1979

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

Utah Supreme Court

IN THE SUPREME COURT OF THE

STATE OF UTAH

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

Plaintiff,

vs.

CRAIG CLARK,

Defendant.

Case No. 16358

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# BRIEF OF APPELLANT CRAIG CLARK

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APPEAL FROM JUDGMENT OF THE SECOND

DISTRICT COURT, WEBER COUNTY

HONORABLE JOHN F. WAHLQUIST, DISTRICT JUDGE

* * * * * * *

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## STATEMENT OF THE KIND OF CASE

Keith Jorgensen's Magnavox Entertainment Center obtained a judgment against defendant Craig Clark in the sum of $4,986.27 plus costs having sued Appellant pursuant to section 70A-2-709, Utah Code Annotated, as amended, action for the price. Appellant Clark and wife signed an Instalment Sale Contract on or about August 16, 1976 to purchase a Model 284 Thomas organ and refused to make any payments under the agreement. Plaintiff Jorgensen obtained judgment for the full purchase price of the Thomas organ and defendant Clark appeals that judgment. The issue primarily centers around the appropriate measure of damages.

## DISPOSITION IN LOWER COURT

The Trial Court, Honorable John F. Wahlquist presiding sitting with a jury, granted judgment against defendant Craig Clark after a one day trial. Motion for a new trial by defendant Clark was denied as was motion for judgment notwithstanding the verdict. Appellant's counterclaim for storage was denied and not submitted to the jury. The jury answered several Interrogatories and the Trial Court entered judgment after memorandums were submitted.

## RELIEF SOUGHT ON APPEAL

Appellant Clark seeks reversal of the judgment of the lower Court or in the alternative granting a new trial.

## STATEMENT OF FACTS

Appellant Clark saw an ad on television promoting Thomas organs at Keith Jorgensen Magnavox Center. He called

their downtown store in Salt Lake City and inquired in general about their Thomas organs for sale. Neither Appellant nor his wife played the organ. The same day, Saturday, August 14, 1976, Appellant drove from his home in Roy, Utah to respondents store in Salt Lake to examine their merchandise.

Appellant was taken to the Fashion Place Mall location after hours, to examine organs having first inspected organs at Respondent's downtown store. Appellant wanted time to think about buying an organ and requested time to do so (R 86). Respondent's employee suggested a free home trial offer. A new model 284 Thomas organ was delivered to Appellant on a free home trial basis by Respondent's employees. The organ was delivered that same night at approximately 11:30 p.m. Employees of Respondent left Appellant's home approximately 1:00 a.m. on August 15, 1976 after demonstrating the organ to Appellant.

Store employees arrived on Monday, August 16, 1976 at 7:00 p.m. at Appellant's home to see if Appellant had decided to purchase the organ. Appellant and his wife were not ready to purchase the organ at that time. Appellant's wife was basically against the idea (R 90).

Appellant and his wife were talked into driving to Salt Lake to look at other organs that same night, August 16, 1976. The parties arrived as the Fashion Place Mall was closing. Two employees of Respondent waited on Appellant and his wife as they perused Thomas organs. Although Appellant's wife was against the idea, Appellant together with his wife signed an Installment Sale Contract to purchase a Thomas organ. Appellant felt certain pressure to make a decision

that night from Respondent's two employees (R 92).

Appellant wanted to arrange his own financing but was told the store arranges its own financing (R 93). The agreement was then signed by Appellant and his wife to purchase the organ that was left in their home. Appellant left the Fashion Place Mall store approximately 10:30 p.m., the evening of August 16, 1976.

Appellant, deciding he had made a mistake, called respondent's Fashion Place store in less than two days stating he would return the organ to the store or respondent could pick it up.

Respondent's employee, Mark Wilkey, acknowledged that Appellant called within two days after signing the agreement offering to return the organ or Respondent come pick it up (R 54). Mark Wilkey acknowledged several other phone calls by Appellant to the same effect. Mr. Wilkey referred the matter to his supervisor, Greg Jukes. No decisions were ever reached by Respondent to allow Appellant to return the organ or that Respondent would pick up the organ. Appellant's requests were ignored by Respondent. Interestingly, Mark Wilkey admits that Respondent teaches its employees to place an organ in the home of reluctant purchasers. It seems the psychology of placing the organ in the home somehow makes the would be purchaser somewhat reluctant to have the same removed from his home and places something of a moral obligation on the buyer (R 33). Also, Mark Wilkey admits two salesmen waited on Appellant at all times and further admitted there was some degree of pressure applied to cause Appellant to sign the Installment Sale Agreement (R 46).

Employees are on a straight commission.

Appellant called every other day speaking to a variety of sales people over his request to return the organ. After approximately two weeks of calling, Greg Jukes informed Appellant Respondent was not going to take back the organ. Appellant did not make any monthly payments pursuant to the Installment Sale Agreement. The only sum paid by Appellant was a down payment of $310.00 on August 16, 1976. Appellant nor his wife have ever used the organ and it is stored in Appellant's home as they have refused to use it (R 99). There is no defect in the particular organ and it appears to operate satisfactorily.

## POINT ONE

## RESPONDENT IS NOT ENTITLED TO AN ACTION FOR THE PRICE UNDER 70A-2-709

Appellant effectively rejected the goods within a reasonable time precluding acceptance and action for the price under Section 70A-2-709. Upon delivery of merchandise a buyer under the Utah Uniform Commercial Code, has an opportunity to inspect the goods, not only for their conformity, but also as to whether he wants to take them at all. See 70A-2-606 UCA, as ammended. Section 70A-2-606 (1) (a) gives the buyer a reasonable opportunity to inspect the goods and to signify acceptance by some means. Importantly, Section 70A-2-606 (1) (b) allows the buyer a reasonable opportunity to inspect the goods and make an effective rejection before acceptance can occur.

Rejection of a totaling conforming tender is of

course wrongful, and gives rise to non-price remedies for the seller, as in 70A-2-708, but it does not amount to an acceptance so long as the statutory procedural requisities for an "effective rejection have been met". See Section 70A-2-606 (1) (b) and Section 70A-2-709 (3).

See White and Summers, Uniform Commercial Code, West Publishing Company, 1972, Chapter 7, dealing with Action For the Price-Goods Accepted, page 211,

> The most troubling case is the one in which the buyer has no substantive basis on which to reject or revoke but he nevertheless effectively rejects or revokes procedurally, that is, he acts in time and properly communicates his rejection or revocation to the seller. All commentators agree that the Code draftsmen comtemplated effective rejections which might be substantively wrongful and intended that all such rejections forestall acceptance without regard to their substantive wrongfulness. Writing for the New York Law Revision Commission, Professor Honnold stated: "Buyer may have the power to make an 'effective' rejection even though his action is a breach of contract and subjects buyer to liability for damages. Professor Honnold's judgment is consistent with the negative implication of 2-606 (1) (b) which provides that failure to make an 'effective rejection' results in acceptance. The negative implication of that subsection is that any effective rejection bars acceptance. We conclude therefore, that a procedurally proper (that is, effective) rejection forestalls acceptance whether or not the rejection is rightful (that is, founded upon a proper substantive basis). This conclusion is consistent with the policy behind 2-709, which normally imposes the burden of redisposing of the goods upon the seller.

Appellant Clark by effectively communicating to respondent his rejection of the organ precluded action for the price under 70A-2-709. Communication was undeniably received by Respondent that Appellant Clark did not want the organ

and he would bring it to Respondent's place of business or Respondent may pick it up. This rejection was within two days after signing the Installment Sale Agreement, not an unreasonable time to inspect the goods and communicate an effective rejection to Respondent. Appellant had the organ in his home only a total of four days before communicating his rejection to Respondent.

Respondent had a remedy under Section 70A-2-708 for nonacceptance and could have recovered the difference between the market price at the time and place for tender and the unpaid contract price together with any incidental damages. Instead it choose specific performance, that is, action for the total price.

According to 3A Bender's Uniform Commercial Code Service Seller's Action For The Price Section 13.06, page 13-76,

> 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.

See, also, Peters,"Remedies for Breach of Contracts Relating to Sale of Goods Under the Uniform Commercial Code: A Road Map for Article 2," 73 Yale Law Journal 199, 241 et seq. (1953),

> Upon arrival, the buyer has an opportunity to inspect the goods, not only for their comformity, but also as to whether he wants to take them at all. Rejection of a totally conforming tender is of course wrongful, and gives rise to non-price remedies for the seller, but it does not amount to an accep-

tance so long as the statutory procedural requisites for an "effective" rejection have been met.

Clearly, when there has been a right or wrongful rejection of the goods, the seller has an obligation to recover the goods in question and he should take the appropriate action necessary to accomplish this purpose. All authors agree the seller is further entitled to his non-price remedies.

One who rejects in an effective manner is not liable under Section 70A-2-709 even though this may be a wrongful act. Section 70A-2-602 UCA deals with rejection. Rejection of goods must only be made within a reasonable time after the delivery or tender.

## POINT TWO

## TRIAL COURT ERRED IN NOT SUBMITTING DEFENDANT'S PROPOSED JURY INSTRUCTIONS

Appellant Clark submitted several (20) proposed jury instructions which were all rejected by the Trial Court as "argumentative". The Trial Court did not alter, amend or substitute for Appellant proposed instructions and thereby effectively prevented Appellant's theories from going before the jury.

Appellant's proposed Jury Instruction No. 1 is a restatement of 70A-2-709 in its entirety. Respondent. admitted during the course of the trial that it was suing under Section 70A-2-709. Appellant should have been allowed to have argued that Respondent had not proved all of the essential elements under Section 70A-2-709. That is, Respondent should have been required to prove (1) the goods were accepted (70A-2-709 (1) (a)) and that the goods were not rejected by Appellant (70A-2-709 (3)). The Trial Court did not require the Respondent to meet its burden of proof on all the essential elements of Section 70A-2-709.

It seems elementary that if Respondent's theory was for the price under 70A-2-709, the statute, or its restatement, should have been submitted to the jury to decide if the facts warranted a remedy under Section 70A-2-709.

More importantly, counsel would have had an opportunity to argue the elements or lack thereof to the jury.

Jury Instruction No. 2 was also rejected by the Court as "argumentative". Instruction No. 2 sets forth Section 70A-2-706. A remedy which is available to Respondent if the case is not a proper action for the price. Appellant was effectively prevented from arguing that other remedies were available to Respondent, other than action for the price.

The Trial Court failed to instruct the jury of the availability of Section 70A-2-708, regarding damages for non-acceptance. Appellant's proposed instruction No. 1 refers to section 70A-2-708 indicating, a seller who is held not entitled to the price under this section shall nevertheless be awarded damages for nonacceptance under the preceding section, (70A-2-708).

Appellant took exception to the Court failing to instruct the jury as requested (R 120-123).

## POINT THREE

## TRIAL COURT'S JURY INSTRUCTIONS WERE INADEQUATE

The Trial Court did not submit one instruction to the jury concerning formation of a contract, acceptance of the goods, rejection of the goods, damages, and availability of other remedies to Respondent.

Two Interrogatories were submitted to the jury concerning selling techniques of merchants to persuade buyers to purchase goods. These Interrogatories are totally inadequate to present to the jury the issue of rejection of the goods and preclusion of 70A-2-709 as a remedy.

Appellant took exception to the lack of proper jury instructions submitted to the trier of fact (R 122).

The Trial Court did not submit to the jury for its factual determination whether Respondent had proved by a preponderance of the evidence all of the essential elements of an action for the price, which necessarily includes proof of acceptance or lack of effective rejection.

## POINT FOUR

## INTERROGATORY NO. 2 SUBMITTED BY THE TRIAL COURT IS AN ERRONEOUS STATEMENT OF THE MEASURE OF DAMAGES

The Trial Court, in Question No. 2, asked the jury to find,

> What value do you find proven by a preponderance of the evidence the organ would have brought if sold on a "forced sale" basis at or about the time the defendant denounced the contract?
>
> Value: $_____
>
> Explanation:
> If there was a market for such an item, such as a market for used cars at an auction, then the Court needs to know what the actual value was at that time.

The Trial Court has erroneously stated the measure of damages by asking the jury to find the value of the organ on a "forced sale" basis. Under Section 70A-2-708, the measure of damages for non-acceptance is the difference between the market price at the time and place for tender and the unpaid contract price together with any incidental damages.

The Court did not ask the jury to determine the market price at the time and place of tender. Nor did it ask the jury to determine any incidental expenses.

There is no explanation where the Court came up with its own measure of damages, that is sale on a "forced sale" basis.

The measure of damages under 70A-20-706 is the difference between the resale price and the contract price together with any incidental damages when the resale is made in good faith and in a commercially reasonable manner. There is absolutely no language concerning sale on a "forced sale"

basis. Interestingly, both Appellant and Respondent objected to the granting of this Interrogatory to the jury (R 122 and R 119).

The jury placed a figure of $2,600.00 on the value of the organ if sold on a "forced sale" basis.

## POINT FIVE

## THE TRIAL COURT DETERMINED DAMAGES PRE-EMPTING THE JURY

Even though the jury detemined that the organ would sell for $2,600.00 on a "forced sale" basis the Court ruled that Respondent was entitled to a judgment for the full price, plus interest at the rate of 16.25% interest from the date of the agreement August 16, 1976 to the date of the judgment February 5, 1979, plus $917.50 attorney fees. Interest for over two years at 16.25% interest is computed to be $1,165.77. Total judgment awarded was $4,986.27.

Appellant had requested a jury trial and as such the jury should have determined the damages, if any, awarded to the Respondent and against Appellant.

If credit for $2,600.00, computed on a "forced sale" basis, had been given to Respondent, the judgment balance would have been $303.00 plus interest and attorney fees.

## POINT SIX

## THE ISSUE OF REJECTION AND ACCEPTANCE WAS A QUESTION OF FACT TO BE DETERMINED BY THE JURY NOT BY THE COURT

Contrary to the requests of Appellant no jury instruction or Interrogatory was submitted by the Trial Court to determine the factual issue of rejection or acceptance of the organ.

Appellant submitted to the Court Proposed Jury Instruction No. 1 but it was rejected by the Trial Court as being "argumentative". The Trial Court did not submit to the jury the issue of whether the organ had been rejected, or in the alternative accepted, by Appellant. The Trial Court ruled in its Memorandum Decision the organ had been accepted by Appellant. In its decision, the Trial Court stated, "under the new Consumer Protection Statutes, the plaintiff may still sue for the purchase price when the merchandise has in fact been examined and accepted and where the merchandise is not in any way deficient."

It is not known what the Trial Court meant by new Consumer Protection Statutes. The only law relied upon by Appellant is the Uniform Commercial Code adopted and interpreted by the State of Utah.

The issue of rejection or acceptance should have been submitted to the jury. The Trial Court effectively prevented Appellant's arguments to the jury by not allowing them to decide the issue.

Questions of acceptance or rejection of goods are to be resolved by the finder of fact and depend upon ascertain-

ment of the intent of the parties, Chrysler Corporation vs. Adamitic, Inc. 208 N.W. 2d 97, 59 Wis, 2d 219 (1973).

What constitutes a conforming delivery, acceptance, rejection, or revocation of acceptance, with respect to the sale of goods or questions of fact to be determined within the frame work of the facts in each particular case, Marine Mart, Inc. vs. Pearce 480 S.W. 2d 133, 252 Ark. 601 (1962).

Also, in Trio Estates, Limited vs. Dyson 178 S.E. 2d 778, 10 N.C. App. 375 (1971), where the Buyer admitted purchase and receipt of a machine and that he did not make installment payments, denial by Buyer of any indebtedness to Seller raised an issue as to whether the Buyer had accepted the machine, which issue should have been determined by the jury from a consideration of all of the evidence in connection with the statute relating to acceptance of goods.

Reference is also made to Cervitor Kitchens, Inc. vs. Chapman 500 P. 2d 783, 7 Wash. App. 520 (1972), holding if facts are disputed, question of what is a reasonable time for Buyer to inspect delivered goods before he will have been deemed to have accepted them and question as to whether Buyer's acts after delivery are inconsistent with Seller's ownership are for trier of the fact.

Also, of importance is Dehahn vs. Innes, Me. 356 A. 2d 711 (1976), holding whether there is an acceptance of goods by reason of acts of the Buyer inconsistent with the Seller's ownership is a question of fact for trier of the facts to be determined from the evidence in each particular case.

Determination of whether actions of the Buyer amounting to acceptance of goods or effective rejection in a particular

case, is generally made by the trier of the fact, overlapping considerations of whether the Buyer gave notice within reasonable time and whether Buyer treated goods in a manner inconsistent with Seller's ownership, Specific Products, Inc. vs. Great Western Plywood, LDT., Tex. Civ. App. 528 S.W. 2d 286 (1975).

Possession does not mean acceptance under Section 70A-2-606, see Zabriskie Chevrolet Inc. vs. Smith 240 A. 2d 195, 99 N.J. Super 441 (1968).

From the cases cited herein, it is clear that it is a jury question whether there has been an effective rejection or acceptance of the goods and the same is certainly to be determined by the trier of the fact. In this case, the Court effectively prevented the Buyer, Craig Clark, from arguing lack of acceptance by failing to submit Proposed Jury Instruction No. 1 and the Court failed to present to the jury, any opportunity to rule upon whether acceptance or rejection had been made in this case.

## POINT SEVEN

## RESPONDENT WAS NOT REQUIRED BY THE TRIAL COURT TO MEET ITS BURDEN OF PROOF ON ALL THE ELEMENTS

Appellant filed a general denial stating Respondent failed to state a claim against him upon which the Trial Court could grant relief. This placed the burden of proof on the Respondent to prove all the essential elements of an action for price. Those elements include that (1) Appellant did not effectively reject the goods and (2) that Appellant accepted the goods.

Appellant put on evidence before the Trial Court that he had called Respondent's employees two days after signing the Installment Sale Agreement rejecting the goods. This testimony was acknowledged by the Respondent's witness Mark Wilkey.

Accordingly, Respondent was called to meet its burden of proof on all the essential elements for an action for price. The Trial Court's instructions do not require the Respondent to meet its burden of proof as it failed to submit the issues of rejection and acceptance to the jury for its factual determination. In Trio Estates, Limited vs. Dyson 178 S.E. 2d 778, 19 N.C. App. 375 (1971), where the Buyer admitted purchase and receipt of a machine and that he did not make installment payments, denial by Buyer of any indebtedness to Seller raised an issue as to whether the Buyer had accepted the machine, which issue should have been determined by the jury from a consideration of all of the evidence.

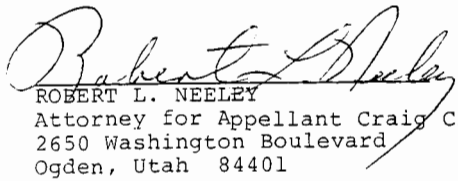
## CONCLUSION

It is respectfully submitted the judgment granted by the Trial Court should be reversed and set aside. Further, that a directed verdict of no cause of action in Appellant's favor and against Respondent should be issued, or in the alternative, grant a new trial to Appellant.

Respondent is not entitled to an action under Section 70A-2-709 for the reasons that respondent has not met its burden of proof regarding issues of rejection and acceptance. Also, Respondent is not entitled to an action for price under 70A-2-709 as the Uniform Commercial Code specifically contemplated wrongful rejections precluding action for the price and limiting damages to non-acceptance sections. Appellant has the right to reject the Thomas organ in question precluding Respondent's action for the price.

Appellent is entitled to a new trial because of the failure to submit appropriated jury instructions concerning issues of rejection and acceptance. Also, the Trial Court committed error in stating the jury should determine what price the organ would bring on a "forced sale" basis. Finally, the Trial Court determined the damages and not the jury contrary to Appellant's demand for a jury trial.

Respectfully Submitted,



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