

1979

# Keith Jorgensen dba Keith Jorgensen's Magnavox Entertainment Center v. Craig Clark : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE

STATE OF UTAH

\* \* \* \* \*

KEITH JORGENSEN, d/b/a )  
KEITH JORGENSEN'S )  
MAGNAVOX ENTERTAINMENT )  
CENTER, )

Plaintiff and )  
Respondent, )

Case No. 16358

vs. )

CRAIG CLARK, )

Defendant and )  
Appellant, )

\* \* \* \* \*

BRIEF OF RESPONDENT KEITH JORGENSEN

\* \* \* \* \*

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Clk. Supreme Court Utah

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QUESTIONS PRESENTED

1) Does a person waive his right to contest on appeal an issue which he conceded at trial?

2) Under the Uniform Commercial Code, does a wrongful revocation of acceptance of goods give rise to an action for the price?

STATEMENT OF FACTS

Defendant-Appellant has filed an Appeal and in his brief has made a statement of facts setting forth the facts as most favorable to his position. Respondent wishes only to state that, contrary to the allegation in Appellant's Statement of the Kind of Case, Appellant in fact made a down payment of \$310.00 on the organ (transcript of trial, p. 108, line 23), and that, contrary to Appellant's Statement of Facts, the organ is presently in Appellant's garage, and not in his home (transcript of trial, p. 100, line 4). In all other respects, Respondent accepts Appellant's Statement of Facts.

POINT I

APPELLANT SHOULD BE ESTOPPED ON APPEAL FROM RAISING THE ISSUE OF ACCEPTANCE.

Counsel for Appellant states in his brief: "The issue primarily centers around the appropriate measure of damages." (p. 1). He then correctly observes that the issue of damages hinges on whether or not Appellant accepted the goods in question. He goes to great lengths to argue that since Appellant effectively rejected the organ which he purchased from Respondent, he should be liable only for the damages which he caused Respondent, and not for the contract price. It is interesting to note, however, that

during the discussion regarding jury instructions, Appellant's attorney conceded that Appellant accepted the organ, and he did not submit any jury instructions on that question. At that time, the defense asserted by Appellant was that of unconscionability, and there was no evidence at all before the trial court that the organ was not accepted by the Appellant, that it was nonconforming, or that Appellant had not had ample time to inspect it. Therefore, the trial court ruled, as a matter of law, that there was acceptance on the part of the Appellant (record, p. 122). Ironically, only after the jury found no unconscionability did Appellant forward his theory of nonacceptance.

It is a well-established legal principle that on appeal, parties waive their right to contest issues which they failed to contest at trial. Five (5) Am. Jur. 2d, Appeal and Error §545 (1962) states:

In order to avoid the delay and expense incident to appeals, reversals, and new trials upon grounds which might have been corrected in the trial court if the question had been properly raised there, the appellate courts have developed and applied the rule that they will normally only consider questions which were raised and reserved in the lower court.

See also 5 Am. Jur. 2d, Appeal and Error §566 (1962); McGrath vs. Manufacturers Trust Co., 338 U.S. 241; and State vs. Woolman, 84 Utah 23, 33 P.2d 640. In the case of Whewell vs. Dobson, 227 N.W. 2d 115 (1975), it was held that the buyer of Christmas trees was precluded from arguing on appeal that the seller failed to perform certain conditions precedent to his recovery from an action on the price, where the buyer did not raise those issues at trial. In the

instant case, Appellant, as buyer, is now likewise attempting to argue on appeal that the Respondent cannot recover the contract price because of the buyer's non-acceptance of the organ. It seems patently unfair that Appellant, after losing the issue of unconscionability at trial, can now appeal his case on the entirely new theory of non-acceptance, and it is therefore urged that Appellant be estopped from now claiming non-acceptance of the organ.

## POINT II

EVEN IF APPELLANT IS PERMITTED TO ARGUE HIS THEORY OF NON-ACCEPTANCE, THE FACTS INDICATE THAT APPELLANT INDEED ACCEPTED THE ORGAN, AND SUBSEQUENTLY WRONGFULLY REVOKED THAT ACCEPTANCE.

From the outset we need to establish that under the Uniform Commercial Code, there is a big difference between a buyer's rejection of goods and his revocation of acceptance. White and Summers note that distinction and state:

Rejection is a combination of the buyer's refusal to keep delivered goods and his notification to the seller that he will not keep them. Revocation of acceptance is a similar refusal in the buyer's part to keep goods, but in this case it is a refusal which comes at a later time in the transaction and after the buyer has "accepted" by allowing the time for rejection to pass or by some act with respect to the goods. White and Summers, Uniform Commercial Code 247 (1972).

Nowhere does the Code define "rejection", but it does define "acceptance".

Section 2-606 of the Uniform Commercial Code states:

(1) Acceptance of goods occurs when the buyer

(a) after a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will take or retain



- (b) fails to make an effective rejection (subsection (1) of Section 2-602), but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them; or
- (c) does any act inconsistent with the seller's ownership; but if such act is wrongful as against the seller it is an acceptance only if ratified by him.

Comment one (1) under that same section states: "If the goods conform to the contract, acceptance amounts only to the performance by the buyer of one part of his legal obligation." See also 2 Anderson, Uniform Commercial Code 190 (2nd Ed. 1971). According to comment three (3), "payment made after tender is always one circumstance tending to signify acceptance of the goods but in itself it can never be more than one circumstance and is not conclusive." See 66 Am. Jur. 2d Sales §385 (1962), where it states: "If the buyer pays for the goods or signifies that he will pay for them, at least where advance payment or payment prior to examination is not required, the buyer will be deemed to have accepted the goods. Moreover, it is indicated that the act of the buyer in arranging for payment on a deferred or other basis may constitute acceptance under the Code." It therefore appears from the foregoing that after the seller tenders the goods, the buyer has a reasonable period of time in which to inspect them, "not only for their conformity, but also as to whether he wants to take them at all." Peters, "Remedies for Breach of Contracts Relating to Sale of Goods Under the Uniform Commercial Code: A Road Map for

Article 2, 1973 Yale Law Journal 199, 241 (1953). Also see Appellant's brief, pps. 6-7. If the buyer does not reject the goods, or if he signifies to the seller [by paying the price, etc.] that the goods are conforming or that he will take or retain them in spite of their non-conformity, then he has accepted them (§2-606). After acceptance, the buyer has no legal right to return the goods to the seller, whether he wants to or not, unless the goods are nonconforming, and unless the buyer seasonably notifies the seller of such nonconformity (§2-608).

In the instant case Appellant did not reject the organ, but instead revoked his acceptance of it. The trial clearly established that Appellant received in his home tender of the organ. By agreement between the parties, he was given two days to inspect it for its conformity and to decide if he wanted to buy it at all. Subsequently Appellant decided he wanted to keep it, and so he made a down payment and signed the Installment Sale Contract. At the moment he signed his name, Appellant accepted the organ, and said in effect, "I promise to pay for this unless it proves to be nonconforming." See White and Summers p. 212. Two days later, Appellant revoked his acceptance, and breached his contract. There was nothing wrong with the organ. It conformed in every respect to Respondent's representations. Nevertheless, Appellant simply decided that he didn't want it after all. He therefore wrongfully revoked his acceptance.

### POINT III

APPELLANT'S WRONGFUL REVOCATION OF ACCEPTANCE GAVE TO RESPONDENT AN ACTION FOR THE PRICE UNDER THE UTAH UNIFORM COMMERCIAL CODE §2-709.

When Appellant accepted the organ, he became liable for the contract price. Section 2-607 of the Uniform Commercial Code states in part:

- (1) The buyer must pay at the contract rate for any goods accepted.
- (2) Acceptance of goods by the buyer precludes rejection of the goods accepted. . . .

Comment one (1) under that section further provides that "Once the buyer accepts a tender, the seller acquires a right to its price on the contract terms."

When Appellant wrongfully revoked his acceptance, Respondent was afforded by the contract the appropriate remedies under the Uniform Commercial Code. Section 2-703 speaks of the seller's remedies both for wrongful rejection and for wrongful revocation of acceptance. It states:

Where the buyer wrongfully rejects or revokes acceptance of goods . . . the aggrieved seller may . . . recover damages for non-acceptance (Section 2-708) or in a proper case the price (Section 2-709).

The distinction between wrongful rejection and wrongful revocation of acceptance now becomes crucial. Wrongful rejection--or "non-acceptance"--permits an aggrieved seller to recover only damages under §2-708, while wrongful revocation of acceptance is the "proper case" for an aggrieved seller to recover the price under §2-709. That section (2-709) states:

- (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 . . . .

Comment two (2) further states:

- (2) The action for the price is now generally limited to those cases where resale of the goods is impracticable except where the buyer has accepted the goods or where they have been destroyed after risk of loss has passed to the buyer. (underlining added)

A proper reading of the rest of §2-709 clearly shows that the above quoted portion is the part which correctly applies to the instant case, and is totally consistent with §2-607 and with §2-703.

In his brief for the case at bar, Counsel for Appellant has either missed or ignored the important distinction between "rejection (pre-acceptance behavior) and revocation of acceptance (post-acceptance behavior)." White and Summers, p. 253. Counsel quotes a long passage from White and Summers, which states that "effective rejections" by the buyer give rise only to liability for damages, and not for an action on the price (Appellant's brief, p. 5). That is certainly correct, as we have already seen. But then White and Summers go on to discuss the appropriate remedy for "effective but wrongful revocations," and conclude that:

any buyer who accepts goods is liable for the price unless he makes a procedurally effective and substantially rightful revocation of acceptance; we believe that a procedurally effective but substantially wrongful revocation should not free him from price liability under §2-709(1)(a). White and Summers, p. 213.

Likewise, on page 3 of Appellant's brief, Counsel quotes from Bender's Uniform Commercial Code Service, the following:

When there is a rejection of goods, the buyer is not exercising any control or dominion over them, whether the rejection is rightful or wrongful. In essence, it would be essential for the seller, regardless of the cause of the rejection, to recover the goods from the carrier, bailee or the buyer. He should take the appropriate action necessary to accomplish this purpose.

Unfortunately, however, Counsel ended the quotation at this point and failed to continue:

On the other hand, where there is a revocation of acceptance, this presupposes a prior acceptance by the buyer. The seller here should be entitled to the action for the purchase price because the goods are in the exclusive control of the buyer and the additional burden imposed upon the seller of reclaiming the goods is not necessarily well placed. 3A Bender's Uniform Commercial Code Service, 13-76 (1978).

It should be remembered that Appellant never rejected the organ, either rightfully or wrongfully. Instead, he accepted it after having it in his home and under his exclusive control for two days, by making the down payment and by signing the Installment Sale Contract. Two days after he had accepted the organ, which was conforming, Appellant revoked his acceptance. Therefore, the quotations in Appellant's brief dealing with liability for damages caused by wrongful rejection, while accurate, are not relevant to the case at bar; for in fact there was no rejection, but instead a wrongful revocation of acceptance. Anderson suggests: The seller may recover the contract price with respect to accepted goods, as to which there has not been any rightful revocation of acceptance. Anderson, Uniform Commercial Code, p. 401).

Nordstrom further observes:

If the seller retakes the goods as the owner, he ought not also have the claim for their price under the 'goods accepted' provision of section 2-709. His remedy is under section 2-708. Of course, if the seller refuses the attempted wrongful revocation, the goods are still the buyer's and the seller may recover the price. Nordstrom, Law of Sales, 544 (1970).

Finally, Squillante and Fonseca have noted that "the action for price becomes due immediately upon the seller's delivery of the goods and the buyers default in payment of the purchase price." 3 Squillante and Fonseca, Williston on Sales, 433 (1974).

While admittedly many courts construing the law of sales have not spoken in precisely the terms of rejection and revocation of acceptance, most have held that recovery of the contract price is allowed immediately after the buyer purchases a conforming good. See for example D. A. Taylor Co., vs. Paulson, \_\_\_\_\_ Utah 2d \_\_\_\_\_, 552 P.2d 1274 (1976), in which the Utah Supreme Court observed simply that when a seller sold and a buyer ordered and accepted some carpet, the buyer was liable for the price. Other Courts, however, have in fact spoken in terms of acceptance and wrongful revocation of acceptance. In Beco, Inc., vs. Minnechange Golf Course, 5 Comm. Cir. 444, 256 A2d 522 (1968) the court held that when conforming goods have been delivered to, and accepted by, the buyer, the seller cannot sue for damages under §2-708 but must sue for the contract price under §2-709. Likewise the court in Haken vs. Sheffler, 24 Mich. App. 196, 180 N.W. 2d 206 (1970) observed that §2-709 authorizes an action for the price when goods have been accepted, as

contrasted with damages under §2-708, when there has been a

"non-acceptance" by the buyer. A Missouri court has held that an action for the price accrues to the seller when the goods have been accepted by the buyer. In that case the court specifically held that the seller was under no obligation under the Uniform Commercial Code to respossess or resell the air conditioners which the buyer had accepted simply because the buyer subsequently revoked his acceptance.

R. R. Waites Co., Inc., vs. E. H. Thrift Air Conditioning, Inc.,  
510 S. W. 2d 759 (Mo. 1974). In the instant case the Appellant has wrongfully revoked his acceptance of the organ. But he should not be able to revoke his liability for the price under the contract.

#### POINT IV

ANY ERRORS MADE BY THE TRIAL COURT WERE HARMLESS.

In his brief, Counsel for Appellant argues that the trial court's jury instructions were both erroneous and inadequate. Specifically he argues that since the court refused to read two sections of the Uniform Commercial Code to the jury, counsel for Appellant was denied the opportunity to argue the elements of rejection and acceptance. It seems unusual that counsel would blame the court for failing to raise an issue which he himself failed to raise at trial. Counsel was given ample opportunity to argue non-acceptance of the organ, but was preoccupied with trying to prove unconscionable selling techniques on the part of Respondent, and subsequent mental anguish on the part of Appellant. In his brief, Counsel for Appellant cites Cervitor Kitchens, Inc., Vs. Chapman, 7 Wash. App. 520, 500 P.2d 783 (1972), which

held that the reasonable time for inspection of the goods by the buyer before he will be deemed to have accepted them is a question of fact if the facts are disputed. In the instant case those facts simply were not disputed at trial, and there was no reason for the jury to decide something which was not in issue, regardless of whether, in retrospect, counsel wishes it had been. Counsel for Appellant failed to mention in his brief that the above cited case then went on to say that if, as here, the facts are undisputed concerning the duration of time for inspection by the buyer of the delivered goods, the question as to whether the buyer has accepted the goods and is therefore liable for the price, becomes one for the court to decide. See also LaVilla Fair vs. Lewis Carpet Mills, Inc., 219 Kan. 395, 545 P.2d 825 (1976). In the instant case the facts concerning the amount of time in which Appellant was given to reject the organ were undisputed. By agreement between the parties he was given two days. The court simply held, therefore, that as a matter of law, Appellant had accepted the organ, and was liable for the price (record, p. 122).

As to counsel's exception to the "forced sale" instruction, it must be pointed out that even if, arguendo, the measure of damages was erroneous, it did not prejudice Appellant's case in any way. The jury decided the issue of unconscionability against Appellant, and therefore the question of damages or set-off to Appellant became a nullity.



As to Respondent's burden of proof, Respondent clearly alleged and proved the making of the contract and Appellant's subsequent breaching thereof. Any allegations of rejection or non-acceptance should have been raised at trial as an affirmative defense by Appellant. See Corbin, Contracts 981, 698 (1952).

#### CONCLUSION

Since Appellant failed to contest at trial that he had accepted the organ, he should be estopped on appeal from claiming non-acceptance. Even if he is permitted to allege non-acceptance, however, the facts indicate that Appellant indeed did accept the organ, but later wrongfully revoked that acceptance. The appropriate statutes and all the authorities suggest that a wrongful revocation of a contract gives rise to an action for the price. It is therefore urged that the judgment of the Trial Court be affirmed.

Respectfully Submitted,



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