

1966

Joanne Adams Leishman Dba Samak Lodge v.  
Kamas Valley Lumber Company, A Corporation :  
Appellant's Brief

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc1](https://digitalcommons.law.byu.edu/uofu_sc1)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors. Jackson B. Howard for Howard & Lewis; Attorneys for Appellant.

---

**Recommended Citation**

Brief of Appellant, *Leishman v. Kamas Valley Lumber*, No. 10711 (1966).  
[https://digitalcommons.law.byu.edu/uofu\\_sc1/4925](https://digitalcommons.law.byu.edu/uofu_sc1/4925)

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (cases filed before 1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

---

---

# In the Supreme Court of the State of Utah

---

JOANNE ADAMS LEISHMAN,  
dba SAMAK LODGE,

Plaintiff and Respondent,

vs.

KAMAS VALLEY LUMBER COMPANY,  
a corporation,

Defendant and Appellant.

CASE  
NO.10711

---

## APPELLANT'S BRIEF

---

Appeal from Judgment of the Third District Court,  
Summit County, State of Utah  
The Honorable A. H. Ellett, Judge

---

JACKSON B. HOWARD, for  
HOWARD & LEWIS  
120 East 300 North  
Provo, Utah

Attorneys for Defendant-  
Appellant

EARL S. SPAFFORD, for  
SPAFFORD & YOUNG  
2188 Highland Drive  
Salt Lake City, Utah  
Attorneys for Plaintiff-  
Respondent

FILED

NOV 15 1966

---

Clerk, Supreme Court, Utah

---

## TABLE OF CONTENTS

	Page
STATEMENT OF THE KIND OF CASE.....	1
DISPOSITION IN LOWER COURT.....	2
RELIEF SOUGHT ON APPEAL.....	2
STATEMENT OF FACTS .....	2
ARGUMENT .....	11

### POINT I

THE COURT ERRED IN FINDING THAT THERE HAD BEEN IMPLIED WARRANTY FROM THE APPELLANT TO THE RESPONDENT OF THE FITNESS FOR USE OF THE BEAMS FOR THE PARTICULAR USE TO WHICH THEY WERE ULTIMATELY PUT .....	11
---	----

### POINT II

THE COURT ERRED IN FAILING TO FIND THAT THE BUYER FAILED TO GIVE NOTICE OF THE BREACH OF WARRANTY.....	14
--	----

### POINT III

THE COURT ERRED IN FINDING THAT THE APPELLANT REPRESENTED THAT THE BEAMS SOLD WOULD STAND THE WEIGHT OF UP TO FOUR FEET OF SNOW.....	15
--	----

### POINT IV

THE COURT ERRED IN FINDING THAT THE PLAINTIFF RELIED UPON A REPRESENTATION OF THE DEFENDANT AS TO FITNESS FOR THE PARTICULAR USE TO WHICH THE BEAMS WERE PUT .....	16
--	----

### POINT V

THE COURT ERRED IN FINDING THAT THE BEAMS WERE NOT AS STRONG AS THEY APPEARED .....	17
---	----

## TABLE OF CONTENTS (Continued)

Page

### POINT VI

THE COURT ERRED IN FINDING THAT THE BUILDING COLLAPSED BY REASON OF DEFECTIVE BEAMS .....	18
---	----

### POINT VII

THE COURT ERRED IN FINDING THAT THE PLAINTIFF HAD NO REASON TO KNOW THAT THE BEAMS PURCHASED FROM THE DEFENDANT WERE OF INFERIOR QUALITY OR THAT THEY WERE STRUCTURALLY DEFECTIVE.....	20
--	----

### POINT VIII

THE COURT ERRED IN FINDING THAT THE PLAINTIFF DID NOT SETTLE HER COMPLAINT CONCERNING THE STRUCTURAL QUALITY OF THE BEAMS BY RECEIVING A REDUCTION IN PRICE .....	21
---	----

### POINT IX

THE COURT ERRED IN FAILING TO FIND THE PLAINTIFF WAIVED HER RIGHT TO CLAIM BREACH OF WARRANTY OR WAS GUILTY OF CONTRIBUTORY NEGLIGENCE IN RESPECT TO THE USE OF THE BEAMS OR IN FAILING TO FIND THAT THE PLAINTIFF ASSUMED THE RISK OF USING THE BEAMS.....	23
---	----

### POINT X

THE COURT ERRED IN FINDING THE RESPONDENT SUFFERED DAMAGES IN THE AMOUNT OF \$7500.00.....	28
--	----

### POINT XI

THE COURT ERRED IN NOT GRANTING THE APPELLANT A NEW TRIAL AND IN FAILING TO SET ASIDE THE JUDGMENT AFTER DISCOVER-	
--	--

## TABLE OF CONTENTS (Continued)

	Page
ING THAT IT HAD MISINTERPRETED THE TESTIMONY OF W. WARD BLAZZARD, WHICH MISINTERPRETATION WAS THE PRIMARY BASIS FOR GRANTING JUDGMENT FOR THE RESPONDENT .....	32

### CASES CITED

Fowler v. Pleasant Valley Coal Company, 52 P. 594, 16 Ut. 348.....	22
Gilmore v. Cohen, 386 P. 2d 81.....	31
McCormick v. Hoyt, 333 P. 2d 639, 53 Wash. 2d 338	28
O'Gara v. Findlay, 306 P. 2d 1073, 6 U. 2d 102.....	20
Paul's Valley Mill Company v. Gabbert, 78 P. 2d 685, 182 Okla. 500.....	26
Roth v. Speck, 126 A2d 153.....	30
State v. Tedesco, 291 P. 2d 1028, 4 U. 2d 248.....	30
Tomita v. Johnson, 290 P. 395, 49 Idaho 643.....	27
Tremeroli v. Austin Trailer Equip. Co., 227 P. 2d 923	30

### OTHER AUTHORITIES AND STATUTES CITED

20 Am. Jur. 1032, Sec. 1181.....	22
22 Am. Jur. 2d 46, Sec. 26.....	30
22 Am. Jur. 2d 194, Sec. 134.....	29
46 Am. Jur. 895, Sec. 765.....	25
46 Am. Jur. 931, Sec. 807.....	26
16 A.L.R. 896.....	26, 27
32 A.L.R. 1247.....	26
33 A.L.R. 2d 514.....	23
41 A.L.R. 2d 1177.....	24
82 A.L.R. 2d 1222.....	26

## TABLE OF CONTENTS (Continued)

	Page
117 A.L.R. 466.....	26
117 A.L.R. 481.....	26
Uniform Commercial Code, Sec. 2-316 (3)b.....	28
Utah Code Annotated, 1953, 60-1-16.....	12
Utah Code Annotated, 1953, 60-5-7.....	21

# **In the Supreme Court of the State of Utah**

---

JOANNE ADAMS LEISHMAN,  
dba SAMAK LODGE,

Plaintiff and Respondent,

vs.

KAMAS VALLEY LUMBER COMPANY,  
a corporation,

Defendant and Appellant.

**CASE  
NO.10711**

---

## **APPELLANT'S BRIEF**

---

### **STATEMENT OF THE KIND OF CASE**

This is an action for compensatory damages brought by the Respondent for implied breach of warranty, the basis for the breach of warranty being that the Appellant is alleged to have furnished laminated beams to the Respondent, which beams were unsuitable and unmerchantable for the use contemplated by the Respondent and which use the Appellant allegedly knew.

## **DISPOSITION IN LOWER COURT**

The Court granted judgment for the Respondent in the amount of \$7500 together with interest thereon at the rate of six percent (6%) per annum from February 23, 1966.

## **RELIEF SOUGHT ON APPEAL**

The Appellants seek an order to amend the Findings of Fact, Conclusions of Law, and Judgment to conform with the facts proved and to reverse to Judgment of the trial court, or in the alternative an order remanding the case to the lower court for trial.

## **STATEMENT OF FACTS**

The Appellant is a lumber company doing business in Kamas, Utah, a small town in southeast Summit County. It engages in the general lumber company business and manufactures and fabricates lumber products.

The Respondent Joanne Adams Leishman purchased property known as the SAMAK LODGE in March of 1964 (R 104). It consisted at that time of approximately 10 acres of ground upon which was located a building which had been operated as a private club known as Samak Lodge. A point of interest is that "Samak" is "Kamas" spelled backward.

The lodge was located just east of Kamas at the mouth of Beaver Creek Canyon. The purchase price of the entire property was \$7500. (TR 104, Interrogatory Answer 2)

Mrs. Leishman was familiar with the weather conditions at Kamas and was aware that winter often brings heavy snow and ice conditions (TR 122).



Mrs. Leishman desired to enlarge the existing structure on the property into a tavern and restaurant. To accomplish this purpose she entered into a business agreement with one Ben Dell of Salt Lake City to build and operate the tavern. The agreement, in substance, was that Mr. Dell would supervise and handle the construction of the tavern and would operate it for one year, whereupon his efforts would entitle him to be a partner in the business (R 33, 114).

The new structure was to be built over the foundation of the structure that had collapsed because of previous snows (TR 21).

In the forepart of the year 1964, Mr. Dell and Mrs. Leishman drew some rough plans for the construction contemplated (TR 35, 115). On the basis of these plans they contacted several suppliers concerning materials and to get quotes. They had determined they would need seven laminated beams of 6" x 12" with variable length size (TR 36). In this regard they had consulted with Morrison-Merrill Company and with Highland Lumber Company prior to ever talking with the Appellant concerning the laminated beams (TR 9, 35, 117). Dell and Claud Thacker measured the old building and determined how many beams they would need and that the spacing should be eight feet (TR 36). They had been advised that the same could not be supplied by those previously contacted in time for their contemplated date to commence construction. This date was approximately April of 1964.

Mrs. Leishman and Mr. Dell contacted the Kamas Valley Lumber Company in the early Spring of 1964 concerning the proposed construction. Here the testimony be-

comes conflicting as to the nature of the contract. The diverse testimony concerning the beams is as follows:

**Mrs. Leishman:**

Mr. Dell and she went to the Kamas Valley Lumber Company and talked with Mr. Weaver, an employee of Kamas Valley Lumber Company. At that time, the first meeting (March or April of 1964), they just discussed lumber. They did not discuss beams (R 116).

On the second meeting, March or April of 1964, both she and Mr. Dell were present and they met with Mr. Weaver again. They told Mr. Weaver that they had consulted with Morrison-Merrill about the necessary laminated beams and that company could not supply the needed beams within their time schedule. She says that Weaver said that Kamas Valley could supply them with laminated beams (TR 116). She said that they (she and Dell) told Weaver they would need eight beams (TR 116). She did not ask them to design the beams for the building (R 122).

She says that Weaver showed them a sample of the beam, and "the sample appeared to be very satisfactory" (TR 117). At the second meeting they placed their order.

**Ben Dell:**

Mr. Dell's version of ordering the laminated beams is considerably different than Mrs. Leishman's. His story is: That on the original trip in March of 1964, they did not purchase anything; they merely asked about prices (TR 12). On the second trip, about a week later, he ordered certain material. Those present were himself, Mr. Weaver, Mr. Bannister, and Mr. Wilde, the latter three being employees of the Respondent (TR 13). His testimony as to

what was said at the time the beams were ordered is: (TR 14)

"A. The beams were to be made, that they try to make delivery in two weeks if possible, because we were hurrying to try to get the building put up, and they said they would try to make the two-week delivery; if not, it may take three. At that time——

Q. Was anything else said?

A. The only other thing was that the studding and the other materials we ordered would be sent up as we needed them."

**Mr. Weaver:**

Mr. Weaver states that sometime in the Spring of 1964 Mrs. Leishman and Mr. Dell came to the office inquiring about prices for material including laminated beams. He quoted him a price for the material they said they needed (TR 146). At the time of the first meeting neither Mr. Dell nor Mrs. Leishman indicated how they were going to use the material except that they were making an addition to the lodge they had purchased (TR 117).

Mr. Weaver did not have any other conversations with Mr. Dell nor Mrs. Leishman again until after the beams had been delivered (R 147).

**Mr. Bannister:**

Mr. Bannister, an employee of Kamas Valley Lumber Company at the time of the beam purchase, testified that about April 17, 1964, Mr. Ben Dell came to the business for the purpose of placing certain orders. He knew exactly what he wanted. He placed an order for three (3) 6" x 12" x 32' beams and four (4) 6" x 12" x 28' beams. He (Dell)

said they were going into his construction. He (Dell) did not say how they were to be used (TR 165). The order was filled and the beams delivered (Exhibit 38, R 166).

The beams were constructed and delivered. Some of the beams had substantial defects in them in that the joints had been improperly joined. The joints were finger joints that intermesh something like the fingers of both hands when interlocked. In this case the imperfect joint was caused by having one or more of the 2 x 6 boards that formed the joints upsidedown at the time of fitting and gluing. This caused a space between the end of the finger and the vertex of the interlocking joint of the next board and also caused one of the boards to be raised from the board to which it was to be laminated by a space as much as one-fourth of an inch and running several feet in length. These defects were obvious to all who looked at them.

Upon delivery, Mrs. Leishman and Mr. Dell made complaint to the Appellant. The nature of the complaint is conflicting:

**Mrs. Leishman:**

Mrs. Leishman says that they complained of both the appearance and construction of the beams, but that they accepted the beams, notwithstanding these defects, at a discount (TR 118, 119). She makes no claim that "price" was a factor in the discount (TR 118, 119).

**Mr. Dell:**

Mr. Dell said they objected to the beams. He admitted they accepted the beams at a discount, but he claims

the discount was not because of defective quality but because someone else had given similar beams at a smaller price and he expected the same price (TR 41).

**Mr. Weaver:**

Mr. Dell came in and complained of a beam with a crack in it. This was the second time he had seen Mr. Dell. Walt Carrol, the shop manager, and Mr. Weaver went up and looked at the beams. Weaver suggested if they still wanted to use them they should put bolts through them. He offered on behalf of the Appellant to furnish the bolts and pay for the carpenter's (Mr. Thacker) time. When he left the job site, Dell was satisfied with this arrangement (TR 158, 159). After the building was constructed, Weaver told Dell the beams were being placed too far apart to support the roof (TR 151).

**Ward Blazzard:**

A short time after the discount was given and before the credit memos were filed, Mr. Blazzard inquired of his employees concerning the reason for the discount. This was in the forepart of May of 1964. Upon learning the reason, he marked the credit memo to read as follows: (TR 183).

"Adjustment of price due to dissatisfaction in laminating"

All of the witnesses agreed that at the time the defective condition of the beams was discovered, the beams had not yet been installed in the building. At this time no one from Kamas Valley Lumber Company knew how

the beams were to be used or the dimensions of the structure.

Mrs. Leishman and Mr. Dell had employed Claude Thacker and his son Don Thacker to help in the construction. Mr. Claude Thacker was a carpenter with 40 years of experience. Mr. Claude Thacker testified concerning the facts. The substance of his testimony was that Dell had a rough sketch from which he worked (TR 175). When Dell wanted something he went to the Kamas Valley Lumber Company to get it. He, Mr. Thacker, told him, Dell, at the time that he did not think the beams were strong enough for the use intended (TR 177, 180).

As the structure went up, it became obvious to Mr. Claude Thacker that the beams would not hold the intended weight. He testified that he told Dell the beams wouldn't hold and that there was too much space between centers (TR 177).

Claude Thacker testified that when walking on the roof there was more than a normal amount of spring or give which indicated a lack of strength to him (TR 177). He told Dell about it and Dell was unconcerned (TR 177).

Claude Thacker also testified that he had lived in the Kamas area 22 years and was aware of winter conditions (TR 177). He advised Dell to put a good strong post under each beam when he left for the winter since the beam was not strong enough to hold up the roof (TR 190).

Don Thacker testified that the beams were obviously defective and that fact was called to the attention of Mr. Dell by his father (TR 198). He further testified that before the beams were installed his father told Dell he would have to put them on four-foot centers (TR 200). Don

Thacker said that when he would walk on the beams after they were installed they would give an inch in the middle (TR 200), so he and his father advised Dell to put props or braces under each beam when he left in the fall (TR 200). Mr. Dell argued with Mr. Claude Thacker about the spacing between the beams (TR 202).

Both Robert Bannister and Bill Weaver warned Dell that there was too much space between the centers of the beams (TR 151, 171). Bannister also told Dell that the beams should not be placed on more than four-foot centers (TR 171). Dell ignored this advice (TR 171, 190).

The building was constructed generally as shown on Exhibit 37, which is labeled "roof plan." This plan was drawn by Mr. William Weaver (Exhibit 36), but to which Ralph L. Wadsworth, a Consulting Engineer, added beams "A", "B", and "C". The plan indicates that the beams were generally on eight foot centers with the exception of the angle area which had as much as a ten-foot spread between centers.

Both the Appellant and Respondent produced expert witnesses in the form of engineers, both of whom testified that the beams, if they had been of average construction, with expected allowable live load carrying capacities, would not, design-wise, have carried the expected load in that area (TR 83, 130). Wadsworth was emphatic that the roof would have failed regardless of the quality of the beam, (TR 131, 135), and that the cause of failure was that it was inadequately designed (TR 131) and constructed (TR 131).

The building was constructed and completed in July of 1964, and operated as a tavern and restaurant until the

close of the season, approximately November of 1964. Mrs. Leishman and Mr. Dell returned to Salt Lake in the Fall. Neither took any corrective measures to brace the beams or the roof (TR 190).

On or about February 23, 1965, part of the building roof collapsed. It was in this part of the structure that the laminated beams were used.

Mrs. Leishman was the sole witness concerning damages. After being placed on the witness stand four times for the purpose of proving damages and with some assistance in the way of counsel from the Court on what the measure of damages is in a case of this nature, (R 49, 105), Mrs. Leishman testified that the property was worth \$25,000.00, (TR 105), before the roof fell, and was worth \$7,500.00 after (TR 105). This is the only proof of damages offered by the Plaintiff.

On examination, Mrs. Leishman testified to the following facts:

1. The entire property cost her initially \$7500.00 (TR 104).

2. Her entire expenditure on the project, including labor for herself and Dell, was \$6,538. 29 (TR 104), which included the following items which had been or could be salvaged or had not been in the building at the time of its collapse: (See Exhibit 35, TR 109, 110) Tools, 20.41; safe, 75.00; furnace, 50.00; concrete 236.07; table lamps, 9.68; antique server, 15.00; windows, 50.00 (one-half of 101.98); stove, 67.28; grill, 232.87; sink, 86.30; sink, 78.00; dishes and silverware, 1,035.20 (Note: these were stolen before collapse); plumbing fixtures, 749.15 (Note: these are not even in this building); cooler, 284.62; licenses, insurance and



legal fees, 987.19; doors, 80.58. By her own testimony, the total maximum cost of the building alone, which was damaged, exclusive of the salvage value of lumber, electrical wiring (TR 108), etc., was \$4,057.35.

## ARGUMENT

### POINT I

THE COURT ERRED IN FINDING THAT THERE HAD BEEN IMPLIED WARRANTY FROM THE APPELLANT TO THE RESPONDENT OF THE FITNESS FOR USE OF THE BEAMS FOR THE PARTICULAR USE TO WHICH THEY WERE ULTIMATELY PUT.

In this case the testimony is unrefuted that the Plaintiff prepared a list of material before ever contacting the appellant (TR 35, 36, 116, 146, 147, 165). She and Mr. Dell had contacted both Morrison-Merrill and Hi-Land Lumber Company, material furnishers in Salt Lake City, before contacting the Appellant. In this case they ordered by sample (TR 117). The furnished beams were patently defective and did not conform to the sample, and both Leishman and Dell knew it (TR 118, 119).

The law in Utah, in force at the time of the Respondent's transaction with the Appellant, was what we know generally as the "Uniform Sales Act", Title 60 Sales Utah Code Annotated, 1953, as amended.

Under this act the following provisions seem clear and applicable:

"If the buyer has examined the goods, there is no implied warranty as regards defects which examination ought to have revealed."

In this case the buyer inspected the goods (TR 118, 19), and with admissions on the part of the Plaintiff that the defects were obvious to her and to Dell (TR 19, 118, 119).

The questions of what duties and responsibilities devolve upon the Respondent by the knowledge she had of the defective condition of the beams are taken up under POINT 9, concerning contributory negligence and assumption of risk.

If the buyer bought by sample as she says she did, (TR 117), then the only warranty under the law is that the bulk will conform with the sample.

"60-1-16. Implied warranties in sale by sample. In the case of a contract to sell or a sale by sample:

(1) There is an implied warranty that the bulk shall correspond with the sample in quality.

(2) There is an implied warranty that the buyer shall have a reasonable opportunity of comparing the bulk with the sample, except as far as otherwise provided in 60-3-7 (3).

(3) If the seller is a dealer in goods of that kind, there is an implied warranty that the goods shall be free from any defect rendering them unmerchantable which would not be apparent on reasonable examination of the sample."

In this case the Plaintiff concedes that the goods did not conform to the sample and she received a price adjustment accordingly. It is obvious that there could be no warranty under the provision of 60-1-16.

The next argument that must be made is that in order for there to have been an implied warranty under the pro-

visions of U.C.A. 60-1-15, the Seller must know the particular purpose for which the goods are required, and it must appear that the buyer relies on the seller's skill or judgment.

It is respectfully submitted that under the facts of this case the claimed warranty must fail not only under the question of reliance which will be taken up under POINT 4 following but for the following reasons:

1. The Plaintiff ordered by specification (TR 35, 36). She knew exactly what she wanted (TR 115). She did not request the Appellant to advise her concerning where to locate the beams she had ordered: (TR 119)

"A. I remember them being in contact with the building.

Q. But you don't remember anyone from Kamas Valley Lumber Company telling you where to place the beams?

A. I do not."

2. The Appellant had no knowledge of the spacing of the beams. Merely to have known they were for roof support is insufficient to impose liability. The Appellant would have had to have intimate knowledge at the time of the sale concerning how the beams were to be used before liability would ensue.

The court's findings of fact number 2 to the effect that "Plaintiff advised Defendant of the use to which the beams would be placed" is inadequate to impose liability, even if there were evidence to support it.

To impose liability the Court must necessarily find that the Appellant knew not only the intended use of the beams but the technical manner of the intended use. The

findings of fact in this regard are entirely silent as to such essential conclusion. For example, the testimony of the employees of the Appellant, the carpenter of the Respondent, and both experts was uniform in saying that the beams would have been adequate if placed on four (4) foot centers, but inadequate otherwise.

To demonstrate more clearly that the Court found just the reverse of what is necessary to impose liability, the Court struck from the initial findings of fact submitted to it, (finding of fact number 2) after the words "the beams would be placed" the following language: "and solicited from the defendant their recommendations as to the type of beam which ought to be suitable and merchantable for the contemplated use."

It is clear, therefore, that the Court did not think that the Appellant had more knowledge than the fact that the beam ordered by the Respondent was to be used to support the roof. It is certainly clear that the Court believed that the Appellant made no recommendation as to the type of beam that might be suitable.

## POINT II

THE COURT ERRED IN FAILING TO FIND THAT THE BUYER FAILED TO GIVE NOTICE OF THE BREACH OF WARRANTY.

The Court, by finding of fact number 1, states "That the plaintiff and her attorneys gave defendant a due and proper notice of the failure of the beams and the collapse of the roof when it came to plaintiff's attention."

The particular language of the code provision applicable to this finding is:

"But if, after acceptance of the goods, the buyer fails to give notice to the Seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know, of such breach, the Seller shall not be liable therefor."

It is respectfully submitted that the breach of warranty, if any, became known to the Respondent on approximately May 22, 1964, the date the beams were delivered. Acceptance of the goods after knowledge of their defective condition relieves the seller of any liability thereunder.

Following further the reasoning above stated, the code further states:

"Where the goods have been delivered to the buyer he cannot rescind the sale, if he knew of the breach of warranty when he accepted the goods, etc."

While the above provision pertains to rights of rescission, nevertheless, it spells out that the buyer's rights accrue at the time of discovery of the breach, and not later, and that is the time when notice must be given.

### POINT III

THE COURT ERRED IN FINDING THAT THE APPELLANT REPRESENTED THAT THE BEAMS SOLD WOULD STAND THE WEIGHT OF UP TO FOUR FEET OF SNOW.

The Respondent blithely prepares a finding of fact number 3 stating "that they (the beams) would stand the weight of up to four feet of snow with the contemplated use of the beams placed on eight foot centers."

Nowhere in the record is there any claim that the De-

fendant represented that the beams would stand the weight of up to four feet of snow. This is a child born without the aid of a mother. There is absolutely no pleading, testimony or evidence to the effect that the Seller ever made such a representation.

If this is a finding upon which the Court relied to grant judgment to the Respondent, then we respectfully submit that we are entitled to have the judgment reversed.

#### POINT IV

THE COURT ERRED IN FINDING THAT THE PLAINTIFF RELIED UPON A REPRESENTATION OF THE DEFENDANT AS TO FITNESS FOR THE PARTICULAR USE TO WHICH THE BEAMS WERE PUT.

It seems inconceivable that the Court could find that the Respondent relied upon a representation of fitness of use under the circumstances of this case. A summary of circumstances negating reliance are as follows:

1. Leishman knew of the potential snow danger in the Kamas area (TR 122).

2. Dell knew of the potential snow danger in the Kamas area (TR 21).

3. The beams were patently defective (TR 24).

4. Leishman sought a rebate because of the defective conditions of the beams (TR 183).

5. A rebate was granted because of the defective condition of the beams (TR 183).

6. Weaver told them to put bolts in the beams (TR 158, 159).

7. Weaver told them to put the beams on four-foot centers (TR 151).

8. Bannister told them the beams would not hold as placed and to place them on four-foot centers (TR 171).

9. Claude Thacker told them to put beams on smaller centers, that they wouldn't hold otherwise (TR 177, 180).

10. Don Thacker told of arguments back and forth between Dell and his father regarding the structural defects in the beams and their inability to support the expected load (TR 202).

11. Thacker advised Respondent to put braces under beams during the winter time (TR 177, 200).

To have relied on the ability of the beams to support the expected snow load in the fact of such overwhelming evidence to the contrary is unbelievable. This, connected with the fact that if the beams had been perfect they would not have supported the snow load makes reliance on "implied" quality absolutely impossible.

#### POINT V

THE COURT ERRED IN FINDING THAT THE BEAMS WERE NOT AS STRONG AS THEY APPEARED.

In finding of fact number 7, the Court found "that said laminated beams were not as structurally sound and strong as they appeared and should have been, if properly manufactured."

This finding is difficult to understand. How strong did they appear? They had large gaps in them. They

were obviously poorly laminated. They were obviously not properly manufactured.

We submit this finding means nothing except that the Respondent must have assumed the risk the appearance of such beams gave. The beams bespoke of weakness. What more could she assume from their appearance?

## POINT VI

THE COURT ERRED IN FINDING THAT THE BUILDING COLLAPSED BY REASON OF DEFECTIVE BEAMS.

The fact is the building would have collapsed regardless of the beams. This finding should have been "the building collapsed because of inadequate design."

Joseph F. Patrick, the Respondent's engineer, testified that the proper design for this area would have assumed a "forty-five pound unit for imposed live loading" (TR 83). An anticipated live load in this area should have anticipated at least 45 lbs. per square foot, according to Mr. Patrick, (TR 83), and yet the maximum load these beams would have supported would have been 30 lbs. per square foot if they had been perfect, (TR 83) and allowing no safety factor for wood variables (TR 84). Mr. Patrick testified that the decking would not hold a thirty pound per square foot live load (TR 91). He further testified that proper wood design required a substantial margin of error because of the peculiar characteristics of wood. Wood is extremely unpredictable, and in these beams and decking there would have been no margin of error if they had been perfect (TR 92).



General design practice would have assumed a beam of this dimension composed of Douglas fir lumber, and would have had an allowable 2400 PSI (pounds per square inch). (Patrick TR 63, Wadsworth TR 127). Wadsworth testified that had these beams been perfect according to expected standards and placed in the span that they were, Beam 'A' would have supported 19 lbs. per sq. ft. allowable load, Beam "B" would have supported 27 lbs. allowable live load, and Beam "C" would have supported 14 lbs. allowable live load (TR 129, Exhibit 37).

In respect to the decking used over the beam expanse, had the beams been adequate it would have supported only the following:

<b>Deck Span</b>	<b>Lbs. Per Sq. Ft. Allowable Live Load</b>
8' 0"	41
9' 4"	21
10' 0"	13
11' 6"	4

(TR 130, 131)

Testimony was introduced and pictures were introduced showing heavy accumulations of snow and ice on the roof. Both expert witnesses testified that such snow and ice measurements would have given live load weight per square foot of greater than 45 pounds (TR 83, 127).

It was clearly demonstrated that under the circumstances of this case the roof would have collapsed even if the beams had been perfect. It is further evidence that a section of the deck span would have collapsed in any event before the beams collapsed.

Both expert witnesses testified that if one beam or one section of decking collapsed substantial additional burden would be immediately thrust upon the remaining beams and decking and one would expect further collapse in a form of chain reaction (TR 87).

We submit that there is not a scintilla of evidence to support the finding that the roof collapsed because of defective beams. Recognizing that the ordinary rule applied to finding of fact by the trial court is that if there is substantial evidence in the record to support the findings of fact, they will be sustained. *O'Gara v. Findlay*, 6 U. 2d 102, 306 P. 2d 1073. Notwithstanding this rule, we respectfully submit that the evidence is clear that the roof collapsed not because of defective beams but because of excessive spacing—or, to put it as the engineer did, “because of inadequate design” (TR 131). The Appellant believes that there is no evidence in the record to support a finding that the roof collapsed because of defective beams *per se*. The mere fact that the roof would collapse sooner or under a smaller weight because of the defects in these beams is not a sound reason to say that the beams were the cause of the collapse. The proximate cause was defective design of the building and intrinsic strength of the beam.

## POINT VII

THE COURT ERRED IN FINDING THAT THE PLAINTIFF HAD NO REASON TO KNOW THAT THE BEAMS PURCHASED FROM THE DEFENDANT WERE OF INFERIOR QUALITY OR THAT THEY WERE STRUCTURALLY DEFECTIVE

In finding of fact number 10 the Court said: “That

plaintiff did not know or have reason to know that the beams as purchased from defendant were of inferior quality and laminations or that they were structurally defective."

Finding of fact number 10 requires the Court to ignore substantial, and in the Appellant's opinion, irrefutable evidence to the contrary. The evidence that we think clearly demonstrates the Respondent's knowledge of the defective and structurally unsound nature of the beams has been partially set out in the argument under POINT 4 above. We respectfully call the Court's attention to the evidence of the Respondent's knowledge listed in Items 1 through 11 on pages 16 and 17 of this brief.

No point was more adequately demonstrated by the Appellant and Respondent than the defective quality of the beams and their knowledge of it. This finding, because of its flight from fact, is especially frustrating to the Appellant.

### POINT VIII

THE COURT ERRED IN FINDING THAT THE PLAINTIFF DID NOT SETTLE HER COMPLAINT CONCERNING THE STRUCTURAL QUALITY OF THE BEAMS BY RECEIVING A REDUCTION IN PRICE.

Under U.C.A. 1953 as amended 60-5-7, it is said:

"Remedies for breach of warranty:

(1) Where there is a breach of warranty by the Seller, the Buyer may at his election:

(a) Accept the goods, and set up against the Seller a breach of warranty by way of recoupment in diminution or extinction of the price.

(2) When the Buyer has claimed and been granted

a remedy in any one of these ways, no other remedy can thereafter be granted."

In the statement of facts we set forth the testimony of Mrs. Leishman concerning the rebate (TR 118, 119). In addition to that testimony is the testimony of Mr. Blazzard (TR 183), all to the effect that the price adjustment was because of the defective quality of the beams.

At the trial the only testimony to the contrary was that of Mr. Dell to the effect that the price was adjusted because someone else had purchased beams at a smaller price (TR 41). We respectfully submit that this testimony (Dell's) is not sufficient to overcome the testimony of all the other witnesses and especially Mrs. Leishman's. We think that the testimony of Mrs. Leishman is binding upon her, especially since she is the party to this action.

It is a fundamental rule that a party may take the testimony offered by the adverse party in the light most favorable to him and that the testimony of a party has great weight against him. See **Jones on Evidence**, Vol. 4, p. 1855, Sec. 984, 20 Am.Jr. 1032, Sec. 1181, **Fowler v. Pleasant Valley Coal Company**, 16 U. 348, 52 P. 594.

In the present case, where Mrs. Leishman admits that the rebate was given because of appearance and structural defects, it would matter not if there were an additional reason for rebate. When she took the rebate under the code section cited above, she barred herself from any other relief because of claimed breach of warranty. Her testimony in this regard coupled with the testimony of Bannister and Blazzard should be conclusive against her.

## POINT IX

THE COURT ERRED IN FAILING TO FIND THE PLAINTIFF WAIVED HER RIGHT TO CLAIM BREACH OF WARRANTY OR WAS GUILTY OF CONTRIBUTORY NEGLIGENCE IN RESPECT TO THE USE OF THE BEAMS OR IN FAILING TO FIND THAT THE PLAINTIFF ASSUMED THE RISK OF USING THE BEAMS.

All of the testimony above set forth and all of the arguments proffered in respect to the other points set forth above apply with even more force and effect against the principles of waiver, contributory negligence and assumption of risk. Because we have clearly set forth the facts that show use after knowledge of the defect, we shall address ourselves to the authorities supporting our belief of the application of these defenses.

"As a general rule, damages which have been caused by the continued use of a defective article, after the buyer has become aware that it does not conform to the warranty, are not recoverable in an action or counterclaim based on breach of warranty.

In the absence of special circumstances, such as the seller's insistence on the continued use of the article or denial that it is defective, or the likelihood of greater damage resulting to the buyer by discontinuing than by continuing its use, the purchaser has no right to continue using a defective article, after he has learned of the defect, if; the result of such use is to increase the damage resulting from the defect." (33 A.L.R. 2d, 514)

"Allowance to the buyer as damages for the furnishing of forty pound instead of fifty pound beams of not only

the difference in value of the beams, but other items of damage, such as setting the beams in the building under construction, removing and taking out the beams and rebuilding the walls, on the theory that the buyer did not discover that the beams were lighter until after they were set in the walls, was held error in *Hawkins vs. Deitz* (1899) 27 Misc. 200, 57 NYS 751, where the buyer had seen the beams before delivery and also at the site of the building, and they were plainly marked with the figures "40", indicating their weight, and the buyer testified that he could tell one from the other "as soon as he saw it." The appellate court observed that the fact that the buyer's employees put the beams into the building and enclosed them in masonry or brickwork the morning after their delivery, in the buyer's absence, did not excuse him for his negligence since the acts of his employees must be deemed his acts. (41 A.L.R. 2d, p. 1177)

"The later cases adhere to the rule that a purchaser of personal property may waive or lose the right to rescind the contract for fraud, breach of warranty, or failure of the article purchased to conform to the contract, if he uses it in his business or otherwise as his own property, for his own benefit or convenience, and not merely for testing or preserving it, after he has knowledge of the grounds for rescission." (*Advance Rumely Thresher Company, Inc. v. Stohl*, 75 Utah 124, 283 P. 731; *Knudsen Music Company v. Masterson*, 121 Utah 252, 240 P. 2d 973; 41 A.L.R. 2d, 1177, *Williston Sales*, Rev. Ed. Sec. 611)

"It is well settled that a purchaser of personal property may waive or lose the right to rescind the contract for breach of warranty or failure of the article purchased to conform to the contract, if he uses it in his business or otherwise as his own property, for his own benefit or convenience, and not merely for testing or preserving

it, after he has knowledge of the grounds for rescission. While in many of the cases the fact that the property, because of the use, had necessarily deteriorated to some extent in value seems to have been a factor in the holding that such use precluded rescission, there is authority which denies the right of rescission where there has been use, even though apparently such use did not result in substantial diminution in value of the property. Moreover, after an attempted rescission by the buyer of chattels, which the seller has not accepted, the buyer if he intends to rely upon it, must adhere thereto and act consistently therewith, and if he thereafter continues to use the property as his own, he may be held to have waived or abandoned the rescission, and may be precluded from rescinding or asserting a claim that he has rescinded; in other words, the use of chattels sold, by the purchaser, after the seller has refused the latter's tender of them in a rescission of the contract defeats the attempted rescission, if the property was used for the personal benefit of the purchaser, and not merely in compliance with his duty as bailee of the seller. This doctrine finds support in numerous cases. It is no excuse for the continued use and consumption that it was required by the exigencies of the buyer's business, and it is also immaterial that the buyer, while continuing to use and consume the property, made objections to the quality. The fact that the further use or consumption of the goods, after knowledge of defects in quality, was for the purpose of establishing evidence of their defective quality will not prevent such use from constituting a waiver of the right to return." (46 Am.Jr. 895, Sec. 765)

While the above citation refers to the right of rescission, it is clear that the same rule applies to a right of dam-

ages under U.C.A. 60-5-7. Rescission is only one of the alternate remedies.

"In spite of his negligence, a seller is, of course, not liable therefor to a buyer who, by his own negligent conduct, has contributed to the injury. And while the use of the purchased article in a particular manner which would otherwise appear to be negligent may be proper where the buyer relies, and has a right to rely upon the seller's assurance that it is safe to use the article after he discovers the danger will be held to have assumed all the risk of damage to himself, notwithstanding the seller's assurance of safety."  
(46 AM.Jr. 931, Sec. 807)

The question of the application of the rule of contributory negligence in a case that fits in a contract category causes some academic consternation. While there is not a wealth of authority using the term "contributory negligence", the acts of the parties which give rise to defenses are interchangeably described as waiver, assumption of risk, and occasionally negligence.

The general rule is that the defense of contributory negligence, except where the common law rule is abrogated by statute, is appropriately invoked in negligence actions, while the defense of assumption of risk is applicable to cases involving consensual or contractual relationship between the parties. 82 A.L.R. 2d 1222. At least in the area of sale and warranty of seed, however, the cases occasionally talk about the negligence of the buyer, 16 A.L.R. 896, 32 A.L.R. 1247, and 117 A.L.R. 481. Among the cases cited in the annotations are *Paul's Valley Mill Company v. Gabbert*, 78 P. 2d 685, 182 Okla. 500, 117 A.L.R. 466 (1938).



In this case the buyer was denied consequential damages where he examined the seed oats and knew that they were not the kind he had ordered, but planted them anyway.

Another case cited by A.L.R. is *Tomita v. Johnson*, 290 Pac. 395, 49 Idaho 643, (1930). Here an experienced potato grower was held to have known by sight that the seed potatoes sold were not the ones he had ordered and that part of the seed had spoiled and that most of the balance of the potatoes were diseased. Having planted with this knowledge, he was not allowed to recover for crop failure.

None of these cases go so far as to state that contributory negligence is being used as a defense. In fact, neither of the cases just cited so much as mentions the word "negligence", "due care" or "contributory negligence", but they are cited in American Law Reports under the heading "Effect of Negligence of Buyer for Failure to Mitigate Damage."

It has also been held where the buyer, by an inspection before acceptance, might have discovered the defective condition of the seed or other articles, the same result obtains; however, the cases talk in terms of waiver of the breach, not in terms of contributory negligence. 16 A.L.R. 896.

Language suggesting contributory negligence as a defense to breach of contract has occasionally been used in connection with implied warranties of fitness of livestock. According to 53 A.L.R. 2d 897, Sec 3(c), inspection and patent defects, where the physical disease or defects of an animal purchased were discoverable by "ordinary care" or where the buyer had "not exercised due care" the warranty is not breached and the buyer "assumes the risk."

It might be implied that the defense of contributory

negligence was the basis for the decision in **McCormick v. Hoyt**, 333 P. 2d 639, 53 Wash 2d 338 (1959). Here a recovery under the theory of breach of warranty of fitness of goods was denied to the buyers where ample opportunity to inspect was offered but refused. The position of the preceding case has been supported in Utah since January 1966 by the Uniform Commercial Code, Section 2-316(3)b, which supercedes 60-1-15(3) Utah Code Annotated:

“(b) When the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him.”

The Appellant respectfully submits that regardless of the label attached, whether it be waiver, assumption of risk or contributory negligence, the Plaintiff by her conduct is barred from recovering in this case.

### POINT X

THE COURT ERRED IN FINDING THE RESPONDENT SUFFERED DAMAGES IN THE AMOUNT OF \$7500.00.

Perhaps the Appellant made a mistake in not showing what the Respondent's actual damages were, even though liability for such was denied; however, it appeared to the Appellant that the proof of damages was so totally deficient that the Plaintiff could not recover.

In this instance the first attempt by the Respondent

at damages was to offer proof of the earning capacity of the business (TR 5). The next attempt was to show the cost of construction (TR 49, 95). It was not until the Court advised the Respondent as to what the measure of damages truly was that Mrs. Leishman testified that the value of the premise before the collapse was \$25,000.00 and after the collapse was \$7500.00 (TR 105). No other evidence was offered.

What she took into consideration in arriving at those figures was never disclosed. In fact the figures were so totally mythical as to be incredible. It is apparent that the Court did not believe them.

If the Court did not believe the testimony offered concerning damages, what did it believe? The only conclusion that one can come to is that the Court speculated as to the Respondent's damage.

The rule concerning damages in this case should have been:

"In the case of an injury of a permanent nature to real property, the proper measure of damages is the diminution in the market value of the property by reason of that injury, or in other words the difference between the value of the land before the injury and its value after the injury." (22 Am. Jur. 2d. 194, Sec. 134)

Generally speaking, the Courts have said that market value means "fair market value", and the accepted definition of "fair market value" is:

"The highest price estimated in terms of money which the property will bring if exposed for sale in the open market by a seller who is willing to sell, allowing a reasonable time to find a buyer who is willing but not

obliged to buy, both parties having full knowledge of all uses to which it is adapted and for which it is capable of being used." (Definition used by General Services Administration, United States of America, *State v. Tesesco*, 4 Utah 2d 248, 291 P. 2d 1028.)

There is absolutely no testimony in this case concerning "fair market value" of the property before and after the collapse of the roof.

Without admitting that there is any evidence of fair market value, there still arises the question concerning the adequacy of proof necessary to sustain the Plaintiff's burden. In this regard the following citations may be helpful:

"\* \* \* To authorize a recovery for more than nominal damages, facts must exist and be shown by the evidence which afford a reasonable basis for measuring the plaintiff's loss. The damages must be susceptible of ascertainment in some manner other than by speculation, conjecture, or surmise and by reference to some fairly definite standard, such as market value, established experience, or direct inference from known circumstances."

22 Am.Jur. 2d, 46, Sec. 26 Restatement of Contracts Sec. 331.

"The burden of proof, of course, is on the plaintiff to prove his damages with reasonable certainty." *Tremmeroli v. Austin Trailer Equipment Co.* (California) 227 P. 2d 923.

"It is established law that where a plaintiff proves a breach of a contractual duty he is entitled to damages; however, when he offers no proof of actual damages or the proof is vague or speculative, he is entitled to no more than nominal damages." *Roth v. Speck* (Dist. of Col.) 126 A. 2d 153, 61 A.L.R. 2d 1004.

In the case of **Gilmore v. Cohen** (Ariz.) 386 P. 2d. 81, the plaintiffs were given options to buy certain property by the defendants. The defendants breached the contract. The plaintiffs put in proof that if the defendants had honored the contract they would have made the same profit on the property to be purchased that they had made on the property already purchased. The trial court allowed only nominal damages. The Supreme Court said:

"The only question remaining for our consideration is whether, on the basis of the evidence presented, it was error for the trial judge to limit his award to nominal damages. The burden was on the plaintiffs to show the amount of their damages with reasonable certainty. *Jacob v. Ciner*, supra; *Martin v. LaFon*, 55 Ariz. 196, 100 P. 2d 182 (1940). It is firmly established, of course, in this state as elsewhere, that "certainty in amount" of damages is not essential to recovery when the FACT of damage is proven. *Story Parchment Co. v. Patterson Parchment Paper Co.*, 282 U.S. 555, 51 S.Ct. 248, 75 L.Ed. 544 (1931); *Grumfmel v. Hollenstein*, 90 Ariz. 356, 367 P. 2d 960 (1962); *Brear v. Klinker Sand & Gravel Co.*, 60 Wash. 2d 443, 374 P. 2d 370 (1962). This is simply a recognition that doubts as to the extent of the injury should be resolved in favor of the innocent plaintiff and against the wrongdoer. But it cannot dispel the requirement that the plaintiff's evidence provide some basis for estimating his loss. This court stated in *McNutt Oil & Refining Co. v. D'Ascoli*, 79 Ariz. 28, 281 P. 2d 966 (1955), that 'conjecture or speculation' cannot provide the basis for an award of damages, and said in *Martin v. LaFon*, supra, that the evidence must make an 'approximately accurate estimate' possible."

We respectfully contend that in this case, as in the

Arizona case cited above, the evidence must make an "approximately accurate estimate" possible. Where the only evidence offered was that the damages were \$17,500.00, that is hardly a basis for a "reasonably accurate" judgment of \$7500.00.

We believe the argument above tendered is even more convincing when considered in the light that the Respondent had invested only \$4,057.35 in the damaged property within nine months of the date of damage and that such figure does not take into consideration the salvage value of such material left.

#### POINT XI

THE COURT ERRED IN NOT GRANTING THE APPELLANT A NEW TRIAL AND IN FAILING TO SET ASIDE THE JUDGMENT AFTER DISCOVERING THAT IT HAD MISINTERPRETED THE TESTIMONY OF W. WARD BLAZZARD, WHICH MISINTERPRETATION WAS THE PRIMARY BASIS FOR GRANTING JUDGMENT FOR THE RESPONDENT.

During the trial the Appellant offered a credit memorandum with the notation "adjustment of price due to dissatisfaction in laminating." The memorandum offered by the Appellant was a carbon file copy extracted from the office file of the Appellant labeled "Samak Lodge" and covering all the material furnished to the Respondent. Upon the production of the file carbon copy the Respondent produced a white copy which had the appearance of an original and which did not have the notation.

Blazzard, who testified at the trial, was as surprised as was counsel concerning the copy in the hands of the Re-

spondent, for it left the appearance that Mr. Blazzard had deliberately used a carbon to make a copy that would imply to the Court that the original (which at that time the Court assumed was the one offered by the Respondent) also contained such a notation.

Mr. Blazzard testified concerning how he believed the error developed (TR 183), but because he did not have all of his office files with him, he could not produce the original at that time.

At the close of the case when the Court rendered its judgment, the judge said in effect that Blazzard went out of his way to write his carbon copy with carbon—so the judge did not believe him (TR 208).

At the time of the motion for a new trial the judge said: "If what Mr. Blazzard said was true, I would be obligated to dismiss the action of the plaintiff."

It was not until the hearing on the motion for the new trial that counsel for the Appellant was fully apprised of the feeling of prejudice the testimony had engendered in the judge concerning this testimony and his disbelief of the explanations offered. It was because of the strong statement of the judge at this hearing that the Appellant prepared and filed the motion to set aside the Findings of Fact, Conclusions of Law and Judgment, which motion was accompanied by the affidavit of Mr. Blazzard. There is set forth as follows the motion and affidavit:

### MOTION

"Comes now the defendant and moves the Court to set aside the Findings of Fact, Conclusions of Law, and Judgment in the above entitled case, or in the alter-

native to allow the defendant to introduce new evidence concerning matters of grave importance in the determination of the issues raised by the pleadings in the above entitled action.

The defendant alleges that at the time of trial and at the time of the hearing on the defendant's Motion for a New Trial, the Court expressed itself in saying that if it had believed the testimony of Ward W. Blazzard concerning the memorandum made on the credit memo introduced in evidence, it would have been obligated to dismiss the plaintiff's case, and that it felt that the carbon entry on the exhibit introduced was a self-serving addition made for the purpose of misleading the Court.

It is the defendant's position that the failure to introduce the original copy of that credit memo was the result of mistake, inadvertence, or excusable neglect, and that the original of that document which refutes the Court's decision constitutes newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b) for reason that the defendant did not know or had no reason to believe that the Court felt the witness, Ward W. Blazzard's, testimony was false. The Court's expressed conclusion at the time of the hearing on the defendant's Motion for a New Trial came as a complete surprise to the defendant, and the exhibit offered is a complete explanation of the Court's erroneous conclusion. This Motion is based upon the Affidavit of Ward W. Blazzard, together with accompanying exhibit, and is based upon Rule 60(b) of Utah Rules of Civil Procedure.

Dated this 2nd day of August, 1966, at Provo, Utah.



**AFFIDAVIT**

"Ward W. Blazzard, being first duly sworn, deposes and says:

At the trial of the above entitled action, Invoice No. 2200 (Sales Order D8967), a credit memo, was introduced in evidence. There was a notation on the credit memo which did not appear on the copy of the invoice delivered to the buyer, Samak Lodge. That notation stated: "Adjustment of price due to dissatisfaction in laminating." I testified at the trial that after discovering the purpose of the credit from my employee, I recorded such purpose on the invoice.

The copy that was introduced at the trial was a carbon copy. The sales order pads used by the Kamas Valley Lumber Company consist of five parts, with fixed carbons. The first copy is the customer's copy, which is white. The original is also white and is filed in our office numerically. The yellow carbon copy goes into the customer's file and is filed alphabetically, and the orange copy is the work order and signature copy, which is filed numerically by sales order number. The pink copy is a delivery slip given to the customer at time of delivery. Usually the customer's white invoice copy is mailed to him at statement time.

I am advised by my attorney, Jackson B. Howard, that the Court stated that it believed that the notation on the credit memo (yellow copy introduced in Court), concerning the purpose of the credit's issuance, was deliberately written in carbon to cause the Court to believe that the copy delivered to the customer had the same notation on it. The explanation for the introduction of the yellow carbon rather than the original is that the yellow copies are filed in the customer's file which contains all of the charges and credits to the customer's account, and it was easily obtained and

did not require any office search. The white copies of original entry are filed numerically, and to have extracted all of the original invoices or sales slips would have taken considerable office time. I had no reason to believe that the customer's file was inadequate. It now appears that the Court believes the customer's white copy to be the original, when in fact the original is attached to this Affidavit and shows that the notation was made in pen on that document. This notation was made shortly after the credit was issued and before the copies had been separated for filing and posting to the customer's account. The notation was not made in anticipation of litigation.

Had I thought that my explanation of the entry made at Court would be misconstrued, without the production of the original document, the original document would certainly have been produced at the trial. It was not until the time of the trial that I discovered that the same entry was not on the customer's white copy of the invoice. When I made the entry I did not know that the customer's white copy had been removed and sent to her.

There is attached to this Affidavit the original of the credit memo, showing the adjustment I made shortly after the issuance of the credit memo, and an orange copy of the same demonstrating the authenticity of the original entry, and a complete sales slip set consisting of an original and four copies.

Dated at Provo, Utah, this 2nd day of August, 1966.

The hearing on the motion was held at Salt Lake City on the 29th day of August, 1966, on stipulation of counsel and for the convenience of the Court. The Court did not have the file from Summit County which contained the al-

tachment to the affidavits, but he took the matter under advisement.

The hearing was after the appeal had been initiated, and was somewhat delayed because Judge Ellett was on vacation

Judge Ellett, after reviewing the file, made the following order, which is set out as follows:

### **ORDER**

"The defendant's motion to set aside the Findings of Fact, Conclusions of Law, and Judgment in the above entitled case having come on regularly for hearing on the 29th day of August, 1966, and the Court having heard the arguments of counsel and having taken the matter under advisement and being fully advised in the premises, and the Court having found by its own investigation and review of the evidence that the statements contained in the motion and affidavit are in fact true, but the Court having other good and substantial reasons for having ruled in favor of the plaintiff and against the defendant,

IT IS THEREFORE ORDERED that the motion of the defendant be and the same is hereby denied.

Dated at Salt Lake City, Utah, this \_\_\_\_\_ day of October, 1966.

**BY THE COURT**

While we recognize that a court may not be committed to oral statements made from the bench, we still believe that his conclusion that if he believed Blazzard he would have to dismiss against the respondent was indicative of his judgment at the time and the prevailing prejudice caused by his belief that Blazzard was trying to put something over on the Court.

The appellant has no desire to cast any adverse reflections upon the trial judge and, on the contrary, counsel considers Judge Ellett to be a judge of the highest caliber; however, all of us are human. The appellant is reminded of the standard instruction given to the jury concerning deliberations, which is quoted as follows:

"It is rarely productive or good for a juror, upon entering the jury room, to make an emphatic expression of his own opinion on the case or to announce a determination to stand for a certain verdict. When one does that at the outset, his sense of pride may be aroused, and he may hesitate to recede from an announced position if shown that it is fallacious. Remember that you are not partisans or advocates in this matter, but are judges."

It is obvious from the Court's ruling that his understanding of this particular fact was fallacious, yet he did not change his position. We believe that in light of his previous observations concerning the strength of this evidence, as believed, against the Appellant, it was an abuse of sound discretion not to grant the Appellant a new trial.

### CONCLUSION

The arguments above set forth demonstrate that the Appellant is entitled to a reversal of the judgment or, in the alternative, a new trial.

Respectfully submitted,

JACKSON B. HOWARD, for  
HOWARD & LEWIS  
120 East 300 North  
Provo, Utah

Attorneys for Appellant