1964

Universal Investment Co. v. Carpets, Inc. : Brief of Appellant

Utah Supreme Court

Mabey, Ronnow & Madsen; Gordon A. Madsen; Attorneys for Defendant-Appellant;
Zar E. Hayes; Pugsley, Hayes, Rampton & Watkiss; Attorneys for Plaintiff-Respondent;

IN THE SUPREME COURT OF THE STATE OF UTAH

UNIVERSAL INVESTMENT COMPANY,
Plaintiff-Respondent,

— vs. —

CARPETS. INCORPORATED,
Defendant-Appellant.

Case No. 10165

APPELLANT'S BRIEF

Appeal From a Judgment of the Third District Court
in and for Salt Lake County,
HONORABLE RAY VAN COTT, *Judge*

MABEY, RONNOW & MADSEN
GORDON A. MADSEN
574 East 2nd South
Salt Lake City, Utah

Attorneys for Defendant-Appellant

ZAR E. HAYES
Pugsley, Hayes, Rampton & Watkiss
El Paso Gas Bldg.
Salt Lake City, Utah

Attorneys for Plaintiff-Respondent

TABLE OF CONTENTS

AUTHORITIES CITED

Statutes

TABLE OF CONTENTS — (Continued)

IN THE SUPREME COURT OF THE STATE OF UTAH

UNIVERSAL INVESTMENT COMPANY,
Plaintiff-Respondent,

— vs. —

CARPETS. INCORPORATED,
Defendant-Appellant.

Case No. 10165

APPELLANT'S BRIEF

STATEMENT OF KIND OF CASE

This was a trial conducted before the District Court in and for Salt Lake County, before the Honorable Ray Van Cott and a jury in which the plaintiff sought recovery for damages due to an alleged breach of warranty, said warranty being an express warranty against "latent defects, faulty material and/or workmanship" (R-7, Exhibit 2), said breach of warranty consisting solely and exclusively of a discoloration of draperies furnished by the defendant to the plaintiff, which as claimed by the plaintiff changed their color as noted in the pre-

trial order "from white to variegated colors" (R-12). Plaintiff's complaint sought damages in the amount of $7,500.00.

DISPOSITION BEFORE A TRIAL COURT

The matter was tried to a jury on April 15 through 17, 1964, and a verdict was returned by the jury in favor of the plaintiff in the amount of $3,750.00.

RELIEF SOUGHT ON APPEAL

Defendant made a motion to dismiss plaintiff's claim at the conclusion of plaintiff's evidence (R-200). It renewed said motion again at the time the matter was submitted to the jury, together with a motion for a directed verdict (R-270-271). Following the return of the verdict, defendant moved for judgment notwithstanding the verdict, for dismissal and for a new trial (R-43).

During trial, defendant also moved for the exclusion of some testimony, took exception to argument of counsel and requested that the matter be re-submitted to the jury, they having left the jury box at the time the motion was made. The court denied or refused all of the above-mentioned motions, the motion for directed verdict, dismissal and new trial being argued before the court on May 11, 1964, and the court's minute entry noting the order and denial was then entered (R-46). From such order and judgment the defendant appeals.

STATEMENT OF FACTS

Pursuant to a written subcontract (Exhibit 1), defendant agreed to furnish the plaintiff with certain finished draperies to be hung in 100 apartment units then under construction by plaintiff, known as the "Susan Kay Arms" (see Exhibit 11). Said draperies were delivered and installed in plaintiff's apartment houses as they were completed during the time period beginning October 1961, and ending May 1962. At the conclusion of the installation and at the time of final payment, which occurred sometime in June 1962, defendant executed a written guarantee or warranty titled "Susan Kay Arms Guarantee" (Exhibit 2). This document reaffirms the provisions of paragraph 13 in the original subcontract relating to "latent defects, faulty material and/or workmanship" and extends the guarantee as being valid and binding until after the "one year inspection by the Federal Housing Commissioner covering the one year guarantee period." Said one year inspection by the F. H. A. Commissioner was made on September 16, 1963 (R-85), and a written report on said inspection or a photostatic copy thereof was introduced in evidence as Exhibit 5 (R-84). The warranty period in issue, therefore, was up to and including September 16, 1963, as identified in the Instruction No. 2 of the court's instructions to the jury (R-16).

Sometime in April of 1962 (while the units were still under construction) the draperies in unit 117, the first unit occupied sometime in October 1961, became discolored as indicated by both plaintiff and defendant's wit-

nesses, the testimony being that iodine or other stain had been placed on them. The plaintiff's resident manager, Mr. Ronald Sweitzer, took these drapes to Beehive Cleaners. The stain not having been removed, Mr. Sweitzer contacted defendant, and defendant replaced said curtains and billed plaintiff therefor. (R-92-94) and (R-193-194)

No further or other complaint was made by the plaintiff regarding the draperies until May 10, 1963, approximately one year later, at which time Sweitzer wrote a letter to defendant which was introduced as Exhibit 6, stating that approximately one-third of said draperies had changed color. On July 2, 1963, counsel for the plaintiff mailed a "Notice and Demand" (introduced as Exhibit 4), stating that approximately fifty per cent of the draperies were "defective and unsatisfactory" and demanding that the same be replaced. On October 4, 1963, plaintiff filed this action (R-10).

Defendant-Appellant will refer to other facts and testimony in the course of its argument hereafter.

ARGUMENT

The trial court erred in the following particulars:

(A) IN PERMITTING THE TESTIMONY OF THOMAS FRANK REGARDING VALUATION AND DAMAGES TO BE INTRODUCED OVER OBJECTION BY COUNSEL FOR DEFENDANT.

(B) IN DENYING DEFENDAT'S MOTION TO DISMISS AT THE CLOSE OF PLAINTIFF'S EVIDENCE.

(C) IN DENYING DEFENDANT'S MOTION FOR A DIRECTED VERDICT MADE AT THE CLOSE OF THE TRIAL.

(D) IN STRIKING THE FINAL PARAGRAPH OF THE COURT'S INSTRUCTION NO. 5 TO THE JURY AFTER PREPARING THE SAME AND SERVING THEM ON COUNSEL, BUT BEFORE READING SAID INSTRUCTIONS TO THE JURY.

(E) IN REFUSING TO RECALL THE JURY TO REHABILITATE THEM IN CONNECTION WITH TWO ERRORS COMMITTED BY COUNSEL FOR PLAINTIFF IN HIS ARGUMENT.

(F) IN REFUSING TO GRANT JUDGMENT, NOTWITHSTANDING THE VERDICT.

(G) REFUSING TO GRANT DEFENDANT'S MOTION FOR A NEW TRIAL.

(A) IN PERMITTING THE TESTIMONY OF THOMAS FRANK REGARDING VALUATION AND DAMAGES TO BE INTRODUCED OVER OBJECTION BY COUNSEL FOR DEFENDANT.

As noted in the Statement of Facts, plaintiff's first complaint of discoloring occurred in May 1963; approximately fifty per cent were claimed discolored as of July 2, 1963; and from the testimony of Mr. Sweitzer, by the time he "left as manager of the apartments" (which was August 1, 1963—R-90) approximately "99%" had changed color to some degree (R-101). The testimony of Mr. Knight, President of plaintiff corporation, indicated

that the draperies in question have continued to be used and were in fact used up to and including the time of trial (April 15, 1964) (R-76).

It was virtually the agreed testimony of all the witnesses called both by plaintiff and defendant that one of the contributing if not principal causes of discoloration was exposure to sunlight. Samples of the draperies in issue were offered and introduced by plaintiff in evidence through the witness Sweitzer, and were received as Exhibits 8, 9 and 10. (R. 103-104) It is important to note, however, that these sample drapes were obtained by Sweitzer at the request of plaintiff's counsel in *January 1964* (R-103), and when they were introduced counsel asked in each instance ". . . it is essentially in the same condition as it was when you procured it and delivered it to me?" or "Would you say that it is in substantially the same condition as it was when it was delivered to me?" or finally, "And except for the indication of where there have been parts of it clipped off, is it essentially in the same condition it was when you delivered it to me?" To each of these questions, the witness Sweitzer answered in the affirmative. *The record is absent any testimony connecting the condition of the sample drapes with the condition of the draperies as of September* 16, 1963 — *the end of the warranty period.* There is further no evidence indicating whether or not the draperies continued to discolor during the period September 1963 to April 1964, the time of trial, but rather there is only evidence that sunlight affects the discoloration and that said draperies remained in use during the said intervening period.

The witness Thomas Frank made his first and only inspection of the premises and the draperies in issue *approximately two weeks prior* to the trial (R-164-165). Counsel for the plaintiff, after establishing the inspection date and inspection, then sought to elicit testimony from Frank regarding what he saw, and counsel for defendant-appellant objected in the following manner:

> "Mr. Madsen: Your Honor, at this point I'm going to object on the grounds that any such testimony about any such inspection made two weeks ago as not being related to the point of September 16, the date of the warranty.
>
> Q. (Mr. Hayes): The testimony is already in the record that the drapes were already in the condition they were at the time prior to the expiration of the warranty when Mr. Sweitzer ceased being the manager." (R-165)

The statement of counsel for the plaintiff is in error. *There is no such testimony.* Accordingly, all of Mr. Frank's testimony relating to the condition of the draperies, relating to their value, etc., is incompetent because the said inspection does not relate to the time of warranty. There is no evidence to show that the drapes' condition at the time of his inspection was identical or substantially the same as they were on September 16, 1963. This proposition is well stated in Am. Jur. on Evidence relating to the introduction of demonstrative evidence in the following language:

> "It must appear as a preliminary to the introduction of any object in evidence that it has not sustained any substantial change by reason of lapse

> of time or otherwise, since the time in issue." 20 Am. Jur § 719

This court adopted essentially that proposition in the case of *Hayes* v. *Southern Pacific Railroad,* 17 Utah 99; 63 Pac. 1001, in the related field of conducting experiments before the jury and requiring that the same resemble in all material particulars the facts as originally alleged. See also *Konold* v. *Rio Grande Western Railroad,* 21 Utah 379, 60 Pac. 1021.

While it is true that the above cited commentary and cases related to the introduction of demonstrative or physical evidence rather than testimony about such evidence, certainly the same rule would apply to testimony relating thereto as it would to the introduction of the thing itself. There being no foundation in the record to demonstrate that the draperies in issue appeared at the time of Mr. Frank's inspection the same as they were as of September 16, 1963, all of his testimony in connection therewith should not have been permitted to get to the jury, particularly in view of the fact that the counsel for defendant made timely objection thereto.

It further appearing that plaintiff's entire valuation testimony came from this witness, said testimony being based upon his inspection of two weeks prior to the trial, it follows that with his testimony stricken, defendant's cause must fail being absent any testimony regarding damages.

(B) IN DENYING DEFENDANT'S MOTION TO DISMISS AT THE CLOSE OF PLAINTIFF'S EVIDENCE.

The plaintiff relied on two principal witnesses to show (1) that color constituted a part of the express warranty in issue, and (2) that the discoloration would be to a latent defect in the material, for which defendant was liable. Said witnesses were the above-named Thomas Frank and a Gordon Harry. From Mr. Harry, the plaintiff produced testimony to the effect that pieces of the Exhibits 8, 9 and 10 (which again should be observed were obtained in January 1964) were subjected by him to tests to determine the cause of discoloration. That testimony follows:

> "Q. I will ask you further whether or not you made tests of those drapes?
>
> A. I did, sir.
>
> THE COURT: Tests for what though, Mr. Hayes?
>
> Q. I will ask you whether I asked you to and you did, in fact, perform tests to determine the reason for discoloration or changing of color of those drapes?
>
> A. We tested them for the discoloration, *knowing what caused it;* but we tested to prove that it was present and it was caused by a fluorescent dye which is applied in the manufacture. It is an artificial brightening. It is in common usage in textile mills. And they haven't used one that will not break down when exposed to light, and this is what has happened. The fluorescent dyes have decomposed upon the exposure to light. And this does not have to be sunlight, although the brighter the light the faster it decomposes. But they will decompose under fluorescent light." (R.-136) (Emphasis added)

Though he purported to know in advance the cause, he nonetheless tested the fabrics and found in them the

presence of what he termed "fluorescent dyes," which he said must have been placed there during manufacture. The said Mr. Harry further testified on cross-examination that he, just prior to trial, (the Friday before trial, April 10, 1964) mailed portions of Exhibits 8, 9 and 10 to a National Institute of Dry Cleaning for them to corroborate his tests, and with some urging produced the report of that Institution, which was entered into evidence as Exhibit 12 (R-153).

The said Exhibit 12, while mentioning "fluorescent dye" as one of the contributing causes, identifies several other causes for the discoloration as well.

The witness Frank was asked by plaintiff's counsel if there were a color change of the nature or type *as indicated in Exhibits* 8, 9 *and* 10, whether or not in the industry this would be considered a "defect." His answer was, "It would." (R-168) He was asked further to fix a valuation on the draperies in the following manner:

> "Q. From a decorator's standpoint what would you say with regard to the drapes as you saw them?
>
> A. Well, they are of no value." (R-166)

On cross-examination, however, he admitted that he had not seen the drapes, nor was he aware of their condition as of September 16, 1963, or any time before that date, (R-178) and that he was *assuming* that the draperies were in the same condition on September 16, 1963, as they were on the date of his inspection some

two weeks prior to the date of the trial, as illustrated by the following questions and answers:

> "Q. That is what I mean. Assuming that the drapes were in the condition on September 16 as of the date you observed them, isn't that your assumption?
>
> A. Yes sir." (R-180-181)

On further cross-examination, this witness admitted that manufacturers generally make an express warranty as to color if the color is to be warranted by the use of the words "guaranteed colorfast" as appears in the following exchange of questions and answers:

> "Q. In the majority of instances manufacturers of drapery fabrics do not warrant or guarantee color of a synthetic fabric, isn't that the case?
>
> A. Well, no. At the most they are labeled and there are some fabrics usually come labeled, sometimes as to the type of dye and they will say "guaranteed colorfast." You will find this in clothing fabrics or upholstery or drapery. Sometimes they are not labeled as such, so that laundering or something may change the color or fade them out. Sunlight will sometimes fade the fabric.
>
> Q. Some fabrics therefore, will be changed and cannot be guaranteed to hold their color, is that so?
>
> A. Yes, that is so.
>
> Q. And this is particularly true as to synthetic fabrics, is that correct? By synthetic I am including dacron or rayon.
>
> A. It is the same as any other fabrics, it depends upon the dye. It is standard practice because they are warranted.

Q. As a matter of fact it is a commonly understood fact in the industry that any fabric exposed to sunlight or even artificial light is going to fade or otherwise discolor, that as you suggested cooking odors sometimes, in fact, affect the color of a fabric, do they not?

A. Yes.

Q. And that for these reasons as a matter of practice in the trade, particularly with regard to synthetic fabrics virtually no manufacturer guarantees color of a fabric, isn't that correct?

MR. HAYES: Now I object to that when you say "virtually."

THE COURT: Let him say.

A. They will oftentimes warrant for a certain amount of time. They are warranted for an estimated life. The manufacturer has set up standards of certain things that will last for two years, three years, five years. Anything, no matter what make of goods is going to deteriorate in color sometime.

Q. *Exactly, and so when they do warrant it they do specify it for a particularly limited period of time with regard to color, isn't that correct?*

A. *Yes.*" (R-173-174) (Emphasis added)

The witness then admitted that his valuation testimony was based on the *assumption* that color was includable in the warranty in issue in this trial:

"Q. And the other characteristics with relation to these fabrics, the capacity to hang without sagging, the failure of decomposition, the other areas as we have discussed when talking about this;

latent defects so far as you are aware are unchanged, isn't that correct?

A. Yes.

Q. There is, in fact, no variation in regard to all of those elements as applies to these drapes — correct?

A. Yes.

Q. So your evaluation testimony is *assuming* that color is one of the elements within a warranty, and then on the color basis alone you value them as useless as of September 1963, or valueless as of September '63 — Correct?

A. Yes.

Q. And then you give a certain use quotient of 15% to 20% for the period in which they had been used up until complaint was made and discoloration occurred — correct?

A. Yes." (R-182-183) (Emphasis added)

On redirect examination plaintiff's own counsel made the matter more emphatic with the following series of questions:

"Q. So if there is no warranty relating to color specifically I take it your testimony is not applicable with regard to the value — correct?

A. I think I am getting a little confused here.

Q. Well, let me clarify it then — if I can. If there was no warranty to keep the color a specific shade between the parties to this lawsuit your valuations would not apply, isn't that correct?

A. Well yes. Although it would have to be, to me a warranty would have to say — we warrant all of these things but color then it wouldn't apply.

Q. You are saying that you have interpreted that there is color in this matter?

A. As part of the fabric.

Q. But that is your assumption. You don't know whether or not the parties warranted as to keeping the colors of the fabric?

A. Not precisely." (R-185)

The net result of Mr. Fank's testimony is that he was first, *assuming* that the draperies in issue were discolored in the same particulars on September 16, 1963, as they were when he inspected the premises two weeks prior to trial (April 1964); and second, that he was *assuming* that color was part of the warranty in this fact situation, and based on that assumption the draperies were first valueless and then perhaps on reconsideration were worth 15% to 20% of their original value. But that if his assumption were incorrect and color was not warranted here, his valuation testimony was inapplicable. He further admitted that when color is warranted in the industry, it is done so expressly.

Appellant wishes here to again emphasize that neither Harry's nor Frank's testimony relate to any inspection, tests, etc., conducted during or at the conclusion of the warranty period in issue, nor was it established in the record that such samples as they tested or inspected appeared the same as the draperies in issue as of September 16, 1963.

In fact, the only testimony relating to the condition of the draperies as of the expiration of the warranty period was the testimony of the F. H. A. witness, Mr. Ernest Fullmer, produced by the plaintiff. Mr. Fullmer

was a supervisor rather than the inspector of the project, but he brought with him a photostatic copy of the report of the inspector, which was introduced as Exhibit 5. Since he, of course, could not testify as to what the inspector observed or noticed, his testimony is far from conclusive. The following exchange of questions and answers, however, throws some light on the report:

> "Q. And, as a matter of fact, how far can the F.H.A. go in regard to requiring the owner of an income property to replace materials or to make modifications in the decorating, specifically as opposed to structural changes?
>
> A. Well, we can recommend of course that the upkeep of the property is such that it will attract occupancy on the normal basis. If it gets too bad the F.H.A. Commissioner has the power to step in and take over the property and run it if the sponsor is not keeping it up to snuff.
>
> Q. Then that is the reason for the annual inspections, is it?
>
> A. That's correct.
>
> Q. And does this not relate to subsequent installation of furnishings and other management and upkeep, apart from the original contract or subcontract of materials furnished?
>
> A. Well, with the exception of drapes and carpets and things of that sort that have a short life the cleaning and maintenance of the drapes is left up to the sponsor who does not become a part of the reserve replacements. *If the drapes were such that they did deteriorate or become ragged or anything like that I'm sure that we would have caught this at the time of the inspection.*
>
> Q. And notwithstanding the fact that as of the time this contract was drafted, prior to your

change in policy of September 1961 had the drapes been so defective, as you say, this would have been noted and you would have the power to recommend some change with relation to those drapes to the owner?

A. Yes sir." (R-87-88) (Emphasis added)

In short, nothing defective about the draperies was noticed by the inspector of such consequence to require that it be put on the report since there is no such indication on Exhibit 5, and had the draperies been defective, the inspector had a right not only to notice it, but to recommend changes or remedies to the owner.

Sections 60-1-12 of the Utah Code defines an express warranty in the language: "Any affirmation of fact or any promise by the seller relating to the goods is an express warranty . . . to induce the buyer to purchase . . . relying thereon." This court held in the case of *Park* v. *Moorman Manufacturing Company,* 121 Utah 339; 241 Pac. 2nd 914, 40 A.L.R. 2d 273, that the question of express warranty is properly submitted to the jury when the evidence is substantial and supports that essential element which the plaintiff is required to prove.

The plaintiff not only failed to show any express oral (or written) warranty as to color herein, but further failed to produce any evidence of an implied warranty of color or reliance on any such implied warranty by the plaintiff, as required by the above-noted statute and case.

The facts above noted being the sum total of the plaintiff's evidence of (1) warranty, (2) breach of warranty, (3) inspection of the product, and (4) damages, is

so inconclusive, illusory and admittedly based on assumption, that defendant's Motion to Dismiss should have been granted.

(C) IN DENYING DEFENDANT'S MOTION FOR A DIRECTED VERDICT MADE AT THE CLOSE OF THE TRIAL.

When Mr. Claude Thompson, president of defendant corporation, took the stand, he was asked at length about the practice in the trade relating to warranting color, and he referred to the fact that the words "colorfast" were used and attached by way of a label on any goods where color was warranted and that absent such label, color was not included as an item of warranty (R.203-204). Thereafter, following objection of counsel for the plaintiff, the court insisted that Mr. Thompson indicate not what the general custom of the industry was, but rather the custom of retailers of draperies. Following that ruling of the court, this exchange in questions and answers occurred:

> "Q. Well, Mr. Thompson, let us turn it then to you in your own practice. What language do you use when you warrant the color of a fabric?
>
> A. I can never remember ever warranting or guaranteeing the color of any fabric.
>
> Q. Of drapery material?
>
> A. Of drapery, carpets, or otherwise.
>
> Q. Is it the custom in your trade generally and that of your competitors and others in business of the retail sale of fabrics and draperies?
>
> A. Not unless this was otherwise specified.

Q. Assuming you would specify would you use the language as specified?

A. Always.

Q. I hand you Exhibit 1 and ask if there is any language therein relating to the warrantying of the color of the drapery furnished?

MR. HAYES: Now I object to that as irrelevant. The contract speaks for itself, the subject contract.

THE COURT: Well, I think as a matter of custom among his trade or among his business he can interpret the meaning. I presume that is what part of the litigation is about, is a dispute as to what it does or doesn't mean. He may answer in that regard.

A. This mentions nothing about warranty or guarantee in any relation to color. The fabric, this curtain is not mentioned in that scope." (R-205-6)

Defendant then called one Stephen Holt who, at the time of trial, was the owner and proprietor of a retail furniture and home accessories store known as Holt's Fine Furnishings in Bountiful, Utah. For the five years prior to August, 1963, however, Mr. Holt was in the employ of the Lensol Fabrics, which company was the supplier of the drapery material in question. As to the issue of whether or not color was includable in a warranty as a matter of custom in the industry, this witness was asked the following questions and gave the following answers:

"Q. Are you aware of the custom of the trade with regard to warranting colors in fabrics?

A. Yes sir.

Q. Specifically, synthetic fabrics?

A. Pretty much all types of fabrics.

Q. And what is the custom in the trade with regard to warranting fabrics as to color?

A. The custom is—

MR. HAYES: Now I object to this as there is no proper qualification.

THE COURT: Well, let us see if he knows what Mr. Thompson does and we are not concerned as to the connection between them and the manufacturer because it may be totally different and then it wouldn't matter what it was. We are interested as a custom what men like Mr. Thompson do.

A. Well, in regards to color when they have this problem come up the retailers, the dealers usually call us to go out on them.

Q. I'm talking about the policy with relation to the original warranty.

A. The retailers' warranting color fastness to a customer?

THE COURT: Yes.

A. I have never known of a manufacturer giving this warranty to a customer. Retailers will again, generally give this warranty.

Q. Had you heard of a warranty which contained such language as warranting against latent defects, faulty materials and/or workmanship, would that language be accepted as the custom of the trade with relation to retailers to ultimate customers —

A. No sir.

Q — include color?

A. No. sir." (R-231-2)

Defendant finally called as a witness Ray Hughes, an expert in the fabric field, having been associated in it for forty years, who on the same question of color warranty gave the following testimony:

"Q. Now with regard to the custom of the trade and retailers are you familiar with such language as warranting against latent defects, faulty materials, or workmanship?

A. Well, that is—

Q. Is that language familiar to you?

A. No, that just sounds like attorney language.

Q. Do you know what the phrase "latent defect" means generally?

A. Latent would be something inside that later comes out.

THE COURT: Now he says he isn't familiar with it, Mr. Madsen. Is there any point in pursuing it?

Q. No, I suppose not, your Honor. With regard to the question of color is color regarded in the profession as a defect of either material or workmanship?

A. Is color what?

Q. Is color regarded in the trade, in the fabric profession among retailers or otherwise as a defect of either material or wokmanship?

A. No sir.

Q. Would you regard the discoloration of these drapes a defect, a latent defect or a matter of faulty construction — latent defect, faulty materials and/or workmanship?

MR. HAYES: Now if the Court please, I believe he indicated he doesn't know what that language means. I object to him answering that question.

Q. I asked him first if that was a custom in the trade.

THE COURT: He said he didn't know and it was lawyer talk.

Q. That's right.

THE COURT: Well, I don't think we should have his opinion about it, what he considers it.

Q. Let me simplify it to the word defect. Would you consider the discoloration of these drapes a defect?

A. Not in that particular fabric, no." (R-254)

Counsel for the plaintiff then cross-examined Mr. Hughes and elicited further testimony as follows:

"Q. Would you expect this particular fabric to change color and turn that color?

A. It can't change color in and of itself. There is no color to it to change. It is pure white. There is nothing for it to change to.

Q. There is nothing for it to change to?

A. No. It would have to be colored from some other source.

Q. Would you expect it to change color in normal use?

A. It depends upon what is in the room that the drape is in.

Q. If they were used as drapes you would expect it to be subjected to the atmosphere, wouldn't you?

A. Right, absolutely. That is why you can't guarantee color.

Q. And you would expect it to be subjected to the sun, wouldn't you?

A. Yes.

Q. And household odors?

A. Yes.

Q. And even to light itself? As you said, you would suspect it to be subjected to that.

A. If it is going to change color if chemicals are in the air and they attach themselves to the fabric then you can't blame the fabric, can you.

Q. So would you say this is inevitable that this change colors?

A. In some conditions, yes.

Q. In every room? In most rooms would it be inevitable?

A. It would depend a lot on your heating. We have found more trouble with gas heat than anything else.

Q. So if it were installed in a project that had gas heat would it be inevitable that it change color.

A. It would change color. Most any fabric would change color some.

Q. I think you indicated that cleaning would have something to do with it?

A. Cleaning could have something to do with it; the chemicals in cleaning.

Q. Do you have an opinion as to whether or not cleaning did, in fact, have anything to do with the change in color in these drapes?

A. I wouldn't know what was the cause for the change of color.

Q. You wouldn't have any idea, would you?

A. No sir; it would be the chemicals, whatever was in the room or the cleaning fluids. It would have to be some outside chemical, different and outside of the fabric itself.

Q. And it couldn't be anything in the fabric itself?

A. No sir. (R-254, 255, 256)''

This last quote of testimony not only throws additional light of the subject of warranty as to color and whether or not discoloration is a defect, but further impeaches the testimony of plaintiff's witness Harry as to the source of the "fluorescent dye." The testimony of Hughes, above, is corroborated by the statements of the witness Holt as follows:

"A. The mill told me that this particular piece of fabric was never subjected to any dye. That it is almost in a natural state of when it was woven and it is given a slight bleach when it comes off the looms and it picks up little dark particles and they look like little dust specks all over and the bleach is to take that color out. The terminology is the exact little spot that appears on fabrics when it comes off the looms — well, it is on all fabrics and this is when it is bleached. There is no dye ever subjected to a white piece of fabric.

Q. Were you in Court this morning when Mr. Harry testified?

A. Yes sir.

Q. And did you hear a discussion about brighteners being used in connection with bleaches?

A. Yes sir.

Q. Brighteners I believe he said had fluorescent dye in them?

A. Yes sir.

Q. But it is your testimony that no dye of any kind, is that right, was used in this fabric?

A. Just bleach and no dye of any kind. And I never heard the term of fluorescent dyes except with the uses of brighteners." (R-228-9)

Both Holt and Hughes, as well as Thompson, indicated in some detail the various causes for discoloration and the various sources from which such "dyes" or other foreign substances could have become attached to or infiltrated among the threads of the fabric in issue, causing discoloration. In that connection, specifically, Mr. Holt testified that it was his company's (Lensol Fabrics) policy, that once a piece of fabric had been dry cleaned or laundered in any manner, the company could uot guarantee it or warranty it in any particular. (R-222)

The undersigned is well aware of the rule adopted and often repeated by this Court that it will not review Findings of Fact or verdicts of juries, where there is any substantial evidence in support thereof. Appellant maintains here that the only evidence in favor of a verdict including color within the warranty was the *assumption* of the witness Frank that color is so included, which assumption is overwhelmingly rebutted by the testimony of Thompson, Hughes and Holt. So, not only did plaintiff fail to establish by preponderance of clear and convincing evidence the existence of a warranty against color, but that contention is negated by the only

competent evidence which was in direct opposition thereto. The lower court should accordingly have awarded a directed verdict to the defendant at the conclusion of the trial.

(D) IN STRIKING THE FINAL PARAGRAPH OF THE COURT'S INSTRUCTION NO. 5 TO THE JURY AFTER PREPARING THE SAME AND SERVING THEM ON COUNSEL, BUT BEFORE READING SAID INSTRUCTIONS TO THE JURY.

Instruction No. 5 as originally prepared by the Court Reporter, read as follows:

> "You are instructed that an item of merchandise (curtains in this case) is defective if it does not remain in substantially the same condition as when sold, or if it ceases to serve the purpose for which purchased, whether because of its appearance or its functional failure.
>
> In this connection you are further instructed that if you find by a preponderance of the evidence in this case that the parties hereto have made an express warranty in reference to the suitability and durability of the merchandise sold herein, then you are instructed that the parties are bound by the express warranty so made." (R-18)

This was the instruction as delivered to counsel of both parties at the conclusion of the evidence prior to the time the court read the instructions to the jury. At the time of reading the instructions, the undersigned did not note that the court had refrained from reading the last paragraph of Instruction No. 5 to the jurors. (See Record, P. 264, for the language of the court in reading

the Instruction.) Had the written instruction delivered to the jury coincided with the instruction read by the court, appellant would not here be able to complain. But appellant maintains that to deliver to the jury Instruction No. 5 as it appers in the record as being deliberately scratched out by the court is more than a mere failure to give the instruction. It is to call it to the jury's attention and then by drawing lines across it indicate the court's displeasure with it while leaving it available to be read. So the clear implication to the jury is that such a statement doesn't in fact constitute the law. This, appellant maintains, was error and gave undue emphasis to the refusal to give said instruction, which paragraph in fact in view of the evidence in this case is a correct statement of law.

Had the jury chosen to adopt defendant's view of the evidence, there being testimony to the effect that color is not warranted unless expressly so provided, and there being no such express language in Exhibit 2, the partie *were* bound and limited by that express warranty, and the eliminated paragraph from Instruction No. 5 was accordingly proper. To strike that part of the instruction therefore while leaving it apparent to the jury to read had a capacity to induce the jury to ignore the evidence related to restrictions in that express warranty to the prejudice of defendant-appellant.

Since counsel for defendant was not aware of such elimination of the paragraph until he had opportunity to inspect the record on appeal and to look at the original of the instruction as delivered by the court to the jury,

no exception was timely made to it at the time of the trial. Clearly, such deletion was prejudicial error and should be reversed.

(E) IN REFUSING TO RECALL THE JURY TO REHABILITATE THEM IN CONNECTION WITH TWO ERRORS COMMITTED BY COUNSEL FOR PLAINTIFF IN HIS ARGUMENT.

The two arguments of counsel for the plaintiff complained of by defendant relate first to his inserting at the time of argument a new element unsupported by any evidence which tended to confuse the jury, and second his abandoning the court's instruction relating to the measure of damages.

Argument to the jury is not generally part of a record and was not transcribed by the reporter in this trial. But in taking exceptions to argument of counsel for the plaintiff, the undersigned recalled for the record statements of plaintiff's counsel as follows:

> ". . . as I recall in substance that the defendant would indemnify the plaintiff for any payment to third persons engaged in the remedying of the defects or alleged defects covered by said warranty. Said exception is taken on the ground that to insert such an argument at a time when there is neither any evidence in support thereof nor justification for argument thereon is to create a new element and argument for the purpose of prejudicing and confusing the jury; and we take exception thereto; there being no evidence of any kind of expenditures or engagement of any parties, third persons or otherwise to remedy or oth-

erwise modify any of the alleged defects complained of by Plaintiff. (R-270)''

That such argument of plaintiff's counsel was deliberate and prejudicial appears more certain in noting that plaintiff's proposed instruction No. 15 (R-39), calls attention to that element which proposed Instruction the court refused to give. Said refusal of course was transmitted to counsel for plaintiff well prior to his argument to the jury. He was, therefore, inserting by way of argument a matter he was not entitled to as an instruction on which the court had previously ruled.

The undersigned further argued that counsel for plaintiff had ignored the court's instruction as to the measure of damages, which was Instruction No. 10. Counsel for the plaintiff's argument in that connection does not appear in the record, but the court's observation about it are as follows:

> ''THE COURT: Well, you should have taken your exception then and there. But Mr. Hayes, there was a thing I almost spoke to you about and that was disregarding my rule of damages.'' (R-270)

Counsel for the plaintiff, in fact, asked the jury to find cost of replacement to be a true measure of the damages, or in other words to rule that the drapes were valueless. Again, plaintiff's counsel was aware, prior to argument, that his theory of the measure of damages was incorrect since his proposed Instructions No. 7, No. 12 (R-34 and 37) were refused.

Counsel for the defendant then took exception both to the argument relating to measure of damages and to

the insertion of the extraneous element, and the court observed that it was a borderlike situation, and so he had said nothing. (R-272) Defendant then moved the court to recall the jury to correct the matter, which motion was denied. (R-272) While these matters do not perhaps seem of great moment by themselves, taken together with the cumulative effect of the other errors observed above, they added to the prejudice of defendant's interest herein, and a simple recalling of the jury at the time to correct any misimpressions created by this improper argument of counsel could have minimized, if not eliminated, the danger. Failing so to do constituted error.

(F) IN REFUSING TO GRANT JUDGMENT, NOTWITHSTANDING THE VERDICT.

The argument made heretofore in arguments (B) and (C) relating to the Motion to Dismiss and the Motion for Directed Verdict constitute the basis for defendant's motion before the court on May 11, 1964, for a judgment notwithstanding the verdict. Refusing to do so, the court committed reversible error. The elements of those arguments appearing heretofore need not be duplicated here.

(G) REFUSING TO GRANT DEFENDANT'S MOTION FOR A NEW TRIAL.

As will be noted from defendant's Motion for a New Trial, pursuant to Rule 59, Utah Rules of Civil Procedure, said motion was made on the grounds of newly discovered evidence which defendant did not with reasonable diligence discover and produce at the time of the trial. Said

motion was supported by Affidavit of counsel for defendant, and said evidence was identified in Paragraph 5 of that Affidavit as being the cotton thread used in sewing the draperies in question.

As pointed out at the time of arguing defendant's Motion for New Trial, the material from which these drapes were made was shipped in rolls from the manufacturer to Carpets, Incorporated, as indicated in Mr. Thompson's testimony. (R-191-192) The sewing of the drapes was contracted out to Mrs. Ruth Cramer, who testified that her shop sewed all of the draperies in question. (R-218)

Now the significance of the cotton thread in question as new evidence is this:

Such cotton thread was manufactured by a different company, made of a different type fabric (that is, cotton as opposed to rayon and dacron, the material content of the drapery fabric) and was supplied from a different mill. Following the trial, while Mr. Thompson and the undersigned were sitting in counsel's office, Thompson noticed dangling from the cut portion of the samples clipped from Exhibits 8, 9 and 10, a single strand of the said thread. On closer inspection, he discovered that the cotton thread discolored in the same manner or streaks as the fabric itself. Since plaintiff's position was that the discoloration was due to the presence of dye inherently installed in the fabric itself at the time of manufacture, to be consistent, the cotton threads, the white cotton threads sewing the fabric together, unless sub-

jected to the same manufacturing process should not have discolored at all, but remain white throughout. If, however, on the other hand, said thread discolored in the same manner and place in the material as the fabric of manufacture this then would be probative, if not conclusive, evidence that the cause of the discoloration came from some source other than the manufacturer, and occurred at a time subsequent to the assembly and sewing of the finished drapes. These facts were not observed or discovered until after the trial was concluded, as indicated above. It was on the basis of the same that counsel for defendant asked for a new trial.

This court has allowed new trials based upon newly discovered evidence as early as 1916 in the case of *Van-Dyke* v. *Ogden Savings Bank,* 48 Utah 606; 161 Pac. 50. In the case of *Uptown Appliance* v. *Flint,* 1952, 122 Utah 298, 249 P. 2nd 826, this court further ruled that the burden is upon the appellant to show what evidence it has to justify the new trial; and in the case of *Jensen* v. *Logan City,* 1936, 89 Utah 347, 57 Pac. 2nd 708, this court further ruled that it must appear that such new evidence would likely change the result rather than merely be cumulative. The opinion reads, in part:

> "... when it appears that the movant for the new trial was not guilty of indiligence in failing to obtain the witness (evidence here) for trial, and that there is no element of holding such witness (evidence here) in reserve for purposes of obtaining a new trial — generally picturesquely denominated in slang phraseology as 'an ace in the hole' — and it appears likely that such evidence would

change the result, a new trial should be granted." (Inserts added) Ibid, p. 723

Counsel for appellant maintains that there was no holding of such evidence in reserve; that the same was not in fact noticed until after the conclusion of the trial, and then only quite by accident. Appellant further maintains that this evidence would likely change the result of the trial and not be merely cumulative. The only real issue is whether or not defendant exercised "reasonable diligence" in obtaining said evidence.

In the case of *Crellin* v. *Thomas,* 1952, 122 Utah 122; 247 Pac. 2d 264, this court, by majority opinion, allowed the defendant a new trial in order to obtain a witness in a slander prosecution that the defendant therein had not become aware of prior to the trial. Justice Wolfe in his dissent, however, pointed out that ample opportunity was available to the defendant, so to have determined the presence and identity of such witness, had ordinary discovery devices been employed in the way of interrogatories to or deposition of the plaintiff. In that dissent there appears a quotation from an Oklahoma case defining reasonable diligence as follows:

> "By reasonable diligence is meant appropriate action, where there is some reason to awaken inquiry and direct diligence in a channel in which it would be successful. Levi v. Oklahoma City, 198 Oklahoma 414; 179 Pac. 2d 465, 466."

Appellant here maintains that the discovery of the dangling thread occurring in counsel's office at the time it did was quite fortuitous and accidental, and that an in-

spection of the draperies as such would not ordinarily bring one to notice the thread by which it was sewn, nor to have pursued this inquiry with diligence; and that appellant upon so discovering and inquiring, promptly so moved for the new trial on that ground. It would be, appellant maintains, a gross injustice to deny the defendant herein opportunity to present such evidence to a jury. Accordingly, he urges this court in the alternative of reversing the court below and granting dismissal to defendant, to at least grant a new trial wherein defendant can present this critical and highly important evidence.

CONCLUSION

For the foregoing reasons, defendant-appellant moves this court to reverse the Trial Court and grant judgment to the defendant dismissing plaintiff's complaint in its entirety with prejudice, or in the alternative granting a new trial herein.

Respectfully submitted,

GORDON A. MADSEN
MABEY, RONNOW & MADSEN
574 East 2nd South
Salt Lake City, Utah

Attorneys for Defendant-Appellant