

2001

# Mack Financial Corporation v. Nevada Motor Rentals : Brief of Appellant

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

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OF THE  
STATE OF UTAH

BRIGHAM YOUNG UNIVERSITY  
J. Reuben Clark Law School

MACK FINANCIAL CORPORATION,

*Plaintiff,*

vs.

NEVADA MOTOR RENTALS, INC.,

*Defendant-Appellant.*

Case No.

13603

REPLY BRIEF OF DEFENDANT-APPELLANT

APPEAL FROM THE JUDGMENT OF THE THIRD  
JUDICIAL DISTRICT COURT FOR SALT LAKE  
COUNTY, STATE OF UTAH,  
HONORABLE BRYANT CROFT, JUDGE

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AUG 15 1974

## TABLE OF CONTENTS

	Page
STATEMENT OF NATURE OF CASE .....	1
DISPOSITION OF CASE IN LOWER COURT ....	1
STATEMENT OF FACTS .....	2
ARGUMENT .....	3
POINT I. DEFENDANT AMPLY TREATED QUESTION OF JURISDICTION IN HIS BRIEF ON APPEAL. PLAINTIFF ADDS NOTHING EITHER BY WAY OF CASES, STATUTES OR ARGUMENT TO THAT POINT .....	3
POINT II. THE METHOD OF SALE OF THE VEHICLES WAS NOT COMMERCIALY REASONABLE FOR TWO REASONS: (A) FAILURE TO GIVE NOTICE; AND (B) FOR THE REASON THAT THE SALE WAS NOT MADE FOR TWO YEARS AFTER THE RE- POSSESSION .....	4
POINT III. PLAINTIFF ERRONEOUSLY STATES THAT THE COURT FOUND AP- PELLANT HAD RECEIVED NOTICE .....	8
POINT IV. AND V. POINTS IV AND V COV- ERING THE VALUES OF THE VEHICLES AND THE REPAIRS WERE TREATED BY DEFENDANT IN HIS APPEAL BRIEF .....	10
POINT VI. THE FIGURE OF THE SALE AMOUNT AND OF THE DAMAGES SHOULD BE CREDITED TO DEFENDANT AS OF THE DATE THAT THE SALE SHOULD HAVE OCCURRED .....	10
POINT VII. PLAINTIFF'S CLAIM THAT IT WAS NOT OBLIGATED TO REPOSSESS THE SEVEN TRUCKS IN QUESTION IS	

## TABLE OF CONTENTS—Continued

	Page
IN ERROR .....	13
POINT VIII. THE TRIAL COURT CORRECTLY RULED WITH RESPECT TO ATTORNEY'S FEES ON THE CASE AND CONSISTENT WITH THE FINDING THAT THE SALE WAS NOT COMMERCIALY REASONABLE	15

### AUTHORITIES CITED

#### *Statutes cited:*

Uniform Commercial Code 79A-9-507 (2) .....	14
---	----

#### *Cases cited:*

Aimonetto v. Keeps, Wyoming, 10/18/72, 501 Pac. 2d 1017 .....	6
Community Management Association of Colorado Springs, Inc. v. Ford Motor Company, Colorado Appeals, 505 Pac. 2d 1314 .....	6
Grant County Tractor Company v. Nuss, 496 Pac. 2d 966, 6 Washington Appeals, 866 .....	4
Homeowners Loan v. Washington, 161 Pac. 2d 355, 108 Utah 469 .....	16
Knudsen Music Company v. Masterson, 240 Pac. 2d 973 .....	14
Maestro Music, Inc. v. Rudolph Wertlizer Company, 354 Pac. 2d 266 .....	14
Nelson v. Monarch Investment Plan of Henderson, Inc., 452 S. W. 2d 375, C. A. Ky. 1970 .....	9

#### *Legal Encyclopedia:*

20 Am. Jur. 2d Costs, Section 73, Page 59 .....	15, 16
---	--------

IN THE  
SUPREME COURT  
OF THE  
STATE OF UTAH

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MACK FINANCIAL CORPORATION,  
*Plaintiff,*

vs.

NEVADA MOTOR RENTALS, INC.,  
*Defendant-Appellant.*

} Case No.  
13603

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REPLY BRIEF OF DEFENDANT-APPELLANT

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STATEMENT OF NATURE OF CASE

This Brief of Fact and Law is supplemental to Defendant's Brief on Appeal.

Defendant incorporates all parts of its Brief on Appeal and specifically makes them a part hereof.

DISPOSITION OF CASE IN LOWER COURT

The latter portion of Plaintiff's Statement of the Nature of the Case is misleading. The Court arrived at its amount of judgment as set forth hereafter in this Brief on page 12.

## STATEMENT OF FACTS

Defendant incorporates the Statement of Facts contained in his Brief on Appeal. Defendant further comments on the Statements of Facts set out by Plaintiff as follows:

1. The trucks were driven to Mack Trucks' lot in February of 1970, and Mack Financial is a wholly owned subsidiary of Mack Trucks.

The Denver outlet of Mack Trucks is a company outlet and not an agency or dealer. R-30.

Also, Mack Financial was not concerned with possession of the vehicles because Mack Trucks had possession and control. R-46 and 47.

Mr. Roddy (Manager at Mack Trucks) asked Mr. Adams (Manager at Mack Financial) if they could dispose of the trucks. He was told that they could not, thus showing the control of Mack Financial over the trucks. R-115 and 116.

2. There is a conflict of testimony regarding the Second Point cited by the Plaintiff.

3. The word abandoned is used by Counsel many places in Plaintiff's Brief. This use of word is not consistent with the facts. The trucks were not abandoned. They were delivered to Mack Trucks, a factory representative, and Mack Trucks took the vehicles into custody, possession and care. At no time were the vehicles abandoned

in fact or in law, and the lower court made no such finding.

4. There is a conflict of testimony on the Fourth Point and the matter has been fully treated in the Defendant's Brief on Appeal.

5. The record indicates that Scott Trucking had freight business, but the witness clearly indicates that Scott had this business, before the purchase contract was entered into for the vehicles. The conclusion that the freight business was a consideration for the purchase of the vehicles is not supported by the evidence. R-160 and 161.

6. Defendant admits the published notices in the newspaper. The notice to counsel only appears as a part of the Brief which counsel submitted to the Trial Court on a Motion for Summary Judgment, and is nowhere sustained in the evidence. The Finding of Fact No. 13, is not substantiated by any evidence adduced at the Trial.

7. Defendant admits that the documents contain a provision providing for a reasonable attorney's fees.

## ARGUMENT

### POINT I.

DEFENDANT AMPLY TREATED QUESTION OF JURISDICTION IN HIS BRIEF ON APPEAL. PLAINTIFF ADDS NOTHING

EITHER BY WAY OF CASES, STATUTES  
OR ARGUMENT TO THAT POINT.

POINT II.

THE METHOD OF SALE OF THE VEHICLES WAS NOT COMMERCIALY REASONABLE FOR TWO REASONS: (A) FAILURE TO GIVE NOTICE; AND (B) FOR THE REASON THAT THE SALE WAS NOT MADE FOR TWO YEARS AFTER THE REPOSSESSION.

The remedy for a sale which is not commercially reasonable should be the loss of any deficiency. The Plaintiff in his Point II relies heavily on a line of cases which the most recent is reflected in *Grant County Tractor Company v. Nuss*, 496 Pac. 2d 966, 6 Washington Appeals, 866. It is believed that the facts of the case are distinguishable from the case at law which this Court is considering on a number of grounds, the most important of which is that the buyers rescinded their contract and gave written notice of such rescision.

There may be many reasons why a sale may not be a commercially reasonable sale. It is Defendant's position that the sale conducted by the Plaintiff was not commercially reasonable for two reasons (one would be sufficient):

- a. No notice of sale was given the Defendants, and
- b. The sale was held two years after repossession.



The plaintiff cites cases to show that public policy frowns on forfeitures. The requested finding is not a forfeiture nor a penalty, but a common sense approach to a problem which would not exist if the Plaintiff had given notice of sale, or if the Plaintiff had otherwise conducted a commercially reasonable sale. Since all of the elements of choice reside with the Plaintiff and the Plaintiff chooses the place, manner and the notice and even the acceptance of a figure of sale, and where no notice of sale is given the Defendant so that the Defendant can monitor the method of sale and indeed can bring in persons to bid, then the true market value of the security being sold cannot easily be determined. Where should the burden of determining the exact amount of damages fall? On the Plaintiff who caused the problem, or on the Defendant who should have the right to appear and establish sales price by positive action? In a Wyoming case, October 18, 1972, the Court said:

“Even so, we are persuaded that one general principal upon which Plaintiffs rely is applicable here, that is, compliance with 34-9-504(3) is a condition precedent to recovery of any deficiency between sale price of collateral and the amount of the unpaid balance . . . The law requires more than a reasonable expectation on the part of the debtor if the notice requirement of the commercial code is to be satisfied. Where Plaintiffs have not been informed as to whether Defendants contemplated private or public sale of diamond bracelet . . . and did not waive demand to redeem and notice of time and place of sale,

Defendants were not entitled to recovery or allege deficiency of interest and attorney's fees."

*Aimonetto v. Keeps*, Wyoming, October 18, 1972, 501 Pac. 2d 1017.

The facts of the above case parallel the facts at bar. The real purchaser, Scott, had returned the vehicles. Defendant was a guarantor of Scott's contract and entitled to Notice.

The Colorado Appeals Court, Colorado held:

"The sale of automobiles is not a recognized market under 9-504(3), and since there is no recognized market . . . the debtors were entitled to notice of sale of the repossessed automobiles."

The Court also stated:

"In an action to recover the deficiency judgment, the burden is upon the secured party to prove the amount of the deficiency. Whenever the value of a collateral is at issue, there is a presumption that the value of the repossessed collateral equals the value of the outstanding debt."

*Community Management Association of Colorado Springs, Inc., v. Ford Motor Company*, Colorado Appeals, 505 Pac. 2d 1314.

The above cases exemplify the two lines of authority in recent cases in the United States dealing with sales of secured items and the treatment of those sales, when those sales have not been in a commercially reasonable

manner. As nearly as Counsel can determine, the question is one of first impression in the State of Utah. In making such a determination, it would appear that the failure to give notice is a special type of sale which is not commercially reasonable. Where notice of sale has not been given, it would appear that the sale is more defective and to a greater degree more commercially unreasonable than for some other impropriety of sale. The Defendant in this action maintains that the sale was not commercially reasonable, and that the sale of the vehicles two years after they had been repossessed was damaging to the Defendant, by reason that there was no notice of sale given. If the sale was commercially unreasonable, as we maintain, then there is no question under the law, that the Defendant is entitled to recover damages. The next question that arises is what is the measure of damages. The lower Court held that the damages consisted of the difference between what the vehicles would have sold for had they been sold promptly by June 30, 1970, and not two years later. The Trial Court made a finding with respect to this amount of damages. The next question that arises is, would a different rule of law apply if the commercially unreasonable transaction arose from the failure to give notice. We maintain that it would. If notice is not given, then the sale which occurs with respect to the Defendant, at least, is essentially, a private sale. The Defendant is not allowed to appear and monitor the sale, and is not allowed to appear and determine for himself the final condition of the vehicles being sold; the defendant is not

allowed to appear with his own buyers or to make his own tender and purchase such as to reduce or completely eliminate any deficiency which might be assessed. As a result of this, the Courts have held that where a notice of sale is not given that even if the line of reasoning forfeiting the deficiency is not followed, that the burden falls heavily upon the Plaintiff to show that the sale price was a fair price, and that there is a presumption that the value of the goods sold would equal the amount of the indebtedness.

In this case, we maintain, that the Court should follow the reasoning in the line of cases requiring the deficiency to be forfeited where notice is not given. However, if that line of reasoning is not followed, the Plaintiff must bear the burden of proof of overcoming the presumption that the security is equal to the outstanding indebtedness. The number of believable witnesses testified that the value of the vehicles was much greater than that which was the purchase price, and much greater than that which was determined by the lower court (See Finding 22, Review of Testimony on value of vehicles in Defendant's Brief).

For the above reasons, it is submitted that there should be no deficiency assessed against the Defendant.

### POINT III.

PLAINTIFF ERRONEOUSLY STATES  
THAT THE COURT FOUND APPELLANT  
HAD RECEIVED NOTICE.

This allegation is not borne out by the evidence. It is not found in Finding No. 13. It is not found in R-633 and R-634 of the record. The letter of Counsel was not introduced into evidence and no evidence was introduced showing any notice of any type to Defendant. Defendant was entitled to notice and there was simply no notice given. In addition to the portion of the case cited by Plaintiff in his Brief (*Nelson v. Monarch Investment Plan of Henderson, Inc.*, 451 S. W. 2d 375, C. A. Ky. 1970), the Court stated:

“Requirement of reasonable notification to defaulting maker of note of time after which a private sale or repossessed automobile is to be made by holder of note means that maker is entitled to notification of specific date after which holder may proceed to dispose of collateral.”

Debtor's knowledge that repossessed automobiles would eventually be sold to satisfy indebtedness did not constitute reasonable notification of time after which private sale could properly be made by creditor.

We also point out that the facts differ greatly in the cited case since the case referred to was a judicial sale made during the process of litigation.

Unless the publication of the notice in newspapers in Denver can be construed to be notice to the Defendant, there simply was no notice given to Defendant of the sale.

POINTS IV AND V.

POINTS IV AND V COVERING THE VALUES OF THE VEHICLES AND THE REPAIRS WERE TREATED BY DEFENDANT IN HIS APPEAL BRIEF.

POINT VI.

THE FIGURE OF THE SALE AMOUNT AND OF THE DAMAGES SHOULD BE CREDITED TO DEFENDANT AS OF THE DATE THAT THE SALE SHOULD HAVE OCCURRED.

Plaintiff's Brief seems to miss the following points.

1. That the Court found the vehicles to be in control of Plaintiff in January, 1970, and that June 30, 1970, was a reasonable time when the sale should have been made.

2. The sale in January of 1972 was not therefore commercially reasonable, and the Defendant was therefore entitled to a counterclaim offset of \$40,700.00 as an amount lost at that time by virtue of the fact that the sale did not take place timely.

3. It is also apparent that if the sale had occurred in June, 1970, the total sale price would have been obtained on that date, and there would have been no further interest to be charged above the total sales price of \$85,450, all of which should have been deducted from

sums due as of June 30, 1970. To allow the Plaintiff to deduct \$44,700 at the sale date in January, 1972, instead of the date when the sale should have been made allows the Plaintiff to benefit from his own wrongdoing. In the Memorandum Opinion, the Court stated: "Interest should be recomputed on the basis that the sale should have been completed by June 30, 1970." R-45.

The first full paragraph contained on page 23 of Plaintiff's Brief states that the Trial Court used the foregoing figures in arriving at its conclusion. The Trial Court submitted no such figures nor accounting, but the accounting was submitted by Plaintiff. We submit that the accounting is in error.

#### DEFENDANT-APPELLANT CALCULATION

	\$109,673.97
Plus 2½ months' interest to June 30, 1970 at 10.5% .....	2,399.11
	<hr/>
TOTAL INTEREST AND PRINCIPAL TO 6/30/70 .....	112,073.08
Less Proceeds of sale .....	44,700.00
	<hr/>
	67,373.08
Less \$40,750 (additional amount which vehicles would have sold for on June 30, 1970 .....	40,750.00
	<hr/>
	26,623.08
Plus out-of-pocket expenses .....	2,477.31
	<hr/>
	29,100.39

Plus interest on \$26,623.08 to June 10, 1972, at 10.5% .....	5,590.84
Plus interest on \$29,100.39 from June 10, 1972, through May 31, 1973 .....	3,055.53
	<hr/>
TOTAL JUDGMENT .....	\$ 37,746.76

## PLAINTIFF-RESPONDENT CALCULATION

<i>Explanation</i>	<i>Amount</i>
April 15, 1970, Payoff .....	\$109,673.97
Interest to June 30, 1970 .....	2,399.12
	<hr/>
Total Due on June 30, 1970 .....	\$112,073.09
Less Loss for Non-Sale as of June 30, 1970 .....	40,750.00
	<hr/>
Total Due after Adjustment on June 30, 1970 .....	71,323.09
Interest from July 1, 1970 to June 30, 1970 .....	7,488.92
	<hr/>
Total Due as of June 30, 1971 .....	78,812.01
Interest from July 1, 1971, through January, 1972 .....	4,827.24
	<hr/>
Total Due through January, 1972 .....	83,639.25
Costs of Sale .....	2,477.31
Less Sales Price .....	44,700.00
	<hr/>
Balance after Sale .....	41,416.56
Interest from February 1, 1972 to Jan- uary 31, 1973 .....	4,348.74
	<hr/>
Total Due as of January 31, 1973 .....	\$ 45,765.30



## POINT VII.

PLAINTIFF'S CLAIM THAT IT WAS NOT  
OBLIGATED TO REPOSSESS THE SEVEN  
TRUCKS IN QUESTION IS IN ERROR.

Mack Financial did repossess the trucks in question and did exercise control and care over the trucks even to the point of telling Mack Trucks when or whether they could be sold and when they could be prepared for sale. The effect of Plaintiff completing an Affidavit for which they claim the repossession actually took place in January, 1972, was entirely self-serving and altered not at all the condition of the vehicles or their possession or their location or the power and authority exercised over those vehicles.

Plaintiff cites a number of cases to make the point that there is no repossession when a vehicle is taken into custody by a once seller of a vehicle. All of these cases may be distinguished in that the vehicles were either abandoned on the street without control or care where they could be damaged or destroyed, or the vehicles were burned beyond recognition or the vehicles were being sold under a Court Order or Writ of Replevin in which case the Court addresses itself to a thirty day statute requiring sale within thirty days of the repossession.

Trial Court in Memorandum Decisions stated:

"A comment is made in U. C. C. Reporting Service, Paragraph 9 504 at page 104, that with re-

spect to Section 5072 that a secured party who without proceeding under Section 5052 held collateral a long time without disposing of it thus running up a large storage charge against the debtor where no reason existed for not making a prompt sale might well be found not to have acted in a commercially reasonable manner. In doing so, it also makes specific reference to the section in good faith as cited above, *supra*."

The Utah Court stated:

"Conditional seller who repossessed property had duty to exercise reasonable diligence and effort to make resale of repossessed property within reasonable time to produce best possible purchase price therefor, and creditor buyer with proceeds as specified in contract."

*Knudsen Music Company v. Masterson*, 240 Pac. 2d 973. The case also is cited in the conclusion reached in a Washington case, *Maestro Music, Inc. v. Rudolph Wertlizer Company*, 354 Pac. 2d 266:

"A conditional seller or his assignee must deal fairly so as to secure the best price reasonably possible and must make it bring its fair market value and account for the difference between the amount owed it and the fair market value of the product."

*Uniform Commercial Code in 70A-9-507(2):*

". . . If the secured party either sells the collateral in the usual manner in any recognized market therefor or if he sells at the price cur-

rent in such market at the time of such sale, or if he has otherwise sold in conformity with reasonable commercial practices among dealers in the type of property sold, he has sold in a commercially reasonable manner."

The fact is that the vehicles were not sold in such manner; notice was not given and the vehicles were held for a period of two years before sale took place. It is submitted that under the best possible interpretation in favor of Plaintiff that the sale was not held in a commercially reasonable manner.

#### POINT VIII.

THE TRIAL COURT CORRECTLY RULED WITH RESPECT TO ATTORNEY'S FEES ON THE CASE AND CONSISTENT WITH THE FINDING THAT THE SALE WAS NOT COMMERCIALY REASONABLE.

Counsel in his Brief cites Exhibits 3P and 4P which provide that if the agreement shall be placed in the hands of an attorney for collection, the Buyer shall pay a reasonable attorney's fees as specified in the document if permitted by law. This was not a simple action of collection, but it was an action to resolve a number of very tangled issues involved in the disposition of a substantial amount of security. Just as important in the litigation were the Defendant's counterclaims against Plaintiff as were the Plaintiff's claims against the Defendant.

In 20 A. M. Jur. 2d Costs, Section 73, page 59, it is

stated:

“Where authority is thus given (statute or contract) for awarding of attorney’s fees, the matter of their allowance rests in the discretion of the trial court, and the exercise of this discretion will not be disturbed by an appellate court except in the case of manifest abuse.”

A Utah Court stated August 10, 1945:

“A debtor cannot be charged with failure to pay an obligation and be held in default where the default complained of is the result of the creditor’s failure to accept payment in accordance with the contract . . .”

*Homeowners Loan v. Washington*, 161 Pac. 2d 355,  
108 Utah 469:

The case before this court is analogous.

Here the Defendant placed in the hands of the Plaintiff all of the vehicles, which, had they been sold on the market at that time or had they been retailed out, pursuant to the testimony of various persons who sought to make purchases of the trucks, this lawsuit might never have occurred. It might well be that the entire indebtedness could have been paid from the sale of the vehicles. Or, if the deficiency was of a reasonable nature, it would not have been necessary to initiate legal action to collect that deficiency. By virtue of the failure of the Plaintiff to assume its responsibility and minimize damages and

loss and to proceed to promptly sell at the best possible price the security which had been left with it, the Plaintiff brought its legal action for a ridiculous amount of \$127,603.05, a figure which was completely unrelated to any sums due to the Plaintiff under the best possible interpretation of the case.

It is submitted that the trial court was correct in its denial of the petition to award attorney's fees.

Respectfully submitted,

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