLUSION | 15 |

CASES CITED

| | Page |
|--|-------|
| <u>Motherly v. State</u> , 71 P.2d 1094 (Okla. 1937) | 10,11 |
| <u>People v. Cox</u> , 227 P.2d 290 (Calif. 1951) | 11,12 |
| <u>People v. McRae</u> , 187 P.2d 741 (Calif. 1947) | 12 |
| <u>State v. Clawson</u> , 308 P.2d 264 (Utah 1957) | 9 |
| <u>State v. Fertig</u> , 233 P.2d 347 (Utah 1951) | 5,7 |
| <u>State v. Georgopoulos</u> , 492 P.2d 1353 (Utah 1972) | 5 |
| <u>State v. Helm</u> , 563 P.2d 794 (Utah 1977) | 5 |
| <u>State v. Howard</u> , 400 P.2d 332 (Ariz. 1965) | 12 |
| <u>State v. Huntsman</u> , 204 P.2d 448 (Utah 1949) | 10 |
| <u>State v. Kimball</u> , 146 P. 313 (Utah 1915) | 10 |
| <u>State v. Thompson</u> , 87 P. 709 (Utah 1906) | 10 |
| <u>Woody v. State</u> , 238 P.2d 367 (Okla. 1951) | 12 |

STATUTES

| | |
|--|------|
| Utah Code Ann. § 55-10-86 (1953) | 8 |
| Utah Code Ann. § 76-2-301 (1953) | 6 |
| Utah Code Ann. § 76-5-401 (1953) | 7 |
| Utah Code Ann. § 76-5-406 (1953) | 6 |
| Utah Code Ann. § 76-6-102 (1953) | 2,15 |
| Utah Code Ann. § 76-7-102 (1953) | 9 |
| Utah Code Ann. § 77-31-18 (1953) | 4,5 |

OTHER AUTHORITIES

| | |
|--|-------|
| 19 A.L.R.2d §§ 9 & 21 | 10 |
| Wharton's Criminal Evidence 13th ed. Vol. 3 § 647 .. | 10,12 |