

1987

# Mitchell D. Henderson v. For Shor Company : Brief of Appellant

Utah Supreme Court

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James C. Jenkins; JENKINS & ASSOCIATES.

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**BRIEF**

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DOCKET NO. 870502-CA IN THE SUPREME COURT OF THE STATE OF UTAH

MITCHELL D. HENDERSON,  
ILEEN BUTTARS, LAURENA B.  
HENDERSON, and DAVID HALE

BRIEF OF APPELLANT

Plaintiffs/Respondents

vs.

FOR-SHOR COMPANY

Supreme Court No. 20626

Defendant/Appellant

870502-CA

BRIEF OF APPELLANT FOR-SHOR COMPANY

Appeal from the Judgment and Decision of the  
FIRST JUDICIAL DISTRICT COURT OF CACHE COUNTY, STATE OF UTAH  
The Honorable VeNoy Christoffersen, Presiding

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Clerk, Supreme Court, Utah

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Plaintiff/Respondents

vs.

FOR-SHOR COMPANY

Supreme Court No. 20626

Defendants/Appellant

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STATEMENT OF ISSUES PRESENTED ON APPEAL

The following are the issues Defendant/Appellant hereby presents to the court on appeal:

1. Right to repossess. Was the repossession of the forms by For-Shor lawful and did For-Shor have a right to repossess the forms pursuant to the title retention agreement as stated on the invoices signed by Henderson? Was the Promissory Note a valid note, and if so was it sufficient to constitute final payment in order to transfer title in the equipment to Henderson?

2. Sale of the forms to Ileen Buttars as a "bona fide purchaser". Was the sale of the equipment from Mitchell Henderson to his grandmother, Ileen Buttars, a valid sale? Is Ileen Buttars a bona fide purchaser for value, as against Defendants?

3. Damages awarded to Plaintiff Hale. Did the Trial Court err in awarding damages to David Hale when the damages were not plead in the Complaint nor proven at trial?

4. Damage for loss of rental. Did the Trial Court err in awarding damages to Ileen Buttars for loss of rentals for three years when no evidence was presented at trial to establish the rentals and, as future anticipated profits, the rentals were speculative?

5. Value of forms. Did the Trial Court err in awarding damages to Ileen Buttars for the value of the forms when no evidence of value was presented at trial?

6. Damage for trespass. Did the Trial Court err in awarding damages to Laurena Henderson for trespass when no damages were shown at trial?

#### STATEMENT OF THE CASE

##### Nature of the Case

This action was originally brought by Plaintiffs in an attempt to recover for damages alleged to have been caused by Defendant/Appellant, For-Shor Company's alleged wrongful repossession of cement forms used to form foundations, retaining walls, etc. Defendant claims that the forms were properly repossessed under a title retention agreement which had been signed by Plaintiff Mitchell D. Henderson. Plaintiffs claim that title to the equipment passed to Mitchell Henderson upon his signing a promissory note or in the alternative when For-Shor Company obtained a default judgment against Henderson on its Complaint following Henderson's default in payments on the note. Defendant claims that the note was voidable and accepted only in reliance on misrepresentations by Mitchell Henderson that the



For-Shor forms had been stolen and that there was no available collateral. Plaintiffs further claim that Henderson sold the forms to his grandmother, Ileen Buttars, and that Mrs. Buttars was in the process of selling the forms to David Hale when the forms were repossessed by For-Shor Company.

#### Disposition in Lower Court

The Trial Court by Memorandum Decision (District Court Record pp. 381- 382) ruled that For-Shor Company had no right to reposses the forms holding that the forms had been purchased by Mr. Henderson, the last payment being in the form of the promissory note accepted by For-Shor Company and later reduced to judgment by For-Shor.

The Court ruled that the sale of the forms from Henderson to Buttars was a valid sale and that, therefore, Mrs. Buttars was damaged by the taking of the forms by For-Shor. The court granted judgment to Mrs. Buttars for the fair market value of the forms in the amount \$5,725.35 and for a rental value of the forms of \$2,500.00 per year for the three years from July 1981 to July 1984. The Court also entered judgment in favor of Plaintiff David Hale for an overcharge claimed by Hale from For-Shor for \$265.00 and judgment was granted to Plaintiff Laurena Henderson for trespass and damages in the amount of \$100.00.

The Court further ruled that Defendant did not interfere with the business relationships between David Hale and Mitchell Henderson or Ileen Buttars, that Defendant's repossession was not the cause of any mental or emotional distress claimed by Mitchell Henderson and ruled that the repossession of the forms by For-

Shor was not with willful or malicious intent, refusing to award punitive damages as requested by Plaintiffs.

### Statement of Facts

Mitchell Henderson testified that he was a licensed contractor and had obtained his license in 1976, (TVI p. 161, l. 21-25) and had no prior management experience. (TVI, p. 59, l. 8-13) In September of 1976, Plaintiff, Mitchell Henderson started his own cement forming business and in furtherance thereof purchased two different brands of forms from a company known as Interstate Industries. One set of forms being the Wallmaster brand and the other set being the Mod-u-form brand. Coincidentally, the Mod-u-form forms had been acquired by Interstate Industries from Defendant in order to fill Plaintiff Henderson's order. (TVI p. 17, l. 3-4; TVI, p. 63, l. 20 -- p. 64, l. 10; Ex. 18) The trial evidence clearly showed that Plaintiff Henderson borrowed approximately \$30,000.00 in the fall of 1976 from First Security Bank of Smithfield to purchase both the Wallmaster and For-Shor forms from Interstate Industries, and that First Security Bank took a security interest in all those forms. (TVI p. 17, l. 3-5; Ex. 1.)

During 1976 to 1978 Mitchell Henderson made purchases of certain supplies and rented additional and separate Mod-u-form concrete forming equipment directly from Defendant, For-Shor Company. As acknowledged in Plaintiff's Trial Brief, the Mod-u-form forms rented by Plaintiff Henderson were in essence identical in type and general appearance to the Mod-u-form forms he had previously purchased from Interstate Industries and

pledged as security to First Security Bank of Smithfield. (DCR p. 315)

In October of 1976, Plaintiff Mitchell Henderson opened an account for rental and purchase of goods and materials from Defendant For-Shor company and entered into an account agreement outlining the terms and provisions for such relationship. (Ex. 17) Of particular importance are paragraphs 1 and 2. Paragraph 1 provides in part that:

"all rentals or purchases of goods or materials by buyer from seller are made subject to this account agreement on such terms and conditions as may be stated on invoices and other documents prepared and submitted by seller to buyer in conjunction with the sale or lease of goods to buyer"

Paragraph 2(b) provides that:

"all payments received by sellers shall be applied first to interest, then to past due accounts, then to current purchases and rent."

The agreement was signed by Mitchell D. Henderson and also by James Snarr on behalf of the For-Shor Company. Mr. Henderson's business dealings from 1976 through 1978 were then documented both by invoices and ledger statements, most of which were also executed by Mr. Henderson and which he acknowledged in the course of the trial. (TVI p. 18., l. 22 -- p. 19, l. 2; Exs. 3, 4, 5) All of the documents used in the business relationship between Henderson and For-Shor included clear and explicit language to the effect that For-Shor Company would retain title in all merchandise either rented or sold until fully paid. The Court will note the language at the bottom of the invoices identified as Trial Exhibits 4 and 5, which reads as follows: "It is understood that title to all merchandise listed on this

invoice remains with For-Shor Company until fully paid for by purchaser."

In bold print at the bottom of each invoice was the notice that "SALES SUBJECT TO TERMS AND CONDITIONS APPEARING ON FACE AND REVERSE SIDE". The reverse side of each invoice indicated firstly by title in bold print that the document contained a Conditional Sales Contract, and further indicated in part

"the title to said property shall remain in vendor until the full purchase price is paid ... and if default be made by the vendee in any payment or in any of the terms of the sale, the vendor shall have the right, at its election, to declare a forfeiture hereunder and may take possession of said property, with the right of entry upon any premises where said property may be and remove therefrom without legal process, and thereupon all of the vendee's rights in or to said property shall cease and all payments theretofor made by the vendee shall be retained by the vendor as rental for the use of said property."

Furthermore, in bold print it provided:

"THIS AGREEMENT SHALL BE INTERPRETED AND GOVERNED BY THE UTAH UNIFORM COMMERCIAL CODE, 70A-1-101 et seq."

These contractual provisions and notices appeared on all of the invoices utilized by the parties to evidence their numerous transactions during the three year period of their business relationship.

By June of 1978, Mr. Henderson had become seriously delinquent in his rental obligation to Defendant and had failed to return numerous items. On June 30, 1978 and pursuant to contract and agreement, For-Shor Company elected to convert the rentals to a purchase arrangement. (TVI p. 19, l. 20 - p. 20, l. 13; Ex. 4) The invoice itemized the property being converted which included 55, two by eight panels; 22 six inch inside by eight feet corner panels; 50, two by four panels; 4, six inch

inside corner by four feet panels; 50, wedge bolts; 50, two by four walers', and 50 Z walers. Also a credit of three months rent was given, leaving, after tax, a total purchase price of \$5,119.21. Shortly thereafter Plaintiff Henderson entered into negotiations with the Defendant to adjust the purchase price and the parties subsequently agreed to an additional credit of \$2,180.83 (TVI p. 44, ¶ 6-13; Ex. 5) thus reducing the total purchase price for that property from \$5,119.21 to \$2,938.38. Additionally, Mr. Henderson had accumulated before the June, 1978 purchase a separate outstanding account balance of \$5,371.64, which was for merchandise and rentals other than those itemized on Exhibit 4. (Exhibit 3) After the account adjustments of Exhibit 5 and application of accrued interest, the new statement balance as of July 31, 1978, as shown on Trial Exhibit No. 3, was \$8,329.12.

Two days later, on August 2, 1978, Plaintiff Henderson made a cash payment on the account of \$6,400.00 and incurred an addition charge as per invoice number 12514 of \$456.33. Trial Exhibit No. 3 evidences that as of August 2, 1978 the account balance owing was \$2,385.45. In accordance with the account agreement (Exhibit 17), Plaintiff's cash payment was credited against the old account balance of \$5,371.64 first, then to the new purchases on Exhibit 4; the result of which was that the items purchsed in June 1978 (Exhibit No. 4) were not fully paid for. Trial Exhibit No. 3 further reflects that Plaintiff Henderson on August 16, 1978 made a payment on the account in the

amount of \$311.03 and incurred an additional charge per invoice 12817 of \$406.21.

Evidently, Plaintiff Henderson's loan at First Security Bank of Smithfield for the purchase of the Interstate forms became delinquent sometime in the summer of 1978. Plaintiff's Grandmother, Ileen Buttars, raised the money to pay off the obligation to First Security Bank. (TVI pp. 82-85) Mrs. Buttars testified at trial that she knew very little about Mitchell Henderson's business except that he was in serious financial difficulty at the time she paid First Security Bank. (TVI p. 82, l. 7-10; p. 84, l. 18-20) She had not, nor had Mitchell notified For-Shor of the pay off to First Security Bank. She never had occasion to inspect, count, or identify the forms which First Security Bank had claimed as security and which she had redeemed. She understood, however, that she was acquiring an interest, if any, was only in the forms which First Security Bank had claimed as collateral by virtue of her repayment of that loan. She never personally used, nor managed the use of the forms after repayment of the First Security loan and never received the same into her possession. The forms remained for all times in the possession and control of her Grandson Mitchell Henderson, who had full and unrestricted use of the same. The forms were kept at his mother's residence and he on occasion rented them out. Plaintiff Mitchell Henderson retained all of the incomes that were generated on the forms. (TVI, p. 71, l. 19) Mrs. Buttars never received any accounting for their use or rental and never requested an accounting. She never reported any income from the forms or claimed revenue from them on her personal income tax

returns. Her Grandson, on the other hand, utilized the forms in his business and claimed the income as his own. At trial, Mrs. Buttars testified that she was uncertain whether the money she provided to pay off First Security Bank was a loan to her Grandson or a purchase of the collateral held by First Security Bank. (TVI pp. 86-87) Significantly, both she and her Grandson however had a full expectation and intention that Mitchell would eventually repay her that sum.

Defendant For-Shor Company did little further business with Plaintiff Mitchell Henderson during 1978, and was thereafter unable to locate him again until the fall of 1979. During that period of time no payments had been made on the account and For-Shor Company had referred the account to its attorneys for collection. In July of 1979 suit was filed against Henderson. He was served with a copy of the Summons and Complaint on August 26, 1979 in Cache County, Utah. (Exhibit 24) A few days later Plaintiff Henderson contacted Mr. Duane Burnett, then counsel for Defendant, regarding the lawsuit. (TVIII, p. 500, l. 11 -- p. 502, l. 7) Mr. Burnett testified at trial that in the course of the conversation Mr. Henderson represented that he wished to resolve the outstanding obligation but that he was unable to pay the entire amount off in one lump sum. He further represented that the specific forms and merchandise which had been purchased from the For-Shor Company had been stolen in of July of 1979, and that there was no collateral available to satisfy the outstanding obligation. Mr. Burnett advised Mr. Henderson that he should contact Mr. James Snarr of the For-Shor Company directly.

On September 6, 1979, Plaintiff Mitchell Henderson visited Mr. Snarr at the For-Shor offices in Salt Lake City and negotiated with the For-Shor Company an arrangement to repay the then outstanding account balance of \$3,748.43 by making monthly installments of approximately \$340.00. (Exhibit 37) At the request of Mr. Snarr, Mr. Henderson executed a written Installment Promissory Note evidencing his agreement to repay that balance over time. For-Shor Company had agreed to allow Mr. Henderson to repay the obligation in accordance with the Promissory Note rather than electing to proceed with the lawsuit, based upon Henderson's representation that the forms had been stolen and were no longer available as collateral, and upon Mr. Henderson's promise to pay as set forth in the note, and also based upon the fact that it had been very difficult to locate Mr. Henderson over the past year and the prospect of receiving payment by any other device did not appear to be good. (TVII p. 501, l. 15 -- p. 502, l. 24) The Promissory Note was received as evidence at trial as Exhibit No. 37.

After making one or two payments on the Note, Plaintiff Henderson defaulted and For-Shor Company obtained a Default Judgment on February 13, 1980, in the sum \$3,831.78. By that time For-Shor had again lost track of Mr. Henderson and had no further knowledge of his whereabouts or dealings until July of 1981 when Defendant repossessed most of the forms it had originally sold to Mr. Henderson per Trial Exhibit No. 4.

Evidently, Mitchell Henderson filed Bankruptcy on or about July 16, 1980. Although For-Shor Company was named on the creditor matrix, it never received notice of the Bankruptcy, and



never filed a claim in those proceedings. (TVII p. 238, l. 8-15) One reason that Defendant did not receive notice of the Bankruptcy proceedings may have been an improper address assigned to the Defendant on the mailing matrix. (TVII p. 209, l. 1 - p. 210, l. 17) The address given was another cement forming company which did business adjacent to the offices of the For-Shor Company. Additionally the name of the Defendant was misspelled. Regardless of the reason, Defendant did not have actual knowledge of the Bankruptcy and undertook no action as a result of the same.

One year later, in July of 1981, it came to the Defendant's attention, quite by chance, that Mitchell Henderson had in his possession and was storing certain cement forms. Defendant, through its agents, went to Clarkston, Utah and determined that both Wallmaster and Mod-u-form forms were stored at what they later learned to be the residence of Mr. Henderson's mother. (TVII p. 293, l. 20 - p. 294, l. 4) Mr. Dan Sharp testified that he was able to determine that there was approximately one or more sets of Wallmaster forms and more than one set of Mod-u-form forms stored at the Henderson residence. Using invoice number 11754 (Trial Exhibit No. 4), which was the original purchase invoice, Mr. Sharp repossessed what he on behalf of For-Shor believed to be the merchandise which had been sold to Plaintiff Mitchell Henderson under the title retention agreement of June 1978. A comparison of the inventory of those forms repossessed (see Trial Exhibits 27 and 28), reveals that just less than all of the items sold to Mr. Henderson in 1978 were repossessed by the For-Shor

Company in July 1981.

Mr. Sharp testified that, using a rental truck, he and another employee entered the Henderson premises along a gravel driveway, leaving the truck on the driveway, and loaded the forms onto the truck. It took approximately forty five minutes to load the truck, whereupon they left the premises in the same manner as they had arrived. Mr. Sharp testified that he did not see any signs prohibiting entry along the driveway nor was he contacted or confronted by anyone during the course of the repossession, and that he caused no damage to any property in the course of that activity. (TVII p. 298, l. 9-8) Plaintiff Laurena B.

Henderson testified that she observed the same truck enter the premises and watched the activities of two men as they loaded the truck for a period of approximately three to five minutes and then left. (TVI p. 96, l. 6 -- p. 97, l. 6) Mrs. Henderson testified that there were several No Trespassing signs and Do Not Enter signs posted on buildings about the premises but that the men who took the forms did not enter any buildings. She further testified that the truck upon leaving drove over a portion of her yard, but that there was no resulting damage. (TVI p. 97, l. 6-11; TVI p. 106, l. 15-24) At page 8, lines 20 and 21 of her deposition taken July 20, 1984, Mrs. Henderson, in response to the question "And was there any damage caused as a result of that?", answered "Oh, not enough to worry about." At page 10, lines 10 through 16 of the same deposition transcript, Mrs. Henderson further testified that she was accustomed to contractors or laborers or other people coming in and out of her premises to get forms.

At trial, Plaintiffs offered no testimony as to the value of the forms taken. Mr. Snarr further testified that the cost to recondition a form including plywood, labor and materials but excluding sandblasting and painting, would be approximately 24% of the current list price, (TVIII p. 441. l. 15-25) and that the For-Shor Company typically purchases used or reconditioned forms for between 40% to 50% off the list price.

Apparently during the period from July 1978 until July 1981 little use was made of the forms by Mr. Henderson. During that three year period less than \$2,500.00 in gross rents was generated from Mr. Henderson's use of all the forms he had in his possession, which included both full sets acquired from Interstate Industries and pledged as collateral to First Security, as well as the approximate half set acquired from the For-Shor Company. (TVI p. 34, l. 12-19) Plaintiff Mitchell Henderson testified, however, that he had been attempting during that period of time to sell all of the forms which he had in his possession but without any success. (TVI p. 31 - p. 32)

#### SUMMARY OF ARGUMENTS

The following is a summary of arguments Defendant/Appellant hereby presents to the court on appeal:

1. Right to repossess. Defendant claims that the repossession of the forms was lawful and that it had a right to repossess the forms pursuant to the title retention agreement as stated on the invoices signed by Henderson. Defendant maintains that the trial court erred in concluding that the repossession was not legal holding that the forms had been purchased by

Henderson, the last payment being in the form of a promissory note accepted by Defendant. Defendant claims that the promissory note was fraudulently issued in that Henderson stated that the forms had been stolen when in fact they had not been stolen. Because of Henderson's misrepresentations, the promissory note is void and of no effect. Therefore, the forms had never been paid for and title has never been transferred from For-Shor to Henderson.

2. Sale of the forms to Ilene Buttars as "bona fide purchaser". Defendant claims that Henderson had no title to the For-Shor forms and could not transfer title to his grandmother, Mrs. Buttars. Furthermore, the forms purportedly sold to Buttars were forms secured to First Security Bank, not Forshor forms and the transfer of the forms to Mrs. Buttars was in the form of a loan and not a sale. There was never a sale of the Defendant's forms to Mrs. Buttars.

3. Damages awarded to Plaintiff Hales. The trial court awarded Hale damages of \$265.00 for an overcharge by For-Shor on separate rentals to Hale, claiming that For-Shor charged Hale to clean forms when the forms had been delivered to Hale dirty. Plaintiff Hale did not plead the overcharge on rentals in the Complaint, nor any amendment thereto, nor were the damages for the overcharge proven by Hale in that Hale had not paid the overcharge.

4. Damages for loss of rental. Plaintiffs did not offer evidence to establish lost profits for loss of rentals. Defendant maintains there is no evidence to support the

judgment and award of damages for loss of rent claimed by Plaintiffs and that Plaintiffs' claim was based solely on speculation of future potential profits. No evidence was presented to establish future rental income with any reasonable degree of certainty.

5. Value of forms. Plaintiffs did not offer competent evidence or testimony regarding the value of the forms which were repossessed by For-Shor. The value claimed by Plaintiff was based on conjecture and speculation outlined in Plaintiffs trial brief, and not based on proper evidence. therefore, damages for the value of the forms should not have been awarded.

6. Damage for trespass. Plaintiffs admitted at trial that there was no damage caused by the tresspass, if any, made in repossessing the forms. Defendant maintains that there was insufficient evidence to support a judgment and award of damages for trespass and that the judgment was based upon speculation.

## ARGUMENTS

### I

FOR-SHOR'S REPOSSESSION OF THE FORMS WAS  
LAWFUL BECAUSE THE MISREPRESENTATION OF  
HENDERSON VOIDED THE PROMISSORY NOTE GIVEN  
TO FOR-SHOR, AND PURSUANT TO THE TITLE RETENTION  
AGREEMENT HELD BY FOR-SHOR, TITLE TO THE  
FORMS RENTED BY MITCHELL HENDERSON DID NOT  
PASS TO MITCHELL HENDERSON.

Plaintiff Mitchell Henderson almost immediately after having been served with a Summons and Complaint by the Defendant in

August, 1979, contacted the Defendant's Attorney, Duane Burnett, and stated that the forms in question had been stolen the month before, and the only way for For-Shor to recover anything would be if he could work out an arrangement to pay over time. James Snarr then allowed Henderson to enter into the Promissory Note of September 6, 1979, based upon the representation that the forms no longer existed and that there was no collateral to support the claim of For-Shor Company. The fact that Mr. Henderson represented that the forms had been stolen is confirmed by Trial Exhibit No. 29, his Bankruptcy Petition, wherein Mr. Henderson stated under oath, at question fourteen of the Statement of Affairs at the beginning of his Bankruptcy Petition, that the forms were stolen in Weber County in July, 1979. In actuality, the forms that Mr. Henderson had purchased in June, 1978 from For-Shor (identified by Trial Exhibit No. 4) were in his possession in Clarkston, Utah, on the date that he executed the Promissory Note in September 1979. His misrepresentation of the theft made the Note at the very least voidable, at the election of the For-Shor Company. In Tanner vs District Judges, Utah, 649 P.2d 5 (1982) the Utah Supreme Court stated, "An agreement obtained by misrepresentation, fraud, or mistake is generally voidable." (See also 17 Am Jur 2d Section 151).

It is generally accepted that property obtained by fraud and misrepresentation cannot be transferred to a third party purchaser in controvention to the title and ownership of the original owner. In Panhandle Pipe and Supply Co. v. S.W. Pressey and Son, 243 P.2d 756 (Col. 1952) Panhandle Pipe had agreed to sell a

truck load of well casing pipe to one L.S. Oliver, for an agreed price of \$2,491.86 to be paid on delivery. When Panhandle's employee delivered the pipe to Oliver, Oliver informed the employee that he was unable to obtain the cashiers check from his bank because the bank had not opened when he left town and asked the employee if he could forward a check to Panhandle on the following day. When the employee attempted to call Panhandle to determine if his instructions could be modified, Oliver took the load of pipe without paying for it. It was later discovered that Oliver had taken the pipe to S.W. Pressey and Son and had sold it to Pressey for cash. Panhandle filed an action in replevin seeking to have the pipe returned to it. The Supreme Court of Colorado ruled that even though Pressey was an innocent purchaser for value, Oliver's fraud and the subsequent action was sufficient to justify the replevin. The Colorado court noted in the action, that where the sale was a cash sale, title to the property did not pass to purchaser until the cash had been received, unless the receipt had been waived by the seller. The court quoted an Oregon case, Johnson v. Iankovetz, 110 P. 398, and stated as follows:

There is a distinction between a sale, induced by fraud, in which the vendor, in ignorance of the fraud, transfers the title and possessions, in which the sale is voidable but not void, and an innocent purchaser from the vendee may acquire a good title. [citing cases]; and a case in which the vendor does not intend to pass with the title until the price is paid, the delivery and payment being concurrent acts, and although the goods are delivered to the vendee, yet, without payment, no title will pass. In the one case it is intended that the title shall pass; in the other, that it shall not pass. 243 P.2d at 760.

The court also noted that mere possession of the personalty fraudulently obtained was not alone enough to protect a good

faith purchaser against the demands of the defrauded owner and that the authorities indicated that possession must be accompanied by indicion of title. 243 P.2d at 761.

In the instant action, the invoices and account agreement with Henderson all clearly stated the title would not pass to him until the equipment had been paid for. Since the promissory note was accepted by For-Shor only on the misrepresentation of Henderson that the forms had been stolen and could not be returned to For-Shor, the promissory note does not constitute payment for the equipment and title therein remained with For-Shor.

A similar decision was reached in South Seattle Auto Action, Inc. v. Ladd, 370 P.2d 630 (Or. 1961). South Seattle had reached an agreement with Virgil Anderson to allow Anderson to obtain used automobiles, recondition them, and then sell them at South Seattle's auction. South Seattle would deliver a sight draft for the purchase of the vehicles and would honor the sight draft when title was delivered to them. During a period of time in late 1959, Anderson obtained several automobiles in that manner, the titles being sent to South Seattle, but Anderson then sold the vehicles to defendant Ladd, a used car dealer. South Seattle filed an action in replevin to obtain possession of the vehicles and Ladd claimed that he was a bona fide purchaser. The Oregon Court ruled that Anderson did not have title and could not transfer title to Ladd and affirmed the judgment and replevin. The Supreme Court of Oregon quoted an Oregon statute similar to Section 7 of the former Utah Uniform Sales Act (U.C.A. 60-2-7):



Subject to the provisions of this chapter, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell. 370 P2d at 638.

The Oregon Court ruled that even though Anderson had possession of the vehicles, that his attempt to sell the vehicles without authority was a fraudulent act and since he did not have title, he could not transfer title to the seller.

A similar case in Utah also referring to former Section 60-2-7, Utah Code Annotated, ruled that the owner of the goods by his conduct was precluded from denying the sellers authority to sell and that the owner could not repossess the property.

In Heaston v. Martinez, 282 P.2d 833, 3 Utah 2d 259 (1955) Plaintiffs had delivered automobiles to one M. R. Bruce doing business as Ra Don Auto Sales in Salt Lake. Plaintiff was a wholesale used car dealer and delivered the vehicle to Bruce together with a sight draft to be paid by Bruce on the sale of the vehicle. Plaintiff was to title to the vehicle until payment was received. Bruce then sold the vehicle without honoring the sight draft and did not convey title to the buyer. The plaintiff then filed an action to repossess. the trial court held that the delivering of possession to Bruce coupled with Bruce's apparent authority to sell the vehicle in the ordinary course of business was sufficient to allow him to sell the vehicle to the buyers. The Utah Supreme Court, in a split decision, upheld the trial court's decision refusing to allow the repossession. The dissenting opinion by Justice Henriod pointed out that the Plaintiff withheld the title in an effort to prevent just such a

situation. The dissent claimed that possession alone was not sufficient to justify a transfer of title and if possession were sufficient, it would be a hazard to leave one's car to be parked for a fee, leaving it for necessary repairs, or even loaning it to dear friend. 282 p.2d at 838.

In Richardson v. Seattle First National Bank, 299 P.2d 341 (Wash. 1951) The plaintiff sold her car to a person claiming his name to be Thornton and representing himself to be an agent of the Central Oldsmobile Company of Seattle. He issued a check in the name of Central Oldsmobile Co. for the purchase price of the car, and the Plaintiff endorsed in blank the certificate of title and gave it to Thornton. As it turned out, the check was a forgery and the man later sold the vehicle to an automobile dealer in Belview, Washington, again forging the Plaintiff's name on the title. The Plaintiffs brought an action to repossess the car and the trial court allowed the replevin ruling that the title had been obtained by fraud and was unenforceable. The court ruled that even though the purchaser was innocent and unknowledgeable of the fraud, the seller could transfer no better title than he held. Since the title he obtained was through fraud, he obtained no title and could, therefore, not transfer title.

In the instant action, any title in the equipment claimed by Henderson was void since the title would necessarily have to have been obtained through Henderson's misrepresentation. Had Henderson not stated that the forms had been stolen, For-Shor would have either required the forms to be returned or that

Henderson execute a valid security agreement to secure the note. Therefore, Henderson had no title he could transfer.

In addition to the fact that the promissory note was void because of the misrepresentation of Henderson, there is no evidence to support Plaintiffs' contention that the note itself was given as payment for the outstanding obligation or to constitute a release of the collateral. Indeed, it is often customary that a promissory note is executed simply to evidence the agreement between debtors and creditors for payment. There is nothing in the content of the note to suggest a release or waiver of Defendant's claim to the subject property. Factually one could only conclude that the note was given to reinforce the obligation and was an additional assurance of payment rather than a compromise of the existing position of the creditor.

The promissory note also has the effect of confirming that a balance indeed was due to For-Shor from Mr. Henderson in the amount of \$3,748.43 as of September 6, 1979, contrary to his testimony in court that he had paid the account in August of 1978. Henderson has provided no evidence that Defendant knowingly or voluntarily waived it's title or claim to the subject property. The testimony was clear that because of the misrepresentations of Mitchell Henderson, the Defendant obtained judgment on the promissory note believing that the property had in fact been stolen in July, 1979. It would be both illegal and inequitable to allow the Plaintiff now to benefit from his deceit and misrepresentation.

## II

THERE WAS NO BONIFIED SALE OF THE FORMS FROM  
HENDERSON TO BUTTARS. FOR-SHORS SECURITY  
INTEREST REMAINED INVALID AND INTACT UP TO AND  
INCLUDING THE DATE OF REPOSSESSION

It must be first noted that there is a clear distinction between the forms purchased by Mitchell Henderson from Interstate Industries in 1976, and the forms purchased from Defendant in June, 1978. Defendant claims, and has only claimed, an interest in the property sold to Henderson in June of 1978. That property is identified by Trial Exhibit No. 4 and is subject to the condition that the For-Shor Company retain title to the merchandise until it was fully paid by the purchaser.

The property which Plaintiff purportedly sold to his Grandmother, Ileen Buttars, in September, 1978 was only the property in which First Security Bank had claimed a collateral interest.

A review of Trial Exhibits No. 3, No. 4 and No. 5 as well as the other invoices signed by Mr. Henderson in the course of his years of business dealings with the Defendant only justifies one conclusion, that Mr. Henderson was to acquire title to the property received from For-Shor only on the condition that he paid for the same. Mr. Henderson has acknowledged on numerous occasions and at Trial that there was a remaining balance due on his account, and Trial Exhibit No. 17 clearly indicates that the account agreement between the parties requires that all payments received were to be applied first to interest, then to past due accounts and then to current purchases and rents. The evidence

is clear that any payments received from Mr. Henderson on the account were properly applied.

Section 70A-9-102(2) of the Utah Uniform Commercial Code defines title retention and conditional sale contracts as security agreements and subjects them to the provisions of the Code. Section 70A-9-201 provides that:

Except as otherwise provided by this act a security agreement is effective according to its terms between the parties, against purchasers of the collateral and against creditors. (emphasis added)

Section 70A-9-306(2) provides in part as follows:

Except where this chapter otherwise provides, a security interest continues in collateral notwithstanding sale, exchange or other disposition thereof unless the disposition was authorized by the secured party in the security agreement or otherwise. (emphasis added)

It is clear that under the Utah Uniform Commercial Code For-Shor Company retained a security interest in the property identified by Trial Exhibit No. 4. Obviously if Mr. Henderson retained possession of that property until it was repossessed, then the provisions for default and repossession of the Uniform Commercial Code apply. If Mr. Henderson did in fact sell, and his Grandmother did in fact purchase, that property, together with the collateral secured by First Security Bank, it is still clear that the security interest of For-Shor is paramount and superior to any claim of Mrs. Buttars. The following factors should be considered in determining whether or not Mrs. Buttars actually purchased the For-Shor property:

1. She was only aware of forms held as collateral by First Security Bank.

2. First Security Bank did not have a security interest in the forms sold by For-Shor to Mr. Henderson in June of 1978.

3. The Bill of Sale prepared by Mr. Henderson to his Grandmother (Exhibit 2) makes no warranties of title.

4. Mrs. Buttars described her redemption of the property from First Security Bank as a loan to her Grandson and not a sale, and expected that he would repay her.

5. Mr. Henderson acknowledged his intention and expectation to repay his Grandmother for paying off the First Security Loan.

6. Mrs. Buttars had no prior or present knowledge of Mr. Henderson's business or the concrete forms business in general.

7. Mrs. Buttars never took the forms into her possession or received use of the same and did not ever manage the use of the forms.

8. Mr. Henderson made no changes in the course of his business after First Security Bank had been repayed. He continued to possess, use, rent and offer for sale the equipment and otherwise manage the possession of the same.

9. Mrs. Buttars never received any income or an accounting of the use from the sales or rental of the forms.

10. Mr. Henderson received all the sales and rental proceeds and never furnished any income to his Grandmother.

11. Mrs. Buttars never reported any income on her income tax returns for the years 1978 through 1981 and never claimed ownership of the forms on her income tax returns.

12. Mrs. Buttars stated in an affidavit, dated April 19, 1983 and filed with the court, (DCR, pp. 104-105) at paragraph 3 thereof, as follows:

"Both before and after the date of purchase I believe that the equipment listed in the said Bill of Sale from Mitch was secured by no one other than First Security Bank of Smithfield. I thought that said Bank had loaned Mitch the funds to initially purchase the equipment."

13. Ileen Buttars stated under oath in answers to Defendant's Interrogatories in this case dated July 29, 1982 and filed herein, (DCR, pp 44-52, 45) in response to Interrogatory No. 4 after identifying all of the properties she purchased, as being the property listed in the afore-referenced Bill of Sale as follows:

"I paid for said equipment (identified in the Bill of Sale) by paying off loans to Mitchell D. Henderson from First Security Bank in Smithfield, which loans I believe, were secured by the equipment which I purchased."

14. In her deposition of July 20, 1984, Ileen Buttars stated under oath referring to the forms secured to First Security Bank at page 7, lines 24 and 25 and page 8, line 1: "Oh, the purpose of the loan to begin with was to buy those forms". Further, at page 9 of said Deposition, Mrs. Buttars testified that a little over \$30,000.00 was paid to First Security Bank to pay off Mitchell's loan at the Bank and that she agreed to purchase the equipment described on that document for the sum of \$26,260.91. Again at page 12, lines 3 through 9, Mrs. Buttars testified as follows:

QUESTION: "Tell me what it was?"

ANSWER: "That I was going to purchase those forms, and they would absolutely be my forms, and of course at that time the First Security held them."

QUESTION: "Yes?"

ANSWER: "And then it was paid off, and First Security released them to me."

15. Mitchell Henderson stated under oath in his affidavit filed in this matter on May 6, 1983, (DCR, p.111) at paragraph 5 as follows:

"In September, 1978, I sold all my equipment to my Grandmother in return for her paying off my obligations at First Security Bank, which were secured by the said forms. The amount paid by my Grandmother for the forms and equipment was approximately their fair market value." (emphasis added)

16. Mrs. Buttars never counted the forms or inventoried them or had any idea how many forms she actually had other than as represented on the Bill of Sale.

17. A comparison of the Interstate Industries purchase inventory, Trial Exhibit No. 18, with the description of property purchased under the Bill of Sale, Trial Exhibit No. 2, and the For-Shor purchase of June 1978 Trial Exhibit No. 4., reveals that the property allegedly purchased by Mrs. Buttars under the Bill of Sale did not include the items purchased from For-Shor in June 1978. The property itemized under Exhibit No. 18 is very nearly the same as that under Exhibit 2. For example, Exhibit 18 indicates that there were 150 two by eight forms (see item number 1 and item number 27), and Exhibit No. 2 indicates that there were 155 two by eight panels sold. Exhibit 18 indicates that there were 100 two by four panels (see items 2 and 28), and Exhibit No. 2 indicates 80 two by four panels.

18. In September 1978, the date of the Bill of Sale, Mr. Henderson supposedly had in his possession all of the forms and materials purchased from Interstate Industries as well as the materials purchased from the For-Shor Company identified by Trial



Exhibit No. 4. Mr. Snarr testified his inventory and calculations revealed that even after For-Shor repossessed its property, there remained enough forms to equal those itemized in the Bill of Sale.

Even the court were to apply only the principal of "substance over form" it is apparent that Mrs. Buttars did not purchase any equipment from her Grandson but simply made a loan to him anticipating and expecting that sometime he would repay the same. Mr. Henderson continued to utilize all of the forms pledged to First Security as well as those acquired from the For-Shor Company for his own personal use. It is also apparent that if indeed Mrs. Buttars did purchase property from her Grandson, it was only the property pledged as collateral to First Security Bank and purchased from Interstate Industries, and unquestionably did not include the forms purchased by Henderson from the For-Shor Company in June of 1978 (Exhibit 4).

The evidence is clear that Defendant executed a lawful repossession of the property which it had claimed a security interest and retained title. Section 70A-9-503 of the Utah Uniform Commercial Code provides that a secured party has, on default, the right to retake possession of the collateral.

"In taking possession a secured party (For-Shor) may proceed without judicial process if this can be done without breach of the peace or may proceed by action."

The clear majority of courts have found that repossession of property located on the premises of a third person is lawful, in the absence of some special circumstances. Generally a breach of the peace requires a confrontation or a clear objection by the

debtor or his agent (see White and Summers, Uniform Commercial Code, pages 968 through 969. Also 75 ALR 3d 1061).

It is also clear that all of the Mod-u-forms purchased either through Interstate or directly from For-Shor in 1978 were interchangeable, i.e. "fungible" as defined under the law.

Black's Law Dictionary describes fungible things as:

"Movable goods which may be estimated and replaced according to weight, measure and number, things belonging to a class. Those things one specimen of which is as good as another."

The parties do not dispute the fact that all of the Mod-u-forms of any particular category, whether they were two by eight foot panels, or two by four foot panels, were, within their category fungible. (See Plaintiffs' Trial Brief, Statement of Facts). As a practical matter, it make little difference whether the specific form pledged to First Security Bank as opposed to a form purchased from For-Shor Company was repossessed by Defendant. The evidence is that Mr. Henderson or his Grandmother still have all the forms listed on the Bill of Sale even after the repossession in 1981 by the For-Shor Company and, therefore, have not been damaged in any way as a result of the repossession.

In addition, Mrs. Buttars is in a close and confidential relationship with her grandson, Mitchell Henderson, and is charged with constructive notice that Henderson did not have title to the equipment recieved from For-Shor. In Blodgett vs. Martsch, Utah, 590 P.2d 298 (1978), this Court stated that a bona fide purchaser is one who takes without actual or constructive knowledge of facts sufficent to put him on notice of the complainants equity. 590 P.2d at 298. The Blodgetts were

owners of two adjacent parcels of land located approximately 6100 South Highland Drive, in Salt Lake. The larger tract was a store property and the smaller tract was utilized as a car wash. Blodgetts had leased the smaller tract to Raco Car Wash Systems to install a car wash facility. In order to obtain financing, Raco was required by the Valley Bank and Trust to provide security for the loan and Blodgetts agreed to execute a trust deed for that purpose. Blodgetts understood that they would sign a trust deed for the car wash parcel but were not informed that the Bank had later required more security and had added the store parcel to the trust deed. Blodgetts signed the document not knowing that it contained both the store and car wash properties. Raco later defaulted on the loan and the Bank proceeded to foreclose on the trust deeds. Even at the time of the sale, Blodgetts were not aware that the Bank was foreclosing on both parcels of property. The property was purchased by Defendant Joe Martsch, who was a former officer of Raco and was married to Betty Purcel, the current president of Raco, for an amount of approximately 1/8 of the fair market value of the property. Blodgetts did not learn that both parcels were included in the trust deed until Martsch asserted his rights of ownership after the sale. Blodgetts then sought to set aside the trust deed and subsequent trustee's deed and as part thereof, claimed that Martch was in a confidential relationship with the Bank and was aware the defect in the trust deed. The Utah Supreme Court agreed with the Blodgetts and remanded the case set for trial.

In the instant action, Mrs. Buttars, because of her relationship with Mitchell Henderson, is charged with at least

constructive knowledge that Henderson did not have title in the equipment claimed by For-Shor and that she could not claim title through her grandson.

### III

THE COURT CANNOT AWARD DAMAGES TO ANY PARTY  
FOR ITEMS WHICH WERE NOT PLEAD BY THAT PARTY  
OR RAISED BY THAT PARTY PRIOR TO TRIAL

The Trial Court awarded judgment to David Hale in the amount of \$265.00 as an overcharge claimed by Hale to have been made by For-Shor. (See Findings of Fact paragraph 11 and Judgment and Decree, paragraph 4) However, Defendant Hale did not raise the issue of overcharged by For-Shor in the Complaint. (DCR pp. 1-8, and particularly the prayer of the Complaint, P. 8.) In fact, the only mention at trial of the overcharge was brief questioning of James Snarr, For-Shor's general manager, regarding a charge to Mr. Hale for returning forms dirty. (TV III, pp. 433-436.) Snarr stated the overcharge to be \$229.52 plus tax, in a total of \$252.58. (TV III, p. 433 1 4 & 5.) Mr. Snarr also testified that there was an outstanding and unpaid balance on David Hale's account of \$237.77, exclusive of interest from March of 1982. (TV III, p. 444 1. 4 - 5.) Although this amount was also not plead by For-Shor, it would be adequate to off-set any error for overcharges by For-Shor and it is clear that Hale has not paid the overcharge.

In the case of Cornia v. Cornia Utah, 546 P.2d 890 (1976), this Court stated that even though the Rules of Procedure provide for liberality in granting of relief for which the

evidence shows a party is entitled, such liberality does not go so far as to authorize the granting of relief on issues neither raised nor tried. In Cornia, Mrs. Cornia's sons filed an application and petition of incompetency to appoint a gaurdian. The complaint dealt only with the issue of her capacity and prayed only for the appointment of a gaurdian of her estate. During the trial, issues were raised regarding the validity of a will and trust deed Mrs. Cornia had executed. The trial court set aside the will and trust deed. The Supreme Court reversed the trial court's decision ruling in effect that since the issues regarding the validity of the will and trust deed had not been raised, the court could not grant refief for those claims.

In the instant action, Plaintiff Hale did not plead nor request relief for the overcharge. In fact, as stated in the first full paragraph on page 6 of Plaintiff's Trial Brief (DCR p. 320), Plaintiffs' counsel stated that the charges were first noticed in preparation for trial. In addition, as the testimony clearly showed, Hale has not paid the overcharge since his account still shows a balance owing in the approximate amount of the overcharge. Hale should not have been granted Judgment on the amount claimed to be overcharged by For Shor since the matter was not raised in the complaint, and the maount has not been paid by Hale.

#### IV

THE CLAIM FOR LOSS OF PROFITS AND RENTALS IS TOTALLY  
SPECULATIVE AND SHOULD NOT HAVE BEEN AWARDED

The Trial Court awarded damages to Mrs. Buttars for the loss of rental value of the forms that were taken for a period of three years, or from July 9, 1981 to July 1984. The Memorandum Decision stated that damages were determined as follows:

A full set being of the rental value of about \$5,000.00 per year, but there being only taken a half set the court will award \$2,500.00 damages per year for the three years or \$7,500.00. (DCR p. 407)

In reviewing the transcript, Defendant was unable to locate any evidence establishing the annual rental value for a full set of forms at \$5,000.00, or at any value. In attempting to establish damages for loss of rentals, Plaintiffs offered testimony of Plaintiff Mitchell Henderson stating that the total rentals for the three months between April, 1981 and July, 1981 were ". . . around \$2,500.00, I beleive," (TV I, p. 34, l. 15) This brief three months is the only period of time from 1978, when the forms were allegedly sold to Ileen Buttars, until the forms were repossessed by For-Shor in July 1981, that there was any testimony of actual rentals. In other words, Plaintiffs attempted to prove annual rentals based on a short three month period during the entire three years prior to the repossession.

In addition, Plaintiffs had approximately two and one half sets of forms available to rent, one set of wall master forms and one set of Mod-u-form forms originally purchased from Interstate Industries, and the half set of Mod-u-form forms rented and later purchased from For Shor.

Plaintiffs also offered Trial Exhibits 9, 10, and 13 in an attempt to establish a rental value. Exhibit No. 9 is a handwritten memorandum of rentals to Plaintiff David Hale; Exhibit 10 is some rentals in a receipt book; and Exhibit 13 is copies of checks to Mitch Henderson from Hansen's Cow Palace Dairy. In reviewing the Exhibits, some of which are duplications (the items in Exhibit 9 and some of the checks listed in Exhibit 13 are also included in the receipt book, Exhibit 10. (See TV 1 pp. 55, 56.), the total rentals are only \$2,034.55. However, no exact figure was ever testified to at trial or presented at trial.

In order for the court to award damages to Plaintiffs for lost profits, there must be testimony supported by competent proof upon which reasonable minds acting fairly thereon could believe that it is more probable than not that the damages were actually suffered. In Jamison v Utah Home Fire Ins. Co., Utah, 559 P.2d 958 (1977), the general rule is stated that "an award of damages cannot properly be made on mere possibility or conjecture, there must be a firmer foundation." 559 P.2d at 961. This court stated in Highland Construction Co. v. Union Pacific Railroad Co., Utah, 683 P.2d 1042 (1984), that although some degree of uncertainty in the evidence of damages will not relieve a Defendant from recompensing a wronged Plaintiff, the longstanding general rule is that a Plaintiff "must show damages by evidence of facts and not by mere conclusions and that the items of damage must be established by substantial evidence and not by conjecture." 683 P.2d at 1045. A similar statement is contained

in Acculog Inc. v Peterson, Utah, 692 P.2d 728 (1984), to the effect that lost profits may be recovered only when the evidence submitted provides a basis for estimating them with reasonable certainty.

A case dealing specifically with damages for lost profits in Utah is Howarth v. Ostergaard, 515 P.2d at 442, 30 Utah 2d 183 (1973). Therein, the plaintiffs, who were in the nursery and floral business, claimed that the defendants had wrongfully recorded a mortgage on a home purchased by plaintiffs from defendants, which prevented the plaintiffs from obtaining a bank loan. It was further claimed that the inability to obtain a bank loan prevented the plaintiffs from financing the sale of Christmas trees, which was an annual venture. The trial court found the claim for lost profits in the Christmas tree venture, even though the sales had been continuing annually for some time, were too speculative to be considered. In affirming the trial court, the Utah Supreme Court stated:

The problem as to when and under what circumstances damages may be recovered for loss in operating a business is, as is true in so many controversial areas of the law, a coin that has at least two sides to it. The basic and general rule is that loss of anticipated profits of a business venture involve so many factors of uncertainty that ordinarily profits to be realized in the future are too speculative to base an award of damages thereon. The other side of the coin is that damages to a business or enterprise need only be proved with sufficient certainty that reasonable minds might believe from a preponderance of the evidence that damages were actually suffered.

We note our awareness of the evidence that the plaintiffs had been engaged in the floral, nursery and christmas tree business for some time. Nevertheless, with respect to this particular venture, as to the bidding on the trees and the projected enterprise, we do not disagree with the trial court's statement upon which the waiver of the jury by the plaintiffs was predicated. 515 P.2d 445



[See also 22 Am. Jur. 2d, p. 243; Jenkins v Morgan, 123 Utah 480, 260 P. 532; Van Zyverden v. Farrar, 15 Utah 2d 367, 393 P.2d 468, cited as authority in Howarth.]

In the instant action, the damages claimed for loss of rentals is too speculative for the court to have awarded damages. Mrs. Buttars had allegedly owned the two and one-half sets of forms for three years, but out of the three years she had owned the forms had only rented them for approximately three months during the period from April 1981 to July 1981. No evidence was presented showing the market for Plaintiff's business, nor the regularity of business activity, nor expenses or operating costs of such business, or Plaintiff's ability to rent the forms. Plaintiffs did not even offer testimony as to the exact amount received for the rentals but stated that it was " around \$2,500.00". When Plaintiff's Attorney attempted to introduce testimony at trial to establish rentals for the remainder of 1981 based on rentals for the three months from April to July of 1981, Defendants Attorney objected on the grounds that such testimony was too speculative and the objection was sustained by the trial court. (TVI, p 37, 1. 11 - 19 ) (See further argument by the attorneys to the court, TVI, p 37, 1. 20 - p 39, 1. 11) Plaintiffs thereafter did not introduce evidence regarding future rentals.

To project lost profits without credible foundation over a three year period based solely on speculation and conjecture and based on a brief three month history is simply too indefinite and speculative to allow an award of damages. The damages of \$2,500.00 a year for loss of rentals for three years, as awarded by the trial court even after the trial court sustained

Defendant's objections and refused to allow testimony on future rentals, should, therefore, be reversed.

V

PLAINTIFFS OFFERED NO EVIDENCE TO ESTABLISH  
THE VALUE OF THE FORMS REPOSSESSED BY FOR-SHOR  
AT THE TIME OF THE REPOSSESSION AND NO VALUE  
SHOULD BE AWARDED TO PLAINTIFF FOR THE FORMS

Similar in nature to establishing damages for lost profits are the requirements to establish value for damages to property . As stated in Bunnell v Bills, 368 P.2d 597, 13 Utah 2d 83 (1962):

Where a rule of law has been established for the measurement of damages, it must be followed by the finder of fact, and to recover damages, Plaintiff must prove not only that she has suffered a loss, but must also prove the extent and the amount thereof. Furthermore, to warrant a recovery based on the value of the property there must be proof of its value and evidence of such facts as will warrant a finding of value with reasonable certainty.

In that case, Defendant Bills had purchased the Alta Motor Lodge from Ervin Stevens on a Uniform Real Estate Contract and then resold the Alta Motor Lodge to the plaintiff by signing an Earnest Money Receipt and Offer to Purchase. When defendant Bills learned that he would be unable to complete his contract with Stevens, they mutually terminated the Uniform Real Estate Contract. Stevens then resold the motel to another party in contravention of the interest plaintiff claimed in the property. At trial, plaintiff established that her agreement to purchase the motel was for the purchase price of \$175,000.00 and that the subsequent sale to the third party was for \$180,000.00. The

trial court awarded damages of \$5,000.00 for the value of the property of the difference between the two purchase prices. The Supreme Court reversed on the issue of damages stating that the value of the property had not been adequately established and that the purchase agreements were not necessarily definitive or sufficient to establish the value of property.

In the case at bar, the transcript of the trial is entirely void of evidence or testimony to establish the value of the forms repossessed by For Shor. In questioning James Snarr, For Shor's general manager, Plaintiffs attempted to establish a 1984 value of the forms based on a percentage increase from 1982 prices. (See TVII pp. 260-262.) In referring to the third page of Trial Exhibit No. 28, Plaintiff's Attorney asked Mr. Snarr if the 1982 price for forms was shown on the Exhibit under the column heading "New Price." The testimony is as follows (beginning p. 261, 1-20):

Q Let me see it. Ok, would you show where the 1982 price is on that third page? Show it to the court.

A The 1982 price is shown in the column next under new price. Right here.

Q That was 1982. And how much of an increase has there been since 1982 on those same forms?

A Approximately --- today?

Q Yes.

A To the present?

Q uh-huh.

A Somewhere between seven and ten percent.

Q And that went up in January of 1984; is that correct,

A It actually went up in October of '73 [sic]. We

could not receive notification until February of '84.

Q So if you were to give today's prices for that same equipment it would be 7% to 10% higher than is on this other exhibit 26; is that correct?

A On page 3?

O Page 3, Yes.

A Yes.

It should be noted that Defendant objected to the admission of Trial Exhibit No. 28 (which is the original of Exhibit 26) on the basis that Exhibit 28 was prepared in preparation for trial, and in an attempt to settle the action and was not admissible for any purpose. Defendant also objected as to any relevance of Exhibits 26 and 28. (TV II pp. 251-253) The Trial Court accepted the documents under Rule 803 (6) of the Utah Rules of Evidence as a business record, but qualified it with "I can't interpret it, but --- ". (TV II p. 253, l. 11-13).

Defendant is unable to find any other evidence in the record where Plaintiffs offered testimony to establish the value of the forms. Even when questioning Mr. Snarr, Plaintiffs did not ask him to state a value of the forms. The only value ever given for the forms is in Plaintiffs Trial Brief prepared after trial to present certain facts and rules of law of the trial court. At page 7 of Defendant's Trial Brief, (DCR pp. 315-335, specifically page 321), Plaintiff refers to Exhibit 27 and to Exhibit 28. Exhibit 27 is the repossession ticket used by For-Shor to indicate what items had been repossessed and Exhibit 28 is the settlement document prepared by Mr. Snarr. Plaintiffs state in the first full paragraph of that page (DCR P. 321) that Mr. Snarr had inspected the remainder of the forms at Mrs. Henderson's

property Clarkston and late 1983 and had stated that those particular forms had a value of 76% of new. Defendant is unable to locate any testimony to that effect to establish a used value based on a percentage of the price for new forms. Plaintiffs then itemized what forms had been repossessed, increased the price from 1982 price taken from Exhibits 27 and 28 to a 1984 price to establish a total value if the forms had been new and then multiplied that total by 76% to come to a value of \$5,725.35.

Plaintiffs' method of establishing the value of the forms is based merely on the conclusions of Plaintiffs and their attorney and is not established by substantial evidence as required by law. See Highland Construction Co. vs. Union Pacific, supra. At no time was Mr. Snarr asked to establish a value of the forms which had been actually repossessed nor was any other testimony presented to establish the value of the forms that had been repossessed. Furthermore, Exhibits 27 and 28 were not offered by Plaintiff for the purpose of establishing the value of the forms and were not accepted by the court for that purpose. Plaintiffs have merely attempted to conjecturally extract the value of the forms from brief testimony which was not given with the intent to establish the value of the forms except for privileged purposes of settlement and from the documents which were not offered or accepted to establish the value of the forms.

Where there is no substantial evidence upon which reasonable minds could establish a value for damages, or as in the instant action, any evidence at all to establish the value of the

property in question, no damages can be awarded for the value of the equipment as claimed by Plaintiffs. Therefore, the trial court's award of damages for the value of the forms in the amount of \$5,725.35 must be reversed.

## VI

### PLAINTIFFS DID NOT ESTABLISH ANY DAMAGES CAUSED BY ANY ALLEGED TRESPASS ON LAURENA HENDERSONS PROPERTY

Even assuming that Defendant trespassed on Laurena Henderson's property, which Defendant denies, Plaintiffs have offered no evidence to establish damages caused by the trespass. When questioned about the damage to her property caused by Defendants, (TVI pp. 100-101) Laurena Henderson testified that Defendant's employees made indentations with a heavy truck that "mashed the grass down into the soil." She testified that they traveled approximately 90 feet by her measurements, which were made by stepping off the distance, as Defendant's employees allegedly traveled across her lawn. (see lines 8-19, p. 100) When asked again what her damages were, Mrs. Henderson stated that her lawn was "mashed down". (see line 15, p.101) Mrs. Henderson did not state a value for damages claimed by her. In fact, in cross examination, Mrs. Henderson again testified that the damages were "not enough to worry about". (TVI p. 106, l. 18-24)

Without establishing a value for damages caused by the trespass, the trial court could only award nominal damages of \$1.00, even upon a finding that Defendant had trespassed on Mrs. Henderson's property. (See 75 AmJur 2d Tresspass, Section 49;

Haase v. Helgeson, 360 P.2d 339 [Wash. 1961]) (Also see Pehrson v. Saderup, 498 P2d 648, 28 Utah 2d 77 (1972) for measuring trespass damages generally.)

#### CONCLUSION

Plaintiffs' action was without merit. Defendant, For-Shor Company, repossessed only the property that lawfully belonged to it, both under theories of title retention and contract. Plaintiffs' claim of payment under promissory note is invalid because the promissory note was entered into upon Mr. Henderson's own misrepresentation. It would be both unjust and inequitable to allow Mr. Henderson or his grandmother to benefit from his misrepresentation and fraud. Furthermore, the evidence is clear that Mrs. Buttars only purchased the property, which was pledged to First Security Bank. There is no dispute between the parties, that the property at issue in this case was never pledged as collateral to First Security. Consequently, it was not sold to Mrs. Buttars. It is abundantly clear that the parties neither intended, nor lawfully could have transferred the For-Shor cement forms to Mrs. Buttars. Therefore, no award of damages can be assessed for Defendant rightfully taking action to repossess.

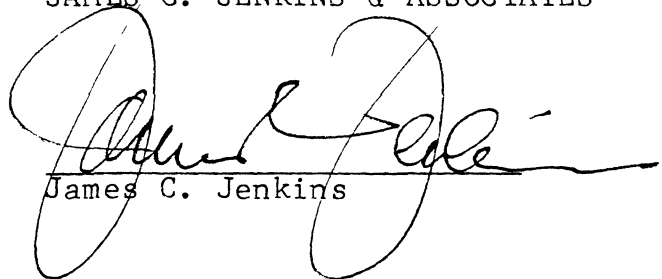
However, even if Plaintiffs had proven wrongful repossession, no evidence supports an award of damages. Plaintiffs have failed to prove with any reasonable degree of certainty that a profit for there rental business was a future reality, let alone that there was any loss of such profit over the three year period from the date of repossession until

judgment. Neither did the Plaintiffs, whose burden it was, prove value of the property which was actually repossessed. Defendant respectfully submits that the Trial Court erred in assessing damages for lost profits and conversion of property. The meaning of such damage cannot be based upon mere speculation.

Finally as to the claims of David Hale and Laurena Henderson, Plaintiff Hale's award of damages is simply unsupported either by the evidence or in law since the same was neither plead nor evidenced. Mrs. Henderson's award of damages for trespass is not supported by any evidence and again suggests the error and apparant bias of the Trial Court in its' decision.

A complete review of the evidence presented at trial suggests only one conclusion: Defendant acted in a normal and reasonable business manner in repossessing property rightfully belonging to it. Plaintiffs' contention remains unsupported. Defendant/Appealants respectfully, therefore, request the Court to set aside the judgment of the Court in its entirety and award costs of trial and appeal to Appellants. Respectfully submitted this 25th day of July, 1985.

JAMES C. JENKINS & ASSOCIATES



James C. Jenkins



## ADDENDUM

Attached hereto for the Court's consideration are copies of the following document and excerpts from the District Court record and transcript:

Memorandum Decision

Findings of Fact and conclusions of Law

Judgment and Decree

Trial Exhibit No. 3 - - Statement, For-Shor Co.

Trial Exhibit No. 4 - - Invoice (with reverse side added)

Trial Exhibit No. 5 - - Credit Memo

Trial Exhibit No. 17 - - Account Agreement

Trial Exhibit No. 27 - - Return Document

Trial Exhibit No. 28 - - List of Forms (original)

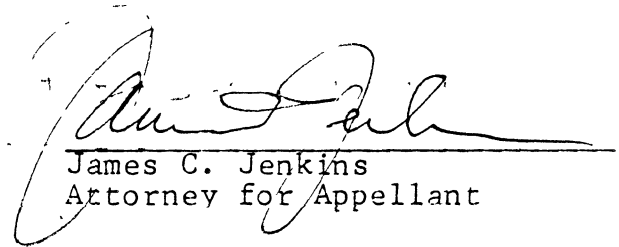
Trial Exhibit No. 37 - - Promissory Note and For-Shor Statements

Page 7 of Plaintiff's Trial Brief TVII pp. 261-262

CERTIFICATE OF SERVICE

I hereby certify that four (4) copies of Appellant's Brief were served on Plaintiff/respondents' Counsel, J. Blaine Zollinger, at 256 North 100 West, Logan, Utah 84321.

DATED this 26 day of July, 1985.



James C. Jenkins  
Attorney for Appellant