

1988

K.B. Enterprises, Ed Kantor, Doug Brooks v.  
George M. Baker, George Baker Construction :  
Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca1](https://digitalcommons.law.byu.edu/byu_ca1)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Ed Kantor, Doug Brooks; respondents pro se.

John D. Parken, Marcella L. Keck; Parken & Keck; attorneys for appellant.

---

### Recommended Citation

Brief of Appellant, *K.B. Enterprises, Ed Kantor, Doug Brooks v. George M. Baker, George Baker Construction*, No. 880008 (Utah Court of Appeals, 1988).

[https://digitalcommons.law.byu.edu/byu\\_ca1/806](https://digitalcommons.law.byu.edu/byu_ca1/806)

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 Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

**BRIEF**

UTAH  
DOCUMENT  
K F U  
50

.A10

DOCKET NO. 880008-CA IN THE UTAH COURT OF APPEALS

---0000000---

K. B. ENTERPRISES; ED : Case No. 880008-CA  
KANTOR; and DOUG BROOKS,

Plaintiffs/Respondents,

v.

GEORGE M. BAKER d/b/a  
GEORGE BAKER  
CONSTRUCTION,

Defendant/Appellant.

Priority 14(b)

---0000000---

**APPELLANT'S BRIEF**

---

Appeal from the Judgment of the Fifth Circuit Court,  
Sandy Department, Small Claims Division  
The Honorable Mark Ethington, Judge *Pro Tem*, Presiding

---

John D. Parken  
Marcella L. Keck  
PARKEN & KECK  
Suite 808 Boston Building  
#9 Exchange Place  
Salt Lake City, Utah 84111

Attorneys for Defendant/Appellant

K. B. Enterprises  
9750 South David Street  
Sandy, Utah 84070

Ed Kantor  
9750 South David Street  
Sandy, Utah 84070

Doug Brooks  
9750 South David Street  
Sandy, Utah 84070

Plaintiffs/Respondents

IN THE UTAH COURT OF APPEALS

---oooOooo---

K. B. ENTERPRISES; ED : Case No. 880008-CA  
KANTOR; and DOUG BROOKS,

Plaintiffs/Respondents,

v.

GEORGE M. BAKER d/b/a  
GEORGE BAKER  
CONSTRUCTION,

Defendant/Appellant.

Priority 14(b)

---oooOooo---

APPELLANT'S BRIEF

---

Appeal from the Judgment of the Fifth Circuit Court,  
Sandy Department, Small Claims Division  
The Honorable Mark Ethington, Judge *Pro Tem*, Presiding

---

John D. Parken  
Marcella L. Keck  
PARKEN & KECK  
Suite 808 Boston Building  
#9 Exchange Place  
Salt Lake City, Utah 84111

Attorneys for Defendant/Appellant

K. B. Enterprises  
9750 South David Street  
Sandy, Utah 84070

Ed Kantor  
9750 South David Street  
Sandy, Utah 84070

Doug Brooks  
9750 South David Street  
Sandy, Utah 84070

Plaintiffs/Respondents

## TABLE OF CONTENTS

	<u>Page</u>
PARTIES . . . . .	1
JURISDICTION . . . . .	1
NATURE OF PROCEEDING . . . . .	1
ISSUES PRESENTED . . . . .	1
DETERMINATIVE AUTHORITY . . . . .	2
DISPOSITION IN TRIAL COURT . . . . .	3
STATEMENT OF FACTS . . . . .	4
SUMMARY OF ARGUMENT. . . . .	6
ARGUMENT . . . . .	7
POINT I The Judge <i>Pro Tem</i> Committed Clear Error by Failing to Recuse Himself in This Case . . . . .	7
POINT II The Court Erred in Sanctioning Plaintiffs' Self-Help "Repossession" . . . . .	10
POINT III The Trial Judge Erred in Failing to Recognize That Defendants Had Waived Their Right to Assert Defendant's Technical Default Under the Verbal Contract . . . . .	11
POINT IV Even if Plaintiffs Had a Valid Security Interest, the Trial Judge Erred in Awarding Money Damages to Plaintiffs . . . . .	13
CONCLUSION . . . . .	14

### Cases Cited

	<u>Page</u>
Tanner v. Baadsgaard 612 P.2d 345 (Utah 1980) . . . . .	12

### Authorities Cited

Canon 2, Code of Judicial Conduct . . . . .	2, 7
Canon 3, Code of Judicial Conduct . . . . .	2, 7-8
Rule 63(b), Utah Rules of Civil Procedure . . . . .	2, 8
Section 70A-2-201(3), Utah Code Annotated (1953 as amended) . . . . .	3, 10
Section 70A-1-201(37), Utah Code Annotated (1953. as amended) . . . . .	3, 10
Section 70A-9-101, <i>et seq.</i> , Utah Code Annotated . . . . . (1953 as amended)	3, 10, 13
Section 70A-9-203, Utah Code Annotated (1953 . . . . . as amended)	10
Section 70A-9-504, Utah Code Annotated (1953 . . . . . as amended)	3, 13-14
Section 70A-9-505(2), Utah Code Annotated . . . . . (1953 as amended)	3, 13
Section 78-7-1, Utah Code Annotated (1953 . . . . . as amended)	2, 8-9

**IN THE UTAH COURT OF APPEALS**

---000O000---

K. B. ENTERPRISES; ED  
KANTOR; and DOUG BROOKS,

Plaintiffs/Respondents,

v.

GEORGE M. BAKER d/b/a  
GEORGE BAKER  
CONSTRUCTION,

Defendant/Appellant.

: Case No. 880008-CA

:

:

: Priority 14(b)

:

:

---000O000---

**PARTIES**

The only parties to this action are those named in the caption.

**JURISDICTION**

This Court is authorized by Section 78-2A-3(c), Utah Code Annotated (1953 as amended), to hear this appeal from the Small Claims Division of the Circuit Court.

**NATURE OF PROCEEDING**

This is an appeal from the final judgment of the judge *pro tem* of the Small Claims Division of the Circuit Court in a civil action for a deficiency judgment.

**ISSUES PRESENTED**

1. Did the *pro tem* judge commit clear error by failing to recuse himself since he had previously represented the Plaintiffs in that he had

appeared as Sandy City Prosecutor in cases in which they were his chief witnesses?

2. Did the judge *pro tem* err in sanctioning or condoning the Plaintiffs' self-help enforcement of a non-existent security interest with respect to equipment that they had previously sold to Plaintiff?

3. Did the trial judge err in failing to recognize that the Plaintiffs were estopped to assert Defendant's technical default under the verbal contract of sale since (i) Plaintiffs and their agents had twice before rejected Defendant's tender of the full remaining purchase price and (ii) Defendant was only one month and four days delinquent with respect to the July 10, 1987, payment when the Plaintiffs "repossessed" the equipment on August 14, 1987, even though, by Plaintiffs' own testimony, Defendant had frequently been 60 to 90 days delinquent on his payments and no previous demand for payment had been made by the Plaintiffs prior to their "repossession" of the equipment.

4. Assuming, *arguendo*, the existence of a valid security interest, were Plaintiffs precluded from a deficiency judgment until such time as there had been a commercially reasonable sale of the collateral?

#### **DETERMINATIVE AUTHORITY**

No statute *per se* mandates a judge's recusal when, as in the present case, a party was a favorable witness in a case in which the now judge was then counsel. However, Canon 2, Canon 3 (Subpart C) Section 78-7-1, Utah Code Annotated (1953 as amended), and Rule 63(b) of the Utah

Rules of Civil Procedure are helpful in the analysis of this issue. These authorities are reproduced in the Addendum, *infra*, at A-1 through A-5.

No statute or common law of the state of Utah permits a "repossession" of personal property as to which the vendor (*i.e.*, Plaintiffs) have failed to retain a security interest. Since there was no written contract in this case, as required by Sections 70A-2-201 and 70A-9-203, Utah Code Annotated (1953 as amended), there could be no security interest as defined in Section 70A-1-201(37) Utah Code Annotated (1953 as amended), and Chapter 9 of the Uniform Commercial Code. While the "savings" provision of Section 70A-2-201(3), Utah Code Annotated (1953 as amended), may allow the enforceability of a verbal contract, it does not sanction the enforcement of a nonexistent security interest. These statutes are reproduced in the Addendum, *infra* at A-6 through A-9.

Sections 70A-9-504 and 70A-9-505(2), Utah Code Annotated (1953 as amended), govern the disposition of collateral and the rights and responsibilities of the creditors after repossession. These statutes are reproduced in the Addendum, *infra* at A-10 through A-11.

### **DISPOSITION IN TRIAL COURT**

A hearing was held on November 18, 1987, in the Small Claims Division of the Sandy Circuit Court, Mark Ethington presiding as Judge *pro tem*. At the conclusion of the hearing, Judge Ethington took the matter under advisement. An unsigned document, on Fifth Circuit Court letterhead, dated December 21, 1987, was apparently prepared with the intent that it serve as the Court's "written opinion." (This document is reproduced in the



Addendum, *infra*, at A-12.) The Small Claims Judgment was entered on December 21, 1987, over the signature of Judge Ethington. (A copy of this Judgment is reproduced in the Addendum, *infra*, at A-14.) This Judgment was originally dated November 18, 1987, that date was crossed out and replaced with December 17, 1987, and that date was eventually crossed out and replaced with the date of December 21, 1987. This appeal followed.

### STATEMENT OF FACTS

In April of 1986, Plaintiffs, two Sandy City policemen doing business as "K.B. Enterprises," sold a piece of construction equipment to Defendant.<sup>1</sup> Defendant never signed any written agreement because the contract that Plaintiffs drafted failed to reflect accurately the terms of the transaction. It was not disputed that the sale was based upon twenty-four (24) monthly payments of \$324.64, which Defendant was to make directly to Plaintiffs' bank. The bank held a security interest in the piece of equipment and Plaintiffs' unpaid balance to the bank, at all times, significantly exceeded the aggregate of all payments agreed to be made by Defendant. In other words, the Plaintiffs had a substantial negative equity in the piece of equipment.

Between the date of the contract and July of 1987, and therefore prior to the default at issue, Defendant twice tendered full payment of the

---

<sup>1</sup>Pursuant to this Court's Administrative Order No. 1, dated April 7, 1987, and paragraph 2(H)(1) thereof in particular, Appellant relies upon the audio recording of the proceedings in the trial court in order to avoid the cost of a transcript. This procedure appears to preclude, as a practical matter, citation to the trial transcript.

remaining balance due to Plaintiffs; however, Plaintiffs rejected these tenders, apparently because they could not provide clear title to the equipment, since they owed their bank far more than they had agreed to accept in total from the Defendant. It was the Plaintiffs' testimony at trial that the Defendant was consistently 60 to 90 days late in making his monthly payments and the Defendant acknowledged that he was often late during the winter months, during which there was no use for the equipment and his income was diminished.

It was undisputed at trial that all payments becoming due through and including the June 10, 1987, payment were, in fact, paid by the Defendant but it was also undisputed that the Defendant had not paid the July 10, 1987, payment by August 14, 1987. Although they had no written documentation and, therefore, could have no perfected security interest, the Plaintiffs proceeded by self-help to "repossess" the equipment on August 14, 1987. At no time did Plaintiffs return or tender the return of the equipment to Defendant.

The small claims judge awarded Plaintiffs judgment for \$649.28, apparently under the belief that Plaintiffs were entitled to retain the property that they had sold to Defendant and hold Defendant liable for all payments coming due under the verbal contract prior to the date of the "repossession."

The small claims judge, a former Sandy City Prosecutor, informed the Defendant that he was personally acquainted with both Plaintiffs. The judge affirmatively asserted, however, that he thought he could be fair. The judge had prosecuted several criminal cases incident to which the Plaintiffs appeared as chief prosecution witnesses and had thus acted in the role of

counsel for the Plaintiffs. Defendant inquired if the matter could be raised on appeal and was essentially assured that it could be.

### SUMMARY OF ARGUMENT

Since the *pro tem* had previously represented the Plaintiffs in court, in that they had appeared as his chief witnesses in cases in which he appeared as Sandy City Prosecutor, the *pro tem* committed clear error by failing to recuse himself.

Plaintiffs sold the equipment to Defendant on the basis of a verbal agreement. There was no written retention of a security interest and, therefore, Plaintiffs held no security interest in the property. Accordingly, the *pro tem* erred in sanctioning Plaintiffs' self-help enforcement of a non-existent security interest.

It was undisputed at trial that Defendant had frequently been 60 to 90 days late in his payments. The Plaintiffs had consistently accepted these late payments. Without any advance notice to Defendant, Plaintiffs then suddenly proceeded to "repossess" the equipment at a time when the payment was only one month and four days late. Under these circumstances, the trial judge erred in failing to recognize that the Plaintiffs were estopped by their consistent acceptance of late payments from "repossessing" the equipment without advance warning. Moreover, Defendant had at least twice tendered full payment of all amounts still due to the Plaintiffs but these offers had been rejected by the Plaintiffs, apparently because they could not secure clear title to the equipment because they owed far more to their bank on a

loan secured by the equipment than they had agreed to accept from Defendant.

Finally, even assuming *arguendo* the existence of a valid security agreement, the trial court erred in awarding what amounts to a deficiency judgment since there had been no commercially reasonable sale of the collateral following its "repossession."

## **ARGUMENT**

### **POINT I: THE JUDGE PRO TEM COMMITTED CLEAR ERROR BY FAILING TO RECUSE HIMSELF.**

In a small claims action, it is generally accepted that the procedures are somewhat informal to accommodate the parties' *pro se* appearances. As a practical matter, the small claims judge must evaluate the facts and apply the law to those facts, whether or not the parties use the appropriate legal terms. The small claims judges must adhere to the applicable provisions of the Code of Judicial Conduct and, in the context of the small claims setting, must be extraordinarily conscientious in informing the parties of their procedural rights.

Canon 2 of the Code of Judicial Conduct, adopted by the Supreme Court of the State of Utah, provides:

#### **A Judge Should Avoid Impropriety and the Appearance of Impropriety in All His Activities.**

- A. A judge should respect and comply with the law and should conduct himself at all times in a manner that *promotes public confidence* in the integrity and *impartiality* of the judiciary.

- B. A judge should not allow his family, social, or *other relationships* to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interests of others; *nor should he convey or permit others to convey the impression that they are in a special position to influence him . . . .*

(Emphasis added.)

Canon 3 more specifically provides:

**A Judge Should Perform the Duties of His Office Impartially and Diligently.**

In the performance of [judicial] duties, the following standards apply:

. . . .

**C. Disqualification**

- (1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:
  - (a) he has a personal bias or prejudice concerning a party, . . .

(Emphasis added.)

The Utah Rules of Civil Procedure, familiar to attorneys but not generally to *pro se* parties, provides at Rule 63 an avenue for the petition of judicial disqualification upon an affidavit of bias. It is not a decision to be made by the judge against whom the affidavit was filed. Rule 63 requires another judge of the same court or a court of like jurisdiction to determine the legal sufficiency of the affidavit of bias. Furthermore, the spirit of the essential need for an unbiased judiciary is expressed by the legislature in Section 78-7-1, Utah Code Annotated (1953 as amended), as follows:

Except by consent of all parties, no justice, judge or justice of the peace shall sit or act as such in any action or proceeding:

(1) To which he is a party, or in which he is interested.

. . . . .

(3) When he has been attorney or counsel for either party in the action or proceeding.

If not by its terms mandating the judge's recusal in this instance, the spirit of the statute, the Rule, and the Canons set forth above clearly demonstrate that the *pro tem* should have recused himself from this case.

In this instance, the judge was not only acquainted with Plaintiffs but also knew that Plaintiffs were quite familiar with the court procedures and effective presentation of their case. They had immediate rapport and credibility with the judge. The judge affirmatively stated that he believed he could be unbiased and assured Mr. Baker, or at least led Mr. Baker to believe, that if the judge was in fact biased, the matter could be dealt with on appeal. At best, this case demonstrates why even the appearance of impropriety necessitates recusal: Since the *pro tem* ruled in favor of Plaintiffs with no discernable legal basis whatsoever, his decision appears, particularly to lay persons, to be the product of bias. This constitutes clear, reversible error.

**POINT II: THE COURT ERRED IN SANCTIONING PLAINTIFFS' SELF-HELP "REPOSSESSION."**

Once property is sold by one party to the other, the seller retains no interest in the property without an express agreement between the parties. A security interest could have been retained in the property sold by Plaintiff only under Section 70A-9-101, *et seq.*, Utah Code Annotated (1953 as amended). Specifically, Section 70A-9-203 provides:

Security interest is not enforceable against the debtor or third parties with respect to the collateral and does not attach unless

(a) . . . the debtor has signed a security agreement which contains a description of the collateral  
. . .

It is undisputed that there was no written agreement between Plaintiffs and Defendant. It is also undisputed that Plaintiffs, without Defendant's permission, retook possession of the property, depriving Defendant of its use. This is clearly in violation of the law and, in fact, constitutes at least conversion.

Since there was no written contract in this case, as required by Sections 70A-2-2-1 and 70A-9-203, Utah Code Annotated (1953 as amended), there could be no security interest as defined in Section 70A-1-201(37), Utah Code Annotated (1953 as amended). While the "savings" provision of Section 70A-2-201(3), Utah Code Annotated (1953 as amended), may allow the enforceability of a verbal contract, it does not supercede Section 70A-9-203, Utah Code Annotated (1953 as amended), nor does it sanction the enforcement of a non-existent security interest.

Without a security interest, Plaintiffs' remedy is to sue Defendant for a breach of the agreement to pay and then enforce that money judgment. Without a security interest, Plaintiffs had no claim to the property. The court erred in sanctioning this illegal behavior by failing to dismiss Plaintiff's Complaint, so that it might have been refiled in a court having jurisdiction to order the return of Defendant's property.<sup>2</sup>

**POINT III: THE TRIAL JUDGE ERRED IN FAILING TO RECOGNIZE THAT DEFENDANTS HAD WAIVED THEIR RIGHT TO ASSERT DEFENDANT'S TECHNICAL DEFAULT UNDER THE VERBAL CONTRACT.**

The contract at issue was entered into in April of 1986. It is undisputed that, from the beginning, Defendant had been sporadic in his payments without significant complaint from Plaintiffs. Defendant did, however, routinely make large payments and was current through June 10, 1987. In fact, he had paid the equivalent of 14 of the 24 payments due under the agreement. Although Defendant had not made the July 10, 1987, and August 10, 1987, payments when Plaintiffs wrongfully took possession of the property on August 14, 1987, Defendant had no reason to believe that Plaintiffs would not accept payment as usual when he was able to pay.

Where a seller has routinely tolerated a buyer's default, the seller waives strict compliance with the contract terms and must give notice before

---

<sup>2</sup>The jurisdiction of the Small Claims Court is limited to the awarding of money damages. (Section 78-6-1(1)(a), Utah Code Annotated (1953 as amended).)



demanding strict compliance. This rule was applied by the Utah Supreme Court in the case of *Tanner v. Baadsgaard*, 612 P.2d 345 (Utah 1980). There, the parties had contracted for Plaintiff to purchase a parcel of real property from Defendants and the parties had specified specific contract terms. The contract price was \$40,000.00 with a down payment of \$500.00, which payment was made. When the first payment of \$14,500.00 came due on May 1, 1977, it was not paid. The parties discussed the purchaser's difficulty in obtaining financing and in approximately June, 1977, the Defendant contacted an agent for the purchaser and informed the agent that the check for the down payment had been lost. A subsequent check for the down payment, plus interest on the past due installment, was sent to the Defendant seller and the seller made no complaint. Various discussions continued and in December of 1977, the Plaintiff contacted the Defendant to discuss financing problems and the Defendant again represented that additional interest would be accruing during the period of the delay. In February of 1978, the Plaintiff contacted the Defendant to inform him that financing had been obtained, only to learn that the Defendant had arranged for the sale of the property to another purchaser. The trial court found that the Defendant had waived the requirement of strict compliance with the dates of payment set forth in the earnest money agreement and that the waiver had been relied upon by the Plaintiff. The Supreme Court affirmed the trial court's application of the rule that after a waiver of strict compliance, "the seller must give notice and a reasonable time to perform before he may insist upon holding the buyer strictly to the time requirements." 612 P.2d at 347 (footnote citations omitted).

Under the facts presented by the Plaintiffs here, they clearly had not given Defendant appropriate notice of their intent to declare him in default. Moreover, it is undisputed that at least in December of 1986 and again in July of 1987, Defendant attempted to pay the obligation in full, but these offers had been rejected by Plaintiffs, apparently because they could not secure title to the equipment. The Plaintiffs owed more to their bank on a loan secured by the equipment than they had agreed to accept from the Defendant. Consequently, it was clearly in Plaintiffs' economic interest to accept as many payments as possible from Defendant while retaining title to the equipment. It was not until the Defendant had paid the sum of \$4,544.96 and had a balance remaining of only \$3,246.40 that Plaintiffs chose to "repossess." It is highly inequitable that the Defendants consistently allowed late payments and refused tender of the entire balance, and then, without notice, took possession of the property under the guise of Defendant's default.

**POINT IV: EVEN IF PLAINTIFFS HAD A VALID SECURITY INTEREST, THE TRIAL JUDGE ERRED IN AWARDING MONEY DAMAGES TO PLAINTIFFS.**

Assuming, *arguendo*, the existence of a valid security agreement, the trial court erred in awarding what amounts to a deficiency judgment. After repossession, a secured creditor may either retain the collateral in satisfaction of the debtor's obligation as provided in Section 70A-9-505(2), Utah Code Annotated (1953 as amended), or the creditor may sell the collateral and seek a deficiency judgment from the debtor pursuant to Section

70A-9-504, Utah Code Annotated (1953 as amended). However, if the creditor seeks a deficiency judgment, the collateral must be sold and the sale must be conducted in a commercially reasonable manner. In this case, a deficiency judgment was absolutely inappropriate, as no commercially reasonable sale whatsoever had occurred. In fact, no sale of the property had occurred at all. It is undisputed that at the time of trial, the Plaintiffs retained possession of the equipment.

As Plaintiffs failed to comply with the provisions of Section 70A-9-504 and 505(2), Utah Code Annotated (1953 as amended), even if this court should find a valid security agreement, the lower court's award of a money judgment is inappropriate and must be reversed.

### CONCLUSION

The judge *pro tem* erred in failing to recuse himself in this action, since he had previously represented the Plaintiffs in court. The trial court's judgment must be reversed because of the *pro tem*'s failure to recuse himself.

There was no written contract governing the sale of the property by Plaintiffs to Defendant. Plaintiffs retained no security interest in the property. The trial court erred in sanctioning Plaintiffs' self-help enforcement of a non-existent security interest.

Defendant had consistently been late in making his payments to Plaintiffs. Plaintiffs had made no demand upon Defendant for payment prior to retaking possession of the equipment. The trial court erred in failing to recognize that, as a result of their consistent acceptance of late payments, the Plaintiffs were estopped from "repossessing" the equipment without

advance warning to Defendant. Moreover, Defendant had twice tendered full payment of the balance due.

Finally, even if this Court finds the existence of a valid security interest, the trial court erred in awarding a deficiency judgment against Defendant, since there was no commercial reasonable sale of the collateral following its "repossession" by Plaintiffs.

**RESPECTFULLY SUBMITTED** this 7th day of March, 1988.

**PARKEN & KECK**

By 

John D. Parken

Attorney for Defendant/Appellant

\_\_\_\_\_  
Original signature

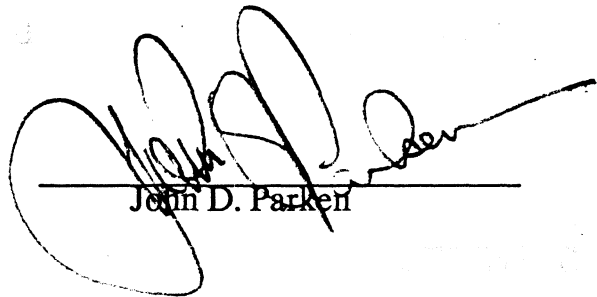
### CERTIFICATE OF DELIVERY

I hereby certify that on the 7th day of March, 1988, I caused four  
(4) true and correct copies of the foregoing Appellant's Brief to be mailed,  
with postage prepaid, addressed as follows:

K. B. Enterprises  
9750 South David Street  
Sandy, Utah 84070

Ed Kantor  
9750 South David Street  
Sandy, Utah 84070

Doug Brooks  
9750 South David Street  
Sandy, Utah 84070



John D. Parker

\_\_\_\_\_  
Original signature

## Addendum

	<u>Page</u>
Canon 2, Code of Judicial Conduct . . . . .	A-1
Canon 3, Code of Judicial Conduct . . . . .	A-1
Section 78-7-1, Utah Code Annotated (1953 . . . . . as amended)	A-4
Rule 63, Utah Rules of Civil Procedure . . . . .	A-5
Section 70A-2-201, Utah Code Annotated (1953 . . . . . as amended)	A-6
Section 70A-9-203, Utah Code Annotated (1953 . . . . . as amended)	A-7
Section 70A-1-201, Utah Code Annotated (1953 . . . . . as amended)	A-8
Section 70A-9-504, Utah Code Annotated (1953 . . . . . as amended)	A-10
Section 70A-9-505, Utah Code Annotated (1953 . . . . . as amended)	A-11
"Written Opinion" of judge pro tem . . . . .	A-12
Small Claims Judgment. . . . .	A-14

# CODE OF JUDICIAL CONDUCT

Approved by the Supreme Court of Utah, March 1, 1974

## CANON 2

*A Judge Should Avoid  
Impropriety and the Appearance of  
Impropriety in All His Activities*

- A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.
- B. A judge should not allow his family, social, or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interests of others; nor should he convey or permit others to convey the impression that they are in a special position to influence him. He should not testify voluntarily as a character witness.

## CANON 3

*A Judge Should Perform  
the Duties of His Office Impartially  
and Diligently*

The judicial duties of a judge take precedence over all his other activities. His judicial duties include all the duties of his office prescribed by law. In the performance of these duties, the following standards apply:

### A. Adjudicative Responsibilities.

- (1) A judge should be faithful to the law and maintain professional competence in it. He should be unswayed by partisan interests, public clamor, or fear of criticism.
- (2) A judge should maintain order and decorum in proceedings before him.
- (3) A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom he deals in his official capacity, and should require similar conduct of lawyers, and of his staff, court officials, and others subject to his direction and control.

- (4) A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider **ex parte** or other communications concerning a pending or impending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before him if he gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.
- (5) A judge should dispose promptly of the business of the court.
- (6) A judge should abstain from public comment about a pending or impending proceeding in any court, and should require similar abstention on the part of court personnel subject to his direction and control. This subsection does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court.
- (7) A judge should prohibit broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions, except that a judge may authorize:
  - (a) the use of electronic or photographic means for the presentation of evidence, for the perpetuation of a record, or for other purposes of judicial administration;
  - (b) the broadcasting, televising, recording, or photographing of investitive, ceremonial, or naturalization proceedings;
  - (c) the photographic or electronic recording and reproduction of appropriate court proceedings.

#### B. Administrative Responsibilities

- (1) A judge should diligently discharge his administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court officials.
- (2) A judge should require his staff and court officials subject to his direction and control to observe the standards of fidelity and diligence that apply to him.
- (3) A judge should take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware.
- (4) A judge should not make unnecessary appointments. He should exercise his power of appointment only on the basis of merit, avoiding nepotism and favoritism. He should not approve compensation of appointees beyond the fair value of services rendered.

#### C. Disqualification.

- (1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:
  - (a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;



- (b) he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;
  - (c) he knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;
  - (d) he or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person;
    - (i) is a party to the proceeding, or an officer, director, or trustee of a party;
    - (ii) is acting as a lawyer in the proceeding;
    - (iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
    - (iv) is to the judge's knowledge likely to be a material witness in the proceeding;
- (2) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.
- (3) For the purposes of this section:
- (a) the degree of relationship is calculated according to the civil law system;
  - (b) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;
  - (c) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, advisor, or other active participant in the affairs of a party, except that:
    - (i) ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;
    - (ii) an office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;
    - (iii) the proprietary interest of a policy holder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;
    - (iv) ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

#### D. Remittal of Disqualification.

A judge may, instead of withdrawing from the proceeding, disclose on the record the basis of his disqualification. If, based on such dis-

**78-7-1. Disqualification for interest or relation to parties.**

Except by consent of all parties, no justice, judge or justice of the peace shall sit or act as such in any action or proceeding:

(1) To which he is a party, or in which he is interested.

(2) When he is related to either party by consanguinity or affinity within the third degree, computed according to the rules of the common law.

(3) When he has been attorney or counsel for either party in the action or proceeding.

But the provisions of this section shall not apply to the arrangement of the calendar or the regulation of the order of business, nor to the power of transferring the action or proceeding to some other court.

1953

### **Rule 63. Disability or disqualification of a judge.**

(a) **Disability.** If by reason of death, sickness, or other disability, a judge before whom an action has been tried is unable to perform the duties to be performed by the court under these rules after a verdict is returned or findings of fact and conclusions of law are filed, then any other judge regularly sitting in or assigned to the court in which the action was tried may perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial.

(b) **Disqualification.** Whenever a party to any action or proceeding, civil or criminal, or his attorney shall make and file an affidavit that the judge before whom such action or proceeding is to be tried or heard has a bias or prejudice, either against such party or his attorney or in favor of any opposite party to the suit, such judge shall proceed no further therein, except to call in another judge to hear and determine the matter.

Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed as soon as practicable after the case has been assigned or such bias or prejudice is known. If the judge against whom the affidavit is directed questions the sufficiency of the affidavit, he shall enter an order directing that a copy thereof be forthwith certified to another judge (naming him) of the same court or of a court of like jurisdiction, which judge shall then pass upon the legal sufficiency of the affidavit. If the judge against whom the affidavit is directed does not question the legal sufficiency of the affidavit, or if the judge to whom the affidavit is certified finds that it is legally sufficient, another judge must be called in to try the case or determine the matter in question. No party shall be entitled in any case to file more than one affidavit; and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith.

**70A-2-201. Formal requirements - Statute of frauds.**

(1) Except as otherwise provided in this section a contract for the sale of goods for the price of \$500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.

(2) Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party *unless written notice of objection to its contents is given within ten days after it is received.*

(3) A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable

(a) if the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement; or

(b) if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted; or

(c) with respect to goods for which payment has been made and accepted or which have been received and accepted (section 70A-2-606).

1965

**70A-9-203. Attachment and enforceability of security interest - Proceeds, formal requisites.**

(1) Subject to the provisions of section 70A-4-208 on the security interest of a collecting bank and section 70A-9-113 on a security interest arising under the chapter on sales, a security interest is not enforceable against the debtor or third parties with respect to the collateral and does not attach unless

(a) the collateral is in the possession of the secured party pursuant to agreement, or the debtor has signed a security agreement which contains a description of the collateral and in addition, when the security interest covers crops growing or to be grown or timber to be cut, a description of the land concerned; and

(b) value has been given; and

(c) the debtor has rights in the collateral.

(2) A security interest attaches when it becomes enforceable against the debtor with respect to the collateral. Attachment occurs as soon as all of the events specified in subsection (1) have taken place unless explicit agreement postpones the time of attaching.

(3) Unless otherwise agreed a security agreement gives the secured party the rights to proceeds provided by section 70A-9-306.

(4) A transaction, although subject to this chapter, is also subject to the Utah Uniform Consumer Credit Code, and in the case of conflict between the provisions of this chapter and the Utah Uniform Consumer Credit Code, the provisions of the latter statute control. Failure to comply with any applicable statute has only the effect which is specified therein.

1977

#### 70A-1-201. General definitions.

Subject to additional definitions contained in the subsequent chapters of this act which are applicable to specific chapters or parts thereof, and unless the context otherwise requires, in this act:

(1) "Action" in the sense of a judicial proceeding includes recoupment, counterclaim, setoff, suit in equity and any other proceedings in which rights are determined.

(2) "Aggrieved party" means a party entitled to resort to a remedy.

(3) "Agreement" means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this act (sections 70A-1-205 and 70A-2-208). Whether an agreement has legal consequences is determined by the provisions of this act, if applicable; otherwise by the law of contracts (section 70A-1-103). (Compare "Contract.")

(4) "Bank" means any person engaged in the business of banking.

(5) "Bearer" means the person in possession of an instrument, document of title, or security payable to bearer or indorsed in blank.

(6) "Bill of lading" means a document evidencing the receipt of goods for shipment issued by a person engaged in the business of transporting or forwarding goods, and includes an airbill. "Airbill" means a document serving for air transportation as a bill of lading does for marine or rail transportation, and includes an air consignment note or air waybill.

(7) "Branch" includes a separately incorporated foreign branch of a bank.

(8) "Burden of establishing" a fact means the burden of persuading the triers of fact that the existence of the fact is more probable than its nonexistence.

(9) "Buyer in ordinary course of business" means a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods buys in ordinary course from a person in the business of selling goods of that kind but does not include a pawnbroker. All persons who sell minerals or the like (including oil and gas) at wellhead or minehead shall be deemed to be persons in the business of selling goods of that kind. "Buying" may be for cash or by exchange of other property or on secured or unsecured credit and includes receiving goods or documents of title under a pre-existing contract for sale but does not include a transfer in bulk or as security for or in total or partial satisfaction of a money debt.

(10) "Conspicuous": A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as: NONNEGOTIABLE BILL OF LADING) is conspicuous. Language in the body of a form is "conspicuous" if it is in larger or other contrasting type or color. But in a telegram any stated term is "conspicuous." Whether a term or clause is "conspicuous" or not is for decision by the court.

(11) "Contract" means the total legal obligation which results from the parties' agreement as affected by this act and any other applicable rules of law. (Compare "Agreement.")

(12) "Creditor" includes a general creditor, a secured creditor, a lien creditor and any representative of creditors, including an assignee for the benefit of creditors, a trustee in bankruptcy, a receiver in equity and an executor or administrator of an insolvent debtor's or assignor's estate.

(13) "Defendant" includes a person in the position of defendant in a cross-action or counterclaim.

(14) "Delivery" with respect to instruments, documents of title, chattel paper or securities means voluntary transfer of possession.

(15) "Document of title" includes bill of lading, dock warrant, dock receipt, warehouse receipt or order for the delivery of goods, and also any other document which in the regular course of business or financing is treated as adequately evidencing that the person in possession of it is entitled to receive, hold and dispose of the document and the goods it covers. To be a document of title a document must purport to be issued by or addressed to a bailee and purport to cover goods in the bailee's possession which are either identified or are fungible portions of an identified mass.

(16) "Fault" means wrongful act, omission or breach.

(17) "Fungible" with respect to goods or securities means goods or securities of which any unit is, by nature or usage of trade, the equivalent of any other like unit. Goods which are not fungible shall be deemed fungible for the purposes of this act to the extent that under a particular agreement or document unlike units are treated as equivalents.

(18) "Genuine" means free of forgery or counterfeiting.

(19) "Good faith" means honesty in fact in the conduct or transaction concerned.

(20) "Holder" means a person who is in possession of a document of title or an instrument or an investment security drawn, issued or indorsed to him or to his order or to bearer or in blank.

(21) To "honor" is to pay or to accept and pay, or where a credit so engages to purchase or discount a draft complying with the terms of the credit.

(22) "Insolvency proceedings" includes any assignment for the benefit of creditors or other proceedings intended to liquidate or rehabilitate the estate of the person involved.

(23) A person is "insolvent" who either has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due or is insolvent within the meaning of the federal bankr-

uptcy law.

(24) "Money" means a medium of exchange authorized or adopted by a domestic or foreign government as a part of its currency.

(25) A person has "notice" of a fact when

(a) he has actual knowledge of it; or

(b) he has received a notice or notification of it;

or

(c) from all the facts and circumstances known to him at the time in question he has reason to know that it exists.

A person "knows" or has "knowledge" of a fact when he has actual knowledge of it. "Discover" or "learn" or a word or phrase of similar import refers to knowledge rather than to reason to know. The time and circumstances under which a notice or notification may cease to be effective are not determined by this act.

(26) A person "notifies" or "gives" a notice or notification to another by taking such steps as may be reasonably required to inform the other in ordinary course whether or not such other actually comes to know of it. A person "receives" a notice or notification when

(a) it comes to his attention; or

(b) it is duly delivered at the place of business through which the contract was made or at any other place held out by him as the place for receipt of such communications.

(27) Notice, knowledge of a notice or notification received by an organization is effective for a particular transaction from the time when it is brought to the attention of the individual conducting that transaction, and in any event from the time when it would have been brought to his attention if the organization had exercised due diligence. An organization exercises due diligence if it maintains reasonable routines for communicating significant information to the person conducting the transaction and there is reasonable compliance with the routines. Due diligence does not require an individual acting for the organization to communicate information unless such communication is part of his regular duties or unless he has reason to know of the transaction and that the transaction would be materially affected by the information.

(28) "Organization" includes a corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, two or more persons having a joint or common interest, or any other legal or commercial entity.

(29) "Party," as distinct from "third party," means a person who has engaged in a transaction or made an agreement within this act.

(30) "Person" includes an individual or an organization (See section 70A-1-102).

(31) "Presumption" or "presumed" means that the trier of fact must find the existence of the fact presumed unless and until evidence is introduced which would support a finding of its nonexistence.

(32) "Purchase" includes taking by sale, discount, negotiation, mortgage, pledge, lien, issue or re-issue, gift or any other voluntary transaction creating an interest in property.

(33) "Purchaser" means a person who takes by purchase.

(34) "Remedy" means any remedial right to which an aggrieved party is entitled with or without resort to a tribunal.

(35) "Representative" includes an agent, an officer of a corporation or association, and a trustee, executor or administrator of an estate, or any other person empowered to act for another.

(36) "Rights" includes remedies.

(37) "Security interest" means an interest in personal property or fixtures which secures payment or performance of an obligation. The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer (section 70A-2-401) is limited in effect to a reservation of a "security interest." The term also includes any interest of a buyer of account or chattel paper which is subject to chapter 9. The special property interest of a buyer of goods on identification of such goods to a contract for sale under section 70A-2-401 is not a "security interest," but a buyer may also acquire a "security interest" by complying with chapter 9. Unless a lease or consignment is intended as security, reservation of title thereunder is not a "security interest" but a consignment is in any event subject to the provisions on consignment sales (section 70A-2-326). Whether a lease is intended as security is to be determined by the facts of each case; however,

(a) the inclusion of an option to purchase does not of itself make the lease one intended for security, and

(b) an agreement that upon compliance with the terms of the lease the lessee shall become or has the option to become the owner of the property for no additional consideration or for a nominal consideration does make the lease one intended for security.

(38) "Send" in connection with any writing or notice means to deposit in the mail or deliver for transmission by any other usual means of communication with postage or cost of transmission provided for and properly addressed and in the case of an instrument to an address specified thereon or otherwise agreed, or if there be none to any address reasonable under the circumstances. The receipt of any writing or notice within the time at which it would have arrived if properly sent has the effect of a proper sending.

(39) "Signed" includes any symbol executed or adopted by a party with present intention to authenticate a writing.

(40) "Surety" includes guarantor.

(41) "Telegram" includes a message transmitted by radio, teletype, cable, any mechanical method of transmission, or the like.

(42) "Term" means that portion of an agreement which relates to a particular matter.

(43) "Unauthorized" signature or indorsement means one made without actual, implied or apparent authority and includes a forgery.

(44) "Value." Except as otherwise provided with respect to negotiable instruments and bank collections (sections 70A-3-303, 70A-4-208 and 70A-4-209) a person gives "value" for rights if he acquires them

(a) in return for a binding commitment to extend credit or for the extension of immediately available credit whether or not drawn upon and whether or not a charge-back is provided for in the event of difficulties in collection; or

(b) as security for or in total or partial satisfaction of a pre-existing claim; or

(c) by accepting delivery pursuant to a pre-existing contract for purchase; or

(d) generally, in return for any consideration sufficient to support a simple contract.

(45) "Warehouse receipt" means a receipt issued by a person engaged in the business of storing goods for hire.

**70A-9-504. Secured party's right to dispose of collateral after default - Effect of disposition.**

(1) A secured party after default may sell, lease or otherwise dispose of any or all of the collateral in its then condition or following any commercially reasonable preparation or processing. Any sale of goods is subject to the chapter on Sales (chapter 2). The proceeds of disposition shall be applied in the order following to

(a) the reasonable expenses of retaking, holding, preparing for sale or lease, selling, leasing and the like and, to the extent provided for in the agreement and not prohibited by law, the reasonable attorneys' fees and legal expenses incurred by the secured party;

(b) the satisfaction of indebtedness secured by the security interest under which the disposition is made;

(c) the satisfaction of indebtedness secured by any subordinate security interest in the collateral if written notification of demand therefor is received before distribution of the proceeds is completed. If requested by the secured party, the holder of a subordinate security interest must seasonably furnish reasonable proof of his interest, and unless he does so, the secured party need not comply with his demand.

(2) If the security interest secures an indebtedness, the secured party must account to the debtor for any surplus, and, unless otherwise agreed, the debtor is liable for any deficiency. But if the underlying transaction was a sale of accounts or chattel paper, the debtor is entitled to any surplus or is liable for any deficiency only if the security agreement so provides.

(3) Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable. Unless

collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor, if he has not signed after default a statement renouncing or modifying his right to notification of sale. In the case of consumer goods no other notification need be sent. In other cases notification shall be sent to any other secured party from whom the secured party has received (before sending his notification to the debtor or before the debtor's renunciation of his rights) written notice of a claim of an interest in the collateral. The secured party may buy at any public sale and if the collateral is of a type customarily sold in a recognized market or is of a type which is the subject of widely distributed standard price quotations he may buy at private sale.

(4) When collateral is disposed of by a secured party after default, the disposition transfers to a purchaser for value all of the debtor's rights therein, discharges the security interest under which it is made and any security interest or lien subordinate thereto. The purchaser takes free of all such rights and interests even though the secured party fails to comply with the requirements of this part or of any judicial proceedings

(a) in the case of a public sale, if the purchaser has no knowledge of any defects in the sale and if he does not buy in collusion with the secured party, other bidders or the person conducting the sale; or

(b) in any other case, if the purchaser acts in good faith.

(5) A person who is liable to a secured party under a guaranty, indorsement, repurchase agreement or the like and who receives a transfer of collateral from the secured party or is subrogated to his rights has thereafter the rights and duties of the secured party. Such a transfer of collateral is not a sale or disposition of the collateral under this chapter.

1977



**70A-9-505. Compulsory disposition of collateral  
- Acceptance of the collateral as discharge of  
obligation.**

(1) If the debtor has paid sixty per cent of the cash price in the case of a purchase money security interest in consumer goods or sixty per cent of the loan in the case of another security interest in consumer goods, and has not signed after default a statement renouncing or modifying his rights under this part a secured party who has taken possession of collateral must dispose of it under section 70A-9-504 and if he fails to do so within ninety days after he takes possession the debtor at his option may recover in conversion or under section 70A-9-507(1) on secured party's liability.

(2) In any other case involving consumer goods or any other collateral a secured party in possession may, after default, propose to retain the collateral in satisfaction of the obligation. Written notice of such proposal shall be sent to the debtor if he has not signed after default a statement renouncing or modifying his rights under this subsection. In the case of consumer goods no other notice need be given. In other cases notice shall be sent to any other secured party from whom the secured party has received (before sending his notice to the debtor or before the debtor's renunciation of his rights) written notice of a claim of an interest in the collateral. If the secured party receives objection in writing from a person entitled to receive notification within 21 days after the notice was sent, the secured party must dispose of the collateral under section 70A-9-504. In the absence of such written objection the secured party may retain the collateral in satisfaction of the debtor's obligation.

(3) The above subsection shall not apply to pledgees receiving pledged property in the regular course of business where the consideration received by the pledgor for the property pledged is less than \$100. ----



## Fifth Judicial Circuit Court

Salt Lake County • Summit County

440 East 8680 South  
Sandy, Utah 84070 Phone 801-533-788

Robin W. Rees  
Judge

December 21, 1987

K-B Enterprises  
9750 South David Street  
Sandy, Utah 84070

Baker Construction  
George Baker  
250 West Plymouth Ave.  
Salt Lake City, Utah 84115.

Re: K-B Enterprises v. Baker Construction; 874001233. Heard November 18, 1987, Mark T Ethington, Pro Tem.

Written Opinion: K-B Enterprises v. Baker Construction.

At the trial in this matter the defendant argued that, pursuant to subsection (1) of section 70A-1-206 of the Utah Code, a written contract was required in this matter and as there was no written contract the plaintiff has no cause of action. It is the finding of the court that section 70A-1-206 is not determinative of this case. Subsection (2) of section 70A-1-206 provides that, "subsection (1) of this section does not apply to contracts for the sale of goods..." Goods are defined in section 70A-2-105(1) as "all things...which are moveable at the time of identification to the contract..." The bobcat in question was moveable so it would fall within the definition of goods.

It appears instead that section 70A-2-201 is controlling subsection (1) of section 70A-2-201 provides that, "except as otherwise provided in this section a contract for the sale of goods for the price of \$500.00 or more is not enforceable...unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought..." Subsection (3) then provides that:

A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable...

- (a) if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made...
- (b) with respect to goods for which payment has been made and accepted or which have been received and accepted.

It is the finding of the court that the defendant admitted in court that a contract for sale had been made and that payments were made for the bobcat, it was delivered to the defendant and he accepted it. Thus, there was a valid and enforceable contract between the parties. The defendant breached that contract by defaulting on his payments, and

judgement is granted in the plaintiff's favor.

The next issue is the amount of damages the defendant is liable for. The defendant is liable for the two payments of \$324.64 that were in default. When a payment is in default, the seller is entitled to recover that payment no matter when repossession took place. However, the defendant is only liable for damages that are reasonably foreseeable, and it is the finding of the court that the \$500.00 refinancing charge to the plaintiff was not a reasonably foreseeable consequence at default.

Judgement will be granted in favor of the plaintiff in the amount fo \$649.28. No costs will be awarded.

KB Enterprises Plaintiff )

Ed Kantor ; Doug Brooks )

vs. )

Baker Construction Defendant )

George M. Baker )

**SMALL CLAIMS**

**JUDGMENT**

Case No. 874001233

This matter came before the court for hearing on the affidavit of plaintiff, and the defendant has been served with the affidavit of plaintiff and order to defend, and return of service has been made. The following parties appeared at the hearing:

☐ Plaintiff only. The defendant failed to appear at the time set, and the defendant's default has been entered.

☒ Both plaintiff and defendant appeared and presented evidence.

\$ 649.28 Principal

\$ 0 Court costs, and

\$ 649.28 TOTAL JUDGMENT

DATED November 18 19 87  
December 17  
December 21, 1987

Mark Eltington  
JUDGE

☒ Both Plaintiff and Defendant received copies of the Judgment at Hearing.

Robert Nite  
Clerk

**TO THE DEFENDANT ONLY:**

If the above judgment was granted in favor of the plaintiff, you now have a judgment against you in the Circuit Court in the amount specified above. If you are dissatisfied with this judgment, you have only FIVE (5) DAYS from ~~receipt~~ <sup>entry</sup> of this notice to appeal the case to the District Court.

**TO THE PLAINTIFF ONLY:**

You should mail a copy of this judgment to the defendant IMMEDIATELY. The defendant has five days from ~~receipt~~ <sup>entry</sup> of the notice to appeal the case. You must complete the mailing certificate and file the original of this judgment with the court before you can proceed with any further court action.

I hereby certify that I mailed a copy of this judgment, postage prepaid, addressed to the above

named defendant(s) at

150 West Plymouth Ave, SLC, Utah 84115 <sup>plaint</sup>

at 9150 David Street, Sandy, 84092

Address & Zip Code

Dated

December 21, 1987

Robert Nite  
SIGNATURE