

1980

Utah Bank & Trust v. James H. Quinn and James H. Wuinn, Jr. : Reply Brief

Utah Supreme Court

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Edward T. Wells & David K. Robinson; Attorneys for Respondents; Layne B. Forbes; Attorney for Appellant;

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IN THE SUPREME COURT OF THE STATE OF UTAH

UTAH BANK & TRUST,
a Utah corporation,

Plaintiff-Respondent,

vs.

JAMES H. QUINN and
JAMES H. QUINN, JR.,

Case No. 16788

Defendants-Appellants.

REPLY BRIEF

Layne B. Forbes
P. O. Box 331
Bountiful, Utah 84010
Attorney for Respondent

David K. Robinson and
Edward T. Wells of
ROBINSON, GUYON, SUMMERHAYS & BARNE
1220 Continental Bank Building
Salt Lake City, Utah 84101
Attorneys for Appellants

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David K. Robinson and
Edward T. Wells of
ROBINSON, GUYON, SUMMERHAYS & BARNE
1220 Continental Bank Building
Salt Lake City, Utah 84101
Attorneys for Appellants

Layne B. Forbes
P. O. Box 331
Bountiful, Utah 84010
Attorney for Respondent

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
I. STATEMENT OF FACTS	1
II. ARGUMENT	
POINT I. THE MAJORITY RULE OF "NO NOTICE - NO DEFICIENCY" IS THE UTAH RULE	2
POINT II. THE COURT DID NOT PROPERLY INSTRUCT THE JURY	8
POINT III. THERE WAS NOT SUFFICIENT EVIDENCE IN THE CASE TO FIND THE SALE WAS COMMERCIALY REASONABLE	9
POINT IV. THERE WAS NO CONSIDERATION GIVEN TO DR. QUINN FOR HIS INCREASED LIABILITY UNDER THE DECEMBER NOTE	10
CONCLUSION	11

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Cases Cited</u>	
<u>Atlas Thrift Company v. Horne,</u> 104 Ca. Rep. 315; 11 U.C.P. Rep. 417, 426 (1972)	7
<u>Beneficial Financing Company of Blackhawk County</u> <u>v. Reed,</u> 212 N.W.2d 453 (Iowa, 1973)	4
<u>Clark Leasing Corp. v. White Sands Forest Products,</u> <u>Inc.,</u> 535 P.2d 1077 (N.M., 1975)	3, 4, 5, 7, 9, 10
<u>Delay First National Bank & Trust v. Jacobsen,</u> 19 U.C.P. Rep. 994 (Neb., 1976).	6
<u>FMA Financial Corporation v. Pro Printers,</u> 590 P.2d 803 (Utah, 1979).	2, 4, 6, 7, 8, 10, 11
<u>Southern Frozen Foods v. Hill,</u> 129 S.E.2d 420	10, 11
<u>Universal CIT Credit Co. v. Rone,</u> 453 S.W.2d 37 (1970)	4, 5, 7
<u>Zions First National Bank v. Hearst,</u> 570 P.2d 1031 (1977)	6
<u>Treatises Cited</u>	
<u>Leases as Security Agreements and the Affect of a</u> <u>Failure to Notify on a Secured Party's Recovery of</u> <u>a Deficiency Judgment: FMA Financial Corp. v. Pro</u> <u>Printers,</u> 1979 Utah L. Rev. 567.	2
___ Am Jur 2d, Bills and Notes, §227	10
___ Am Jur 2d, Guarantee, §45.	11

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REPLY BRIEF

I. STATEMENT OF FACTS

The Court should note that the statement of facts given in the Respondent's brief is ambiguous and does not correctly state the evidence presented to the Court below. Respondent states on page 3 of its brief "it was mutually decided that the automobiles be sold through local dealers." There is no evidence in the case of any such agreement between any of the parties that the automobiles be sold through local car dealers. In fact, the testimony of Mr. Jay Quinn was that he tried to get the bank to allow the vehicles to be taken out of state where a higher price could have been obtained and the bank refused to do so. (Tr. 216). The Respondent failed to cite any portion of the transcript of the trial wherein such an agreement was made. The statement of counsel that it was mutually decided that the automobiles be sold through local car dealers is a mis-statement of the evidence. The Respondent at page 3 of

its brief states, "Shortly after the December 23, 1977 meeting, the parties undertook to sell the cars and the boat." A more correct statement of the facts would be that it was the understanding that everyone would participate in the sales. However, the bank refused to allow the Defendants to participate in the sale of the cars and, in fact, refused to allow Jay Quinn to take the Ferrari to Arizona where a much higher price could have been obtained than that for which the bank sold it in Utah. (Tr. 216).

II. ARGUMENT

POINT I. THE MAJORITY RULE OF "NO NOTICE - NO DEFICIENCY" IS THE UTAH RULE

Respondent argues in its Point One that the failure to give notice of sale of collateral under Article 9 of the Uniform Commercial Code does not preclude Plaintiff from obtaining a deficiency judgment. The Respondent admits at page 7 of its brief that many jurisdictions hold that a failure to give notice to the debtor of the sale of collateral constitutes an absolute bar to a deficiency. The Respondent, however, fails to note this is the majority position and to include the State of Utah within that list of states. Appellant respectfully submits that FMA Financial Corporation v. Pro Printers, 590 P.2d 803 (Utah, 1979), establishes Utah as one of the states wherein the "no notice - no deficiency" rule has been accepted.

In a Utah Law Review article entitled "Leases as Security Agreements and the Affect of a Failure to Notify on a Secured Party's Recovery of a Deficiency Judgment: FMA Financial Corp. v. Pro Printers," 1979 Utah L. Rev., 567, the author concluded that, based on the cases cited by the Court in reaching its decision in FMA, Utah had adopted the "no notice - no deficiency" rule.

The "no notice - no deficiency" rule is the majority position in the United States at this time. The author further concluded that in the event the Court decides to retreat from the "no notice - no deficiency" rule, that the language of FMA then would compel adoption of the so-called Arkansas Rule. The Arkansas Rule is that if the creditor fails to give notice as required by the Code, he then has to overcome the presumption that the repossessed collateral is worth at least the amount of the actual sale of the collateral or in the alternative, to show in fact what was a fair and reasonable price for the collateral.

The Respondent failed to point out to the Court the significance of Clark Leasing Corporation v. White Sands Forest Products, Inc., 535 P.2d 1077 (N.M., 1975) cited at page 8 of the Respondent's brief. In Clark, the New Mexico Court recognized that the majority of the states accept the rule of "no notice - no deficiency". 535 P.2d at 1081. The Respondent further failed to point out that the position argued for in Point One is basically the minority position. Even if the Court were to adopt the minority position set forth in Respondent's cases at pages 7 and 8 of the brief, the Court would be compelled to reverse the trial court because the Plaintiff did not meet its burden of proof under the so-called "Arkansas Rule". If this Court adopted the Arkansas Rule as the law of the State of Utah, then the Appellant would be entitled to reversal or a new trial on the issue of whether or not the sale was commercially reasonable, and whether or not the Defendant was damaged by the failure of the bank to give notice. The Arkansas Rule as set forth in the cases cited by Respondent at Pages 7 and 8 of its brief, notably Universal

CIT Credit Company v. Rone, 453 S.W.2d 37, (1970), Beneficial Financing Company of Blackhawk County v. Reed, 212 N.W.2d 454, (Iowa, 1973), states that for the creditor to obtain any deficiency at all, it must overcome the presumption that the value of the collateral was the same as the amount owed on the note. All of the cases cited by Respondent at pages 7 and 8 of its brief appear to adopt the Arkansas Rule. Although, as pointed out in Clark Leasing Corp. v. White Sands Forest Products, Inc., supra, this is the minority view, the Respondent still urges that it should be adopted by this Court.

The trial court did not try the case on the Arkansas theory. The jury was not instructed with regard to the burden of proof under the Arkansas Rule. Under the Arkansas Rule, the bank must prove that the property was not valued in an amount equal to the amount owed on the note. At trial, the Court submitted this case to the jury on the presumption that the Defendant had the burden of showing that it had been damaged by the failure of the bank to give notice and/or to conduct the sale in a commercially reasonable manner. If this Court reverses the FMA Financial rule of "no notice - no deficiency", and adopts the Arkansas Rule as urged by the Respondent, the case must be reversed and sent back to the trial court for a new trial because the Arkansas Rule requires the secured party to show, by a preponderance of the evidence, the reasonable value of the collateral. There was insufficient evidence at trial for Plaintiff to meet that burden. Under the Arkansas Rule, there is a rebuttable presumption that the collateral is equal to the value of the amount owed on the note.

See e.g., Universal CIT Credit Co. v. Rone, 453 S.W.2d 37 (Ark., 1970).

The Arkansas Court stated:

Whenever the value of the collateral is an issue in an action to recover a deficiency, there is a presumption that it was worth at least the amount of the debt and the secured party has the burden of proving the amount that should have been obtained through a sale conducted according to law. Id. at 39.

The Court then goes on to state that the amount received at a sale where notice of the sale is not given to the debtor is no evidence of the value of the collateral. The Court reasoned:

It is only where the sale is conducted according to the requirements of the Code that the amount received or bid at a sale of collateral is evidence of its true value in an action to recover a deficiency. Id. at 39-40.

As stated by the Court in Clark Leasing Corp. v. White Sands Forest Products, Inc., supra:

There is a presumption that the value of the repossessed collateral at resale is equal to the outstanding debt. Where the sale is conducted in accordance with Section 9-504(3), the sum received at sale is evidence of the market value. But if the sale is not conducted according to the Code (such as when there is a failure to give notice of the sale to the debtor,) the amount received is not evidence of the market value of the collateral. The secured party has the burden of proving the market value by other evidence. (Emphasis added) 535 P.2d at 1082.

A priori, if the Court here rejects the majority rule of "no notice - no

deficiency", and adopts the minority Arkansas Rule, the case should be retried. At the trial, the jury was not instructed that the Plaintiff had the burden of showing that the collateral was worth less than the amount owed if it claimed a deficiency. Also, the jury was not instructed regarding who had the burden of showing the reasonable value of the collateral.

Respondent places a great deal of emphasis upon the case of Zions First National Bank v. Hearst, 570 P.2d 1031 (1977). However, this Court in FMA Financial, supra, wisely rejected the dicta of Zions First National Bank v. Hearst, relied upon by Respondent.

The real question in this case turns on the Court's holding in FMA Financial, supra. In FMA Financial, supra, as rightly pointed out by the Court, the creditor had completely failed to give the debtor notice of proposed sale of collateral. The Court stated that due to the fact that the policy purpose of notice was to allow the debtor to protect its interest and to participate in causing the collateral to be sold for the best price available, and that the denial by the creditor of that right to the Defendant should preclude the creditor from seeking a deficiency. The Respondent claims that this position is punitive in nature and repugnant to the spirit of the Code citing certain sections therefrom. However, the Court should note that the apparent majority of jurisdictions which have ruled on the issue have adopted the "no notice - no deficiency" rule. The Appellant urges that the reasoning of the Court in Delay First National Bank and Trust v. Jacobsen, 19 U.C.P. Reporter 994 (Neb., 1976), is the correct way to approach the problem. In Delay, the Court noted that no notice was given the ^{debtor}~~creditor~~ and allowed no deficiency. However, as

pointed out in Appellant's original brief the policy reason for the "no notice - no deficiency" rule is obvious. Section 1-103 of the Uniform Commercial Code brings traditional common law principles of equity, justice and fair play into code practice. Such policy would suggest that a creditor should not be allowed a deficiency judgment when he breaks the law. In the instant case, not only did the bank fail to give legal notice, the bank also failed to follow the notice requirement in the boilerplate language of the bank's own documents. (See e.g. Atlas Thrift Company v. Horne, 104 Ca. Rep. 315, 11 UCP Rep. 417, 426 (1972)). If the Commercial Code adopts common law principles of fair play and equity, it should preclude a creditor who has broken the law by failing to give the notices required under Article 9 of the Commercial Code from recovering a deficiency. Otherwise, the creditor bank could sell the property at a price substantially below what it was valued as collateral, and what the debtor claimed it was worth, and then recover a deficiency judgment from the debtor. See e.g. Universal CIT Credit Co. v. Rone, supra. The reasoning of the majority of Courts that compliance with the Uniform Commercial Code for notification as to the disposition of collateral is a condition precedent to a secured creditor's right to recover a deficiency, is fair and reasonable and was properly adopted as the law of the State of Utah in FMA Financial Corp. v. Pro Printers, supra. As pointed out in the footnote at page 12 of Appellant's original brief, the majority of decisions of jurisdictions appear to have adopted the "no notice - no deficiency" rule. In fact, one of the cases cited by Defendant Clark Leasing Corp. v. White Sands Forest Products, Inc., supra, notes that even though New Mexico accepts the Arkansas Rule, the "no notice - no deficiency" rule does appear to be the majority rule in the United States. The Appellant respectfully submits that "no notice - no deficiency" is a reasonable rule. It is

the majority rule. As enunciated in FMA Financial, this Court should now forcefully hold that when a bank fails to give notice of the sale of collateral as required by the Code, the bank will not be allowed to recover any deficiency judgment.

POINT II. THE COURT DID NOT
PROPERLY INSTRUCT THE JURY

In Point Three of the Respondent's argument, the Respondent urges that the Court did not err in failing to give Defendant's requested Instruction No. 7. On the contrary, the trial court did err.

If this Court continues to follow the majority rule that a party cannot recover a deficiency judgment if it does not give notice of the sale, then of course, Point Three relating to whether or not a jury was properly instructed becomes moot. If this Court reverses the "no notice - no deficiency" rule and, instead, adopts the "Arkansas Rule," then the instructions given by the Court become crucial to the issues in this case. Since the Plaintiff bank's burden under the Arkansas Rule is to show, in fact, that the sale was commercially reasonable and that the price obtained was, in fact, the reasonable value of the collateral, the elements which should be used to decide whether or not the sale was commercially reasonable have to be articulated to the jury.

The instructions set forth in the Respondent's brief, to-wit, Instructions No. 15, 16 and 17, fail to instruct the jury in the elements that it can legally and lawfully consider relating to the issue of the commercial reasonableness of the sale and value of the collateral. First, they fail to state that Plaintiff-Appellee has the burden to establish the value of the

collateral by evidence independent of the sale price. Also, as pointed out in the Appellant's original brief at pages 13 through 19, all of the elements set forth in the Defendant's Requested Instruction No. 7 are elements that should be properly considered by the jury in making a determination as to whether or not the sale was commercially reasonable. Without having given that instruction to the jury, the Defendant was prejudiced. Without this instruction, there is no basis other than speculation on which to determine whether or not the sale was reasonable. Without instruction on the elements of a commercially reasonable sale, the jury cannot decide if the sale was reasonable. There was also, as stated, no instruction on Plaintiff's burden to prove the value of the merchandise and to rebut the presumption that the repossessed property's value equalled the amount of the note.

POINT III. THERE WAS NOT SUFFICIENT EVIDENCE
IN THE CASE TO FIND THE SALE WAS COMMERCIALY REASONABLE

With regard to the Respondent's Point Four, Respondent argues that there is sufficient evidence that the collateral was disposed of in a commercially reasonable manner. It is clear that if the Court adopts the Arkansas Rule, there was no evidence in the Plaintiff's case which would rebut the presumption that the vehicles were worth the amount owed on the note. The only evidence introduced by the Plaintiff as to the value of the vehicles was to show, in fact, the price at which they were sold. However, as pointed out by the New Mexico Court in Clark Leasing Corp. v. White Sands Forest Products, Inc. supra, "if the sale is not conducted according to the Code, the amount received is not evidence of the market value of the collateral. The secured party has

the burden of proving the market value by other evidence." Id. at 1082. Clark Leasing coupled with the presumption that the value of the repossessed collateral at resale is equal to the value of the outstanding debt compels the conclusion that there is no way that the bank met its burden of proving that it was entitled to any deficiency judgment. Therefore, regardless of whether this Court follows the "no notice - no deficiency" rule of FMA Financial, supra, or adopts the so-called "Arkansas Rule", the trial court must be reversed. The bank failed at trial to meet its burden of showing that it was entitled to a deficiency under either rule.

Therefore, the Appellant respectfully submits that the judgment awarded to the Plaintiff in the trial court cannot be allowed to stand.

POINT IV. THERE WAS NO CONSIDERATION GIVEN TO DR. QUINN
FOR HIS INCREASED LIABILITY UNDER THE DECEMBER NOTE.

In Point Five of the Respondent's brief, the Respondent asserts that there was legal consideration given to Dr. Quinn for execution of the new note. Such contention is wrong. He has given no new consideration. The Am Jur section cited by the Respondent and the case of Southern Frozen Foods v. Hill, 129 S.E.2d 420, set forth as Respondent's legal basis for the argument that there was adequate consideration, simply do not apply to the situation in this case. Section 227 of Am Jur on Bills and Notes, applies only to a situation where a new note is given by a third party to cover a pre-existing debt. It is clear that in such a situation there is adequate consideration for the giving of the new note. However, in this case, Dr. Quinn had a pre-existing debt to the bank only in the amount of \$180,000.00 and that pursuant to

a continuing guarantee which he had given to the bank. At the time the new note was signed in December of 1977, the Plaintiff bank converted Dr. Quinn's \$180,000.00 continuing guarantee into a note for \$198,000.00. The additional \$18,000 had been advanced to Jay Quinn, Jr. prior to the time the note was signed. Dr. Quinn received no benefit therefrom. The Plaintiff bank gave no consideration to Dr. Quinn for the additional \$18,000 on the second note. In Southern Frozen Foods, supra, the Court relied on the fact that the makers of the note were ^{principals}~~principles~~ in a corporation and that the corporation had received the benefit. Therefore, the Court held that they were liable on the note. It is clear that a mere naked promise, absent some consideration, to pay an existing debt of another is not sufficient to create consideration for a note signed as evidence of said promise. Am Jur 2d, Guarantee, Section 45. In the instant case, Dr. Quinn was induced to sign a note in December of 1977 wherein he became responsible for the pre-existing debt of his son and where he received no benefit to induce him to become obligated for the additional \$18,000. The bank is precluded from enforcing its note as to any sum over and above the \$180,000.

CONCLUSION

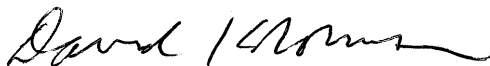
The Appellants respectfully submit to the Court that FMA Financial, supra, places this Court with the majority rule of "no notice - no deficiency." The judgment of the trial court should, therefore, be reversed.

If, however, this Court modifies FMA and adopts the alternative position known as the "Arkansas Rule," then this Court is obligated to reverse the judgment or in the alternative, order a new trial because of the failure

of the Court below to properly instruct the jury so as to place the burden of proof on the Plaintiff to overcome the presumption that the collateral was worth the amount of the note. The case should, under the "Arkansas Rule", be reversed based upon the failure of the Plaintiff bank at the trial to produce any independent evidence to rebut the presumption that the collateral was, in fact, worth the amount itemized in the bank's Security Agreement documents describing the motor vehicles.

The Court should also hold there was no consideration for the \$198,000 note and \$18,000 of said note for lack of consideration.

Respectfully submitted this 19 day of June, 1980.



David K. Robinson
Attorney for Defendants-Appellants
1220 Continental Bank Building
Salt Lake City, Utah 84101



Edward T. Wells
Attorney for Defendants-Appellants
1220 Continental Bank Building
Salt Lake City, Utah 84101

CERTIFICATE OF SERVICE

I hereby certify that I handed to TRS Runner Service 10 originals to be delivered to the Supreme Court, State Capitol Building, Salt Lake City, Utah, and 2 copies of the same to the Attorneys for Plaintiff-Respondent, Layne B. Forbes were mailed to P. O. Box 331, Bountiful, Utah 84010, on the _____ day of June, 1980, postage prepaid.