

1979

# Johnson Tire Service Inc. v. Thorn, Inc. : Appellant's Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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JOHNSON TIRE SERVICE, INC.,	)	
a Utah corporation,	)	
	)	
Plaintiff,	)	
Appellant &	)	
Cross-Respondent,	)	
	)	
vs.	)	No.16,625
	)	
THORN, INC., a Utah	)	
corporation,	)	
	)	
Defendant,	)	
Respondent &	)	
Cross-Appellant.	)	

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APPELLANT'S REPLY BRIEF

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APPEAL FROM THE JUDGMENT OF THE FOURTH  
JUDICIAL DISTRICT COURT OF UTAH COUNTY  
HON. DAVID SAM, JUDGE

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### DESIGNATION OF PARTIES

For convenience, and to conform with the style used by the respondent in its brief, the plaintiff, appellant, and cross-respondent, Johnson Tire Service, Inc., will be designated throughout this Brief as "Johnson", and the defendant, respondent, and cross-appellant, Thorn, Inc., will be designated as "Thorn".

### FACTUAL CLARIFICATIONS

1. The Affidavit of Dennis D. Weir, an executive Vice-President of Thorn, was inadequate to controvert any of the factual allegations made by Johnson, since Mr. Weir was never involved with Johnson or with Thorn's contractual relationship with Johnson. The District Court concluded in its Findings of Fact that the fact as outlined on Johnson's pleadings "have not been controverted by the defendant." Any unresolved questions of fact were, by the nature of the Summary Judgment rendered, determined by the District Court to be immaterial.

2. The Purchase Order sent by Thorn to Johnson (a copy of which is the Appendix of Thorn's Brief) does not contain the entire "Contract" between the parties. As Thorn contends, said Purchase Order does not contain a provision for the payment of interest, costs, or attorney's fees. It should be pointed out however that this Purchase Order does not contain a provision relating to the purchase price of the goods. Johnson's form of Acknowledgment and Acceptance contains all of such terms. (R. 4).

3. Jerry Thorn, President of Thorn, Inc., did object to the interest rate of 18% per annum, but only did so after a period of at least four years during which period all payments by Thorn were applied, without Thorn's objection, first to interest and then to principle. (R. 18).

4. Johnson entered into a Stipulation that Byron Hobbs was not an agent of Thorn. This was a Stipulation of Fact and NOT a Stipulation of Law which was made to avoid a fruitless hearing on the question regarding the agency of Byron Hobbs, since investigation by Johnson's counsel had lead to the conclusion that Proof of Agency would be virtually impossible, and since the question of agency was irrelevant under the provision of Section 70A-2-207 of the Utah Uniform Commercial Code.

### REPLY ARGUMENTS

POINT ONE: A STIPULATION AS TO THE FACTS DOES NOT PREVENT JOHNSON FROM APPEALING ON A QUESTION OF LAW.

The Stipulation, attached as an exhibit in the Appendix hereto, specifically provides that the Stipulation: "Shall not constitute a waiver of or in any way effect either party's right to appeal the [District] Court's Conclusions of Law and any portion of the Judgment based thereon."

After due investigation, Johnson stipulated that Byron Hobbs was not an Agent of Thorn. The District Court's previous ruling (cited on page 4 of Thorn's Brief) had established the basic Conclusions of Law which the Court had reached.

When it appeared that a hearing on the question of the agency of Byron Hobbs (who had signed the principal invoice for Thorn) would be fruitless, counsel for Johnson, while on a conference telephone call with the District Court and counsel for Thorn, inquired of the Court how to preserve the question of Law on Appeal without having a hearing at which Johnson had no evidence to present. The Court and counsel for both parties concluded to use the Stipulation which was prepared by Johnson's counsel and signed by both parties.

Thorn's argument is that Johnson, in order to preserve the Question of Law for appeal, should have had a hearing on the

factual question, regardless of the available evidence and regardless of the truth. The Stipulation made was a Stipulation of Fact only, and although it was made with full view to its consequences based on the District Court's previous ruling, it was made without Stipulation or Waiver with respect to the Question of Law which the District Court had previously decided. This Appeal by Johnson is timely and proper.

POINT TWO: THORN FAILED TO ADDRESS ITSELF TO THE KEY ISSUES RAISED IN JOHNSON'S BRIEF.

Johnson's chief argument is that there was a Contract between it and Thorn which provided for the sale of tires at an agreed-upon price which would be paid under specified terms of credit (including interest at 18% per annum, Court costs, and attorney's fees), which terms of credit became part of the agreement by operation of Section 70A-2-207 of the Utah Uniform Commercial Code. That provision, the provision of Section 70A-710 of the Utah Uniform Commercial Code (relating to incidental damages), and the Utah Uniform Commercial Code as a whole, indicate the statutory intent to make the non-breaching party whole and to reimburse said party for all commercially reasonable expenditures incurred in seeking its remedies. Thorn's Brief evades the chief issue and focuses only on a minor point there



While it is true that attorney's fees are not to be awarded unless there is a statutory or contractual provision to the contrary 22 Am.Jur.2d Damages, § 1657, in this case Section 70A-2-207 of the Utah Uniform Commercial Code makes the attorney's fees part of the contract as between these parties. That section of the Utah Uniform Commercial Code should apply in this case because none of the exceptions to that statute exists here. Thorn has failed, both in the District Court as well as in its Brief, to suggest even one exception to Section 70A-2-207 of the Utah Uniform Commercial Code which should apply.

POINT THREE: THORN'S COUNTER-APPEAL AS TO INTEREST IS IMPROPER BECAUSE THE STATEMENT OF THORN'S POINTS ON APPEAL WAS NOT TIMELY FILED.

If an appellant fails to timely file the appropriate Notice of Appeal, appellant's Appeal will be dismissed for lack of jurisdiction. Rule 73(a) U.R.C.P.; Watson v. Anderson, 29 Utah 2d 36, 504 P.2d 1003 (1973).

In this case, Thorn's Statement of Points on Appeal was not filed until on or after September 4, 1979. This was twenty-six days after Johnson filed its Notice of Appeal and twenty-two days after Johnson filed its Statement of Points on Appeal. Thorn never requested an extension of time with respect to its Statement of Points on Appeal.

Although Thorn may argue that Rule 74(b) requires no Notice of Appeal, that Rule specifically requires that in lieu thereof a Statement of Points must be filed on time as specified in Rule 75 U.R.C.P. which provides for ten days.

If an Appeal will be dismissed for want of jurisdiction for the appellant's failure to file a Notice of Appeal within the prescribed period, a respondent's Counter- or Cross-Appeal should be dismissed for its failure to file a Statement of Points on Appeal within the prescribed period. This is the Rule in other jurisdictions, and should also be the Rule in Utah. Sadler v. State, 401 P.2d 848, 66 Wash.2d 215 (1965).

POINT FOUR: THORN'S COURSE OF DEALINGS WITH JOHNSON PRECLUDES THEIR ARGUMENT THAT JOHNSON IS NOT ENTITLED TO INTEREST AT THE RATE OF 18% PER ANNUM.

The District Court determined that there was no issue of material fact raised by Thorn's Affidavit. First, the Affidavit submitted by Thorn (contained in the Appendix of Thorn's Brief) was that of Dennis Weir, who was never shown to be involved in Thorn's dealing with Johnson, and therefore was inadequate. The statement in said Affidavit that "Affiant never discussed with any representative of [Johnson] the matters of payment of counsel fees, interest or the time in which [Johnson] expected the bill to be paid" is meaningless where said Affiant

was not involved in the matter at any stage until after suit by Johnson was commenced. Second, the Affidavit of Ed and Mike Johnson was supported by Johnson's billing records, the most recent part of which was attached to Johnson's Complaint, which record showed Johnson's consistent practice of applying Thorn's payments first to accrued interest, and then to principle.

The District Court would have erred had it ruled that a material question of fact existed with respect to the parties' course of dealings. In its pleadings, as well as at Oral Argument before the District Court, Thorn continually denied the existence of a formal, written contract. It never really addressed the issue of the parties' course of dealings or commercial expectations which are recognized under the Utah Uniform Commercial Code. At no time did Thorn, in its pleadings, by Affidavit, or in Oral Argument, refute the facts in Johnson's pleadings and Affidavit. Thorn avoided the issue of the parties' course of dealings, and the District Court had no course but to conclude that the 18% interest rate on delinquent payments was part of the parties' agreement under Sections 70A-2-208 (relating to Course of Performance) and 70A-1-205 (relating to Course of Dealings and Trade Usage) of the Utah Uniform Commercial Code.

POINT FIVE: EVEN IF THE PARTIES' COURSE OF DEALINGS WAS NOT SUFFICIENT TO ENTITLE JOHNSON TO INTEREST AT THE RATE OF 18% PER ANNUM ON THE UNPAID BALANCE, THE PROVISION WITH RESPECT TO SUCH INTEREST BECAME PART OF THE PARTIES' AGREEMENT UNDER THE PROVISIONS OF SECTION 70A-2-207 OF THE UTAH UNIFORM COMMERCIAL CODE.

In its Counter-Appeal, Thorn alleges that the parties' course of dealings is a material question of fact which would require a hearing to determine. Such a hearing, however, is unnecessary, since Section 70A-2-207 of the Utah Uniform Commercial Code makes the provision regarding the rate of interest part of the parties' agreement. The argument made in Johnson's Brief with respect to the application of said Section regarding the provision for attorney's fees applies equally to the Provision regarding the rate of interest.

The District Court erred in ruling that Johnson was not entitled to the terms of credit shown on its invoices, including interest at the rate of 18% (as well as attorney's fees), where such terms: (a) Are not restricted by the original offer (Thorn's Purchase Order); (b) Do not materially alter the Contract by creating surprise and undue hardship; and (c) Were not objected to by Thorn within a reasonable time.

In short, interest and other terms of credit are exactly what the Legislature intended to be part of this agreement under the terms of Section 70A-2-207 of the Utah Uniform Commercial Code, and the District Court had no grounds for concluding otherwise.

## CONCLUSION

1. Principal Argument: The District Court improperly disregarded Section 70A-2-207 of the Utah Uniform Commercial Code both as to interest and attorney's fees. Since the record indicates that there was no material alteration of the parties' agreement and that the defendant failed to object to the additional terms within a reasonable time, the terms of credit in the plaintiff's invoices are a binding part of the sales agreement between the parties. This argument has been ignored by Thorn in its pleadings, and oral argument before District Court and in its Brief before the Utah Supreme Court.

2. Statutory Intent: The Utah Uniform Commercial Code as a whole, particularly as reflected in Section 70A-2-710 thereof, was intended to make a non-breaching party whole and to reimburse it for its commercially reasonable expenditures incurred in seeking its remedies.

3. Untimely Counter-Appeal: Thorn's Counter-Appeal with respect to the 18% interest rate was not timely filed, and therefore should be dismissed.

4. Course of Dealing: Thorn failed to give the District Court sufficient refutation of the facts shown in Johnson's pleadings and Affidavit with respect to the parties' course of dealings concerning the allocation of Thorn's payments between

interest and principle. The evidence presented by Johnson was more than sufficient to preclude a hearing on that factual question, and Summary Judgment was appropriate.

5. Interest Under Section 70A-2-207: Even if the parties' course of dealings was not sufficient to entitle Johnson to interest, the District Court erred in failing to apply Section 70A-2-207 of the Utah Uniform Commercial Code and to thereby make the provisions relating to interest part of the parties' agreement and enforceable by Johnson.

CERTIFICATE OF MAILING

I hereby certify that two copies of the foregoing  
Reply Brief were served upon:

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by mailing same, postage prepaid, this \_\_\_\_\_ day of \_\_\_\_\_,  
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