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**In the United States Bankruptcy Court**  
**for the Northern District of Iowa**

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RONALD B. REIL KAYE A. REIL  
Debtors.

Bankruptcy No. L92-00860W  
Chapter 11

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RONALD B. REIL and KAYE E. REIL  
Plaintiffs

Adversary No. L92-0094W

vs.

ETHEL STANLEY and DES MOINES GOLD &  
SILVER BUYERS, INC.

Defendants.

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**RULING**

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On September 11, 1995, the above-captioned matter came on for trial pursuant to assignment. Plaintiffs/Debtors Ronald and Kaye Reil appeared with attorney John Walker. Defendants Des Moines Gold & Silver Buyers, Inc. and Ethel Stanley were represented by attorneys Joseph Van Winkle and S.P. DeVolder. After the presentation of evidence and arguments of counsel, the Court took the matter under advisement. The time for filing briefs has passed and this matter is ready for resolution.

**STATEMENT OF THE CASE**

The Reils bought gold, silver, diamonds and jewelry from Defendants Ethel Stanley and her business, Des Moines Gold & Silver Buyers, Inc., a pawnshop in Des Moines. The Reils also sold or traded some of the items back to Defendants and placed some of their jewelry and gems with Defendants on consignment. These transactions occurred between May 3, 1991 and April 18, 1992.

The Reils filed their complaint under 544(b) and 548(a)(2) to avoid certain transfers as fraudulent. The Reils assert that the transfers were made for less than reasonably equivalent value and caused them to become insolvent. They also claim that Defendants committed negligent misrepresentation, fraudulent misrepresentation and conversion and caused emotional distress. The claim for emotional distress is hereby denied pursuant to the Court's order filed November 11, 1994 denying the Reils' Motion for Leave to Amend Complaint.

Defendants deny that the exchanges were for less than reasonably equivalent value or that they caused the Reils to become insolvent. They assert that they have not made any type of misrepresentations or

committed conversion. They argue that the exchanges were reasonable for the pawnshop business. Defendants filed a counterclaim for \$18,695, the balance due on the Reils' account.

### **JURISDICTION**

Defendants deny that this is a core proceeding and reiterate their argument, from an early motion to dismiss or abstain, that this Court does not have subject matter jurisdiction. Judge Melloy denied the earlier motion in a ruling filed September 16, 1992. In the ruling, Judge Melloy stated that Defendants had abandoned their motion to dismiss by acknowledging that the action is related to the bankruptcy. He went on to rule that abstention was not appropriate.

The Court concludes it has subject matter jurisdiction over this proceeding. The Reils' claim that the transfers should be avoided under 548(a)(2) or 544(b) is a core proceeding pursuant to 28 U.S.C. 157(b)(2)(E) and (H). Therefore, the Court's ruling on those issues shall be a final order pursuant to 157(b)(1). The Reils' claims of negligent misrepresentation, fraudulent misrepresentation and conversion, as well as Defendants' counterclaim, are noncore, related proceedings. The Court's ruling on those issues shall be submitted as proposed findings of fact and conclusions of law pursuant to 157(c)(1). See In re Hedged-Investments Assoc., Inc., 163 B.R. 841, 844 (Bankr. D. Colo. 1994).

### **FINDINGS OF FACT**

The Reils have been farmers and for some years prior to 1992 purchased jewelry and precious metals for personal and investment purposes. They began entering into transactions with Defendants in the early 1990s. The relevant transactions are described in the Amended Joint Pretrial Statement. Between May 1991 and April 1992, the Reils developed a relationship with Mrs. Stanley. They visited each other and talked over the telephone. Mrs. Stanley expressed affection for the Reils, as she did for other clients. The Reils attended Mrs. Stanley's Christmas party, along with other clients.

The parties' dealings culminated with a transaction on April 18, 1992 in which Defendants gave the Reils \$20,000 in cash in exchange for several diamonds which the Reils assert are worth more than \$200,000. The Reils assert that the April 18, 1992 transaction constituted a loan rather than a sale. They state that they had agreed to make the transaction look like a sale in order to avoid problems with unknown persons who were calling Defendants to inquire about the Reils' finances. The Reils assert that they agreed that Defendants would then sell the items on consignment and transfer the proceeds to their insurance policy. Defendants maintain that the transaction was an outright sale.

The Reils testified that on the way home from the transaction they became uneasy about the transaction and called Defendants to confirm that the \$20,000 was merely a loan. They stated that Mrs. Stanley replied that they "better get their heads screwed on right", the transaction was a sale and the items now belonged solely to Defendants. The Reils argue that Defendants committed fraud and conversion by asserting complete ownership of the five traded items.

The Reils reported their dealings with Defendants to the police on the next day. They asserted that Defendants committed fraud. The police changed the complaint from theft to a violation of pawnshop

regulations and apparently concluded that no violation had occurred.

Not long after the transaction, the parties' attorneys discussed the option of returning the jewelry to the Reils. Defendants' attorney explained their offer in a letter dated May 5, 1992. He states that Defendants would return the jewelry in exchange for \$38,697.00 which includes \$20,000 the Reils received on April 18, 1992 and \$18,697<sup>(1)</sup> due on their account. The Reils rejected the offer.

In their complaint, the Reils request injunctive relief. An order was entered May 15, 1992, pursuant to stipulation between the parties, that Defendants would not dispose of the jewelry. The effect of the order was limited to 30 days. On August 17, 1992, the Court entered an order which stated that no further action would be taken on the request for injunctive relief unless the Reils filed a specific request for a hearing on that issue. The order further provided that Mrs. Stanley keep detailed records of the sale of the items. The Reils did not request a hearing and Defendants did then sell the jewelry.

Near the same time as the April 18, 1992 transaction, the Reils gave Defendants a 5.0 carat diamond ring ("Kaye's ring") to hold as security for the balance due on their account. Defendants continue to have possession of this ring. According to Defendants' records of the Reils' account, the balance due is \$18,695. The Reils have not refuted this accounting.

Also in early April 1992, the Reils' farm lender, Waterloo Savings Bank, asked the Reils to get a different lender. The Reils consulted with Attorney Barton Schweiger regarding a possible workout arrangement. They filed their Chapter 11 petition on April 30, 1992.

The Reils did list jewelry assets and their claim against Defendants in their original bankruptcy schedules with unknown values. The Reils' Fourth Amended Plan of Reorganization was confirmed as amended on November 14, 1994. The Plan apparently pays all creditors in full. Therefore, only the Reils, rather than their creditors, will benefit from any judgment rendered in this adversary proceeding. The Reils have maintained a positive net worth at all relevant periods and have always timely paid their debts. Their most current estimate of their net worth is \$1,028,435.

The following table lists the relevant items purchased, sold or traded by the Reils. The second column shows the amount paid by the Reils to Defendants and the date of the purchase for each item. The third column shows the amount received by the Reils from Defendants for the same item through sale or trade. The final disposition of the item, if any, is listed in the next column. The final column shows the amount of loss the Reils incurred on the item.

The Court finds that the value of each item is the amount paid by the Reils for each item rather than the wholesale amount paid by Defendants to originally purchase the item, the amount for which Defendants finally disposed of the item after termination of the injunction, or the appraisal, or "Rapport", value. If the Reils did not purchase the item from Defendants, the Court values the item as indicated in the table below.

Item			Final Disposition	
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	<b>Value, Price Paid/ date</b>	<b>Price rec'd/ date</b>		<b>Net Loss</b>
3.17 carat Marquis ring	9,950 5/3/91	5,000 3/17/92		4,950
3.70 carat diamond ring	15,000 5/3/91	15,000 12/19/92	rec'd back as part of trade 3/21/92 for \$26,500 retained by Defendants 4/18/92*	15,000
8.15 carat tennis bracelet	6,900 12/19/91	3,000 3/17/92	rec'd back as part of trade 4/18/92** for \$6,900	3,900
4.54 carat diamond	31,500 12/19/91		traded to Defendants for 5,000 plus 3.70 carat diamond (15,000) 3/21/92	11,500
4.55 carat diamond	46,800 4/9/92		retained by Defendants 4/18/92* identified as Ladies' ring 4.0 carat with 7 small diamonds	46,800
6.15 carat diamond	75,000 3/3/92		retained by Defendants 4/18/92*	75,000
5.96 carat diamond	75,000 3/3/92		traded to Defendants 4/18/92** for tennis bracelet (6,900) plus 60 gold coins (24,000)	44,100
5.07 carat diamond with 1.50 baguettes	39,200 3/17/92		retained by Defendants 4/18/92*	39,200
Gents' ring with 15 small diamonds	Reils bought in 1986 for 6,000			
retained by Defendants 4/18/92*	6,000			
<b>Total Net Loss:</b>				<b>\$246,450</b>
<b>Less \$20,000 received from Defendants on 4/18/92</b>				<b>\$226,450</b>
<i>* Items retained by Defendants 4/18/92 in exchange for \$20,000; the Reils originally paid a total of \$182,000 for these items.</i>				
<i>** In a separate transaction on 4/18/92, the Reils traded 5.96 carat diamond, originally purchased for \$75,000, for 8.15 carat tennis bracelet (6,900) and 60 gold coins (24,000).</i>				

The Reils attempted to show that some of the receipts produced by Defendants regarding the transactions were doctored in some manner. They argued that Ron Reil's signature was forged and that information appeared on the receipts which was not present at the time of the transactions. The Court specifically finds that the Reils have failed to prove that any of the receipts have been tampered with. The Court accepts the receipts at face value.

The foregoing represents the Court's findings of fact. Further facts will be discussed below where relevant to the issues presented.

### EVIDENTIARY RULING

The Reils questioned Mrs. Stanley in her deposition regarding her prior criminal history. Defendants objected to admission of such evidence. A review of the deposition provides information regarding a 1964 parole violation, 30 days in jail for a December 1980 first degree theft conviction and a second degree theft conviction in 1984. No evidence was presented to the Court regarding these incidents other than through the deposition testimony. Mrs. Stanley did not deny the accuracy of this information during the deposition but appeared not to remember any relevant details.

Evidence of conviction of crime can be used for the purpose of attacking the credibility of a witness in some circumstances. Fed. R. Evid. 609. An exception exists which restricts admissibility if more than 10 years has elapsed since the date of conviction or confinement. Fed. R. Evid. 609(b). Evidence of a conviction more than 10 years old is admissible "if its probative value supported by facts and circumstances substantially outweighs its prejudicial effect." United States v. Brown, 956 F.2d 782, 787 (8th Cir. 1992). The Court has broad discretion in deciding whether to admit evidence of an older conviction. Id.

Based on the foregoing, the Court concludes that the evidence presented regarding Mrs. Stanley's prior criminal history is inadmissible. The three criminal convictions are all over 10 years old. The evidence presented was very limited and not well supported. The Court is unable to determine that its probative value outweighs its prejudicial effect.

### CONCLUSIONS OF LAW

The Reils assert that they are entitled to avoid transfers between them and the Defendants under 548(a)(2) as constructively fraudulent. They also assert avoidance powers under 544(b). In their related proceedings, the Reils argue that they are entitled to recover under theories of negligent misrepresentation, fraudulent misrepresentation and conversion.

Initially, Defendants argue that Mrs. Stanley cannot be personally liable under 548(a)(2) or 544(b). The Court disagrees. A corporate officer who benefits by a constructively fraudulent conveyance is a proper defendant in a suit to avoid the transfer. Bartle v. Markson, 357 F.2d 517, 522 (2d Cir. 1966). Considering the amount of involvement Mrs. Stanley had in her corporation and in the transfers with the Reils, the Court concludes that she undoubtedly benefitted from the transfers. Therefore, she is a proper defendant in this action to avoid the transfers under 548(a)(2) or 544(b). Likewise, it is now well settled that corporate officers can be held liable for negligence if they take part personally in the commission of the tort. Haupt v. Miller, 514 N.W.2d 905, 909 (Iowa 1994). Therefore, Mrs. Stanley is also a proper defendant in the Reils' claims of negligent misrepresentation, fraudulent misrepresentation and conversion.

#### 1. CONSTRUCTIVE FRAUD, 548(a)(2)

In order to set aside a transfer as a fraudulent conveyance under 548(a)(2), the Reils, as debtors-in-possession with the powers of a trustee, must prove the following five elements: (1) that an interest of the debtor in property; (2) was voluntarily or involuntarily transferred; (3) within one year of the date of filing the petition; (4) that the debtor received less than a reasonably equivalent value; and (5) that the debtor was insolvent at the time of the transfer or became insolvent as a result thereof. In re

Cormack, No. L88-01506D, Adv. No. L88-0285D, slip op. at 5-6 (Bankr. N.D. Iowa Jul. 7, 1989). The burden of proof is on the Reils to establish each of the five elements by a preponderance of evidence. Id. at 6; In re Breuer, 68 B.R. 48, 50 (Bankr. N.D. Iowa 1985).

The Reils argue that they did not receive reasonably equivalent value in the transfers to Defendants. Defendants assert that the Reils were not insolvent at the time and did not become insolvent as a result of the transfers. The question of the Reils' insolvency is one of fact for the Court. Cormack, slip op. at 8. Under Bankruptcy law, balance-sheet solvency determines whether payments to creditors are avoidable. In re Taxman Clothing Co., 905 F.2d 166, 170 (7th Cir. 1990). A traditional balance sheet test of insolvency is set out in 101(32)(A) which requires a determination of whether debts are greater than assets, at fair valuation, exclusive of exempted property. In re Koubourlis, 869 F.2d 1319, 1321 (9th Cir. 1989). The court must ask what a buyer would be willing to pay for the debtor's entire package of assets and liabilities. Covey v. Commercial Nat'l Bank, 960 F.2d 657, 660 (7th Cir. 1992). If the price is positive, the debtor is solvent; if the price is negative, the debtor is insolvent. Id.

The Court concludes that the Reils have failed to prove that they were insolvent at the time of the transfers or became insolvent as a result of the transfers. Their confirmed Chapter 11 Plan pays creditors in full. The Summary of Assets and Liabilities attached to the Reils' Fifth Amended Disclosure Statement estimates their net worth on 4/30/92 to be over \$440,000. The Court finds that the Reils' net worth would remain positive after excluding exempted property based on the Reils' Schedule C as amended April 28, 1994. This positive net worth near the time that the transfers between the Reils and Defendants occurred prevents the Reils from meeting their burden to prove their insolvency under 548(a)(2). Since the Reils have failed to prove one of the elements of their 548(a)(2) claim, the Court need not address whether the Reils received reasonably equivalent value.

## **2. AVOIDABLE TRANSFER, 544(b)**

Under 544(b), a trustee or debtor-in-possession may avoid a transfer that is avoidable under applicable state law. In re United Energy Corp., 944 F.2d 589, 593 (9th Cir. 1991). A trustee's rights under 544 are derivative; they are those of a creditor under state law. In re Rolain, 823 F.2d 198, 199 (8th Cir. 1987). The trustee must first establish that there was an existing unsecured creditor that could avoid the transfer under state law at the time of the transfer. In re Mizrahi, 179 B.R. 322, 326 (Bankr. M.D. Fla. 1995); 11 U.S.C. 544(b).

Apparently, the Reils are attempting to use 544(b) to avoid the transfers as fraudulent conveyances under Iowa state law. The Iowa Supreme Court has recently defined the doctrine of fraudulent conveyances.<sup>(2)</sup>

A fraudulent conveyance is generally defined as "a transaction by means of which the owner of real or personal property has sought to place the land or goods beyond the reach of his creditors, or which operates to the prejudice of their legal or equitable rights." . . . To determine whether a conveyance is fraudulent we look for certain badges or indicia of fraud such as inadequacy of consideration, insolvency of the transferor, and pendency or threat of third-party creditor litigation. . . . In addition to these recognized indicia of fraud, courts also examine transactions for secrecy or concealment,

departure from the usual method of business, the reservation of benefit to the transferor, or the retention by the debtor of possession of the property. . . . Proof of fraud must be established by clear and convincing evidence.

Graham v. Henry, 456 N.W.2d 364, 366 (Iowa 1990) (citations omitted).

The Reils listed quite a few creditors as unsecured creditors in their initial schedules filed April 30, 1992. At least two of these, Marv's Feed and Jessup Coop, were provided for in the Reils' Chapter 11 Plan. The Court concludes that the Reils have established the existence of an unsecured creditor at the time of the transfers with Defendants.

Using the strong-arm powers of 544(b) to assert a state law claim of fraudulent conveyance puts the Reils in the unenviable position, as debtors-in-possession, of arguing that they entered into transactions with Defendants in order to put their property beyond the reach of their creditors. If the Reils actually did transact business with Defendants with that goal in mind, this Court is not inclined to reward them for it by allowing them to avoid the transfers for their own benefit. Regardless, the Court concludes that the Reils have not proved the existence of fraudulent conveyances by clear and convincing evidence. They failed to present evidence of the badges of fraud set out in Graham at trial. They essentially failed to address the merits of this claim with any specificity. The Court holds that the Reils are not entitled to avoid the transfers to Defendants under 544(b).

### **3. NEGLIGENCE MISREPRESENTATION**

The tort of negligent misrepresentation was recently discussed and defined in Haupt v. Miller, 514 N.W.2d 905, 909 (Iowa 1994). The Iowa Supreme Court cited section 552 of the Restatement (Second) of Torts (1977) as follows:

One who, in the course of his business, profession or other employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

A differentiation has been made between a person engaged in the business or profession of supplying guidance to others and those commercial transactions where the parties are dealing at arm's length. Haupt, 514 N.W.2d at 910; Meier v. Alfa-Laval, Inc., 454 N.W.2d 576, 581 (Iowa 1990). The rule arising from these cases bars a negligent misrepresentation claim against a party not in the business of supplying guidance to others when negotiating a commercial transaction at arm's length. Budget Mktg., Inc. v. Centronics Corp., 927 F.2d 421, 428 (8th Cir. 1991). Thus, retailers and manufacturers/dealers are not generally considered liable for negligent misrepresentation. Meier, 454 N.W.2d at 581.

In their dealings with the Reils, Defendants occupied the roles of retailer, pawnshop operator and appraiser. As retailers and pawnshop operators, Defendants were not in the business of supplying information to others but rather were conducting commercial transactions with the Reils at arm's length. In their role as appraisers, however, Defendants were in the business of supplying information and could be liable for negligent misrepresentation.

The Reils have not specifically claimed that the appraisals prepared by Defendants constitute actionable misrepresentations. To the contrary, the Reils appear to rely on the appraisals as indicative of the value of the diamonds. The Reils have presented no evidence refuting the accuracy of the appraisals or showing lack of due care by Defendants in the preparation of the appraisals. The Court concludes that any claim that Defendants are liable for negligent misrepresentation is not supported by the record.

#### **4. FRAUDULENT MISREPRESENTATION**

The Reils must prove each element of their fraudulent misrepresentation claim by clear, satisfactory and convincing evidence. Beeck v. Aquaslide 'N' Dive Corp., 350 N.W.2d 149, 155 (Iowa 1984); McGough v. Gabus, 526 N.W.2d 328, 331 (Iowa 1995). The elements of such a claim are: "(1) a material misrepresentation, (2) made knowingly (scienter) (3) with intent to induce the plaintiff to act or refrain from acting, (4) upon which the plaintiff justifiably relies, (5) with damages." Beeck, 350 N.W.2d at 155.

The requirements of scienter and intent can be met when the evidence shows the representations were made in reckless disregard of their truth or falsity. Id. Justifiable reliance exists when the plaintiffs in view of their own information and intelligence had the right to rely on the representations. McGough, 526 N.W.2d at 332. Plaintiffs cannot recover if they "blindly rely on a misrepresentation the falsity of which would be patent to them if they had utilized their opportunity to make a cursory examination or investigation." Id.

A representation is material if it substantially affects the interest of the party alleged to have been defrauded. Smith v. Peterson, 282 N.W.2d 761, 765 (Iowa App. 1979). "Materiality has been found where a fact influences a person to enter into a transaction, where it deceives the person or induces the person to act, or where the transaction would not have occurred without it." Id.

The Reils assert that, in general, Mrs. Stanley tricked them into believing that she cared about them and was their friend and that they could make a lot of money through transactions with her. Mrs. Stanley did tell the Reils she loved them, spent considerable time talking to them on the phone and invited them to her Christmas party. She told them that certain transactions represented very good deals for them.

The Court finds, however, that such representations are not material. The Reils had experience buying and trading gems and jewelry prior to their acquaintance with Defendants. In light of their knowledge and experience, they could evaluate for themselves whether the transactions constituted good deals. It



is not reasonable for the Reils to rely on declarations of affection in making monetary decisions concerning the parties' transactions.

The only specific representation of which the Reils complain relates to whether the trade of several items for \$20,000 on April 18, 1992 was a loan or a sale. The Reils state that they understood the \$20,000 to be a loan at 8 percent secured by the five pieces of jewelry left in Defendants' possession. Defendants assert that the transaction was an outright sale.

The evidence is contradictory on this issue. The fact that the Reils immediately filed a police report lends credibility to their version that they perceived the transaction as a loan. However, the receipt for the transaction specifically states that the items were "Sold to Ethel Stanley". The Court accepts the authenticity of the receipt based in part on testimony by Rhonda DePriest who appears to be the most disinterested witness testifying. Ms. DePriest is a nurse who was working for Defendants as a bookkeeper at the time of the transaction. She testified that she wrote out the receipt, admitted at trial as Plaintiff's Exhibit No. 16, as it now appears.

The Reils state that they agreed with Defendants that they would make the transaction look like a sale in order to avoid problems with unidentified persons who were allegedly calling Defendants inquiring about the Reils' finances. In many respects, this appears to constitute an admission of a scheme to defraud creditors which is completely contrary to the philosophy of the Bankruptcy system. Regardless, the Reils have not produced evidence to rebut the receipt and testimony of Ms. DePriest and others. All the evidence other than testimony by the Reils and their police complaint supports Defendants' characterization of the transaction as a sale.

The Court concludes that the Reils have not met their burden of proving a fraudulent misrepresentation occurred relating to the April 18, 1992 transaction. They have not produced clear, satisfactory and convincing evidence that their characterization of the transaction as a loan rather than a sale was correct. The Reils' fraudulent misrepresentation claim is denied.

## **5. CONVERSION**

Conversion is the act of wrongful control or dominion over another's personal property in denial or inconsistent with that person's possessory right to the property. Ezzone v. Riccardi, 525 N.W.2d 388, 396 (Iowa 1994), cert. denied 115 S. Ct. 1958 (1995).

No conversion may be found where the exercise of control was not wrongful, as, for example, where the property was rightfully in the possession of the defendant, where the plaintiff abandoned the property, or where the plaintiff expressly or implicitly consented to the interference.

Larson v. Great West Casualty Co., 482 N.W.2d 170, 173 (Iowa App. 1992) (citations omitted). Exemplary damages can arise where the conversion is characterized by malice or willful disregard of

the plaintiff's rights. Id. at 174.

Iowa has adopted from the Restatement (Second) of Torts 222A the following a list of factors to be considered in determining whether the interference was sufficiently serious to give rise to a conversion:

- (a) the extent and duration of the actor's exercise of dominion or control;
- (b) the actor's intent to assert a right in fact inconsistent with the other's right of control;
- (c) the actor's good faith;
- (d) the extent and duration of the resulting interference with the other's right of control;
- (e) the harm done to the chattel;
- (f) the inconvenience and expense caused to the other.

Kendall/Hunt Publishing Co. v. Rowe, 424 N.W.2d 235, 247 (Iowa 1988).

As a general rule, mitigation of damages principles are applicable to actions for conversion. Welke v. City of Davenport, 309 N.W.2d 450, 453 (Iowa 1981). However, it is also the rule that a converter cannot require a plaintiff to take back the converted property. Id. The cause of action is not defeated by a tender of the property to the plaintiff. Id.

The record establishes that the jewelry was in the rightful possession of Defendants after the April 18, 1992 transaction. The Reils characterize the transaction as a loan rather than a sale, with the jewelry constituting collateral for the loan. Even if this was true, it was necessary for the Reils to tender the amount due to Defendants prior to bringing an action for conversion. 18 Am. Jur. 2d Conversion 83, at 204 (1985). At no time were the Reils prepared to return the \$20,000 they characterize as a loan in exchange for the return of their jewelry. The Court concludes that the Reils have failed to prove conversion.

## **6. COUNTERCLAIM**

Defendants filed a counterclaim for \$18,695, the amount due on the Reils' account with Defendants. Defendants' Exhibit E is a photocopy of a summary of activity for Ron Reil's account. This shows a balance owed on 4/18/92 of \$18,695. The Reils admit all of the noted transactions occurred and that amount remained unpaid. Defendants hold Mrs. Reil's 5.0 carat diamond ring as collateral on the account.

Defendants' counterclaim constitutes an action on an open account. They have the burden of proving the account, "including that the prices charged were fair and reasonable." McIntire v. Muller, 522

N.W.2d 329, 331 (Iowa App. 1994). The Court concludes that Defendants have not met the requirement of proving the prices charged were fair and reasonable.

The Court has found, as set out in the table on page 4 herein, that the Reils lost more than \$200,000 through buying and trading eight or nine different pieces of jewelry over a period of less than one year. On this record, the Court cannot find that the prices Defendants charged the Reils were reasonable, even taking into account the realities of the pawnshop business.

For example, Defendants sold the 5.96 carat diamond to the Reils on 3/3/92 for \$75,000. On 4/18/92, Defendants took this diamond back in trade for a diamond tennis bracelet worth perhaps \$6,900 and 60 gold coins worth \$24,000, for a total loss to the Reils on this one item of jewelry of over \$44,000. The tennis bracelet is one that the Reils had previously purchased for \$6,900 and resold to Defendants for \$3,000, for another loss of almost \$4,000. These types of transactions underscore for the Court that the prices Defendants charged the Reils were not fair and reasonable.

The Court concludes that Defendants' counterclaim should be denied. Defendants have failed to meet their burden of proof. Defendants must return Mrs. Reil's 5.0 carat diamond ring which they hold as collateral on the account.

## **7. SUMMARY**

Neither the Reils nor Defendants have proved their claims. The Reils may not avoid the transactions as fraudulent conveyances under 548(a)(2). They were not insolvent at the time of the transactions. The Reils have not proved that they are entitled to use the strong-arm powers of 544(b) to avoid the transfers under state law. The Court's decision regarding these two claims constitutes a final ruling in core proceedings.

In their related claims, the Reils may not claim negligent misrepresentation against Defendants. They have not met their burden of proving Defendants' actions constituted a fraudulent misrepresentation or conversion. Finally, Defendants are not entitled to payment on the Reils' account which was based on prices which they failed to prove were fair and reasonable. The Court submits its decision regarding these three related claims to the District Court as proposed findings of fact and conclusions of law.

**WHEREFORE**, judgment shall enter against the Reils and in favor of Defendants under 11 U.S.C. 548(a)(2) and 544(b). The Reils' claims that the transfers should be avoided under those sections are hereby **DISMISSED**.

**FURTHER**, the findings and conclusions herein shall be considered proposed findings and conclusions as to the Reils' three related, noncore claims, i.e. negligent misrepresentation, fraudulent misrepresentation and conversion, and as to Defendants' counterclaim in accordance with 28 U.S.C. 157(c)(1). Based upon these proposed findings and conclusions, this Court recommends that these

claims be DISMISSED.

**FURTHER**, the proposed findings and conclusions are being submitted to the U.S. District Court pursuant to Bankruptcy Rule 9033. Any objections to any of the proposed findings and conclusions shall be filed with the clerk of the U.S. Bankruptcy Court within 10 days from the date of this order. See Fed.R.Bankr.P. 9033(b).

**SO ORDERED** this 6th day of December, 1995.

Paul J. Kilburg  
U.S. Bankruptcy Judge

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1. The correct amount is actually \$18,695.
  2. The Uniform Fraudulent Transfer Act was adopted in Iowa effective January 1, 1995 in Iowa Code Chapter 684. It applies to causes of action arising on or after that date. Because the transfers between the Reils and Defendants occurred in 1992, Chapter 684 cannot be applied.