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Utah Court of Appeals

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Harry Suniville; Defendant/Appellant.
Richard C. Terry; Christopher G. Jessop; Douglas A. Oviatt; Terry, Jessop & Bitner; Attorneys for Plaintiff/Appellee.

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IN THE UTAH COURT OF APPEALS

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| JORDAN CREDIT UNION,<br><br>Plaintiff/Appellee,<br><br>v.<br><br>HARRY SUNIVILLE,<br><br>Defendant/Appellant. | Case No. 20090398-CA |

**BRIEF OF APPELLEE JORDAN CREDIT UNION**

Appeal from a ruling of the Honorable Kate A. Toomey
Judge of the Third District Court


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## JURISDICTION

The Utah Court of Appeals has jurisdiction over this appeal pursuant to Utah Code Ann. § 78A-4-103(2)(j).

## RESTATEMENT OF THE ISSUES

Although Mr. Sunniville's appeal brief contains a statement of the issues, the statement does not include any standards of appellate review, as required by Rule 24(a)(5) of the Utah Rules of Appellate Procedure. Jordan Credit Union therefore restates the issues, and sets forth the applicable standards of review, as follows.

**Issue 1:** Did the lower court properly consider Mr. Suniville's memorandum in opposition (styled "Answer & Memorandum and reply in support of motion to dismiss and opposing response to plaintiff's motion for summary judgment")?

**Standard of Review:** A ruling on whether to strike (or ignore) an untimely memorandum is reviewed for abuse of discretion. *See Pratt v. Nelson*, 2005 UT App 541, ¶ 9, 127 P.3d 1256. ("'A ruling thereon, except under circumstances which amount to a clear abuse of discretion, will not be disturbed on appeal.'" *Pratt,* citing *Adams v. Portage Irrigation, Reservoir & Power Co.*, 95 Utah 1, 72 P.2d 648, 651 (1937).)

**Issue 2:** Was Mr. Suniville entitled to the appointment of counsel in a civil case, or, in the alternative, to stay the civil proceedings against him for over a year until he was released from prison?

**Standard of Review:** This is a question of law, which is reviewed for correctness. *See State v. Richardson,* 843 P.2d 517, 518 (Utah Ct. App. 1992) ("[W]e consider the trial court's interpretation of binding case law as presenting a question of law and review the trial court's interpretation of that law for correctness.").

**Issue 3:** Did the lower court appropriately consider Mr. Suniville's otherwise inadmissible evidence?

**Standard of Review:** The trial court's interpretation of the Utah Rules of Evidence and the Utah Rules of Civil Procedure is a question of law which is reviewed for correctness. *See Rushton v. Salt Lake County,* 1999 UT 36, ¶ 17, 977 P.2d 1201.

**Issue 4:** Did the lower court properly conclude that Jordan Credit Union's repossession of the vehicle was commercially reasonable?

**Standard of Review:** The grant of summary judgment is a question of law, which is reviewed for correctness, affording no deference to the trial court. *See Johnson v. Gold's Gym*, 2009 UT App 76, ¶ 9, 206 P.3d 302.

**Issue 5:** Did the lower court properly conclude that Jordan Credit Union's repossession and subsequent sale of the vehicle at issue to a salvage yard was commercially reasonable?

**Standard of Review:** The grant of summary judgment is a question of law, which is reviewed for correctness, affording no deference to the trial court. *See Johnson v. Gold's Gym*, 2009 UT App 76, ¶ 9, 206 P.3d 302.

## CONSTITUTIONAL AND STATUTORY PROVISIONS

The following statutes are of central importance to this appeal:

1. **Utah Code Ann. § 70A-9a-627(1) and (2). Determination of whether conduct was commercially reasonable.**

(1) The fact that a greater amount could have been obtained by a collection, enforcement, disposition, or acceptance at a different time or in a different method from that selected by the secured party is not of itself sufficient to preclude the secured party from establishing that the collection, enforcement, disposition, or acceptance was made in a commercially reasonable manner.
(2) A disposition of collateral is made in a commercially reasonable manner if the disposition is made:
(a) in the usual manner on any recognized market;
(b) at the price current in any recognized market at the time of the disposition; or
(c) otherwise in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition.

## STATEMENT OF THE CASE

This is a garden-variety collection action for a deficiency owed to Jordan Credit Union by Defendant, Harry Suniville. Specifically, Jordan loaned $12,829.00 to Mr. Suniville in October 2005, so that he could purchase a 2003 Mitsubishi Eclipse. Two years later, Jordan became aware that Mr. Suniville had been arrested for driving under the influence, and that the vehicle had been impounded. Pursuant to the default clause in the loan agreement between the parties, Jordan elected to repossess the vehicle (which Jordan later discovered had been significantly damaged over time) and accelerate the debt. After sending notice to Mr. Suniville's address of record, and after attempting to auction the vehicle for two weeks with no bids from any prospective buyers, Jordan sold the

vehicle to a salvage company for $200. Jordan then sued Mr. Suniville for the deficiency, which was $8,778.12 as of January 26, 2008.

Mr. Suniville, acting *pro se*, initially filed a motion to dismiss which was denied. Jordan then filed a motion for summary judgment, which the trial court granted, based in part, on Mr. Suniville's failure to submit any admissible evidence in opposition to the motion. Mr. Suniville appeals from the trial court's Memorandum Decision and Order, dated April 6, 2009.

## STATEMENT OF FACTS

Because there is no formal statement of facts in Mr. Suniville's opening brief, Jordan hereby recites the undisputed facts, as relied upon by the trial court, as follows: (Hereafter, all citations to the Record shall be "R. at ___.")

1. On or about October 5, 2005, Mr. Suniville executed a Retail Installment Contract and Security Agreement (hereinafter the "Agreement") in connection with the purchase of a 2003 Mitsubishi Eclipse (hereinafter the "Collateral"). (R. at 119, ¶ 4; *see* Exhibit C attached hereto.)

2. On or about December 3, 2007, Mr. Suniville was arrested for driving under the influence and the Collateral was impounded. (R. at 34; R. at 128; Ex. C.)

3. A notice dated December 3, 2007 was sent to Jordan from the Utah State Tax Commission stating that the Collateral had been impounded. (R. at 128; Ex. C.)

4. Mr. Suniville was in default under the Agreement due to his failure to keep the Collateral in his possession and because Jordan now believed, in good faith, that Mr. Suniville would not be able to continue to perform his obligations under the Agreement. (R. at 126; R. at 119 ¶ 7; Ex. C.)

5. After the Collateral had been in impound for one week, and to protect its interests, Jordan elected to repossess the Collateral, retrieving it from the impound lot on December 10, 2007. (R. at 119, ¶ 7; Ex. C.)

6. Under the terms of the Agreement, any failure to perform any obligation under the Agreement, or the good faith belief by the lender that an obligation would not or could not be performed, is considered a default. (R. at 126, Section "Default"; Ex. C.)

7. Upon default, Plaintiff was permitted to avail itself of one or more of several remedies listed in the Agreement. These included acceleration of the entire debt, pay any fees incurred and/or costs of repair (to be added to the principal debt amount), repossession and sale of the collateral, and initiate a legal action to collect on any amounts left owing after the sale, including attorney's fees. (*Id.*)

8. On or about December 11, 2007, Jordan sent a letter to Mr. Suniville, at the address he provided, stating that the Collateral had been repossessed due to the impound action. The letter explained that the costs of impound and repossession totaled $869.00 and had been added to the loan balance. The letter further stated that the debt had been accelerated and directed Mr. Suniville to pay to Jordan the entire loan balance of

$9,312.37 on or before December 20, 2007. The letter also stated that failure to do so would result in Jordan's sale of the Collateral and that Mr. Suniville would be liable for any deficiency between the sale price and the loan balance. (R. at 130; Ex. C.)

9. Jordan received no subsequent communication from Mr. Sunniville. Hence, the Collateral was advertised for sale to the auto wholesale community, as is usual and customary in the industry. (R. at 120, ¶ 12; Ex. C.)

10. Jordan received no bids on the Collateral due to its condition. (Id.)

11. In response to the lack of interest due to the damage, Jordan delivered the vehicle to a mechanic, Ken Martinez, for inspection and evaluation. (R. at 120, ¶ 13; R. at 134, ¶¶ 4-5; *see* Ex. C and Ex. D attached hereto.)

12. The inspection showed that the vehicle had not been kept in good condition and repair as required by the Agreement. There were many issues, both aesthetic and mechanical, that required extensive parts and labor to correct. An estimate prepared by Ken Martinez on January 12, 2008, indicates that the vehicle required more than $2,500.00 in body work. (R. at 134 ¶¶ 6-7; R. at 136; Ex. D.)

13. At the time of the initial notice of repossession sent to Defendant, the issues related to the true condition of the vehicle were not known. After learning of the extensive damage to the vehicle and the great expense that would be required to make the car sellable, the only commercially reasonable option available to Jordan was to sell the Collateral as salvage. At that point, Jordan had received no offers to purchase the vehicle.

Furthermore, Jordan's inquiry into the value of the vehicle indicated that even if the necessary repairs were performed, the wholesale value of the vehicle would only be about $3,500.00. In Jordan's experience, sales after repossession generally only bring approximately wholesale value, or slightly less. (R. at 120, ¶ 14; Ex. C.)

14. After considering these factors, and after receiving no communication from Mr. Suniville, Jordan sought offers from salvage yards and accepted the only offer it received, which was for $200.00 from Midvale All Small Auto, Inc.. Jordan sold the vehicle to Midvale All Small Auto on or about January 17, 2008. R. at 121, ¶ 15; R. at 152, ¶ 5; *see* Ex. C and Ex. G attached hereto.)

15. After the disposition of the Collateral, Jordan sent a letter to Mr. Suniville at his record address informing him that the Collateral had been sold and that after applying the sale proceeds to his loan, the deficiency that remained was $8,778.12, plus collection costs, attorney fees and interest at the rate of 5.5% per annum accruing as of January 26, 2008. (R. at 121, ¶ 16; Ex. C.)

## SUMMARY OF ARGUMENTS

I. MR. SUNIVILLE HAS FAILED TO MARSHAL THE EVIDENCE.

Rule 24(a)(9) of the Utah Rules of Appellate Procedure require an appellant to marshal the evidence against him and meticulously demonstrate how the evidence does not support the factual findings of the trial court. Mr. Suniville did not marshal the evidence or show that the findings of fact are clearly erroneous and lacking in support.

## II. THE TRIAL COURT PROPERLY CONSIDERED MR. SUNIVILLE'S MEMORANDUM IN OPPOSITION.

Although the trial court concluded that Mr. Suniville's memorandum in opposition was untimely, the court nevertheless considered all of the arguments and documents Mr. Suniville submitted, including Mr. Suniville's memorandum in opposition, as demonstrated in the court's Memorandum Decision and Order. The trial court properly ruled against Mr. Suniville after considering all of his documents and arguments.

## III. MR. SUNIVILLE WAS NOT ENTITLED TO APPOINTED COUNSEL NOR TO STAY THE PROCEEDINGS.

The trial court properly denied Mr. Suniville's request for appointment of an attorney, as a civil litigant has no right to court-appointed counsel. Furthermore, the trial court properly declined to stay the proceedings for over a year pending Mr. Suniville's release from prison.

## IV. THE TRIAL COURT PROPERLY CONSIDERED AND DISCOUNTED MR. SUNIVILLE'S INADMISSABLE EVIDENCE.

Mr. Suniville failed to meet his burden under Rule 56(e) of the Utah Rules of Civil Procedure. None of the purported evidence he submitted to the trial court was admissible. The trial court therefore properly granted summary judgment in favor of Jordan Credit Union.

## V. JORDAN WAS WITHIN ITS RIGHTS TO REPOSSESS THE VEHICLE FOLLOWING MR. SUNIVILLE'S ARREST AND INCARCERATION.

Mr. Suniville defaulted under the terms of the Agreement between the parties because he lost possession of the vehicle as a result of his incarceration. Mr. Suniville further breached the Agreement by not keeping the vehicle in good condition or repair. Jordan was therefore within its contractual rights to repossess the vehicle**.**

## VI. JORDAN'S DISPOSITION OF THE VEHICLE WAS COMMERCIALLY REASONABLE.

Jordan materially complied with the obligations imposed by the loan and security agreement as well as the Utah Commercial Code for disposition of repossessed collateral. Notice was properly given, despite a harmless error concerning Jordan's notice of the anticipated sale of the vehicle. The sale was to a third party in an arms length transaction, with no self dealing, in a manner recognized for this type of collateral. Thus, the sale was for commercially reasonable.

## VII. JORDAN IS ENTITLED TO AN AWARD OF ITS ATTORNEY'S FEES ON APPEAL.

Jordan is entitled to an award of its attorney's fees on appeal pursuant to the Agreement between the parties, and in accordance with Utah law.

# ARGUMENT

## I. MR. SUNIVILLE HAS FAILED TO MARSHAL THE EVIDENCE.

Although, strictly speaking, the granting of summary judgment is a question of law, it is clear from Mr. Suniville's brief that he hotly contests the finding of facts that undergird the lower court's ruling. Specifically, Mr. Suniville wants to dispute whether the Court correctly accounted for the condition of the vehicle at the time Jordan sold it to the salvage yard. Mr. Suniville further attempts to dispute whether Jordan gave adequate notice of its intentions after it repossessed the car, and whether the sale of the car was commercially reasonable at all. The problem is that Mr. Suniville failed to put any admissible evidence in front of the trial court that might have created a dispute of material fact. Mr. Suniville now has a similar problem on appeal, in that he has failed to marshal the evidence, much less identify any fatal flaw in the lower court's reasoning.

It is the duty of the appellant challenging a factual finding to marshal the evidence that supports the challenged finding. Utah R. App. P. 24(a)(9); *See also Wardley Better Homes and Gardens v. Cannon*, 2002 UT 99, ¶ 14, 61 P.3d 1009. The appellant must then demonstrate that, even with this evidence, the findings of fact are clearly erroneous and lacking in support. *Hill v. Estate of Allred,* 216 P.3d 929, 943 (Utah 2009). Mr. Suniville has failed to meet his obligation to show that the findings of the trial court were erroneous and that the grant of summary judgment was therefore against the great weight of the evidence. Consequently, the findings of fact (as set forth in the "Background"

section of the lower court's Memorandum Decision and Order) are presumed to be correct. *See Johnson v. Higley*, 1999 UT App 106, ¶ 31, 977 P.2d 1209.

## II. THE TRIAL COURT PROPERLY CONSIDERED MR. SUNIVILLE'S MEMORANDUM IN OPPOSITION.

Mr. Suniville suggests that the trial court improperly failed to consider his memorandum in opposition because the trial court believed that it was untimely. For the record, Jordan concedes that it received Mr. Suniville's memorandum in a timely fashion after filing its motion for summary judgment. For whatever reason, the memo in opposition was not filed with the court (or, at least it was not stamped in) until January 5, 2009, approximately one month after Mr. Suniville mailed the memorandum to counsel for Jordan.[1] (*See* R. at 175; *See* Ex. E.)

In its Memorandum Decision and Order, the court concluded that the memorandum in opposition was untimely. (R. at 232; *See* Ex. A.) Nevertheless, the court went on to consider all of the arguments and documents that Mr. Suniville had submitted, just as the court said it would do during oral argument. (R. at 232-235; *see* Ex. A. *See also* R. at 283, page 19, lines 22-23.) Those arguments included: (a) whether Mr. Suniville was current with his car payments; (b) whether Jordan had given adequate notice of the sale;

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[1]Not all of Mr. Suniville's opposing documents were filed on time, however. The unsigned affidavits of Ron Hinckley (Mr. Suniville's prison caseworker) and Mirror Image Auto Body and Paint, together with a Notice Regarding New Evidence, were not filed until late February, 2009, nearly three months after Mr. Suniville sent his memorandum in opposition to counsel for Jordan, and well after his deadline to file a response to Jordan's motion for summary judgment. (*See* R. at 210 and 225.)

and (c) whether the vehicle was in working condition when it was repossessed. (R. at 233-235; *see* Ex. A.) After considering all of that, the court concluded that Mr. Suniville's opposition was "substantively lacking" and ruled against him anyway.[2] (*Id.*) The argument that the court failed to consider Mr. Suniville's memorandum is without merit.

## III. MR. SUNIVILLE WAS NOT ENTITLED TO APPOINTED COUNSEL NOR TO STAY THE PROCEEDINGS.

Mr. Suniville next argues that the trial court should not have denied his request for appointed counsel or to stay of the proceedings until his release from prison, scheduled for March 23, 2010. (*See* Appellant's Brief, at 8.) Again, this argument is without merit. Mr. Suniville is not entitled to have counsel appointed for him in a civil matter. *See State v. Young,* 853 P.2d 327, 354 (Utah,1993) ("We note that Defendant has no right to counsel in a civil case"). Furthermore, the court informed Mr. Suniville from the beginning of the case that choosing to represent himself would come with certain consequences and he chose to proceed on his own anyway. (*See* R. at 56.) That was his choice, and it is his problem. The court properly denied the motion to appoint counsel.

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[2]The trial court concluded that the evidence Mr. Suniville offered consisted of "hearsay, unsubstantiated opinions, and irrelevancies." (R. at 233; *see* Ex. A.) To illustrate, Mr. Suniville submitted: (1) the unsigned affidavit of his prison caseworker (R. at 210; *see* Ex. H.); (2) the affidavit of Shannon Weirick, who is the *wife* of a mechanic who had reportedly performed work on the car (R. at 225, *see* Ex. J); and (3) various other documents offered with no foundation or basis for admission (R. at 84-101).

The court also correctly denied Mr. Suniville's request to stay the proceedings for over a year until he was released from prison. There was and remains no legal basis for his request to stay the proceedings. While Mr. Suniville's current housing situation is lamentable, it is nonetheless one of his own making. Allowing this matter to sit on the trial court's calendar for over a year would have resulted in undue delay and prejudice to Jordan Credit Union. Thus, the Court properly denied the request to stay the proceedings.

## IV. THE TRIAL COURT PROPERLY CONSIDERED AND DISCOUNTED MR. SUNIVILLE'S INADMISSABLE EVIDENCE.

Mr. Suniville next argues that the court ignored "pivotal and key evidence." (*See, e.g.,* Appellant's Brief, at 9.) This argument is without merit. Again, the court states in its Memorandum Decision and Order that it considered Mr. Suniville's submissions, generally, and specifically referred to the unsigned affidavit of Mr. Suniville's prison caseworker, who speculated that the car must have been functional when Mr. Suniville was arrested. (R. at 233-35; *see* Ex. A.) The problem is that none of Mr. Suniville's purported evidence was admissible.

Rule 56(e) of the Utah Rules of Civil Procedure says:

> Supporting and opposing affidavits shall be made *on personal knowledge*, shall set forth such facts *as would be admissible in evidence*, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest

> upon the mere allegations or denials of the pleadings, but *the response*, by affidavits or as otherwise provided in this rule, *must set forth specific facts showing that there is a genuine issue for trial. Summary judgment, if appropriate, shall be entered against a party failing to file such a response.* (Emphasis added.)

None of Mr. Suniville's purported evidence rose to the level of creating a dispute of material fact for the purposes of Rule 56(e). Not only did Mr. Suniville fail to submit signed affidavits, the purported testimony in the affidavits was speculative, contained hearsay, or was without foundation altogether. (*See* R. at 210, 225; *see* Ex's H and J.)

Take for example, the Affidavit signed by Shannon Weirick.[3] (R. at 225; Ex. J.) Ms. Weirick is the wife of the mechanic who allegedly worked on the vehicle a few months prior to its repossession. Ms. Weirick had no personal knowledge concerning the inspection of the vehicle. Hence, her testimony is inadmissible hearsay. (*See* Utah R. Evidence, Rules 802, 803, and 804.) The unsigned affidavit of Ron Hinckley also contains hearsay and opinion testimony concerning a portion of a report that he did not produce describing events to which he was not present. (R. at 210; Ex. H.) Finally, Mr. Suniville wanted the court to consider other documents, such as value and repair estimates, that were submitted without any hint of authentication or foundation, and were not attached to any sworn testimony at all. (*See* R. at 84-101, 220.) Mr. Suniville cannot ignore the basic, fundamental rules of evidence and civil procedure, and expect to create a dispute

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[3]The unsigned affidavit appears in its entirety in the Record at 225. The signature page, which is only signed by Mrs. Weirick, appears in the Record at 221. (*See* Ex. I.)

of material fact for the purposes of Rule 56 - much less prevail on any of his claims or defenses. More importantly, Mr. Suniville cannot accuse the lower court of ignoring pivotal and key evidence, when he did not put any admissible evidence before the court in the first place.

## V. JORDAN WAS WITHIN ITS RIGHTS TO REPOSSESS THE VEHICLE FOLLOWING MR. SUNIVILLE'S ARREST AND INCARCERATION.

Next, Mr. Suniville essentially argues that Jordan breached the loan agreement by repossessing the vehicle at issue solely as a result of Mr. Suniville's incarceration. Again, Mr. Suniville is wrong. The Retail Installment Contract and Security Agreement, which Mr. Suniville signed on October 5, 2005, requires Mr. Suniville to keep the vehicle in his possession and in good condition and repair." (R. at 125-26, *see* "Ownership and Duties Toward Property", paragraph D; Ex. C.) He was also required to keep the vehicle at the address listed on page 1 of the Agreement, unless otherwise agreed in writing. (*Id.*) The Agreement goes on to say that Mr. Suniville will be in default if he fails to perform any obligation set forth in the Agreement, or Jordan believes in good faith that he cannot or will not perform his obligations. (*Id.*, *see* "Default".) In the event of default, the Agreement gives Jordan the right to immediately repossess the vehicle. (*Id.*, *see* "Remedies", paragraph D; Ex. C.)

Mr. Suniville breached the Agreement when the vehicle was impounded as a result of his arrest for driving under the influence. (*See* R. at 128; Ex. C.) Because of these

events, the vehicle was no longer stored at Mr. Suniville's address, and he no longer had possession of the vehicle. Mr. Suniville further breached the Agreement by failing to keep the vehicle in good condition and repair. (*See* R. at 133-137; Ex. D.) Jordan was therefore within its contractual rights to repossess the vehicle.

## VI. JORDAN'S DISPOSITION OF THE VEHICLE WAS COMMERCIALLY REASONABLE.

In addition, despite Mr. Suniville's arguments to the contrary, Jordan's subsequent sale of the vehicle was commercially reasonable, and was consistent with the requirements of the Uniform Commercial Code as set forth in Utah Code Ann. § 70A-9a-601 *et. seq*. After default, a secured party is allowed to take possession of collateral securing a debt. (*See* U.C.A. § 70A-9a-609.) Following repossession the secured party may dispose of the collateral by commercially reasonable means. (*See* U.C.A. § 70A-9a-610.) If the sale is commercially reasonable, the "secured party may dispose of collateral by public or private proceedings, by one or more contracts, as a unit or in parcels, and at any time and place and on any terms." *Id.* Whether a sale is commercially reasonable depends upon whether the sale is made, "(1) in the usual manner on any recognized market, (2) at the price current in any recognized market at the time of the disposition, or (3) otherwise in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition." (U.C.A. § 70A-9a-627(2).)

A pre-requisite to the disposition is notice to the debtor of the repossession and intended disposition of the collateral. (*See* U.C.A. § 70A-9a-611.) This notice must contain the information set forth in U.C.A. § 70A-9a-614. Then a creditor may dispose of the collateral and apply the proceeds of the sale first to the costs of sale and repossession, second to the loan balance owed to the creditor, and finally to any subordinate security interests. (*See* U.C.A. § 70A-9a-615.) The debtor is then entitled to proceeds in excess of the loan amount or is liable for any deficiency. *Id.* When disposing of collateral, the creditor has an obligation to secure the best possible price, but is under no obligation to use extraordinary means to obtain that price. *Chrysler Dodge Country, U.S.A, Inc., v. Curley,* 782 P.2d 536, 541 (Utah Ct. App. 1989).

Jordan notified Mr. Suniville of the repossession of the vehicle by way of a letter, dated December 11, 2007, that was sent to the address listed on the first page of the Agreement. (*See* R. at 125, 130.) Having notified Mr. Suniville of the acceleration of the debt and that the car would be sold after December 20, 2007, if he had not paid the loan in full, and having received no communication from Mr. Suniville thereafter, Jordan proceeded to market the car for sale as is, but received no offers. (R. at 120, ¶¶ 11-12; Ex. C.) Jordan had the vehicle examined by a mechanic who determined that it required in excess of $2,500 in repairs. (R. at 120, ¶¶ 13-14; Ex. C. *See also* R. at 133-137; Ex. A.) Jordan decided that it would likely not recoup that expense in a later sale and elected

to sell the car for the best price it could get. (R. at 120, ¶ 14; Ex. C.) Jordan was offered $200 and accepted the offer on January 17, 2008. (R. at 120, ¶ 15; Ex. C.)

Jordan's disposition of the vehicle was commercially reasonable under these circumstances, especially considering that the vehicle needed thousands of dollars of repair work. Requiring Jordan to expend thousands of dollars with no guarantee of recouping those funds, either through the sale or by adding them to the loan balance and seeking the deficiency, is an extreme measure that Jordan is not required to take under the *Chrysler Dodge* opinion. *See Chrysler Dodge*, at 541.

Nevertheless, Mr. Suniville attempts to dispute elements of the sale, specifically that the notice letter Jordan sent to him on December 11, 2007, only gave nine days's notice of Jordan's intent to advertise the vehicle for sale, instead of ten days, as required by the Agreement. (*See* R. at 126, "Remedies," paragraph E; Ex. C.) It is true that the Agreement provides that a notice of disposition would be sent no less than 10 days prior to any intended sale. And Jordan concedes that the letter provided only nine days' notice. However, the trial court correctly held that this was a harmless error because even if the extra day had been given, it would not have mattered as Mr. Suniville was still incarcerated and would not have received it in any case. (R. at 234; Ex. A.) In addition, the actual sale did not take place until January 17, 2008, more than five weeks after the date of the letter. (R. at 120, ¶ 15; Ex. C.) The lack of a full 10 day notice of the

intended sale was an immaterial breach, if a breach at all, and resulted in no harm to Mr. Suniville.

Finally, Mr. Suniville repeatedly raises the issue of the blue book value of his car. Although valuation is not an element of determining the commercial reasonableness of a sale, both parties nevertheless introduced printouts from online vehicle evaluators as evidence of the value of the car at the time of the sale. (R. at 99-102 and 132; Ex. C.) Jordan introduced its valuation by way of a sworn affidavit, while Mr. Suniville did not. (R. at 118, 132; Ex's B and C.) Ignoring the admissibility issue, Mr. Suniville's valuation greatly overestimates the value of his car by using values that did not account for the damage to the car. The car was not in excellent condition, as Mr. Suniville would have the Court believe. Based on the descriptions in the condition ratings, the car was in fair condition, at best, if not poor condition, putting the value between $3,000 and $4,000. The battle of competing estimates is moot, however, because Jordan could not find a single buyer in the wholesale community, that was willing to purchase the car in its damaged state. (R. at 120, ¶ 12l; Ex. C.) Thus, the payment of $200 by the salvage yard is an accurate reflection of the fair market value of the vehicle.

The trial court found that the diminished value of the car, together with the reduced sales prices at the auction and the extreme cost of making the car appealable to a buyer justified Jordan's decision to forgo the repairs and seek the best price it could get, as is.

Mr. Suniville produced no admissible facts to dispute this finding or to show that it was in error. This Court should do the same.

## VII. JORDAN IS ENTITLED TO AN AWARD OF ITS ATTORNEY'S FEES ON APPEAL.

Jordan Credit Union hereby requests an award of the attorney's fees and costs it has incurred on appeal pursuant to the "Default" section of the written agreement between the parties, which says, in relevant part, "If you default, you agree to pay our costs for collecting amounts owing, including, without limitation, court costs, attorneys' fees, and fees for repossession, repair, storage and sale of the Property securing this Contract." (R. at 126, "Default"; Ex. C.) Utah follows the American rule regarding attorney fees, which dictates that fees are generally recoverable only if provided for by statute or contract. *Culbertson v. Board of County Commissioners of Salt Lake County*, 2008 UT App 22, ¶9, 177 P.3d 621.

## CONCLUSION

For the reasons set forth above, the decision of the trial court should be affirmed and Mr. Suniville's appeal denied. The Court should also award Jordan its attorney's fees and costs incurred on appeal, pursuant to the written agreement between the parties.

DATED this 4th day of November, 2009.

TERRY JESSOP & BITNER
Attorneys for Appellee Jordan Credit Union

______________________________
Douglas A. Oviatt

______________________________
Christopher G. Jessop

## CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing was mailed to the following at the address(es) indicated on the ____ day of January, 2009.

Harry F. Suniville, Jr.
#17265
c/o Utah State Prison
P.O. Box 250
Draper, Utah 84020

______________________________________

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# ADDENDUM