

2001

## Iverson v. O'Brien : Brief of Respondent

Utah Supreme Court

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### Recommended Citation

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## IN THE SUPREME COURT OF THE STATE OF UTAH

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FRED P. ADAMS,	)	
	:	
<i>Plaintiff-Respondent,</i>	:	
	)	
vs.	:	CASE NO. 14281
	:	
FIRST STATE BANK,	)	
	:	
<i>Defendant-Appellant.</i>	:	

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## APPELLANT'S BRIEF

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APPEAL FROM THE JUDGMENT OF THE THIRD  
JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY

HONORABLE BRYANT H. CROFTS, JUDGE

-----

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APPELLANT'S BRIEF

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STATEMENT OF THE KIND OF CASE

This is an action brought by Plaintiff and Respondent, Fred P. Adams (hereinafter "ADAMS") who was the purchaser of a boat from Deseret Manufacturing Corporation (hereinafter "DESERET") a now bankrupt borrower of Defendant and Appellant, First State Bank (hereinafter "BANK") which held a Financing Statement filed with the Secretary of State and other documents under the Uniform Commercial Code securing Bank's loan to Deseret. The dispute concerns validity of the Financing Statement. Adams demands damages for the Bank's "wrongful taking" and withholding of possession of the boat.

### DISPOSITION IN THE LOWER COURT

The Trial Court granted a Summary Judgment to Adams holding that a one-digit error in the serial number of the boat was fatally defective in the Financing Statement; that the Bank had no security interest in the boat; and that the Bank was liable in damages to Adams for "wrongful taking" of it.

### RELIEF SOUGHT ON APPEAL

On a Petition under Rule 72(b), Utah Rules of Civil Procedure, this Court granted this Interlocutory Appeal and the Bank now asks for a reversal of the Trial Court's Summary Judgment which held the Bank's Financing Statement void.

### STATEMENT OF FACTS

The boat in dispute was owned, having been manufactured by Deseret, a Defendant in the original action which does not appeal but is now bankrupt (R.68-70). Deseret gave the Bank a Security Agreement (R.39) and a Financing Statement which was filed with the Utah Secretary of State August 5, 1974 (R.40). The Financing Statement described a Seaflite 2200 Offshore #DMFA0082M-75L (R.39-40).

The actual number appearing on the boat is DMFA0082M-74-L (R.104).

However, the Financing Statement described the engine number of the boat with precise accuracy, viz: WLD-VS-L16-

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The make of the boat is "Seaflite" as appears in both the Financing Statement and on the boat and the manufacture of the engine is Waukesha as appears on the Financing Statement (R.40) and on the boat (R.103).

Adams did business as the sole proprietor of "FASCO" (apparently a contraction of his name) and was a trade supplier of Deseret, selling them materials for the construction of boats (R.2). Deseret became substantially indebted to Adams, doing business as FASCO, and attempted to pay him with checks that did not clear the bank (R.3).

Some time after August 8, 1974, and considerably after the bank had filed its Financing Statement, Deseret issued an invoice to "FASCO" for the boat in question as well as other boats (R.103). The deposition of Adams was taken and he could not produce any invoice for the boat in question but did exhibit the one appearing at R.103 saying that the invoice on the boat in question was "like this" and admitting that the invoice on the boat in question would have been issued to him (as "FASCO") at even a later date than August 8, 1974 (Deposition of Fred Adams, p.18).

Adams never made any investigation with the Secretary of State to determine whether there was a Financing Statement on the boat until after he had been advised that

First State Bank (Manti Branch) had a lien on the boat (Adams Deposition p.28, 29).

The invoice at R.103 clearly indicates that the consideration which Adams or "FASCO" paid was an *antecedent indebtedness* but that is not an issue before this Court since the Trial Court reserved as an issue of fact and law whether or not Adams was a buyer in the ordinary course of business or acquired the boat because of an antecedent debt (R.90). That reserved issue became naturally immaterial as far as the Trial Court was concerned since he found the one-digit error to be a jurisdictional and fatal defect nullifying entirely the Bank's security interest - irrespective of the "ordinary course of business" rule.

The boat was received by Adams long after the Financing Statement was filed (Adams Deposition p.18).

Adams took delivery of several boats from Deseret and received "roughly \$12,000.00 in cash" from sale of boats other than the one in question here which Adams retained for his own use (Adams Deposition p.31).

There is one important direct conflict in the evidence and therefore an issue of fact precluding summary judgment for Adams, as two witnesses whose depositions were published

and reviewed by the Trial Court in the Summary Judgment proceeding testified that both of the witnesses advised Adams that First State Bank had a lien on the boat (Deposition of Lynn Nuffer, p.14, lines 6 and 7; p.70, lines 20-25; Deposition of Steven Tapp, p.11, lines 8-10).

When the Bank confronted officers of Deseret about the wrongful disposal of the Bank's security, Deseret's principal officers and stockholders, Lynn Nuffer and Steven Tapp, called First State Bank and asked if they should pick up one boat and return it to their place of business. They were instructed by the Bank to return the Bank's security (Deposition of Steven Tapp, p.18,19; Deposition of Lynn Nuffer, p.33-35). The boat was picked up by Nuffer and Tapp and not by the Bank (Deposition of Lynn Nuffer, p.34 and 35).

[It should be noted parenthetically here that a secured party has the statutory right to require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party (70A-9-503) after default.]

First State Bank had taken judgment against Deseret Manufacturing (R.11) and the note was in default (R.64).

## A R G U M E N T

### POINT I

THE TRIAL COURT ERRED IN RULING THAT  
A ONE-DIGIT ERROR IN A FILED FINAN-  
CING STATEMENT UNDER THE UNIFORM COM-  
MERCIAL CODE WAS FATALLY DEFECTIVE

The decision of the Trial Court that a one-digit error is a fatal defect is clearly erroneous under the Uniform Commercial Code adopted by Utah effective January 1, 1966.

That proposition is unequivocally established by every case decided under the UCC which has considered the issue. In a well-reasoned and authoritative decision, the Supreme Court of Massachusetts in *Still Associates, Inc. vs. Murphy*, 267 NE2d 217 carefully reviewed all decisions of all other jurisdictions to rule upon the question under the Uniform Commercial Code and its conclusion was to overrule one of its prior decisions of long standing handed down under the old "chattel mortgage" law, a field of legislation and case law which now, the Massachusetts Court holds, is superseded entirely by the Uniform Commercial Code.

In *Still Associates* the facts are virtually the same as here. The Court stated that "the Defendant [buyer of the personal property under the code filing] had no actual notice and acted in good faith". The issue in question in this Massachusetts case was a one-digit error in the Financing

Statement description of a motor vehicle.

The unanimous opinion in *Still Associates* held:

Notice Filing [The central filing provided by the Uniform Commercial Code] is a method of protecting security interests which at the same time would give subsequent potential creditors and other interested persons information and procedures adequate to enable the ascertainment of the facts they needed to know.

The Court then recites its own decision of *National Cash Register vs. Reston*, 346 Mass.255, 267; 197 NE2d 471.

The Court held that under the "broad purposes of the Act [the UCC]" validity of the Financing Statement was not affected by the mistake in the last digit of the serial number.

The Massachusetts Supreme Court goes on to say:

Courts in other jurisdictions have held much less to be sufficient: *General Motors Acceptance Corp. vs. Terra Costa Corp.*, 161 NYLS 941 (holding that the term "motor vehicle" was sufficient). Given a sufficient description, the mere fact of an erroneous serial number following it cannot be held to be "seriously misleading". *Bank of North America vs. Bank of Nutley*, 94 NJ SUPR. 220-227, 227 Atl.2d A2d 535.

The Massachusetts Court had this to say concerning the holdings under the Uniform Commercial Code:

It has been held that the requirement of listing by serial number had been taken away by the Uniform Commercial Code and, in fact, a description of automobiles as being passenger and commercial automobiles

financed by a bank is sufficient (quoting *Girard Trust Corn Exchange Bank vs. Warren Leppley Ford Co.*, 13 PA D&C2d 119).

The Intermediate Court of Appeals had held the Financing Statement fatally defective because of the one-digit error the same as the Trial Court has done here. The Intermediate Court of Appeals had relied upon a 1924 decision of Massachusetts, *Wise vs. Kennedy*, 248 Mass. 83, 142 NE 745, which had held:

It is common knowledge \* \* \* that cars of any number of the makers can be distinguished with reasonable certainty for another automobile of the same class only by the number by which each car is designated.

Although *Wise vs. Kennedy* had been followed extensively in Massachusetts the Court of that state in *Still Associates* held that:

It is implicit in the holding that *Wise vs. Kennedy* is no longer to be followed \* \* \* The requirement of a description of collateral is evidentiary. The test of sufficiency of a description laid down by Code Section 9-402(5) [our 70A-9-405(5)] is that the description do the job assigned to it - that it makes possible by identification of the thing described. Under this rule Courts should refuse to allow the holdings often found in older chattel mortgage cases, that descriptions are insufficient unless they are of the most exact and detailed nature, the so-called "serial number" test.

It is also interesting to note the American Law Institute's "1962 Official Text with Comments" published by the American Law Institute and the National Conference of Commissioners on Uniform State Law under Section 9-110 has

exactly the same statement as that adopted by the Massachusetts Supreme Court (Page 633 Uniform Commercial Code, Official Text with Comments of the ALI and National Conference of Commissioners on Uniform State Laws).

Nearer to home the Oklahoma case of *Central National Bank and Trust Co. of Enid vs. Community Bank and Trust Co. of Enid* (Okla 1974) 528 P2d 710, adopts exactly the same holding, stating that the "serial number" test has been discarded by the UCC and that if the Financing Statement makes possible (by pursuing means which a reasonable person would be put on inquiry to ask about) the identification of the thing covered by the Financing Statement it will not be fatally defective.

In the case of *Yantze Brothers Co. vs. D.E.H. Sierra, Inc.*, 108 Ga.App. 875, 134 SE2d 828, the Court said that merely stating an incorrect serial number would not vitiate the contract if the key to identity of the property is there.

\* \* \*

A person of ordinary prudence would have found out from such lines of inquiry as the date given in the mortgage would naturally suggest to his mind and additionally any further information actually possessed by the claimants at the time of their transaction which would have led an

ordinary man to believe that he was dealing with the mortgaged property or would ordinarily have led him to further inquiry \* \* \*.

Under Code Section 9-110 [Utah's 70A-9-110] the description of the property is not required to be specific and under 9-208 [Utah's 70A-9-208] the debtor has means of obtaining from the secured party the statement of both the amount owing and the correct identification of the collateral.

*Girard (supra)* holds that the Uniform Commercial Code has:

Removed the necessity of listing by serial number the property used as collateral in a security agreement.

Of substantial interest in the Massachusetts case of *Still Associates, Inc., vs. Murphy* is the holding that:

When the error is not on its face sufficiently serious to invalidate the Financing Statement, it appears proper to us to require the party seeking to invalidate it under 9-402(5) [Utah's 70A-8-402(5)] to make some showing of actual prejudice.

Of particular interest is the separate opinion of Justice Crockett in the very recent decision of *Melville vs. Salt Lake County*, 536 P2d 133 including the footnote citing *Miller vs. Salt Lake City*, 7 U2d 300, 410 P2d 764 to the effect that anyone who has actual notice and suffered



no disadvantage cannot complaint of defects in the notice.

C O N C L U S I O N

We respectfully submit that the foregoing cases adequately demonstrate the clear error of the Trial Court in holding the Financing Statement fatally defective. The difficulty is that he has not only ruled against the Bank as far as its security interest goes, but has also left the necessity to try a protracted case on the question of damages, liability for which is absent if the correct rule is followed.

We respectfully submit that the Court should reverse the ruling of the Trial Court and permit First State Bank to retain its possession of the security which it has lawfully taken into custody for the purpose of realizing upon its statutory security interest.

Respectfully submitted,

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CERTIFICATE OF MAILING

I certify that on the 29th day of January, 1976,  
I mailed two (2) copies of the within and foregoing Brief  
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