

ROSEBUD SIOUX SUPREME COURT
ROSEBUD SIOUX RESERVATION
ROSEBUD, SOUTH DAKOTA

Beck Motors, Inc.)
Plaintiff)
vs.)
Howard John Fuller III)
Defendant)

CIV 95-160

Memorandum Opinion

And Order

Defendant Howard John Fuller III filed his "AMENDMENT NOTICE OF APPEAL OF DOCKET #CIV 95-160 JUDGMENT AND ORDER FOR REPOSSESSION."

Defendant simultaneously files his Affidavit Of Inability To Pay Bond Docket # CIV 95-160.

The Court shall liberally construe Defendant's Affidavit Of Inability to Pay Bond as a request for this Court to waive the required bond.

The posting of bond in civil appeals is governed by Rule 2 Notice of Appeal and Bond--Rules of Procedure, Rosebud Sioux Tribal Court of Appeals. Rule 2 provides as follows:

"Upon the filing of the Notice of Appeal, the Appellant shall also be required to post an Appellate bond. In civil matters, bond shall be set at \$50.00, plus the Appellant shall be required to file a statement of financial responsibility equal to the amount of the judgment in Tribal Court. If the Appellant is unable to file the required financial statement, they shall be required to post cash or other sureties equal to the amount of the Tribal Court judgment."

Paragraph 2 of Rule 2 governing appeals in criminal cases provides that "appellants who have proceeded in the lower court In Forma Paueris, shall be allowed to proceed In Forma Pauperis through the appellate proceedings upon application." However, Rule 2 does not provide In Forma Pauperis proceedings in civil cases.

The distinction between civil and criminal appellate procedures is obviously based on the nature of rights involved. An indigent person convicted of a crime should be and is afforded rights of appeal despite his inability to post a bond. Civil cases involve monetary judgment awards which result in a debt owed to the prevailing Plaintiff in this case. The purpose of the bond is to ensure that the appealing party will pay the judgment should his appeal be without merit. "In a technical sense a bond is an obligation in writing, generally under seal, binding the obligor to pay a sum of money to the obligee . . ."--11 C,J,S, 398.

Waiver of the Rule 2 bond requirement would at least require the consent of the Plaintiff in this case, and in the absence of a provision allowing the Defendant to file a civil appeal In Forma Pauperis, it is our decision to deny the Defendant's request to waive the required bond. The clerk is instructed not to proceed with Defendant's appeal until he has complied with Rule 2.

Done this 24 day of June, 1996

BY THE COURT:

Patrick Lee
Associate Justice

Diana Zephi
Associate Justice

R. R. Evans
Associate Justice

ATTEST:

Stephanette Bird
Clerk of Courts

(SEAL)

**Rosebud Sioux Tribal Court
Rosebud Sioux Tribe
Rosebud, South Dakota**

Beck Motors Inc.,)
Plaintiff)
)
v.)
)
Howard John Fuller III)
Defendant)

AMENDMENT
NOTICE OF APPEAL OF
DOCKET # CIV95-160
JUDGMENT AND ORDER
FOR REPOSSESSION

-
1. Comes now Howard John Fuller III, Post Office Box 214, Mission, South Dakota 57555 , files this Notice of Appeal concerning Docket Number CIV95-160, JUDGMENT AND ORDER, issued by ASSOCIATE JUDGE, VIRGIL HAUFF on the 2nd day of April 1996.
 2. Howard John Fuller III hereby submits, a Certificate of Service showing that the following parties to the Tribal Court action have been sent a NOTICE OF APPEAL concerning Docket Number CIV95-160.

BECK MOTORS INC.
Post Office Box 729
Pierre, South Dakota 57501

Theresa Maul
Attorney for Plaintiff
837 East Fifth Street
Winner, South Dakota 57580

3. Associate Judge Virgil Hauff erred by his ruling concerning Theresa M. Maul, when he allowed her to practice Law in the Rosebud Sioux Tribal Court on matters pertaining to her private practice.

A. In accordance with Theresa M. Maul's contract, which Judge Hauff used in court when he made his ruling allowing her to conduct private practice in Tribal Court, Judge Hauff failed to consider the part of the contract that say's "(t)he prosecutor shall conformer conduct to the code of Judicial Conduct as adopted by the American Bar Association." The code of Judicial Conduct in South Dakota which is the same as the American bar Association, at appendix cc Chapter 16-2 of SDCL, says "(a) judge shall not practice law." While clearly a prosecutor is not a judge, the contract which she agreed to as is evidence from her signature means that she has to follow the Code of Judicial Conduct, and she can not practice law in the Rosebud Sioux Tribal Court other than that as a prosecutor.

B. Associate Judge Virgil Hauff also has that same clause in his contract with the Rosebud Sioux Tribe, Therefore he should of requested an outside judge to hear this issue. By Judge Hauff hearing this issue and allowing Theresa M. Maul to conduct Private Practice in Tribal; Court, his ruling would effect him also because it now allows Judge Hauff the right to conduct private practice in Tribal Court.

4. On April 23, 1996 defendant was informed that Associate Judge Virgil Hauff had an interest in this case, due to the fact that his vehicle was involved in a motor vehicle accident with

the said vehicle identified in Docket Number CIV95-106, which is Howard John Fuller's vehicle. Because of Judge Hauff's interest in this matter he should not have heard this case.

5. Title 13 The Rosebud Sioux Tribal Commercial Code:

1. Judge Hauff findings are in conflict with the courts ruling on the 11th day of August 1995, in which the Tribal Court issued an Order, releasing the said vehicle and also that Defendant did not sign a self help clause in his contract with Plaintiff.

6. Waisner v Jones

107 NM. 260, 755, P. 2d, 598
6 U.C.C. Rep. 2d, 1374 (1988)

1. In Waisner v Jones the court held that any time a Law Enforcement Officer is accompanies a reposessor the repossession is wrong.

7. Jackson v Richards 5 & 10, Inc.,
289 Pa.Super. 445 A. 2d 888 (1981) (dicta) and

First & Farmers Banks of Somerset v Henderson,
763 S.W. 2d 137 (Ky. Ct. App. 1988)
7U.C.C. Rep. 2d 1305

1. Found that use of Law Enforcement Officer not constructive but Breach of Peace.

8. Soldal v Cook County
1992 WL 357311 (US. ILL.)

1. The United States Supreme Court found that the seizure was a violation of the fourth amendment, and in citing United States versus Jacobsen the court reiterated that a seizure of property occurs when "there is some meaningful interference within the individual possessory interest in the property."

9. eg Blades v. White Motor Credit Corp.
90, Or. App. 125, 750 P 2d, 1198 (1988)

1. (Upholding a jury verdict for conversion of truck for \$18,239 in compensory damages and \$18,000 in punitive damages, even through purchaser was late on payments and there was evidence collateral might have been abandoned.)

10. eg Lane v. John Deer Co.
767 S.W. 2d 138, 8 U.C.C. Rep 2d 609 (Tenn. 1989)

1. (Upholding Jury Verdict of \$45,000 against creditor when debtor was admitingly in default on 6 of 12 contracts.

11. Donald Leader Charger v. Mary Leader Charger (Nandeto)
Rosebud Sioux Tribal Court, D 91-01

1. In Donald Leader Charger v. Mary Leader Charger (Nandeto), D 91-01, the court in its finding of facts, number 17, and in its conclusion, cited Res Judicata, in which a complaint once acted upon in court and found to lack evidence in the

allegation and the court has already made that determination, the case can not be tried again at a later date.

12. Owens v. Walt Johnson Lincoln Mercury Inc.
574, P 2d, at 644 Supra., note 4

1. The case points out that the creditors obligation is an affirmative one. In this case the creditor argued that the disability insurance would not have covered all the delinquent payments. There, too, the court said that the ultimate eligibility for benefits is not the operative fact. The implicit agreement is that the creditor will first look to the insurance if it is aware of a possible claim.

13. Carter v. U.S. National Bank in Oregon
768, P 2d, 930, 932, (Or. App. 1989), (citing Owens v. Walt Johnson Lincoln Mercury Inc., 574, P 2d, 642 (Or. 1978)

1. The court found that U.C.C. 9-503 provides in part that "Unless otherwise agreed a secured party has an default the right to take possession of collateral." The courts reasoning is that the sale of insurance constituted an agreement that the creditors right to repossess is subordinate to collection of unpaid installments from the insurance, "and by implication subordinated also to a fair opportunity to establish eligibility under that coverage.

In Carter v. U.S. National Bank in Oregon, the consumer had not filed a claim (because she did not get claim forms until after repossession.) but the court said that it did not matter whether she could have collected or not; the repossession was wrongful "If the seller or its assignee hauled away her automobile before attempting to ascertain whether she was entitled to have them look to the insurer for payment."

These cases hold that U.C.C. 9-503 imposes a burden on the creditor who is "aware of the insurance provisions in the contract. Creditors, including assignees almost universally be aware of the existence of insurance on a contract, because of the conspicuous disclosures required by Truth in Lending in order to exclude credit insurance premiums from the TIC finance charge," (15 USC 1605 (d); Reg, Z,12 CFR 226.4 (d).

14. 16 CFR 433

1. In accordance with 16 CFR 433, the seller is required to include in the contract, **IN 10 BOLD FACE TYPE, IN CAPITAL LETTERS, A NOTICE STATING THAT THE HOLDER OF THE CONTRACT IS SUBJECT TO CLAIMS AND DEFENSES THAT THE DEBTOR COULD ASSERT AGAINST THE SELLER.**

If the seller assigns the sale's agreement without including the F.T.C. notice, the assignee is not the holder in due course and should not be insulated from the consumers claims against the seller. UCC protects assignees from the buyer's claim only where the assignee takes the instrument "in Good Faith", in accordance with UCC 3-302 (b) An assignee accepting an instrument that on its face violates the F.T.C. rules does not take the instrument in good faith.

Mr. Fuller also rely's on the following:

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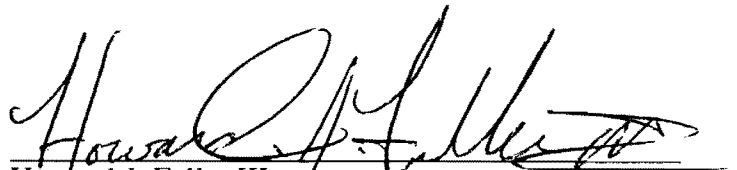
UCC 3-302 (b)
F.T.C. 433.2
UCC 2-209(5)
UCC 9-503

15. When Judge Hauff issued the release of the vehicle on April 2 1996, with his Judgment and Order, and failed to give notice to Mr. Fuller until after the vehicle was taken by Beck Motors, and before for 30 days expired he violated RULE 62, section (a). which states " Except as ordered by the court for good cause shown, no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of 30 days after its entry unless ordered by the court."

16. Judge Hauff failed to respond to Mr. Fuller Motion to Strike. Beck Motors through their Attorney filed a Legal Brief on December 12 1995, one day after it was ordered by the court. Mr. Fuller through his Attorney filed a motion to strike and this was never addressed.

17. Mr. Fuller is requesting that the Order and Judgment by Judge Hauff issued on April 02 1996, be vacated and reversed, or the case be remanded for a new hearing by a different Judge.

Dated this 2nd day of May 1996.


Howard J. Fuller III, pro se

