DA 18-0421

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 80

CHARLENE HUTZENBILER,

Plaintiff and Appellant,

v.

RJC INVESTMENT, INC.,

Defendant and Appellee.

APPEAL FROM: District Court of the Thirteenth Judicial District,
In and For the County of Yellowstone, Cause No. DV-17-1933
Honorable Gregory R. Todd, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

D. Michael Eakin, Eakin, Berry & Grygiel, PLLC, Billings, Montana

For Appellee:

Christopher T. Sweeney, Peter M. Damrow, Moulton Bellingham PC, Billings, Montana

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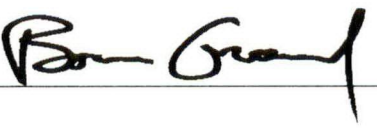

Justice Beth Baker delivered the Opinion of the Court.

¶1 Charlene Hutzenbiler appeals an order of the Thirteenth Judicial District Court, Yellowstone County, granting RJC Investment, Inc. ("RJC") summary judgment on Hutzenbiler's claim to an accounting and recovery of surplus proceeds on the resale of her mobile home after she returned it to RJC. We restate the dispositive issues as follows:

> *1. Did the Release between Hutzenbiler and RJC terminate application of the Uniform Commercial Code's requirement for an accounting and surplus after RJC sold the collateral?*
>
> *2. Did the District Court err in determining that the Release constituted an acceptance of the collateral in full satisfaction of Hutzenbiler's secured obligation?*
>
> *3. Is RJC entitled to summary judgment on other statutory or equitable grounds?*

We reverse the District Court's summary judgment order and remand for further proceedings.

PROCEDURAL AND FACTUAL BACKGROUND

¶2 Hutzenbiler entered into an Installment Sale Contract and Security Agreement (the "Contract") with Cherry Creek Development, Inc. ("Cherry Creek") to purchase a mobile home in March 2010. The purchase price of the mobile home was $47,500. Cherry Creek retained a security interest in the mobile home to secure Hutzenbiler's payment obligations. Hutzenbiler paid $3,800 down and agreed to pay $483 per month for fifteen years to pay off the remaining $43,700 balance, with payments due on the 19th of each month. The Contract provided that a late fee would be charged for any payment that was five days past the due date. Cherry Creek assigned the Contract to its parent company, RJC.

¶3 Hutzenbiler acknowledges that she made some of her payments late but disputes that she "missed" payments or was in default. On December 10, 2015, Hutzenbiler vacated the mobile home and allowed RJC to take possession of it. Hutzenbiler signed a Full Release of Contract (the "Release"), under which she relinquished all rights to the mobile home. The Release reads in its entirety as follows:

> I/We **Charlene L. Hutzenbiler** herby [sic] release all rights to the manufactured home located at 8 Lapin St. N, Billings, MT 59105 described by serial number **HY12485** am [sic] releasing myself and removing my name off of the contract currently in place with RJC Investment, Inc. and Cherry Creek Development, Inc. I am fully aware that by signing this I am completely removing my rights to all aspects of the home and I will not be entitled to any rights of this home or refund of all money applied to the home including but not limited to the down payment, and all payments made on the home and the lot up to this day.

(Emphasis in original). The Release was executed by Hutzenbiler and by Roy Clause, as President of Cherry Creek and RJC. When the Release was executed, Hutzenbiler owed $34,499.01 under the Contract.

¶4 RJC resold the mobile home in February 2016, without notice to Hutzenbiler, for $45,500. Hutzenbiler's counsel requested an accounting of the sale from RJC, but RJC failed to provide one. RJC did not refund any surplus to Hutzenbiler and claims none was owed. Hutzenbiler sued RJC for failing to provide for an accounting of the results of the resale of the mobile home pursuant to § 30-9A-616(2)(a)(ii), MCA; for failing to pay her the surplus proceeds of the mobile home's resale pursuant to § 30-9A-615(4)(a), MCA; and alleging that the trial court should apply all her payments to the principal, providing

for a larger surplus, because RJC failed to comply with the Retail Installment Sales Act (RISA), Title 31, chapter 1, part 2, MCA.

¶5 RJC moved for summary judgment, asserting that the Release terminated the underlying Contract and any further application of Uniform Commercial Code ("U.C.C.") Article 9.[1] RJC argued that even if Article 9 still applied, the parties' execution of the Release constituted an acceptance of the mobile home in full satisfaction of Hutzenbiler's obligations. RJC argued in the alternative that, because RJC was unaware that Hutzenbiler remained a debtor, it could not remain liable under the U.C.C. RJC alternatively argued that Hutzenbiler was equitably estopped from pursuing her claims because she made false representations that she would not pursue her rights under the U.C.C. when she signed the Release.

¶6 The District Court granted RJC's motion for summary judgment, holding that Hutzenbiler did not state a claim upon which relief could be granted under any reading of Montana law. The court reasoned that "[t]his identical issue was previously heard . . . in *Kapor v. RJC Investment, Inc.*," Thirteenth Judicial District Cause No. DV 17-0311, and concurred with the district court's opinion and order in that case.[2] The District Court did not address RJC's other alternative arguments.

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[1] U.C.C. Article 9 is codified in Title 30, chapter 9A, MCA.

[2] This Court reversed that district court order in *Kapor v. RJC Investment, Inc.*, 2019 MT 41, 394 Mont. 311, 434 P.3d 869.

STANDARD OF REVIEW

¶7 We review de novo a district court's grant or denial of summary judgment, applying the criteria of M. R. Civ. P. 56. *Yorlum Props., Ltd. v. Lincoln County*, 2013 MT 298, ¶ 12, 372 Mont. 159, 311 P.3d 748. Summary judgment "should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." M. R. Civ. P. 56(c)(3). We view the evidence in the light most favorable to the party opposing summary judgment, and we draw reasonable inferences in favor of the party opposing summary judgment. *Maier v. Wilson*, 2017 MT 316, ¶ 15, 390 Mont. 43, 409 P.3d 878. Where the material facts are undisputed, we "identify the applicable law, apply it to the uncontroverted facts, and determine who prevails." *Yorlum Props., Ltd.*, ¶ 12. The determination whether a party is entitled to judgment on the facts is a conclusion of law, which we review for correctness. *Yorlum Props., Ltd.*, ¶ 12.

DISCUSSION

¶8 *1. Did the Release between Hutzenbiler and RJC terminate application of the Uniform Commercial Code's requirement for an accounting and surplus after RJC sold the collateral?*

¶9 The District Court held that Article 9 did not apply after the Release was executed because it severed all security interests created under the original contract. Because the U.C.C. no longer applied, the District Court determined that Hutzenbiler had no right to any surplus from the repossession sale. Hutzenbiler argues that Article 9 imposed duties on RJC that survive the discharge of the security interest, including the duty to account for

the proceeds and expenses of the sale and the duty to pay her the alleged surplus. The parties disputed facts concerning Hutzenbiler's payments on the contract. Because it addressed the issues the parties presented and concluded that Article 9 no longer applied after the Release was executed, the District Court did not determine whether Hutzenbiler was in default or analyze her claims further.

¶10 *Kapor* involved similar facts and a virtually identical release to the one Hutzenbiler signed. In *Kapor*, the trial court granted RJC's motion for summary judgment after it determined that Article 9 no longer applied once Kapor executed the release, and even if Article 9 applied, the release constituted an acceptance of the collateral in full satisfaction of the secured obligation. We held, "Except as allowed under other U.C.C. provisions, [a party's] discharge or release [of obligations under a secured transaction for the sale of a mobile home] cannot [] waive or vary [the creditor's] duty to account for or [the debtor's] right to receive any surplus proceeds from the resale of the mobile home." *Kapor*, ¶ 13. Sections 30-9A-608(1)(d) and -615(4)(a), MCA, provide that a "secured party shall account to and pay a debtor for any surplus" from proceeds of the sale of collateral. Section 30-9A-602(5), MCA, expressly forbids a debtor from waiving protections the U.C.C. provides for payment of surplus proceeds of collateral.

¶11 Pursuant to § 30-9A-616(2), MCA, when the debtor is entitled to a surplus or a consumer is liable for a deficiency, a creditor must provide a debtor with an explanation of how the proceeds obtained from the sale of collateral were applied to the debtor's account. In every consumer-goods transaction, the debtor is entitled to know the amount of a surplus

or deficiency and the basis upon which it was calculated. Section 60-9A-616, MCA, cmt. 2. Section 30-9A-210(2)(a), MCA, also provides that a secured party is required to provide an accounting explanation within 14 days of receipt of request. Section 30-9A-602(2) and -602(9), MCA, expressly forbid either party from waiving the protections the U.C.C. provides for the accounting explanation.

¶12 We held in *Kapor* that "[t]he Release did not, by its express terms, lift the parties' relationship from that of debtor and creditor under U.C.C. Article 9 or render obsolete the protections afforded a debtor under §§ 30-9A-608(1)(d) and -615(4)(a), MCA." *Kapor*, ¶ 14. "Article 9 may still require the creditor to account for a surplus realized from the collection of an account or from the disposition of the collateral." *Kapor*, ¶ 14 (internal citation and quotations omitted).

¶13 The Release that Hutzenbiler executed is substantively identical to the release that Kapor executed. The Release cannot waive or vary Hutzenbiler's right to an accounting or to receive surplus proceeds, if any, from resale of the mobile home. The Release also did not terminate the application of the U.C.C. altogether. The parties were free to discharge their obligations to one another, but that discharge could not waive the protections provided in the U.C.C. *Kapor*, ¶ 13. *Kapor* is controlling.

¶14 The statutory requirements are triggered when the debtor defaults. *See* § 30-9A-601, MCA (explaining that "this part" governs the secured party's rights after default). That question remains to be decided here. Despite the Dissent's invitation, we decline to conduct an independent review of the summary judgment record to decide *sua*

sponte whether Hutzenbiler was in default. That issue was not litigated by the parties, developed in the record, decided by the District Court, or briefed on appeal. *See Pilgeram v. GreenPoint Mortg. Funding, Inc.*, 2013 MT 354, ¶¶ 20-21, 373 Mont. 1, 313 P.3d 839 (explaining that we do not consider new arguments for the first time on appeal because it would be fundamentally unfair to the parties).

¶15 The record indicates that the parties disputed whether Hutzenbiler had defaulted on her obligations, but neither party made an argument regarding the effect of any default or lack thereof. Clause stated in his affidavit that, "From 2013 ***through 2015***, Hutzenbiler repeatedly failed to meet her obligations under the Contract, and failed to make her monthly payments on numerous occasions." (Emphasis added.) Hutzenbiler asserted in her summary judgment response that "[t]here are disputed facts concerning the Plaintiff's payments on the contract," and that she had not "missed" payments as averred by Clause but had made all of her payments within the "statutory" grace period. It seems odd, indeed, that Hutzenbiler would maintain she never defaulted when that well could defeat her U.C.C. arguments. Also odd, if in fact supported in the existing record, is that RJC has not argued Hutzenbiler's lack of default to refute her claims. We simply take the case in the procedural posture presented and will not speculate on the arguments, if any, the parties may have regarding Hutzenbiler's default or its effect on the statutory requirements. The District Court erred when it granted RJC summary judgment on the ground that the U.C.C. no longer applied after Hutzenbiler signed the Release.

¶16 *2. Did the District Court err in determining that the Release constituted an acceptance of the collateral in full satisfaction of Hutzenbiler's secured obligation?*

¶17 The District Court alternatively held that even if Article 9 does apply, the Release constituted full satisfaction of the parties' respective obligations under the contract in accordance with § 30-9A-620(1), MCA. Hutzenbiler argues that the Release did not satisfy the requirements of strict foreclosure because the Release did not contain any language releasing the claims of RJC. Hutzenbiler adds that the Release was signed before she was in default, and strict foreclosure therefore is not permitted. RJC responds that the undisputed facts establish strict foreclosure in compliance with the statute.

¶18 Addressing the same arguments on identical release language, we held in *Kapor*: "[T]here must be mutual agreement between the parties; the statute does not allow a creditor to obtain a debtor's relinquishment of rights without accepting the collateral in satisfaction of the debt and waiving its right to pursue a deficiency." *Kapor*, ¶ 24. "Although explicit language may not be required, the document must indicate at least that [the creditor] was giving up its right to seek a deficiency from [the debtor] or was accepting the collateral in full satisfaction of the obligation." *Kapor*, ¶ 27.

¶19 *Kapor* requires a like conclusion in this case. Whether Hutzenbiler was or was not in default, the plain language of the Release is insufficient for strict foreclosure. As in *Kapor*, RJC did not include any language in the Release that it accepted the collateral in satisfaction of the obligation, that it released Hutzenbiler from all her obligations, or that it relinquished its right to pursue a deficiency judgment against her if the mobile home sold for less than the owed principal. The District Court erred in granting RJC summary

judgment on the ground that RJC satisfied the elements of the acceptance of collateral in full satisfaction pursuant to § 30-9A-620, MCA.

¶20 *3. Is RJC entitled to summary judgment on other statutory or equitable grounds?*

¶21 RJC argues that the District Court could have granted summary judgment on the alternative ground that the exculpatory provision of the U.C.C. absolved RJC of any liability because RJC had no reason to believe Hutzenbiler remained a debtor after signing the Release. Section 30-9A-628(2), MCA, provides that a secured party is not liable because of its status as a secured party unless the secured party knows that the person is a debtor. *See also* § 30-9A-605(1), MCA. The Official Comments explain that without this provision "a secured party could incur liability to unknown persons and unknown circumstances that would not allow the secured party to protect itself." Section 30-9A-628, MCA, cmt. 2. An example of an unknown debtor is when "a secured party may be unaware that the original debtor has sold the collateral subject to the security interest and that the new owner has become the debtor." Section 30-9A-605, MCA, cmt. 2. Hutzenbiler was not an "unknown" debtor. Cherry Creek assigned RJC the Contract that Cherry Creek and Hutzenbiler entered to create the debtor/creditor relationship, and RJC collected payments from Hutzenbiler under that Contract. RJC is not entitled to summary judgment under §§ 30-9A-605(1) or -628(2), MCA.

¶22 Finally, RJC argues that the District Court also could have granted RJC summary judgment on the ground that Hutzenbiler was equitably estopped from asserting her claims because of her alleged false representations through the Release that she would not seek

remedies under the U.C.C. We resolved this issue in *Kapor*, ¶¶ 31-37. The same holding applies. RJC is not entitled to summary judgment on other statutory or equitable grounds.

CONCLUSION

¶23 The District Court erred in granting RJC summary judgment on the grounds that Article 9 no longer applied after the Release was signed and that the Release satisfied the elements of strict foreclosure. Because the District Court held the U.C.C. inapplicable, it did not reach the merits of Hutzenbiler's claims; nor do we. The case is remanded to the District Court for further proceedings consistent with this Opinion.

Justice

We Concur:

Chief Justice

Justices

Justice Laurie McKinnon, dissenting.

¶24 I agree with the Court that the District Court erred when it failed to first determine whether Hutzenbiler was in default before holding Title 30, MCA, did not apply to Hutzenbiler and RJC's relationship after they signed the Full Release of Contract ("2015 Agreement"). Notwithstanding, based on the existing record, I would hold Hutzenbiler was not in default when she signed the 2015 Agreement. Therefore, she is not entitled to any surplus from the mobile home's sale provided for under Title 30, chapter 9A, part 6, MCA ("Part 6"), which governs default in secured transactions. Furthermore, even if Hutzenbiler was in default, then the District Court's alternative conclusion—that Hutzenbiler and RJC executed a strict foreclosure—was correct. Accordingly, I would affirm the District Court's order granting summary judgment in favor of RJC.

¶25 The Court states that the District Court must decide the question of default on remand, but it provides no guidance to the District Court for how to evaluate whether Hutzenbiler was in default, and it fails to paint a clear picture of why the issue of default is so important to begin with. Thus, I will explain its importance here: if Hutzenbiler was not in default when she executed the 2015 Agreement, she is not entitled to any surplus from the mobile home's sale. Further, the parties do not dispute any material facts, and Hutzenbiler's payment record and security agreement are part of the record on appeal. The record establishes that Hutzenbiler was not in default when she executed the 2015 Agreement. Where the material facts are undisputed, we "identify the applicable law,

apply it to the uncontroverted facts, and determine who prevails." *Yorlum Props., Ltd.*, ¶ 12.

¶26 Part 6 governs default in secured transactions. Default triggers certain rights provided under Part 6 for both secured parties and debtors, but those rights do not exist before default. Section 30-9A-601(4), MCA ("Except as otherwise provided . . . *after default*, a debtor and an obligor have the rights provided in this part and by agreement of the parties." (emphasis added)); § 30-9A-601(1), MCA ("*After default*, a secured party has the rights provided in this part and, except as otherwise provided in [§] 30-9A-602, [MCA,] those provided by agreement of the parties." (emphasis added)). For example, a secured party may take possession of collateral after default, but it may not do so before. Section 30-9A-609(1)(a), MCA; *see Padin v. Oyster Point Dodge*, 397 F. Supp. 2d 712, 725 (E.D. Va. 2005) (interpreting Virginia's version of § 30-9A-609, MCA: "A secured party may take possession of the collateral, but only *after* default." (emphasis in original)). Similarly, a debtor is only entitled to a surplus under §§ 30-9A-615 and -616, MCA, after default, because the statutory mechanisms that lead to a surplus—for example, the secured party's possession and disposition of the collateral under §§ 30-9A-609 and -610, MCA—can only occur after the debtor defaults.

¶27 Part 6 provides fundamental protections for debtors and specific statutory procedures that secured parties must follow to possess and dispose of collateral after a debtor is in default. These protections are especially important because a debtor in default is in a substantially inferior bargaining position. *See Walker v. Grant Cty. Sav. & Loan*

Ass'n, 803 S.W.2d 913, 916 (Ark. 1991) ("One clear policy reason underlying Article 9 default provisions is the protection of post default debtors from the potential of overbearing tactics and intimidation by secured parties. After default the secured party is unquestionably in a position of control and even dominance."). However, when the debtor *is not* in default, the debtor and creditor can mutually agree to exchange the collateral and terminate their security agreement without triggering Part 6. And this makes sense: when the debtor is not in default—when the parties hold more balanced positions of bargaining power—the parties must be able to exchange the collateral, terminate their security agreement, and go their separate ways without concern that the default procedures of Part 6 will impede their ability to do so. Debtors have a significant interest in avoiding the negative consequences of a default proceeding.

¶28 How courts should define default varies from case to case. Neither Title 30, MCA, nor the UCC define the term "default." Black's Law Dictionary defines "default" as "[t]he omission or failure to perform a legal or contractual duty; esp., the failure to pay a debt when due." *Default*, Black's Law Dictionary (10th ed. 2014). In most cases, however, default is simply "whatever the security agreement says it is." 4 James J. White, Robert S. Summers, & Robert A. Hillman, *Uniform Commercial Code: Practitioner Treatise Series* § 34:5, at 530 (6th ed. 2015) (internal quotations and footnotes omitted). Thus, in order to determine whether a party is in default, courts should look first to the security agreement itself. Here, the parties' original security agreement ("2010 Security Agreement") states what the parties agreed would constitute a

default: "Default. If [Hutzenbiler] fails to perform any of the covenants or promises called for hereunder, such failure shall, at the election of [RJC], constitute a default in performance of this agreement."

¶29 Notwithstanding, a security agreement may provide debtors with an opportunity to cure a default, acting to reverse the events that led to it. When a debtor cures a default, the debtor returns both parties to their pre-default positions. *See In re Taddeo*, 685 F.2d 24, 26-27 (2d Cir. 1982) ("Curing a default commonly means taking care of the triggering event and returning to pre-default conditions. The consequences are thus nullified."). Accordingly, an effective cure eliminates a default and its attendant consequences. After a debtor cures, the debtor is simply no longer in default. *In re Entz-White Lumber & Supply, Inc.*, 850 F.2d 1338, 1342 (9th Cir. 1988) (holding that after a debtor cures the default, the debtor "is entitled to avoid all consequences of the default . . . ."). Courts sometimes refer to the period of time the security agreement allows the debtor to cure a default as a "cure period." *See Rathblott v. PeopleStrategy, Inc.*, 2016 U.S. Dist. LEXIS 28864, *8-9 (E.D. Pa. 2016).

¶30 The 2010 Security Agreement provides the following cure period: "If [Hutzenbiler] fails to cure any such default within THIRTY(30) days after written notice thereof to [Hutzenbiler], [RJC] may, without further notice or period of grace, declare the entire unpaid balance of the purchase price, principal and accrued interest, immediately due and payable." In other words, if Hutzenbiler defaulted—for example, by failing to make a payment—the 2010 Security Agreement gave Hutzenbiler thirty days to cure the

default before RJC could accelerate her outstanding debt. And once Hutzenbiler cured it, she was no longer in default.

¶31 In the District Court, while the parties disputed whether Hutzenbiler was in default when she signed the 2015 Agreement—a legal conclusion—they did not dispute any material facts. Specifically, they did not dispute Hutzenbiler's payment history. Hutzenbiler failed to make timely payments several times over the course of her relationship with RJC. She ultimately made every payment within 30 days of the due date, though, curing each default. She wrote a check for what would become her final payment to RJC on November 23, 2015. After RJC deposited Hutzenbiler's check, Hutzenbiler's account was current, and the next payment was not due under the terms of the 2010 Security Agreement until December 19, 2015. That fact is crucial—because Hutzenbiler's account was current, she was *not in default* when she executed the 2015 Agreement. Through the 2015 Agreement, Hutzenbiler agreed to transfer ownership of the mobile home to RJC in exchange for terminating the 2010 Security Agreement and forgiving the remaining balance Hutzenbiler owed RJC. And Hutzenbiler executed the 2015 Agreement when she was not in default—when she and RJC shared more balanced positions of bargaining power. Accordingly, I would hold Hutzenbiler is not entitled to whatever surplus RJC derived from the mobile home's sale.

¶32 Finally, even if Hutzenbiler was in default, I would hold Hutzenbiler and RJC executed a strict foreclosure under § 30-9A-620, MCA, following similar reasoning from my dissent in *Kapor*. *See Kapor*, ¶¶ 46-61 (McKinnon, J., dissenting).

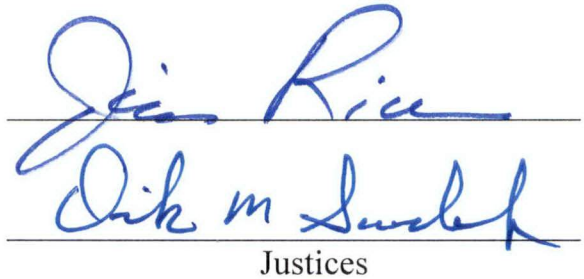
In the 2015 Agreement, the phrase "releasing myself and removing my name off the contract currently in place with RJC" is clear and unambiguous language indicating the parties were agreeing to release Hutzenbiler from her obligations and terminate their contract. By holding that RJC did not consent to accepting the mobile home in satisfaction of Hutzenbiler's obligation, the Court once again elevates form over substance, as it did in *Kapor*. *See Kapor*, ¶¶ 49, 54, 61 (McKinnon, J., dissenting). Even if the 2015 Agreement's language is ambiguous, the surrounding circumstances—just like the circumstances in *Kapor*—indicate Hutzenbiler was attempting to give up any rights she had in the mobile home, transfer her rights to RJC, and terminate the security agreement with RJC, just like a debtor would in strict foreclosure. The 2015 Agreement could have no other purpose but to relieve the parties from the terms of the security agreement. Like *Kapor*, this case simply involves a debtor and a creditor, through a signed agreement, attempting to consent to a transfer of collateral to the creditor in full satisfaction of the debtor's obligation. *See* § 30-9A-620, MCA. The Court, however, renders the 2015 Agreement meaningless.

¶33 From the record before the Court, including the 2010 Security Agreement and Hutzenbiler's payment history, Hutzenbiler was not in default when she executed the 2015 Agreement. I disagree with the Court that remand is necessary to resolve the issue. Hutzenbiller is not entitled to any surplus RJC derived from the mobile home's sale under Part 6, and specifically §§ 30-9A-615 and -616, MCA. Furthermore, even if Part 6 applies,

Hutzenbiler and RJC executed a strict foreclosure. I would affirm the District Court's conclusion that Hutzenbiler was not entitled to a surplus. I dissent.

Justice

Justice Jim Rice and Justice Dirk Sandefur join in the dissenting Opinion of Justice McKinnon.



Justices