

1989

# K & K Insurance Agency v. Salt Lake Typewriter, Inc., a Utah corporation : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS  
APPEALS

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K F J  
SO PLAINTIFF/RESPONDENT  
.A10

DOCKET NO. 890077

SALT LAKE TYPEWRITER, INC.,  
A UTAH CORPORATION,

DEFENDANT/APPELLANT

APPELLANT'S BRIEF

CASE NO. 890077-CA

PRIORITY CLASSIFICATION  
14(B)

Appeal from the granting of a Summary Judgment against  
Defendant/Appellant on October 26, 1988, and denial of Defendant's  
Motion to Alter, Amend or Vacate the order granting Summary Judgment  
on February 8, 1989, entered in the Third Circuit Court, State of Utah,  
Hon. Eleanor Van Sciver, presiding.

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ATTORNEYS FOR RESPONDENT

FILED

APR 5 1989

IN THE UTAH COURT OF APPEALS

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K & K INSURANCE AGENCY,  
  
PLAINTIFF/RESPONDENT

VS.

SALT LAKE TYPEWRITER, INC.,  
A UTAH CORPORATION,  
  
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## **JURISDICTION**

This appeal is taken pursuant to Utah Code Annotated 78-2(a)-3(2)(c) as amended 1988, and Rules 3 and 4 of the Rules of the Utah Court of Appeals.

## **NATURE OF PROCEEDINGS**

This appeal is taken from Summary Judgment entered against the Appellant in the Third Circuit Court, State of Utah, Salt Lake County, Salt Lake Department, and denial of Appellant's Motion to Alter, Amend or Vacate, made pursuant to Rule 59, Utah Rules of Civil Procedure.

## **STATEMENT OF ISSUES ON APPEAL**

Was the granting of Plaintiff's motion for Summary Judgment improper and prejudicial error in that there existed and were placed before the court genuine issues of material fact?

Did the refusal of the Circuit Court to vacate the Summary Judgment by granting Appellant's Rule 59 Motion supported by uncontradicted affidavits constitute abuse of discretion and error?

## **DETERMINATIVE CONSTITUTIONAL PROVISIONS AND STATUTES**

This case is governed by select provisions of the Uniform Commercial Code, U.C.A §70A, et seq., contained in Addendum "A" of this brief and Rule 60(b), Utah Rules of Civil Procedure.

## **STATEMENT OF THE CASE**

This case is governed by the special rules of the Uniform Commercial Code respecting the sale of goods. Respondent filed a complaint in the Third Circuit Court alleging that a Hermes 51 Typewriter purchased following a 90 day trial period on July 29, 1987, was defective. Respondent's complaint stated two counts as grounds for relief. Both counts sought relief under §70A-2-608. Respondent subsequently filed a Motion for Summary Judgment, which was heard by the court on October 12, 1988, and granted at that time. Appellant then filed a Motion to Alter, Amend or Vacate, which was heard on December 14, 1988 and denied at that time. Appellant's Motion to Alter, Amend or Vacate tolled the applicable period of time for appeal of the Summary Judgment granted on October 12, 1988, pursuant to the holding in Hume v. Small Claims Court, 590 P.2d 309 (Utah 1979). Appellant timely filed the present appeal following the denial of its Motion to Alter, Amend or Vacate.

#### STATEMENT OF FACTS

K & K Insurance (Plaintiff) purchased a Hermes 51 typewriter from Salt Lake Typewriter (Defendant) which was delivered on or about March 30, 1987. (Complaint para. 7) Plaintiff paid for the typewriter on or about July 29, 1987, after the trial period of ninety (90) days had lapsed. Plaintiff has retained the possession and use of the Hermes 51 typewriter since delivery to date.

At the hearing for Summary Judgment, Defendant's counsel, then Mr. Hunt, identified the issues of material fact before the court regarding rejection within a reasonable time and seasonable notification of the rejection:

Mr. Hunt: If the Court please, the Commercial Code uses the term rightfully rejected or rightfully rescinded. This machine was in use something over half a year before there even was a letter.

TSJ at 7.

Plaintiff claimed it experienced problems with the subject typewriter. (Complaint para. 11, T. 5-6 on Motion for Summary Judgment, hereinafter "TSJ") After inspection, it was determined that the complaints and problems were connected to the power supply at Plaintiff's office then located at 654 South 900 East, Salt Lake City, Utah. Defendant had no control over the power source or its stability. A surge protector was recommended to solve the problem. (See statement of Donald Thompson, attached as addendum "B") Plaintiff determined that the surge protector was too expensive and sent it back to Salt Lake Typewriter without using or paying for it.

Plaintiff, (K & K Insurance) moved its office from its old location to its present location in October, 1987. Defendant was not made aware that Plaintiff claimed the problems with the typewriter continued until receiving a letter dated February 29, 1988, some five (5) months after Plaintiff moved its offices. Plaintiff claimed that it sent a letter to Defendant dated February 5, 1988 which was in fact sent by Plaintiff to itself and signed by their own employee, Mary Strang. Defendant disputes and denies having ever received this letter.

From approximately February 29, 1988 to March 23, 1988, Defendant was not given access to the equipment to determine if a problem existed, and if one did, the nature of the problem. Calls were made by Mr. Sanders, President of Salt Lake Typewriter, to Mr. Kauffman of K & K



Insurance in an attempt to arrange an appointment to have the equipment inspected, determine if there was a problem and if one existed have it corrected. Each time Mr. Sanders was told that he would have to talk to Mr. Kauffman directly, although Mr. Kauffman was not available.

Shortly after the hearing of October 12, 1988 on Plaintiff's Motion for Summary Judgment, Defendant, by its President, Mr. Sanders, made a surprise visit to the business office of K & K Insurance Company to view the Hermes 51 typewriter. He was accompanied by L. Keith Day and Margaret Voyles, both employees of Defendant, Salt Lake Typewriter. This surprise visit revealed that the Hermes 51 typewriter, the subject of this action, was in operating condition and in use by Mary B. Strang, the employee of Plaintiff, K & K Insurance. Mary Strang related to Mr. Sanders that a representative of Associated Business Machines had found a loose wire and fixed it. This information was not disclosed by Plaintiff at the hearing of the Motion for Summary Judgment. (See TSF generally, and affidavits contained in Addendum "C") Mr. Sanders requested Mary Strang to produce a repair bill or invoice showing the repair of the machine, which she could not do. The only explanation was she thought there had been no charge for the repair of the loose wire. Mary Strang also stated to Mr. Sanders that the Hermes 51 typewriter had operated properly from the time Plaintiff moved its office to 4001 South 700 East, Suite 520, Salt Lake City, Utah and the alleged repair of the loose wire. (Addendum "C")

Upon discovering this information, Defendant filed its Rule 59 Motion and supported it by Affidavits. Defendant's Rule 59 Motion was heard by the Court on December 14, 1988. At this hearing, plaintiff's

counsel admitted and acknowledged that the Hermes 51 typewriter was still in possession of plaintiff and in full use. (T. 7, Transcript of Defendant's Motion to Alter, Amend or Vacate, hereinafter "TDM") Defendant's Rule 59 Motion, after it was taken under advisement by the lower Court, Judge Eleanor Van Sciver, was denied, without a Memorandum or explanation.

The conduct of the court in this matter may prove revealing. On commencing the hearing regarding Defendant's Motion to Alter, Amend or Vacate, the court stated in open court, with representatives of Defendant corporation present:

The Court: Now, I suppose I'll take this case that keeps popping up more often than any others first. K&K Insurance Agency vs. Salt Lake Typewriter.

This is your motion Mr. Fankhauser?

Mr. Fankhauser: Yes, it is, your Honor.

The Court: I see Mr. Hunt got tired of this case and withdrew.

TDM at 2. This raises an issue of whether or not the court properly used the remedy of Summary Judgment to dispose of cases which present no issues of genuine material fact and can be disposed of as a matter of law, or whether or not summary judgment was used to dispose of what the court improperly felt was a nuisance.

### SUMMARY OF ARGUMENT

Summary Judgment acts as a harsh remedy which should only be employed in cases where there clearly is no genuine issue of material fact which should go to trial by the trier of fact. Because of its harsh result, it

should be employed cautiously by the court and all doubts should be resolved in favor of the party moved against, in this case the appellant. This case involved sections of the Uniform Commercial code which refer to rejection within a "reasonable time" which are "seasonably" tendered. These terms raise issues of fact regarding the timing and manner of rejection of goods. Whether or not a rejection is timely and seasonably noticed depends entirely upon the circumstances and facts surrounding the transaction, the nature of the goods and the customs of the trade or industry. This case does not involve the lapse of a statute of limitations or the time for filing an answer or some other statutory provision which states a fixed period of time. We are dealing here with notions of "reasonableness" and "Seasonableness". These are genuine issues of material fact which cannot be disposed of properly by summary judgment. Indeed, it is difficult to conceive of factual issues which are more material and which are in dispute.

Following the entry of summary judgment, Appellant's representatives paid a surprise visit to the offices of Respondent. The visit had to be a surprise since Respondent had repeatedly denied Appellant access to its facilities. New facts were brought to the attention of Appellant which were known by Respondent at the time judgment had been entered. These facts were of such a nature that Appellant filed a motion pursuant to Rule 59, Utah Rules of Civil Procedure, in order to correct what appeared to be a serious misrepresentation practiced upon the court by Respondent. Appellant learned that, not only had there never been a serious problem with the machine in question, but that it had and was completely functional and in active use by Respondent. This fact was not discoverable by Appellant prior to or during trial, since Respondent had denied Appellant

access to its facilities repeatedly and Respondent had always maintained, since the filing of its Complaint that the machine was not functional. Furthermore, there had never been a "trial" as such, but only a hearing for Summary Judgment, and Appellant could not therefore discover anything by due diligence prior to "trial". The serious nature of these allegations, supported as they were by new uncontested affidavits required the court to reexamine the order and summary judgment entered earlier. Failure to do so constituted an abuse of discretion and prejudicial error. The failure of the court to reexamine these issues by proceeding to trial further substantiates the apparent prejudice of the court toward the Appellant, as evidenced by the court's remarks at the commencement of the hearing of Defendant's Rule 59 Motion.

This court should reverse and remand for new trial on all issues, and grant Appellant its costs together with any and all other remedies determined to be fit and proper.

## POINT I

THE GRANTING OF SUMMARY JUDGMENT WAS IMPROPER SINCE THE UNIFORM COMMERCIAL CODE PROVISION RAISE GENUINE ISSUES OF MATERIAL FACT REGARDING THE TIMING OF RESPONDENT'S REJECTION AND NOTIFICATION OF REJECTION.

The standards under which a motion for Summary Judgment should be granted are clearly set forth in Utah law. There must be no genuine issue of material fact which requires trial by the trier of fact. If even a doubt exists as to whether or not there is a material issue of fact, then the case must go to trial. (See Bowen v. City of Riverton, 656 P.2d 434 (Utah 1982); Lucky Seven Rodeo Corporation v. Clark, 755 P.2d 750 (Utah App.

1988); Western Pacific Transport v. Beehive State Agricultural Co-op, 597 P.2d 854 (Utah 1979); Foster v. Steed, 432 P.2d 60 (Utah 1967); Controlled Receivables Inc., v. Harman, 413 P.2d 807 (Utah 1966); Durham v. Margetts, 571 P.2d 1332 (Utah 1977). Furthermore, this Court, pursuant to the applicable standard of review must liberally construe all factual allegations in a light most favorable to Appellant, and if there appears to be a single issue of material fact. (Oberhansly v. Sprouse, 751 P.2d 1155 (Utah App. 1988)). The disputed material fact in this case was raised by the very statute itself under which Respondent claimed relief. The Uniform Commercial Code, as we shall see, raises issues of fact by referring to a rightful rejection or revocation of acceptance that is made within a "reasonable time" based upon "seasonable" notice. By invoking this section of the Code, Respondent raised an immediate material issue of fact which could not be properly disposed of by means of Summary Judgment.

The Complaint alleged a rightful revocation of Respondent's acceptance of the Hermes 51 Typewriter under the provision of U.C.A. §70A-2-608, et seq. This section states in part that:

(2) Revocation of acceptance must occur within a **reasonable time** after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.

(3) A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them.

U.C.A §70A--608 (2) et seq., emphasis added. The rightful rejection of goods referred to in subsection (3) above is addressed in §70A-2-602, et seq., which states in part:

(1) Rejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller.

U.C.A §70A--602 (1). The Uniform Commercial code further defines what is meant by a reasonable rejection and a seasonable notification of rejection under these provisions:

(2) What is a reasonable time for taking any action depends on the nature, purpose and circumstances of such action.

(3) An action is taken "seasonably" when it is taken at or within the time agreed or if no time is agreed at or within a reasonable time.

U.C.A. 70A-1-204 et seq. If the revocation of an acceptance of goods is to be effective, and therefore result in the creation of rights of recovery of sums paid and damages to Plaintiff/Respondent, such revocation must fit the terms and rules of rightful rejection under the Uniform Commercial Code. The rejection, in order to be rightful, must be timely, that is made within a reasonable time and based upon seasonable notification of the rejection. The Utah Supreme Court addressed these issues in the case of Christopher v. Larson Ford Sales, 557 P.2d 1009 (Utah 1976). The court stated that:

What constitutes "a reasonable time" for return and request for rescission under [§70-2-608] is usually a question of fact to be determined from the circumstances of each case.

Christopher at 1012. See also Lanners v. Whitney, 428 P.2d 398 (Or.).

All relief requested by Respondent in its Complaint were premised upon a timely revocation and rejection of the typewriter under the Uniform Commercial Code. Whether or not the attempted rejection, which took place over half a year after the purchase of the machine following a 3 month trial period was or was not reasonable depends on several factual determinations.

First, the court must consider the customs of the industry; there was a 90-day warranty on the machine which may serve to set the bounds of reasonableness in this matter. Second, this was a transaction between merchants who had a history of dealings with each other. Third, the alleged notification came several months following the purchase of the machine. Fourth, when did the problem show up? Fifth, was the problem attributable to the location of the company, or to the burden placed upon the power supply at that location? Sixth, exactly when did the alleged tender of revocation occur? Seventh, what was the exact cause of the machine's dysfunction? All of these elements address the reasonableness of the timing of the revocation. The purposes of these provisions are to guarantee that a buyer cannot purchase a machine and then use it for its anticipated lifetime and thereafter "reject" it because it developed a functional problem. The granting of summary judgment under these conditions effectively undermines the rationale behind the Uniform

Commercial Code. There were in fact issues of material fact regarding the timeliness of the revocation and notification of the same.

Respondent objected pursuant to Rule 56(e), Utah Rules of civil Procedure, to the form of the affidavit of Odell Sanders, which was filed in a timely manner. The Utah Supreme Court addressed the sufficiency of affidavits supporting or opposing motions for Summary Judgment in Lucky Seven at 752:

One sworn statement under oath is all that is needed to dispute the averments on the other side of the controversy and create an issue of fact, precluding the entry of summary judgment.

The affidavit of Odell Sanders provides disputed facts in excess of that required under either Rule 56 or Lucky Seven. The cover sheet to the affidavit states that Mr. Sanders is a fully trained expert in the installation, repair and maintenance of the Hermes electronic typewriter sold to the Respondent. He made statements under oath based upon personal knowledge of the events in question. Aside from the most obvious issue of material fact in this case (whether or not the amount of time that lapsed before an alleged notice of revocation of acceptance or rejection under the UCC), Mr. Sanders raises the following issues specifically. The equipment: 1) was in service for over one year; 2) was used continually without proper surge protection; 3) was relocated by the customer to another location where the local power supply to the building was different; 4) was moved to another location by the customer without proper packing; 5) was installed by the customer at the new location and not by trained personnel. Any one of these factors could be responsible for the alleged malfunctioning



of the machine, and not some alleged latent defect. The affidavit of Mr. Sanders was more than sufficient to raise serious issues of material fact. The court improperly granted summary judgment. The case should be remanded for proceedings in keeping with the letter and the spirit of the Uniform Commercial Code.

## POINT II

THE COURT ERRED IN NOT GRANTING DEFENDANT'S MOTION TO ALTER, AMEND OR VACATE PURSUANT TO RULE 59 OF THE UTAH RULES OF CIVIL PROCEDURE.

Rule 59 provides the grounds upon which a motion for new trial should be granted:

(a) Grounds Subject to the provisions of Rule 61, a new trial may be granted to all or any of the parties and on all or part of the issues, for any of the following causes: . . .

(4) Newly discovered evidence, material for the party making the application, which could not, with reasonable diligence, have discovered and produced at trial.

Rule 59, Utah Rules of Civil Procedure. Although Appellant is not alleging a fraud on the part of Respondent, there was clear evidence of active and knowing misrepresentations made by Respondent at and before the hearing on Summary Judgment. The issue now before this court has been framed in several Utah cases. The granting of a motion for a new trial based upon newly discovered evidence must be founded upon material evidence which could not have been discovered by reasonable diligence

which is of such a nature that the outcome would have been different below. (Universal Inv. Co. v. Carpets, Inc., 400 P.2d 564 (Utah 1965); Gregerson v. Jensen, 617 P.2d 369 (Utah 1980); Doty v. Town of Cedar Hills, 656 p.2d 993 (Utah 1982); Kettner v. Snow, 375 P.2d 28 (Utah 1962);) Appellant exercised that diligence required by a case of this type in discovering the issues of fact and law to be resolved at trial. This included the production of affidavits and other competent evidence. Since the problem was one of misrepresentation, Appellant argues that due diligence would likely resulted not in discovery of the complete operational condition of the machine, but would probably have resulted in further misrepresentations. The only reason that the functional condition of the machine was discovered was because of a "surprise" visit to Respondent's place of business. Appellant there discovered that not only was the machine functional then, but had been functional all along. Because Respondent's entire complaint was premised upon the existence of a non-functional machine it is difficult to imagine how these facts could not create a different result than that achieved at the hearing for Summary Judgment. Therefore, Appellant was entitled to a new trial at which the functionality of the machine could be addressed. The court below wrongfully denied this motion in the face of new evidence which was uncontroverted, and which addressed the propriety and integrity of the most essential facts of the Complaint. This case should therefore be remanded with sufficient instructions to allow Appellant a fair trial of the issues and facts.

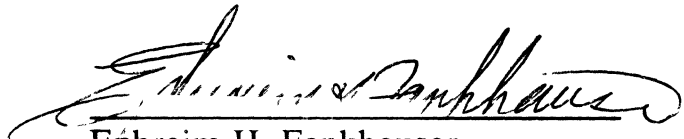
### CONCLUSION

The Uniform Commercial Code (basis for all relief prayed for by Respondent) requires revocations to be made in a reasonable time after

acceptance of goods in order to be effective. Whether or not Respondent's alleged rejection was made in a reasonable amount of time is a question of fact. That question of fact is material because it forms an essential element of Respondent's claim for relief. The granting of Summary Judgment under these conditions was improper and resulted in prejudicial error.

Appellant was entitled to a new trial based upon newly discovered facts unknown at trial which would have likely resulted in a different outcome below. Respondent's misrepresentations go to the heart of the litigation. Respondent wrongfully recovered a judgment based upon those misrepresentations. In the interest of the integrity of the judicial system the interests of justice, this court should reverse and remand for further proceedings which reflect the intent and the letter of the law.

Respectfully submitted this 25 day of April, 1989.



Ephraim H. Fankhauser  
Attorney for Appellant

#### MAILING CERTIFICATE

I certify that a copy of the foregoing Brief of Appellant was mailed, postage prepaid, to John B. Anderson, Anderson & Holland, Attorneys for respondent, at 623 East First South, this 25 day of April, 1989.



## **ADDENDUM A**

**Collateral References.**

Sales ⇌ 164, 177.

77 CJS Sales §§ 168, 184, 218.

67 AmJur 2d 540 to 545, Sales §§ 386 to 389

**70A-2-602. Manner and effect of rightful rejection.**

- (1) Rejection of goods must be within ~~a reasonable time~~ after their delivery or tender. ~~It is ineffective unless the buyer seasonably notifies the seller.~~
- (2) Subject to the provisions of the two following sections on rejected goods (sections 70A-2-603 and 70A-2-604),
  - ✓ (a) ~~after rejection any exercise of ownership by the buyer with respect to any commercial unit is wrongful as against the seller.~~
  - (b) ~~if the buyer has before rejection taken physical possession of goods in which he does not have a security interest under the provisions of this chapter (subsection (3) of section 70A-2-711), he is under a duty after rejection to hold them with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them; but~~
  - (c) the buyer has no further obligations with regard to goods rightfully rejected.
- (3) The seller's rights with respect to goods wrongfully rejected are governed by the provisions of this chapter on seller's remedies in general (~~section 70A-2-703~~).

**History:** L. 1965, ch. 154, § 2-602.

Seller's remedies in general, 70A-2-703.

**Cross-References.**

Buyer's right to inspection of goods, 70A-2-513.

Improper delivery, buyer's rights, 70A-2-601.

Merchant buyer's duties as to rightfully rejected goods, 70A-2-603.

Notice or notification, 70A-1-201.

Payment by buyer before inspection, 70A-2-512.

Reasonable time, 70A-1-204.

**Collateral References.**

Sales ⇌ 177, 178 (2).

77 CJS Sales §§ 220, 224, 342.

67 AmJur 2d 546 to 554, Sales §§ 391 to 397.

Duty of purchaser of goods "on trial" or "on approval" regarding notice of rejection, 78 ALR 533.

Seller's right to retain down payment on buyer's unjustified refusal to accept goods, 11 ALR 2d 701.

**70A-2-603. Merchant buyer's duties as to rightfully rejected goods.**

- (1) Subject to any security interest in the buyer (subsection (3) of section 70A-2-711), when the seller has no agent or place of business at the market of rejection a merchant buyer is under a duty after rejection of goods in his possession or control to follow any reasonable instructions received from the seller with respect to the goods and in the absence of such instructions to make reasonable efforts to sell them for the seller's account if they are perishable or threaten to decline in value speedily. Instructions are not reasonable if on demand indemnity for expenses is not forthcoming.
- (2) When the buyer sells goods under subsection (1), he is entitled to reimbursement from the seller or out of the proceeds for reasonable expenses of caring for and selling them, and if the expenses

Deduction of damages from the price, 70A-2-717.

Notice and notification, 70A-1-201.

Performance or acceptance under reservation of rights, 70A-1-207.

Reasonable time, 70A-1-204.

Revocation of acceptance in whole or in part, 70A-2-608.

Waiver of buyer's objections by failure to particularize, 70A-2-605.

Warranty against infringement, 70A-2-312.

#### **"Reasonable time."**

Where purchasers of a motor home, upon finding a number of defects in the vehicle, sought to rescind the contract the day after it was entered, but were persuaded by the seller to retain the vehicle and take it on a planned trip to California, during which time the already noted problems persisted and new ones became manifest so that the day after they returned home purchasers again attempted rescission, they acted within a "reasonable time" within the meaning of this section. *Christopher v. Larson Ford Sales, Inc.* (1976) 557 P 2d 1009.

#### **Collateral References.**

Indemnity ⇌ 10, 12; Sales ⇌ 179, 285, 288 (2), 427.

42 CJS Indemnity § 15; 77 CJS Sales §§ 218, 225, 339, 346; 78 CJS Sales § 520.

67 AmJur 2d 554 to 559, Sales §§ 399 to 401.

Acceptance after agreed time of delivery as waiver of damages on account of seller's delay, 80 ALR 322.

Buyer's acceptance of delayed installment of goods as waiver of similar default as to later installments, 32 ALR 2d 1128.

Buyer's acceptance of part of goods as affecting right to damages for failure to complete delivery, 169 ALR 595.

Form and substance of notice which buyer of goods must give in order to recover damages for seller's breach of warranty, 53 ALR 2d 270.

Misrouting as affecting duty of the buyer to accept goods, 46 ALR 1120.

Purchaser's use or attempted use of articles known to be defective as affecting damages recoverable for breach of warranty, 33 ALR 2d 511.

Right of seller as condition of delivery to insist on or resort to means not provided by contract to assure payment, 44 ALR 443.

Seller's right to retain down payment on buyer's unjustified refusal to accept goods, 11 ALR 2d 701.

Seller's waiver of sales contract provision limiting time within which buyer may object to or return goods or article for defects or failure to comply with warranty or representations, 24 ALR 2d 717.

Sufficiency and timeliness of buyer's notice under UCC § 2-607 of seller's breach of warranty, 93 ALR 3d 363.

Use of article by buyer as waiver of right to rescind for fraud, breach of warranty, or failure of goods to comply with contract, 41 ALR 2d 1173.

### **DECISIONS UNDER FORMER LAW**

#### **Counterclaim of buyer.**

Breach of promise or agreement on part of seller to furnish demonstrator does not defeat the right of seller to recover for goods sold, but saves to the purchaser the right to offset by way of counterclaim for any damages which may have been sustained by reason of the failure of the seller to perform that part of its agreement. *Detroit Vapor Stove Co. v. Farmers' Cash Union* (1923) 61 U 567, 216 P 1075.

#### **Proffer return of goods by buyer.**

Where a horse was bought with the knowledge of both parties that he was to be used for breeding purposes and the horse proved to be sterile but died before it could be returned, buyer was not barred from recovery by his failure to proffer the return of the carcass nor could seller raise his own good faith as a defense where no fraud was claimed or shown as it was assumed by the court that both parties acted in good faith in respect to the defective horse. *Ericksen v. Poulsen* (1964) 15 U 2d 190, 389 P 2d 739.

#### **70A-2-608. Revocation of acceptance in whole or in part.**

- (1) The buyer may revoke his acceptance of a lot or commercial unit whose nonconformity substantially impairs its value to him if he has accepted it
  - (a) on the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured; or

- (b) without discovery of such nonconformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.
- (2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.
- (3) A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them.

**History:** L. 1965, ch. 154, § 2-608.

**Cross-References.**

Effect of acceptance, 70A-2-607.  
 Improper delivery, buyer's rights, 70A-2-601.  
 Proof of market price, 70A-2-723.  
 Reasonable time, 70A-1-204.  
 Rightful rejection, manner and effect, 70A-2-602.

Waiver of buyer's objections by failure to particularize, 70A-2-605.

**"Reasonable time."**

What constitutes a "reasonable time" for revocation of acceptance under this section is usually a question of fact to be determined in light of the circumstances of the particular case, and the supreme court upon review will not disturb a finding on the issue unless there is no reasonable basis in the evidence to sustain it. *Christopher v. Larson Ford Sales, Inc.* (1976) 557 P 2d 1009.

Where purchasers of a motor home, upon finding a number of defects in the vehicle, sought to rescind the contract the day after

it was entered, but were persuaded by the seller to retain the vehicle and take it on a planned trip to California, during which time the already noted problems persisted and new ones became manifest so that the day after they returned home purchasers again attempted rescission, they acted within a "reasonable time" within the meaning of this section. *Christopher v. Larson Ford Sales, Inc.* (1976) 557 P 2d 1009.

**Collateral References.**

Sales ⇐ 179, 427.  
 77 CJS Sales § 225; 78 CJS Sales § 520.  
 67 AmJur 2d 919 to 926, Sales §§ 710 to 716.

Measure and elements of buyer's recovery upon revocation of acceptance of goods under UCC § 2-608 (1), 65 ALR 3d 388.

Time for revocation of acceptance of goods under UCC § 2-608 (2), 65 ALR 3d 354.

What constitutes "substantial impairment" entitling buyer to revoke his acceptance of goods under UCC § 2-608, 98 ALR 3d 1183.

**70A-2-609. Right to adequate assurance of performance.**

- (1) A contract for sale imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired. When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return.
- (2) Between merchants the reasonableness of grounds for insecurity and the adequacy of any assurance offered shall be determined according to commercial standards.
- (3) Acceptance of any improper delivery or payment does not prejudice the aggrieved party's right to demand adequate assurance of future performance.

"Good faith" defined, 70A-1-201 (19),  
70A-2-103 (1) (b).

Improper tender or delivery of goods, cure  
by seller, 70A-2-508.

Merchant buyer's duties as to rejected  
goods, 70A-2-603.

Option to accelerate at will, 70A-1-208.

Substituted performance of contract for  
sale, 70A-2-614.

#### **Collateral References.**

17 CJS Contracts § 494.

15A AmJur 2d 478, Commercial Code § 26.

Effectiveness of original financing state-  
ment under UCC article 9 after change in  
debtor's name, identity, or business struc-  
ture, 99 ALR 3d 1194.

#### **70A-1-204. Time — Reasonable time — "Seasonably."**

- (1) Whenever this act requires any action to be taken within a reason-  
able time, any time which is not manifestly unreasonable may be  
fixed by agreement.
- (2) What is a reasonable time for taking any action depends on the  
nature, purpose and circumstances of such action.
- (3) An action is taken "seasonably" when it is taken at or within the  
time agreed or if no time is agreed at or within a reasonable time.

**History:** L. 1965, ch. 154, § 1-204.

should be ruled upon as a matter of law. Lish  
v. Compton (1976) 547 P 2d 223.

#### **Questions of fact and law.**

What constitutes a reasonable time is usu-  
ally a question of fact, but if the time elapsed  
was outside the ambit which fair-minded  
persons might conclude was reasonable, it

#### **Collateral References.**

Time ⇔ 15.

86 CJS Time § 8.

15A AmJur 2d 480, Commercial Code § 27.

#### **70A-1-205. Course of dealing and usage of trade.**

- (1) A course of dealing is a sequence of previous conduct between the  
parties to a particular transaction which is fairly to be regarded  
as establishing a common basis of understanding for interpreting  
their expressions and other conduct.
- (2) A usage of trade is any practice or method of dealing having such  
regularity of observance in a place, vocation or trade as to justify  
an expectation that it will be observed with respect to the trans-  
action in question. The existence and scope of such a usage are to  
be proved as facts. If it is established that such a usage is embodied  
in a written trade code or similar writing the interpretation of the  
writing is for the court.
- (3) A course of dealing between parties and any usage of trade in the  
vocation or trade in which they are engaged or of which they are  
or should be aware give particular meaning to and supplement or  
qualify terms of an agreement.
- (4) The express terms of an agreement and an applicable course of  
dealing or usage of trade shall be construed wherever reasonable  
as consistent with each other; but when such construction is unrea-  
sonable express terms control both course of dealing and usage of  
trade and course of dealing controls usage of trade.
- (5) An applicable usage of trade in the place where any part of perfor-  
mance is to occur shall be used in interpreting the agreement as  
to that part of the performance.



## **ADDENDUM B**

This letter is to certify my findings and condition of Hermes 51 typewriter. Upon initial servicing of machine, the following information was obtained. First, no problem with the internal circuitry of the machine could be found. Second, going by there description of problems, I suggested a possible power line problem from line spike or current kick-backs from some kinds of other equipment (copiers, coffee machines, heaters on the same line. The Hermes 51 typewriter has a sophisticated logic control circuit, ran by a CPU chip and similar to one in a computer that stores memory. This CPU chip and its support ICs are very sensitive to power line spikes and current kick-backs, a surge protector was recommended to solve there problem. I received no further complaints about machine after installation of the surge protector.

STATE OF UTAH )

: SS.

COUNTY OF SALT LAKE )



Donald Thompson being duly sworn deposes and states that he made the foregoing statement and that the same is true to the best of his knowledge, information and belief.

Notary Public:  Maury Sanders expires 4-20-91, Residing in Salt Lake, Ut

## **ADDENDUM C**

E. H. FANKHAUSER  
Bar No. 1032  
Attorney for Defendant  
243 East 400 South, Suite 200  
Salt Lake City, Utah 84111  
Telephone: 534-1148

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THIRD CIRCUIT COURT, STATE OF UTAH  
SALT LAKE COUNTY, SALT LAKE DEPARTMENT

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K & K INSURANCE AGENCY,

Plaintiff,

vs.

SALT LAKE TYPEWRITER, INC.  
a Utah Corporation,

Defendant.

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AFFIDAVIT IN SUPPORT OF  
MOTION TO ALTER OR AMEND  
JUDGMENT OR VACATE JUDGMENT

Civil No. 883003265 CV

Judge Eleanor Van Sciver

---

STATE OF UTAH            )  
                              : ss.  
COUNTY OF SALT LAKE    )

ODELL SANDERS, being first sworn on oath deposes and states that he is the President of Defendant, Salt Lake Typewriter, Inc., and has personal knowledge of the matters stated herein.

1. Affiant, together with L. Keith Day and Margaret Voyles went to the business office of K & K Insurance Agency on or about October \_\_\_\_, 1988, for the purpose of viewing the typewriter which is the subject of this action.


2. Upon entering the business office of K & K Insurance Agency, Affiant observed the Hermes 51 typewriter, which is the subject of this action, to be on a desk, in operating condition and in use. Mary B. Strand was the person who was using the typewriter.

3. Upon observing the typewriter in use, I inquired of Mary B. Strand concerning the machine and her use of it. She then related to me that the typewriter had been in use continuously since K & K Insurance Agency moved its office from 654 South 9th East, Salt Lake City, Utah to 4991 South 700 East, Suite 520, Salt Lake City, Utah. I inquired about the claims that the machine would not operate properly and was defective. She related to me that Associated Business Machines had found a loose wire and had fixed it. I requested she produce the repair bill or invoice showing repair of the machine. She could not produce a repair order or invoice and then stated that she thought that there had been no charge for the repair of the loose wire.

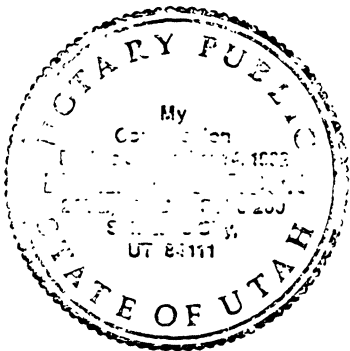
4. She stated in my presence and the presence of L. Keith Day and Margaret Voyles that the machine had operated properly since K & K Insurance Agency had moved its offices to 4001 South 700 East, Suite 520, Salt Lake City, Utah and the alleged repair of the loose wire by Associated Business Machines.

5. All of this information was well known to the Plaintiff at the time of the hearing on the Motion for Summary Judgment. That the Plaintiff willfully failed to disclose this information to the Court. Plaintiff represented to the Court that the typewriter had sat idle for months and was out of service. Plaintiff also claimed to hold a security interest in the subject typewriter until recovery of the purchase price sought in this action by its Motion for Summary Judgment. Under these circumstances, the typewriter was not accessible to Affiant for the purpose of determining that the typewriter was not in fact idle, was in use and had been in use continuously by the Plaintiff from the time of filing the Motion for Summary Judgment to and including the date of hearing before this Court.

6. I reaffirm my former Affidavit on file in this case to the effect that the problem with the machine was the improper power source used by Plaintiff at its prior business office, 654 South 9th East, Salt Lake City, Utah as opposed to the power source now being used by Plaintiff at its present office location, 4001 South 700 East, Suite 520, Salt Lake City, Utah and not due to any defect in the machine itself.

  
ODELL SANDERS

Subscribed and sworn to before me this 3<sup>rd</sup> day of  
November, 1988.



Diane J. Hollbrook  
NOTARY PUBLIC  
Residing in Salt Lake County, Utah  
My Commission Expires:

MAILING CERTIFICATE

I certify a true and correct copy of the foregoing was  
mailed to John B. Anderson, Attorney for Plaintiff, 623 East  
First South, Salt Lake City, Utah 84102 on this 2 day of  
November, 1988.

Frankhaus

E. H. FANKHAUSER  
Bar No. 1032  
Attorney for Defendant  
243 East 400 South, Suite 200  
Salt Lake City, Utah 84111  
Telephone: 534-1148

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THIRD CIRCUIT COURT, STATE OF UTAH  
SALT LAKE COUNTY, SALT LAKE DEPARTMENT

---

K & K INSURANCE AGENCY,  
Plaintiff,

vs.

SALT LAKE TYPEWRITER, INC.,  
a Utah Corporation,  
Defendant.

\*  
\* AFFIDAVIT OF L. KEITH DAY  
\* Civil No. 883003265 CV  
\* Judge Eleanor Van Sciver  
\*  
\*

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STATE OF UTAH            )  
                              : ss.  
COUNTY OF SALT LAKE    )

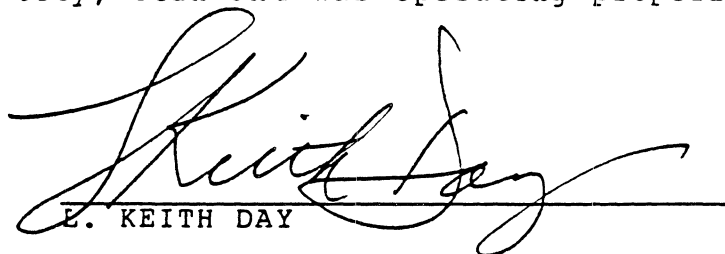
L. KEITH DAY, being first sworn on oath deposes and states that he has personal knowledge of the matters set forth hereinbelow.

1. On or about October 24<sup>th</sup>, 1988, I accompanied Odell Sanders and Margaret Voyles to the business office of K & K Insurance Agency, 4001 South 700 East, Suite 520, Salt Lake City, Utah.

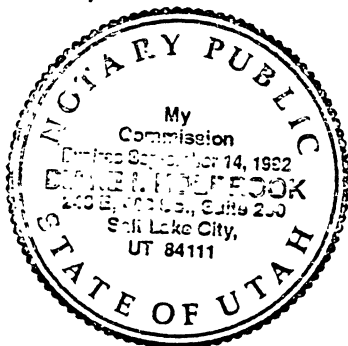



2. On arrival at the business office of K & K Insurance Agency I observed the Hermes 51 typewriter to be on a desk, in use and operated by Mary B. Strand.

3. I was present and heard all of the conversation between Odell Sanders and Ms. Strand pertaining to the operation and continued use of the typewriter. Ms. Strand admitted that the typewriter had been used continuously by K & K Insurance Agency contrary to their representations that it had set idle for several months. I heard her tell Mr. Sanders that ASSociated Business Machines had found a loose wire and repaired it. I was present when she indicated she could not produce a repair order or invoice from Associated Business Machines. She stated to Mr. Sanders that the machine had been in use and operated properly since K & K Insurance Agency moved its office to 4001 South 700 East, Suite 520, Salt Lake City, Utah and was operating properly on this occasion.

  
E. KEITH DAY

Subscribed and sworn to before me this 3<sup>rd</sup> day of November, 1988.



  
NOTARY PUBLIC  
Residing in Salt Lake County, Utah  
My Commission Expires:

E. H. FANKHAUSER  
Bar No. 1032  
Attorney for Defendant  
243 East 400 South, Suite 200  
Salt Lake City, Utah 84111  
Telephone: 534-1148

---

THIRD CIRCUIT COURT, STATE OF UTAH  
SALT LAKE COUNTY, SALT LAKE DEPARTMENT

---

K & K INSURANCE AGENCY,  
Plaintiff,

vs.

SALT LAKE TYPEWRITER, INC.,  
a Utah Corporation,  
Defendant.

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AFFIDAVIT OF MARGARET VOYLES

Civil No. 883003265 CV

Judge Eleanor Van Sciver

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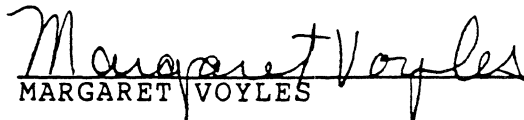
STATE OF UTAH            )  
                              : ss.  
COUNTY OF SALT LAKE    )

MARGARET VOYLES, being first sworn on oath deposes and states that she has personal knowledge of the matters set forth hereinbelow.

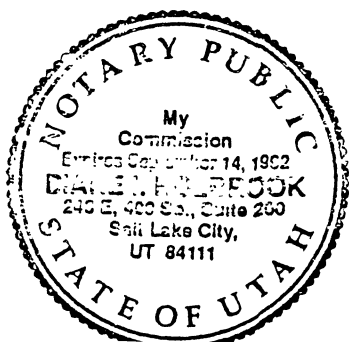
1. On or about October 24<sup>th</sup>, 1988, I accompanied Odell Sanders and L. Keith Day to the business office of K & K Insurance Agency, 4001 South 700 East, Suite 520, Salt Lake City, Utah.


2. On arrival at the business office of K & K Insurance Agency I observed the Hermes 51 typewriter to be on a desk, in use and operated by Mary B. Strand.

3. I was present and heard all of the conversation between Odell Sanders and Ms. Strand pertaining to the operation and continued use of the typewriter. Ms. Strand admitted that the typewriter had been used continuously by K & K Insurance Agency contrary to their representations that it had set idle for several months. I heard her tell Mr. Sanders that Associated Business Machines had found a loose wire and repaired it. I was present when she indicated she could not produce a repair order or invoice from Associated Business Machines. She stated to Mr. Sanders that the machine had been in use and operated properly since K & K Insurance Agency moved its office to 4001 South 700 East, Suite 520, Salt Lake City, Utah and was operating properly on this occasion.

  
MARGARET VOYLES

Subscribed and sworn to before me this 3rd day of  
November, 1988.



  
NOTARY PUBLIC  
Residing in Salt Lake County, Utah  
My Commission Expires:

E. H. FANKHAUSER  
Bar N. 1032  
Attorney for Defendant  
243 East 400 South, Suite 200  
Salt Lake City, Utah 84111  
Telephone: 534-1148

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THIRD CIRCUIT COURT, STATE OF UTAH  
SALT LAKE COUNTY, SALT LAKE DEPARTMENT

---

K & K INSURANCE AGENCY,	*	AFFIDAVIT OF ODELL SANDERS
	*	IN OPPOSITION TO AFFIDAVIT
Plaintiff,	*	OF ROBERT D. KAUFMAN
vs.	*	Civil No. 883003265 CV
SALT LAKE TYPEWRITER, INC.,	*	Judge Van Sciver
A Utah Corporation,	*	
Defendant.	*	

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STATE OF UTAH            )  
                              : ss.  
COUNTY OF SALT LAKE    )

ODELL SANDERS, being sworn on oath deposes and states that he is the President of Defendant, Salt Lake Typewriter, Inc., a Utah Corporation, and has personal knowledge of the matters stated herein. In opposition to the Affidavit of Robert D. Kaufman, dated December 2, 1988, the following statements are submitted to the Court for its information and consideration.

1. The Hermes 51 Typewriter was purchased by the Plaintiff, K & K Insurance Agency after the acceptable trial period had lapsed. The typewriter was delivered on March 30, 1987. The actual sale was not completed until July 29, 1987.

2. The old Hermes 51 typewriter referred to by Mr. Kaufman in his Affidavit was more of a typewriter and did not have the same circuitry or devices that the new 51 Hermes possessed. The new Hermes 51 typewriter had completely different CPU and circuitry, with added screen and disc drive. The machine would lose its memory when the power went off. Salt Lake Typewriter had no control over the power source or the stability of the power source that existed at K & K's offices located at 654 South 900 East, Salt Lake City, Utah.

3. Contrary to the statements of Mr. Kaufman, Salt Lake Typewriter never retook the machine after it was delivered. Further, K & K Insurance Agency did not keep the surge protector, and did not purchase it as claimed. K & K Insurance determined that the surge protector was too expensive and sent it back to Salt Lake Typewriter without using or paying for it.

4. There never was a problem with the new Hermes 51 typewriter other than the power problem at the old office location of K & K. Contrary to the statements of Robert D. Kaufman, in paragraph 3 of his Affidavit, no promises were made

that the machine would be replaced or corrected. In fact, the machine was paid for 90 days after it was delivered and used by K & K Insurance. At the time payment was made, K & K Insurance was satisfied with the equipment and that it was working properly.

5. Contrary to the statements of Mr. Kaufman, the only service call that was placed to Salt Lake Typewriter was related to the inadequate power source in the building occupied by K & K Insurance at 654 South 900 East, Salt Lake City, Utah. The statement by Mr. Kaufman that the surge protector did not cure the problem was due to the fact that it was not used by K & K.

6. The statement by Mr. Kaufman that the old Hermes machine continued to operate without surge problem or protector on the same circuit was due to the fact that the machines were completely different. As stated, the old machine was more of a typewriter and did not have the same circuitry, capability, monitor, disc drive and added memory of the new computerized Hermes 51. Further, the old machine was on the opposite side of the room and connected to an entirely different outlet.

7. The Court should be aware that the letter claimed to have been sent on February 5, 1988, was in fact sent by K & K Insurance to themselves and signed by their own employee, Mary Strang. Until the letter of February 29, 1988, Salt Lake Typewriter and myself were not aware until this point that there

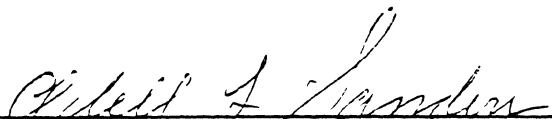
was a problem. Mr. Kaufman states that K & K moved its office in October, 1987. This gives rise to the question of why K & K waited five (5) months to notify Salt Lake Typewriter that it claimed a problem existed.

8. From the time the letter of February 29, 1988 was received to the time the letter of March 23, 1988 attempting to revoke was sent and received, Salt Lake Typewriter was not given access to the equipment to determine if a problem existed, and if one did, what the nature of the problem was.

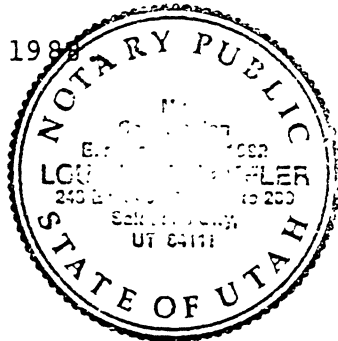
9. Contrary to the statements made by Mr. Kaufman in paragraph 5 of his Affidavit, calls were made by Salt Lake Typewriter to K & K Insurance in an attempt to arrange an appointment to have the equipment inspected to determine if there was a problem, but was refused.

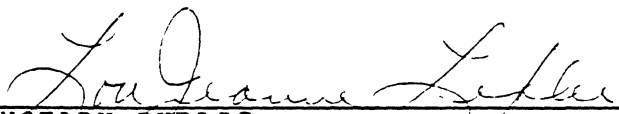
10. The statements made by Mr. Kaufman in his Affidavit, paragraphs 6 and 7 are totally disputed. It was not until our surprise visit in October, 1988 that K & K claimed a repairman from Associated Business Equipment found a loose wire. We requested that they produce a copy of the repair order. As of this date, no service order or a copy of a repair order or statement has been produced by K & K to substantiate their claims. Further, Associated Business Equipment is basically a copier company. In that the Hermes 51 is a state of the art with

modular plug in components, the only wires that could be found exposed would be to a light in the cover. Based on my personal inspection of the equipment in October, 1988, it is my opinion that the equipment worked properly and there never has been any repair to the machine as alleged. Further, the fact remains that there has never been any evidence produced that the equipment had an unknown defect other than the problems associated with the power interruption. The first notice of any alleged problem came five (5) months after K & K moved its offices on or about March 1, 1988. I also wish to note that Mr. Kaufman does not deny that the new Hermes 51 typewriter, at the time of my surprise visit in October, 1988, was in fact in use and operating at the office of K & K Insurance by its employee, Mary B. Strand.

  
ODELL SANDERS

Subscribed and sworn to before me this 12 day of  
December, 1988



  
NOTARY PUBLIC  
Residing in Salt Lake County, Utah  
My Commission Expires: 5/11/92



DELIVERY CERTIFICATE

I certify a true and correct copy of the foregoing was hand delivered to John B. Anderson, Attorney for Plaintiff, 623 East First South, Salt Lake City, Utah 84147 on this 12<sup>th</sup> day of December, 1988.

A handwritten signature in cursive script, appearing to read "J. B. Anderson", is written over a horizontal line.

Gayle Dean Hunt  
Attorney for Defendant  
2121 South State,  
Salt Lake City, Utah  
tel 4868701

IN THE CIRCUIT COURT, SALT LAKE COUNTY

STATE OF UTAH

K. AND K. INSURANCE AGENCY

PLAINTIFF,

VS

SALT LAKE TYPEWRITER, INC.,

Defendant.

AFFIDAVIT IN OPPOSITION  
TO  
MOTION FOR SUMMARY JUDGMENT

No. 88 3003265

Hon. Eleanor S. VanSciver

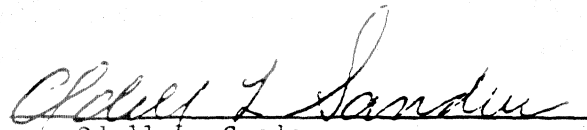
STATE OF UTAH

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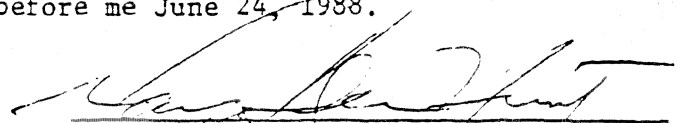
County of Salt Lake

Odell L. Sanders, being duly sworn deposes and says he  
President of Defendant company and is a fully trained expert in the  
installation, repairs, and maintenance of the Hermes electronic typewriter  
sold to the above plaintiff, and that in connection therewith he wrote  
the summary attached hereto respecting condition, complaints, and alleged  
defencts and that the contents thereof are true and correct.

Dated June 24rd , 1988.

  
Odell L. Sanders

Subscribed and sworn to before me June 24, 1988.

  
Notary Public residien in Salt Lake  
County, Utah

My commission expires Jan. 24, 1992

# SALT LAKE TYPEWRITER



April 13, 1988

RE: Civil #883003265CV

Clerk  
Fifth Judicial Circuit Court  
Salt Lake County  
Salt Lake Department  
State of Utah

To Whom It May Concern:

The equipment purchased by K & K Insurance Agency was, in fact accepted on March 30, 1987 (see Exhibit A) After a prior trial period and not July 29th as indicated. The equipment worked perfectly at the time of installation and also 4 months later when they paid for the equipment.

The only service calls that were performed on this equipment were due to power failure at K & K Insurance, there was other equipment on the same circuit and overloading the breaker. Salt Lake Typewriter made several requests to have the equipment put on a isolated line or use a battery back up surge protector to prevent electrical damage to the equipment we also went as far as to install at our expense a battery back up line filter. This device would sound a alarm to allow the operator to reset the breaker after a power outage or power surge. The operator unplugged this device because the alarm annoyed her and plugged the equipment in direct, "proving the power problem at K & K Insurance did exist."

The only other problem was cables unplugged at the equipment.

# SALT LAKE TYPEWRITER



We have made every attempt to rectify any problems that have come to light, the problems that have existed at K & K Insurance have been beyond our control, because they would not cooperate. Exhibit (C) was never received, and signed for by an unknown person. Exhibit (D) was received March 1, 1988. Due to the fact this equipment has been in service for over one year and used continually without proper power protection and has also been relocated by the customer to another location, without proper packing and installation - Salt Lake Typewriter cannot be responsible for the condition of this equipment. We can and will service this equipment as required to bring it to proper operating condition. The factory warantee is 90 days which has long since expired.

We will be willing to work with K & K Insurance to resolve this matter. However, due to the length of time involved, and the conditions in which the equipment was subjected, the cost of repair will be upon K & K Insurance.

A handwritten signature in cursive script that reads "Odell L. Sanders".

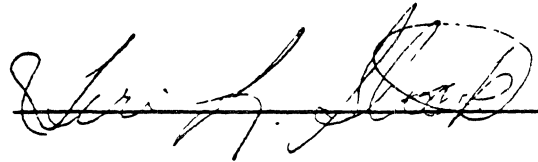
Odell L Sanders,  
President  
SALT LAKE TYPEWRITER  
777 South State  
Salt Lake City, Utah 84111

cc: John B Anderson  
Attorneys for Plaintiff  
623 East First South  
Salt Lake City, Utah 84102

CERTIFICATE OF SERVICE

On June 24, 1988 I mailed/delivered a copy of the foregoing Response to Motion for Summary Judgment to the following:

John B. Anderson  
William A. Somppi  
Anderson & Holland  
Attorneys for Plaintiff  
623 East First South  
SLC, Utah 84102  
Telephone: 363-9345



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Attachments:

1. Affidavit of Odell L. Sanders
2. Affidavit of