

1975

GEORGE ZEESE and EMILY ZEESE, his wife, v.
ESTATE OF MAX SIEGEL; DAN SIEGEL, EVA
SIEGEL, and WESLEY D. WEBB, a partnership d-
b-a Patton's Travelers; TRAILER MART, IN C., a
Nevada corporation d-b-a Dan's Campers N'
Trailers; and HUSKY OIL COMPANY OF
DELAWARE, a Delaware corporation : Brief of
Appellant

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc1

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Prince Yeates Ward; Neilsen Condor Hansen and Henriod; Attorneys for Respondents.

Stone and Theodore; Marcus G Theodore; attorney for appellants.

Recommended Citation

Brief of Appellant, *Zeese v. Estate of Max Siegel*, No. 13870.00 (Utah Supreme Court, 1975).
https://digitalcommons.law.byu.edu/byu_sc1/110

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

207

In the Supreme Court of the State of Utah

GEORGE ZEESE and EMILY
ZEESE, his wife, *Plaintiffs-Appellants,*

v.

ESTATE OF MAX SIEGEL; DAN
SIEGEL, EVA SIEGEL, and
WESLEY D. WEBB, a partnership
d-b-a Patton's Travelers; TRAILER
MART, INC., a Nevada corporation
d-b-a Dan's Campers N' Trailers; and
HUSKY OIL COMPANY OF
DELAWARE, a Delaware corporation

Defendants-Respondents.

Case No.
13870

BRIEF OF APPELLANTS

GEORGE ZEESE and EMILY ZEESE

Appeal from the Judgment of the
Third District Court of Salt Lake County
The Honorable James S. Sawaya, Judge

PRINCE YEATES WARD
MILLER & GELDZAHLER
Richard L. Blanck, Esq.; Michael F.
Heyrend, Esq.; and John P. Ashton, Esq.
Third Floor John Hancock Building
455 South Third East
Salt Lake City, Utah 84111

Attorneys for Respondents
Estate of Max Siegel, Dan
Siegel, Eva Siegel, Wesley
D. Webb, and Trailer Mart, Inc.
NIELSEN CONDOR HANSEN & HENRIOD
Arthur H. Nielsen, Esq.
410 Newhouse Building
Salt Lake City, Utah 84111
Attorneys for Respondent
Husky Oil Company of Delaware

STONE & THEODORE
Marcus G. Theodore, Esq.
P.O. Box 8007
Salt Lake City, Utah 84108
MERRILL K. DAVIS, Esq.
72 East 400 South
Salt Lake City, Utah 84111
Attorneys for Appellants
George and Emily Zeese

FILED

JAN 8 - 1975

TABLE OF CONTENTS

	<i>Page</i>
NATURE OF THE CASE	1
DISPOSITION IN THE LOWER COURT ..	2
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF THE FACTS	2
ARGUMENT	15
POINT I. THE DISTRICT COURT ERRED IN FINDING THAT MAX SIEGEL ACTED AS AGENT FOR TRAILER MART, INC. WHEN HE TOOK THE ASSIGNMENT OF THE LEASE IN QUESTION FROM HUSKY OIL COMPANY OF DELAWARE	15
POINT II. UPON THE DEATH OF A LESSEE, THE LEASED PROPERTY COMES INTO THE POSSESSION OF HIS PERSONAL REPRESENTATIVE	24
POINT III. THE DISTRICT COURT ERRED IN FINDING THAT EVA SIEGEL, EXECUTRIX NAMED IN THE LAST WILL AND TESTAMENT OF MAX SIEGEL, WAS ACTING AS AGENT FOR TRAILER MART, INC. WHEN SHE SENT THE LETTER RE- GARDING THE LEASE OPTION	32

	<i>Page</i>
POINT IV. THE DISTRICT COURT ERRED IN INVOKING THE DOC- TRINE OF ESTOPPEL TO PRE- CLUDE PLAINTIFFS FROM ENFORC- ING THE RESTRICTIVE USE COVENANTS CONTAINED IN THE LEASE	38
POINT V. THE DISTRICT COURT ERRED IN INVOKING THE DOC- TRINE OF WAIVER TO PRECLUDE PLAINTIFFS FROM ENFORCING THE RESTRICTIVE USE COVENANTS CONTAINED IN THE LEASE	46
POINT VI. THE DISTRICT COURT ERRED IN INVOKING THE DOC- TRINE OF ESTOPPEL AND WAIVER TO PRECLUDE PLAINTIFFS FROM JUDGMENT AGAINST HUSKY OIL COMPANY OF DELAWARE FOR BREACH OF THE LEASE BY ITS ASSIGNEE, TRAILER MART, INC.	51
POINT VII. THE JENSEN VS. OK IN- VESTMENT CORPORATION CASE DISTINGUISHED	52
CONCLUSION	54

AUTHORITIES CITED

Statutes

United States Code Annotated	
Title 26, <i>Internal Revenue Code</i> §2031	29
Utah Code Annotated	
§16-10-25	20
§16-10-40	20

	<i>Page</i>
§16-10-49	20
§25-5-1	17, 18, 35
§25-5-3	17, 18, 35
§59-12-3	29
§74-3-19	28
§75-9-4	30
§75-11-8	12, 34
Utah Rules of Civil Procedure	
Rule 67	21
Rule 8(c)	52
 Cases	
<i>Aiken vs. Less Taylor Motor Company</i> , 110 U. 265, 171 P.2d 676 (1946)	27
<i>Allen vs. Rose Park Pharmacy</i> , 120 U. 608, 237 P.2d 823 (1951)	46
<i>Audubon Hotel Co. vs. Braunnig</i> , 120 La 1089, 46 So. 33 (1908)	43
<i>Baugh vs. Logan City</i> , 27 U.2d 291, 495 P.2d 814 (1972)	35
<i>Brittain vs. Gorman</i> , 42 U. 586, 133 P. 370 (1913)	52
<i>Brown's Executor vs. United States Trust Co.</i> , 185 Ky. 747, 215 S.W. 815 (1919)	26
<i>B. T. Moran, Inc. vs. First Security Corp.</i> 82 U. 316, 24 P.2d 384 (1933)	16
<i>Cifelli vs. Santamaria</i> , 79 N.J.L. 354, 75 At. 434 (1910)	42

	<i>Page</i>
<i>Coombs vs. Ouzounian</i> , 24 U.2d 39, 465 P.2d 356 (1970)	42
<i>E. A. Strout Western Realty Agency, Inc. vs. Owen H. Broderick</i> , No. 13479, filed April 30, 1974,U.2d...., 522 P.2d 144 (1974)	16
<i>Estate Realty Inc. vs. Kershaw</i> , 29 U.2d 92, 505 P.2d 777 (1973)	29
<i>Frandsen vs. Gerstner</i> , 26 U.2d 180, 487 P.2d 697 (1971)	35
<i>Hart et al. vs. Walker</i> , 40 N.M. 1, 52 P.2d 123 (1935)	27, 44
<i>Hatch vs. Adams</i> , 8 U.2d 82, 329 P.2d 285 (1958)	16
<i>Holloran-Judge Trust Co. vs. Heath et al.</i> , 70 U. 124, 258 P. 342 (1927)	31
<i>In re Grattan's Estate. Bethel College of Newton vs. Pihlblad</i> , 155 Kan. 839, 130 P.2d 580 (1942)	30
<i>Jensen vs. OK Investment Corporation</i> , 29 U.2d 231, 507 P.2d 713 (1973)	26, 52
<i>Joost vs. Castel</i> , 33 CA 2d 138, 91 P.2d 172 (1939)	26, 31
<i>Lee vs. Polyhrones</i> , 57 U. 401, 195 P. 201 (1921)	35
<i>Lesser vs. Pomin</i> , 3 CA 2d 117, 39 P.2d 451 (1934)	31
<i>Logan vs. Time Oil Company</i> , 73 Wash. 2d 161, 437 P.2d 192 (1968)	45

	<i>Page</i>
<i>Loudave Estates, Inc. vs. Cross Roads Improvement Co. Inc.</i> , 28 M.2d 54, 214 N.Y. Supp.2d 72 (1961)	44
<i>M. B. Zeidman vs. A. Davis</i> , 161 Tx 496, 342 S.W.2d 555 (1961)	44
<i>Mathis vs. Madsen</i> , 1 U.2d 46, 261 P.2d 952 (1953)	16, 18
<i>Migliaccio vs. Davis</i> , 120 U. 1, 232 P.2d 195 (1951)	39
<i>Miller vs. Ready</i> , 59 InA 195, 108 N.E. 605 (1915)	27
<i>Nance vs. Schoonover</i> , No. 13471 filed April 23, 1974,U.2d...., 521 P.2d 896 (1974)	28
<i>Novosad vs. Clary</i> , 431 S.W.2d 422 (1968)	44
<i>Olson et al. vs. Frazer et al.</i> , 154 Kan. 310, 118 P.2d 505 (1941)	26
<i>Parowon Mercantile Co. vs. Gurr</i> , 83 U. 463, 30 P.2d 207 (1934)	52
<i>Robinson vs. Hadley</i> , 351 F.2d 385 (1965), (9th Cir. C.A.)	48
<i>Shell Oil Company vs. Stiffler</i> , 87 U. 176, 48 P.2d 503, reh. den. 87 U. 197, 49 P.2d 1150 (1935)	53
<i>Southern Pacific Company vs. Swanson</i> , 73 CA 229, 238 P. 736 (1925)	26
<i>Tropico Land and Improvement Co. vs. Lambourn</i> , 170 Cal. 33, 148 P. 206 (1915)	31
<i>Verdier vs. Roach</i> , 96 Cal. 467, 31 P. 554 (1892)	31

	<i>Page</i>
Miscellaneous	
49 American Jurisprudence Second §1063	48
68 American Law Reports 590	27
127 American Law Reports 948	44
51 American Law Reports Second 1404	44
Bancrofts Probate Practice, Vol. 3, §769, §772, §773, §774, §786 (Second Edition 1950, 1974 Supp.)	31
51C Corpus Juris Secundum, <i>Landlord and Tenant</i> §92	27
51C Corpus Juris Secundum, <i>Landlord and Tenant</i> §117 (6)	49
Opinions of the Accounting Principles Board, No. 5, Sept. 1964, <i>Reporting of Leases in Financial Statements of Lessee</i>	29
Opinions of the Accounting Principles Board, No. 31, June 1973, <i>Disclosure of Lease Commitments by Lessees</i>	29
Restatement of Law Second, <i>Agency</i> , Vol. 1, §121 (1958)	34
Thompson On Real Property, Vol. 3A, §1207 (Fourth Edition 1959, 1965 Supp.)	25
Thompson On Real Property, Vol. 3A, §1328 (Fourth Edition 1959, 1965 Supp.)	48

IN THE SUPREME COURT OF THE STATE OF UTAH

GEORGE ZEESE and EMILY
ZEESE, his wife, *Plaintiffs-Appellants,*

v.

ESTATE OF MAX SIEGEL; DAN
SIEGEL, EVA SIEGEL, and
WESLEY D. WEBB, a partnership
d-b-a Patton's Travelers; TRAILER
MART, INC., a Nevada corporation
d-b-a Dan's Campers N' Trailers; and
HUSKY OIL COMPANY OF
DELAWARE, a Delaware corporation
Defendants-Respondents.

Case No.
13870

BRIEF OF APPELLANTS

GEORGE ZEESE and EMILY ZEESE

NATURE OF THE CASE

This is an action in unlawful detainer brought by the plaintiffs-appellants on the grounds that: 1) the option to extend the lease in question was not exercised, and 2) if the option were exercised, the defend-

ants-respondents have breached the restrictive use covenants contained therein. Plaintiffs-appellants will hereinafter be referred to as plaintiffs, and defendants-respondents will hereinafter be referred to as defendants.

DISPOSITION IN THE LOWER COURT

The District Court divided the trial of plaintiffs' causes of action into 1) the issue of liability, and 2) the issue of damages. After presentation of the facts concerning defendants' liability, the District Court entered judgment dismissing plaintiffs' causes of action, and denied plaintiffs' motion to amend findings and alter judgment.

RELIEF SOUGHT ON APPEAL

Plaintiffs George and Emily Zeese seek a reversal of the judgment of the District Court; an order requiring all defendants to vacate the premises in question; a remand to the District Court for a determination of the damages suffered by the plaintiffs; and a dismissal of defendants' counterclaims.

STATEMENT OF FACTS

On February 7, 1956, George and Emily Zeese acquired as joint tenants from the Elizabeth Ann

Watts Estate approximately three and one half acres of land located at 6240 South State Street in Murray, Utah (Executor's deed, Exhibit 1P). Said property, which is directly across from the Fashion Place Mall shopping center, was subsequently conveyed to Emily Zeese as sole owner on August 14, 1961 (Warranty Deed, Exhibit 2P).

By written lease agreement dated October 28, 1959 (Exhibit 3P), George and Emily Zeese leased approximately one acre of the property abutting State Street to Saturn Oil Company, a Missouri corporation, for the erection and operation of a gasoline and oil filling station. Saturn Oil Company drafted the lease in question (TR. 439), which had an initial term of 10 years commencing December 18, 1959, and included three ten year options to extend the lease upon Lessee giving Lessor 60 days written notice prior to the end of the term (page 2, ¶3 of Exhibit 3P). The leased premises were to be used for no other purpose or business than for a gasoline and oil filling station, a restaurant, a truck stop (page 1, ¶3 of Exhibit 3P), or to be sublet for a gasoline and oil filling station (page 2, ¶6 of Exhibit 3P). This lease was assignable without Lessor's consent, provided that the Lessee-assignor would not be released from the lease obligations, but would at all times be liable for the faithful performance of all of the covenants of the lease (page 2, ¶6 of Exhibit 3P). The parties further covenanted that there would be no waiver or any forfeiture, by acceptance of rent or otherwise, of any subsequent cause for forfeiture, or

breach of any terms and conditions of the lease (page 4, ¶2 of Exhibit 3P). In turn, the Lessors allowed Lessee 30 days, from receipt of notice of termination, to remedy any breach of the terms and conditions and reinstate the lease (page 3, ¶6 of Exhibit 3P).

Saturn Oil Company then erected a gasoline and oil filling station on the leased premises and operated it until the lease was assigned (Exhibit 4P) on March 8, 1965 (TR. 439) to J. L. Terborg & Company, a general partnership. J. L. Terborg & Company continued to operate a gasoline and oil filling station on the leased premises until the lease was quitclaimed (Exhibit 5P) on June 1, 1968 by the Estate of M. H. Robineau, successor to J. L. Terborg & Company, to Husky Oil Company of Delaware (TR. 441). Husky Oil Company of Delaware then continued to operate a gasoline and oil filling station on the leased premises until April, 1969 (TR. 443). On May 1, 1969, without prior notice to the Zeeses, Husky Oil Company of Delaware assigned (Exhibit 6P) the lease to Max Siegel, *an individual*. The applicable paragraphs of Exhibit 6P read as follows on next page.

ASSIGNMENT OF LEASE

THIS ASSIGNMENT made this 1st day of May, 1969, between HUSKY OIL COMPANY OF DELAWARE, a corporation, with offices at 4040 East Louisiana Avenue, Denver, Colorado 80222, hereinafter called "Assignor" and

MAX SIEGEL, an individual

with offices at 6210 S. State St., Salt Lake City, Utah 84107
Salt Lake City, Utah, hereinafter called "Assignee",

WITNESS THE SIGNATURES OF THE Assignor and Assignee
the day and year first above written.

HUSKY OIL COMPANY OF DELAWARE
Assignor

ATTEST:

/s/ Karl F. Anuta
Karl F. Anuta,
Assistant Secretary

By /s/ L.M. Thompson
Vice-President /s/ KFA

Assignee:

~~SECRET~~

~~SECRET~~

By /s/ Max Siegel

STATE OF COLORADO)
CITY AND COUNTY OF DENVER) ss.

On the 1st day of May, 1969, personally appeared before me L.M. Thompson ^{Judge} who being by ^{and} ~~me~~ ^{me} duly sworn, did say that he is the ~~vice President of~~ ^{Vice President of} Southern Region Oil Company of Delaware, and that said instrument was signed on behalf of said corporation by authority of its by-laws and said L.M. Thompson acknowledged to me that said corporation executed the same.

Witness my hand and official seal.

/s/ Jeannet B. Wilson

Notary Public

My Commission expires: Sept. 7, 1969.

STATE OF UTAH)
COUNTY OF Davis) ss.

On the 24th day of April, 1969, personally appeared before me Max Siegel, who being by me duly sworn, did say that he is the individual of _____, and that said instrument was signed on behalf of said corporation by authority of its
and said and _____ acknowledged
by to me that said corporation executed the same.

Witness my hand and official seal.

/s/ Lamar Hatch

Notary Public

My Commission expires:

On or about May 1, 1969, Max Siegel allowed Trailer Mart, Inc. to expand its trailer and recreational sales outlet onto the Zeese property from the contiguous Jensen property for additional display area (TR. 549) contrary to the restrictive use covenants contained in the lease. On May 6, 1969, Husky Oil Company of Delaware apprised the Zeeses by letter (Exhibit 6P) that it had assigned the lease to Max Siegel, *an individual*:

HUSKY OIL
Company

4040 East Louisiana Ave.
Denver, Colorado 80222
Telephone 303-756-1511

May 6, 1969

Mr. George Zeese
734 South 13th East
Salt Lake City, Utah

Dear Mr. Zeese:

Re: Lease Agreement of October 28, 1959

Please refer to the Lease Agreement dated October 28, 1959, executed by you and your wife as lessors to Saturn Oil Company, a Missouri corporation, as lessee. As you are aware, this lease was assigned on March 8, 1965 by Saturn Oil Company to J. L. TerBorg & Co., a general partnership. By a further conveyance dated June 1, 1968 the successor to J. L. TerBorg & Co. assigned its interest in this property to this company. Attached for your information is a photocopy of an assignment of this lease from this

company to Mr. Max Siegel, an individual, whose address is shown thereon.

We have directed Mr. Siegel to make all future payments of rental under the terms of the above-referenced Lease Agreement, in the amount of \$200 per month, to your attention at the address shown in the lease which is the address to which this letter is addressed. Mr. Siegel has assumed the entire responsibility for this property and its use and should any questions arise we believe you should contact Mr. Siegel directly.

Yours truly,

/s/ Karl F. Anuta

Karl F. Anuta, Manager
Law Department—Denver

KFA:bg
Enc.

On May 8, 1969, Max Siegel's attorney, David S. Geldzahler, sent a letter (Exhibit 7P) along with a copy of the assignment to notify the Zeeses that the lease in question had been assigned to Max Siegel, and that Trailer Mart, Inc. would be using the premises:

Law Offices of
OWEN, WARD, & GELDZAHLER
608 El Paso Natural Gas Building
315 East Second South Street
Salt Lake City, Utah 84111
Phone 359-2058
May 8, 1969

Mr. George Zeese
734 South 13th East
Salt Lake City, Utah

Dear Mr. Zeese:

As attorneys for Mr. Max Siegel, we herewith wish to confirm that on May 1, 1969, Husky Oil Company assigned all of its right, title and interest in and to that lease made by and between you and Emily Zeese, as Lessors, with Saturn Oil Company, as Lessee, on October 28, 1959, to Max Siegel, of 6210 South State Street, Salt Lake City, Utah. A copy of this assignment is enclosed for your records.

Mr. Siegel has asked me to further advise you that Trailer Mart, Inc. doing business as Dan's Campers, entered into substantial commitments to acquire additional inventory because of the additional display area made available as a result of the assignment of the lease above referred to.

Moreover, both Mr. Siegel and Trailer Mart, Inc. have committed themselves to a significant advertising program based upon the thus expanded sales facilities.

Please be assured that both Mr. Siegel and Trailer Mart, Inc. will comply with all of the obligations of the Lessee under the lease referred to hereinabove.

Very truly yours,

/s/ David S. Geldzahler

David S. Geldzahler

DSG:nd

Carbon copy to:

Mr. Max Siegel

At the time Max Siegel received the lease in question, he was president of three corporations: Siegel Trailer and Auto Finance, a Utah corporation, (TR. 415) which received the real property tax notices concerning the leased premises (Exhibit 45P), and financed the trailer and recreational vehicle sales; Western Mobile Homes Insurance Agency, Inc., a Utah corporation (TR. 419) which insured the mobile homes sold on the contiguous Jensen property; and Trailer Mart, Inc., a Nevada corporation, (TR. 416) which sold the trailers and recreational vehicles on the leased premises.

No evidence was presented:

1) That a board meeting was held by Trailer Mart, Inc., prior to Max Siegel's negotiations with Husky Oil Company of Delaware, orally authorizing Max Siegel to act on its behalf in taking the assignment of the lease,

2) That Max Siegel was authorized to act on behalf of Trailer Mart, Inc. without a meeting of its board of directors,

3) That written authorization was given by Trailer Mart, Inc. to Max Siegel to act on its behalf in taking the assignment of the lease from Husky Oil Company of Delaware,

4) That a board meeting was held by Trailer Mart, Inc. subsequently ratifying on behalf of the corporation the taking of the lease by Max Siegel, and

5) That Trailer Mart, Inc. gave anything of value to Max Siegel for an assignment of the lease. (TR. 516).

Nevertheless, over the repeated objections of counsel for Husky Oil Company of Delaware, the District Court found that Max Siegel was acting as agent for Trailer Mart, Inc. when he acquired the lease from Husky Oil Company of Delaware.

Max Siegel died on June 3, 1969, thirty-three days after taking the assignment of the lease from Husky Oil Company of Delaware. Eva Siegel, Executrix named in the Last Will and Testament of Max Siegel, then sent a letter to the Zeeses concerning the lease option on June 16, 1969, more than one month prior to her receipt of letters testamentary (Probate File #56090). The letter (Exhibit 8P) was drafted by Mrs. Siegel's attorney, David S. Geldzahler, (TR. 499) and reads as follows:

Eva Siegel
4155 Mount Olympus Way
Salt Lake City, Utah
June 16, 1969

Mr. George Zeese
734 South 13th East
Salt Lake City, Utah

Dear Mr. Zeese:

As the Executrix named in the Last Will and Testament of my husband, Max Siegel, who died on

June 3, 1969, I am, on behalf of the estate of Max Siegel, deceased, hereby advising and notifying you of the exercise of the option to renew the lease originally made by and between you and Emily Zeese, as Lessors, and Saturn Oil Company, as Lessees, which lease was on May 1, 1969, assigned by Husky Oil Company to Max Siegel.

The exercise of this option by the estate of Max Siegel will, of course, result in the extension of this original lease for an additional term of 10 years commencing December 18, 1969, and ending December 17, 1979, unless the option to renew the said lease for an additional ten-year term is exercised at such time.

Very truly yours,

/s/ Eva Siegel
Eva Siegel, Executrix
Named in the Last Will
and Testament of
Max Siegel, Deceased

ES:DSG:nd

The District Court found that Eva Siegel as Executrix named in the Last Will and Testament of Max Siegel, deceased, sent the above letter as agent for Trailer Mart, Inc. even though Dan Siegel, current president of Trailer Mart, Inc., testified that the corporation did not send a letter regarding the lease option (TR. 533):

Q. (By Mr. Theodore) Okay. Did Trailer Mart, Inc., ever send a letter to the Zeeses exercising the option?

A. No.

No evidence was introduced that a board meeting was held giving oral authorization to Eva Siegel to act as agent for Trailer Mart, Inc. Nor was evidence introduced that written authorization was given to Eva Siegel to act as agent for Trailer Mart, Inc.

Probate File #56090 indicates:

1) That Eva Siegel did not petition the Probate Court pursuant to section 75-11-8, U.C.A., 1953, as amended, for permission to continue any business interests Max Siegel may have had in Trailer Mart, Inc. and exercise the option on its behalf,

2) That Eva Siegel did not list the lease in the inventory of the Estate of Max Siegel, even though she filed amended schedules to include later discovered properties,

3) That Eva Siegel did not list the lease as a liability of the Estate of Max Siegel as she had done with other debts of Max Siegel, and

4) That none of the parties filed claims against the Estate of Max Siegel to enforce the lease obligations after notice to creditors had been published.

The lease was not listed on the Utah estate tax returns or the Federal estate tax returns (TR. 392), and Eva Siegel did not give anything of value to the Zeeses to exercise the option to extend the lease (TR. 449).

Trailer Mart, Inc. sent monthly checks (Exhibit 1D) to George Zeese who cashed these checks believing that the lease had expired with Max Siegel's death (TR. 449), and that Trailer Mart, Inc. was a month to month tenant. Mr. Zeese's beliefs were based upon his election not to file a claim against the Estate of Max Siegel to enforce the lease obligations, and his conversations with Dan Siegel who handled the day to day business affairs of the Estate of Max Siegel (TR. 500). Most of these conversations occurred during the Fall of 1972 and the Spring of 1973 when Dan Siegel was negotiating to buy the entire Emily Zeese property (TR. 450, 453, 454) for his seven year old niece, Valerie Richter; not Trailer Mart, Inc. As part of these negotiations, Dan Siegel had an appraisal made of the property (Exhibit 9P) which contained representations that the lease had been assigned to Max Siegel, an individual, and that the appraised value in 1972 was \$143,000.00 subject to a \$73,779.00 leasehold interest. George Zeese denied that the property was subject to a leasehold interest and refused to discount the selling price (TR. 512). Dan Siegel then agreed in the Spring of 1973 to purchase the property as trustee for his niece for \$150,000.00 (See the terms of the sale which Dan wrote on the back of his business card, Exhibit 10P). However, the sale negotiations terminated when Dan Siegel insisted upon the right to subordinate the proposed installment sale contract to a building loan (TR. 455).

Plaintiffs then served notices of termination upon the defendants to vacate the premises in 30 days since

the option to extend the lease in question was not exercised, and the defendants were violating the restrictive use covenants by operating a recreational vehicle and trailer sales outlet on the premises. Defendants refused to vacate the premises or alter the use of the premises to reinstate the lease.

After notices to quit had been served, Eva Siegel, Executrix, petitioned the Probate Court on August 21, 1973 for permission to distribute the assets of the Estate of Max Siegel, and disclaimed any interest that the Estate of Max Siegel may have had in property not listed in the inventory (Probate File #56090). The Estate of Max Siegel then answered plaintiffs' complaint by claiming a contingent interest in the lease in question, and filed a \$780,000.00 counterclaim without petitioning the Probate Court for permission to do so (Probate File #56090).

On December 7, 1973, the District Court granted plaintiffs' motion to require the Estate of Max Siegel to deposit into Court, pending the outcome of the case, the accumulating rent and taxes allegedly owing plaintiffs as outlined in its pleadings. Various parties then deposited the accumulating rent and taxes into court on behalf of the Estate of Max Siegel, over the repeated objections of plaintiffs' counsel (Motion for Order to Show Cause, Objections to Findings on Plaintiffs' Motion for an Order to Show Cause, TR. 637).

ARGUMENT

POINT I

THE DISTRICT COURT ERRED IN FINDING THAT MAX SIEGEL ACTED AS AGENT FOR TRAILER MART, INC. WHEN HE TOOK THE ASSIGNMENT OF THE LEASE IN QUESTION FROM HUSKY OIL COMPANY OF DELAWARE.

Plaintiffs contend that the District Court erred in finding that Max Siegel was acting as agent for Trailer Mart, Inc., when he took the assignment of the lease from Husky Oil Company of Delaware, because the evidence, the law, and the positions taken by defendants' counsel do not justify the finding.

Specifically, plaintiffs' first objection to the District Court's finding of Max Siegel's agency is based on Exhibit 6P, the assignment in question. Exhibit 6P is the best evidence of the negotiations which occurred 33 days before Max Siegel's death, and leaves no doubt that Max Siegel was acting as an individual when he took the assignment of the lease. The document is clear and unambiguous that Max Siegel was not acting on behalf of any corporation when he entered into the lease assignment. Indeed, it was deliberately modified to dispel any inference that he had taken the assignment on behalf of a corporation. No other conclusion can be drawn from the alteration of the corporate acknowledgement form on the signature page to conform with the introduction clause on page one

of the lease to indicate that Max Siegel signed as an individual.

Therefore, the District Court erred in making findings contrary to the parole evidence rule by relying on parole testimony to establish Max Siegel's agency at the time he entered into the assignment, because there is no ambiguity on the face of the instrument indicating that he was acting as agent for Trailer Mart, Inc. As this Court stated in *Mathis vs. Madsen*, 1 U.2d 46, 261 P.2d 952 (1953); and reaffirmed in *E. A. Strout Western Realty Agency, Inc. vs. Owen H. Broderick*, No. 13479 filed April 30, 1974U.2d...., 522 P.2d 144 (1974); citing *B. T. Moran, Inc. vs. First Security Corp.*, 82 U. 316, 24 P.2d 384 (1933); and *Hatch vs. Adams*, 8 U.2d 82, 329 P.2d 285 (1958):

“ . . . In searching for the meaning the Court must first examine the language used in the instrument itself and accord to it the weight and effect which the instrument itself may show that the parties intended the words to have. If then its meaning is still ambiguous or uncertain, the Court may consider other contemporaneous writings concerning the same subject matter, and may, if it is still uncertain, consider parole evidence of the parties' intention. See *Burt vs. Stringfellow*, 45 Utah 207, 143 P. 234; *Beagley v. United States Gypsum Co.*, Utah, 235 P.2d 783.”

The three contemporaneous writings [the letter from Husky Oil Company of Delaware's attorney dated May 6, 1969 (Exhibit 6P) containing a copy

of the assignment; the letter from David S. Geldzahler dated May 8, 1969 (Exhibit 7P) also containing a copy of the assignment; and the letter from Eva Siegel, Executrix named in the Last Will and Testament of Max Siegel, which was drafted by Mr. Geldzahler and dated June 16, 1969 (Exhibit 8P)] do not alter the fact that Max Siegel took the assignment of the lease from Husky Oil Company of Delaware as an individual.

Therefore, unless this Court is willing to condone findings based on the testimony of Dan Siegel recalling a long-distance telephone conversation overheard from another room four years before, the District Court erred. Especially it erred when this witness admitted that he was not part of the assignment negotiations (TR. 546)! One also wonders why Dan Siegel had prepared and presented to Mr. Zeese in the Fall of 1972 Exhibit 9P, the appraisal, which indicated that Max Siegel and his successors and assigns had the lease in question, not Trailer Mart, Inc.

Plaintiffs' second objection to the District Court's finding of Max Siegel's agency is based on the law. Sections 25-5-1 and 3, U.C.A., 1953, as amended, state:

25-5-1. *Estate or interest in real property.*—No estate or interest in real property, other than leases for a term not exceeding one year, nor any trust or power over or concerning real property or in any manner relating thereto, shall be created, granted, assigned, surrendered or declared otherwise than by act or operation of law, or by deed or conveyance *in writing subscribed*

by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized in writing. (emphasis added)

25-5-3. *Leases and contracts for interest in lands.* —Every contract for the leasing for a longer period than one year, or for the sale, of any lands, or any interest in lands, shall be void unless the contract, or some note or memorandum thereof, is *in writing subscribed by the party by whom the lease or sale is to be made, or by his lawful agent thereunto authorized in writing. (emphasis added)*

Therefore, under Utah law, to act as an agent for a corporation, one must be authorized by a corporation to act on its behalf. As this Court stated in *Mathis vs. Madsen*, *supra*:

“The statute of frauds, sec. 25-5-1, U.C.A. 1953, provides that no interest shall be created in real property unless it is in writing subscribed by the party to be charged or ‘by his lawful agent thereunto authorized by writing.’ Naturally, that section is applicable to agents of corporations, but the courts in interpreting similar provisions have adopted an exception when the person *who acts under an oral authorization* is either a *general agent or executive officer of the corporation.*” (emphasis added)

In that case, this Court held that where a corporate officer was orally given authorization by the Board of Directors of the Davis County Co-op prior to his entering into a land purchase contract (as evidenced by the minutes of a corporate meeting held prior to the trans-

action, *which were entered into the record*), the statute of frauds was not applicable to void the transaction.

No evidence was introduced in the present case that Trailer Mart, Inc. ever held a meeting to authorize Max Siegel, its president in 1969, to enter into an assignment of the lease on its behalf. Indeed, there is no evidence in the record that Trailer Mart, Inc., ever authorized Max Siegel to enter into lease contracts at all; not to mention the lease in question.

When the lack of evidence of Max Siegel's corporate authorization was pointed out to the District Court, the Court ruled these laws do not apply to family corporations (TR. 633, 634):

THE COURT: You mean resolution of the Board of Directors or something?

MR. THEODORE: Board of Directors, Articles of Incorporation, any such as this. Nothing was presented in the record, Your Honor.

THE COURT: Of course, that isn't—that isn't the law with regard to corporations with few shareholders. As I recall the law is that—

MR. THEODORE: Your Honor, that case specifically went to corporation authorizing an agent.

THE COURT: Of course, the law draws a distinction between a corporation like General Motors, for example, and a corporation consisting of a family type corporation where someone acts with apparent authority and there is nobody to object.

For this Court to uphold the District Court's ruling by carving an exception to the laws governing the manner in which family owned corporations may conduct business would circumvent the laws of the State of Utah. The legislature has specifically prescribed under sections 16-10-25, 16-10-40, and 16-10-49, U.C.A., 1953, as amended, the manner in which corporate business may be conducted without a meeting of the board of directors. Therefore, where no affirmative evidence was presented that Max Siegel as president of Trailer Mart, Inc. had authority under the articles of incorporation, the corporate by-laws or the written consent of all the members of the Board of Directors, to bind the corporation without a meeting of its board, the District Court erred in implying this authority simply because the corporation was owned by the Siegel family. Were the law otherwise, parties dealing with family corporations would never know if they were dealing with the corporation or with the officers as individuals. One would suspect that if the District Court's ruling were adopted, it would result in officers of family corporations electing to use the corporate veil when liabilities were encountered, and to disregard it when unfavorable contracts were to be voided under the statute of frauds.

Nor can it be said that Trailer Mart, Inc. was the alter ego of Max Siegel, and therefore all of his actions were performed on behalf of Trailer Mart, Inc. The record clearly indicates that at the time of the assignment of the lease, Max Siegel was the president of at least three corporations which were operating on the

Zeese property and the contiguous Jensen property: Siegel Trailer and Auto Finance, Inc.; Western Mobile Homes Insurance Agency, Inc.; and Trailer Mart, Inc.

In summary, the evidence introduced at the trial is not sufficient under the law to take the assignment of the lease in question out of the statute of frauds if Max Siegel were acting as agent for Trailer Mart, Inc. Therefore, the assignment was either *void ab initio*, or it was entered into with Max Siegel as an individual.

Plaintiffs' third objection to the District Court's finding of Max Siegel's agency is based on the fact that defendants' counsel during the course of this law suit have already conceded that Max Siegel was not acting as agent for Trailer Mart, Inc. when he took the assignment from Husky Oil Company of Delaware.

The first time counsel conceded this point was at the hearing dated December 7, 1973 on Plaintiffs' Motion to Deposit Amounts Due In Court pursuant to Rule 67 of the Utah Rules of Civil Procedure. Plaintiffs brought their motion to have the Estate of Max Siegel deposit into court the accumulating rents and taxes allegedly due and owing plaintiffs under paragraphs 61, 62, 64, 7, 19, 22, 26, and 27 of its answer to plaintiffs' complaint:

61. That Trailer Mart, Inc. if not in possession of the premises *as assignee of the Estate of Max Siegel* is in possession as a subtenant of the Estate of Max Siegel.

62. Trailer Mart, Inc. is in possession of the premises as *a subtenant of the Estate of Max Siegel* and at all times has performed in accord with the lease agreement and is *in possession of the premises by virtue of a valid and existing lease and subletting thereof*.

64. That Eva Siegel as Executrix of the Estate of Max Siegel and Trailer Mart, Inc. are in possession of the premises by virtue of a valid and existing lease and at all times have performed in accord with the lease agreement and *stand ready to continue to perform*.

7. On or about the 1st day of May, 1969, Husky Oil Company assigned all of its right, title and interest in and to the premises and the lease to *Max Siegel*; a copy of that assignment is marked as Exhibit "D" and attached to plaintiffs' original Complaint.

19. The lease in question was *assigned by Eva Siegel as Executrix of the Estate of Max Siegel, to Trailer Mart, Inc.*

22. Plaintiffs have at all material times recognized that *Trailer Mart, Inc. was properly in possession of the premises as assignee of the Estate of Max Siegel, deceased*.

26. Trailer Mart, Inc., if not in possession of the premises *as assignee of the Estate of Max Siegel, deceased, is in possession of the premises as a subtenant of the Estate* and has at all times performed in accord with the lease agreement and is *in possession of the premises by virtue of a valid and existing lease and subletting thereto*.

27. Trailer Mart, Inc., if not in possession of the premises *as assignee of the Estate of Max*

Siegel, deceased, is in possession of the premises as a subtenant of the Estate of Max Siegel, deceased.

After the motion was argued, with the defendant Estate of Max Siegel and plaintiffs appearing through counsel, the Honorable Ernest F. Baldwin, Jr., ordered the defendant, Estate of Max Siegel, to deposit into Court the monies due plaintiffs as alleged in its answer to plaintiffs' complaint. Various parties then deposited monies into Court on behalf of the Estate of Max Siegel over the objections of plaintiffs' counsel which were made because the estate had been distributed, and no petition to reopen it had been made. At no time did counsel for the Estate of Max Siegel indicate that Max Siegel took the lease as agent for Trailer Mart, Inc., so that the Estate of Max Siegel had no interest in the lease. Nor was an order sought modifying Judge Baldwin's order.

The second time that counsel conceded this point was at the trial on May 16, 1974. In his opening statement, Mr. Heyrend, stated (TR. 402) :

“ . . . Perhaps the most difficult and tricky conceptual part of this case is the fact that there was no signed document from Max Siegel to Trailer Mart, Inc., assigning that particular piece of property. However, the law in this area does not require an assignment, a written document of any specific form or even a written document.”

When later asked by the District Court to clarify his position, Mr. Heyrend again conceded this point (TR. 427, 428) :

THE COURT: Well, what's your position Mr. Heyrend? You acknowledge that Mr. Siegel took an assignment of the lease from Husky Oil Company?

MR. HEYREND: That's correct.

THE COURT: What's your position as to what he did with them thereafter or what happened to the assignment of that lease thereafter?

MR. HEYREND: It's our position it is now with Trailer Mart, Inc.

THE COURT: Well, how did it get there?

MR. HEYREND: That it was assigned—we have two—two theories.

For the reasons outlined above, plaintiffs contend that the District Court erred in finding that Max Siegel acted as agent for Trailer Mart, Inc. when he took the assignment of the lease from Husky Oil Company of Delaware.

POINT II

UPON THE DEATH OF A LESSEE, THE LEASED PROPERTY COMES INTO THE POSSESSION OF HIS PERSONAL REPRESENTATIVE.

As outlined in Point I, plaintiffs contend that the District Court erred in making its finding that Max Siegel was acting as agent for Trailer Mart, Inc. when he took the assignment of the lease in question. Therefore, upon his death, the lease came into the possession

of Eva Siegel as Executrix, *since no evidence was presented that Max Siegel ever assigned the lease to Trailer Mart, Inc. during the thirty-three days before his death.* Indeed, Dan Siegel testified that no firm commitment as to the use of the leased premises was entered into by and between Max Siegel and Trailer Mart, Inc. (TR. 505) :

Q. (By Mr. Theodore) You have just stated that Trailer Mart, Inc. paid no rent to your father for the use of the premises at 6210 South State?

A. Correct.

Q. All right. Did Trailer Mart, Inc. have a firm commitment from Max Siegel as to a term of the use of the premises?

A. In writing you mean or something like that?

Q. Well, yes. In writing.

A. No.

He also testified that no consideration was given to Max Siegel or the Estate of Max Siegel for an assignment of the lease (TR. 516) :

Q. Did Trailer Mart, Inc. ever give the estate or Max Siegel anything of value for an assignment of the lease?

A. No.

Therefore, as outlined in *Thompson On Real Property*, Vol. 3A, §1207 (Fourth Edition 1959, 1965 Supp.), no assignment of the lease to Trailer Mart, Inc. occurred where no consideration was given to Max Siegel.

Nor was any evidence introduced that Max Siegel ever disclaimed an interest in the lease as required under the *Jensen vs OK Investment Corporation* criteria, 29 U.2d 231, 507 P.2d 713 (1973) for his subtenant Trailer Mart, Inc. to become the lessee. On the contrary, Eva Siegel's letter (Exhibit 8P) clearly indicates an intent on the part of his legal successor, the Estate of Max Siegel, to claim an interest in the lease! The unexpired portion of the lease therefore passed into the Estate of Max Siegel upon his death. This rule of succession is found in *Brown's Executor vs. United States Trust Co.*, 185 Ky. 747, 215 S.W. 815 (1919); and followed in *Olson et al. vs. Frazer et al.*, 154 Kan. 310, 118 P.2d 505 (1941); *Southern Pacific Company vs. Swanson*, 73 CA 229, 238 P. 736 (1925); and *Joost vs. Castel*, 33 CA 2d 138, 91 P.2d 172 (1939). The Kentucky Court stated:

"... when a lessee of property like this dies, the leased property comes into the possession of his personal representative, and he has only three rights of election in respect to it: First, he may keep the property, thereby charging the estate with the performance of the terms and conditions of the lease. Second, he may, if the contract or statute permit it, sublease the premises; but this would not, of course, relieve the estate of its obligation to satisfy the terms and conditions of the lease as between it and the landlord. Third, he may surrender the leased property to the landlord, and refuse to have anything further to do with it, thereby working a cancellation of the lease; but the doing of this would subject the estate to a suit for damages by the landlord for breach of contract."

The right to renew a lease also passes to the representative of a deceased lessee, and, if he fails to exercise the lease option, the lease terminates; see *Hart et al. vs. Walker*, 40 N.M. 1, 52 P.2d 123 (1935).

Therefore, upon the death of Max Siegel, the lease held by him passed to his legal representative, Eva Siegel as Executrix, to be listed as an asset of the estate and properly accounted for as required by *Miller vs. Ready*, 59 InA 195, 108 N.E. 605 (1915); and discussed in 68 A.L.R. 590, and 51C C.J.S. *Landlord and Tenant* §92:

“In case of the death of the lessee, the term or the unexpired portion thereof becomes a part of the personal assets of the estate, to be inventoried, appraised, and sold as any other personal property.”

Eva Siegel, acting as Executrix, would then have had to exercise the option in the manner specified to extend the lease as discussed in the *Aiken vs. Less Taylor Motor Company* case, 110 U. 265, 171 P.2d 676 (1946):

“It is elementary that an option to renew contained in a lease must be exercised to effect the renewal. Usually affirmative acts are required either by the express terms of the lease or by implication of law to exercise the option to renew . . .

Though the ordinary case requires affirmative acts to exercise the option to renew, the parties to a lease may specify any method they choose of the way the option is to be exercised.”

Also, see *Nance vs. Schoonover*, No. 13471 Filed April 23, 1974,U.2d...., 521 P.2d 896 (1974), and the cases cited therein. Since the parties to the lease by and between George and Emily Zeese and Saturn Oil Company agreed that:

“As a further consideration of this Lease, LESSOR hereby gives and grants unto the LESSEE the exclusive option and privilege of renewing and extending the Lease for THREE (3) additional terms of TEN (10) YEARS each, provided LESSEE shall give notice in writing to LESSOR on or before 60 days before the expiration of the original term of this Lease or any succeeding option term.”

Eva Siegel, acting as executrix, would have had to send written notice of her intent to exercise the option to extend the lease on behalf of the Estate of Max Siegel prior to October 28, 1969.

When she sent Exhibit 8P regarding the lease option on June 16, 1969, more than one month prior to her receipt of letters testamentary, Eva Siegel would have had to have been exercising one of those executory powers enumerated in Section 74-3-19, U.C.A., 1953, as amended:

74-3-19. Executor must qualify—Limited power before letters issue.—No person has any power as an executor until he qualifies, except that before letters have been issued he may pay funeral charges and take necessary measures for the preservation of the estate.

Because the probate file does not indicate that the lease was extended and included as part of the Estate of

Max Siegel, Eva Siegel was not protecting an asset of the estate in sending Exhibit 8P; and therefore her offer was void under the recent *Estate Realty, Inc. vs. Kershaw* ruling, 29 U.2d 92, 505 P.2d 777 (1973). In that case, this Court voided a real estate sales commission contract because it was signed by an executor one month prior to his receipt of letters testamentary.

Nor did Eva Siegel have any intention of exercising the lease option to extend the term on behalf of the Estate of Max Siegel. This is evidenced by her failure to inventory the lease, set aside a contingent fund to satisfy future rents, and to list the lease on the federal and state estate tax returns.¹ Had she so intended, she had three months from the date she received letters testamentary to petition the Probate Court for permission to exercise the lease option or to ratify the sending of Exhibit 8P. Indeed, where she was aware of the necessity of petitioning the Probate Court to enter into contracts on behalf of the Estate of Max Siegel (as evidenced by the petition filed September 16, 1969 for permission to borrow money on behalf of the estate), her failure to get court approval to extend the lease was no oversight. Especially when

¹ See 26 U.S.C.A. Internal Revenue Code §2031 which would require that the lease assigned to Max Siegel be included in his gross estate if the parties had not allowed the lease to lapse; and its counterpart under Utah law, §59-12-3, U.C.A., 1953, as amended. Also see Opinions of the Accounting Principles Board, No. 5, September 1964, **Reporting of Leases in Financial Statements of Lessee** as supplemented by Opinions of the Accounting Principles Board, No. 31, June 1973, **Disclosure of Lease Commitments by Lessees**, which would also have required that the lease be listed on the financial statements of the Estate of Max Siegel if the parties had not allowed the lease to lapse.

she subsequently petitioned eleven times to enter into additional contracts to borrow money on behalf of the estate, and amended the inventory to include after discovered property.

In summary, since Eva Siegel as Executrix did not inventory the lease by petitioning the Probate Court for permission to exercise the option to extend the lease on behalf of the Estate of Max Siegel, she had no capacity to contract and the offer was void; see *In re Grattan's Estate. Bethel College of Newton vs. Pihlblad*, 155 Kan. 839, 130 P.2d 580 (1942), which held that executors must render their accounts to the probate court for approval to bind the estate, especially for acts committed prior to receipt of letters testamentary. The lease, therefore, expired December 17, 1969.

Nor did any party file a contingent claim against the Estate of Max Siegel to require Eva Siegel as Executrix to extend the lease and charge the estate with the performance of its terms and conditions after notice to creditors had been published pursuant to section 75-9-4, U.C.A., 1953, as amended:

"75-9-4. Claims to be presented within time limits—Exceptions—All claims arising upon contract, whether the same are due, not due or contingent, must be presented within the time limited in the notice, and any claim not presented is barred forever; provided, that when it is made to appear by the affidavit of the claimant, to the satisfaction of the court or judge thereof, that the claimant had no notice as provided in this chapter by reason of being out of state, it may

be presented at any time before a decree of distribution is entered; provided further, that nothing in this title contained shall be so construed as to prohibit the foreclosure of liens or mortgages as hereinafter provided."

Simply put, if Trailer Mart, Inc., subtenant of the Estate of Max Siegel, were relying on the lease in question, it should have filed a claim against the Estate of Max Siegel to have Eva Siegel as Executrix extend the lease and protect its subtenancy rights. Defendants' claims and counterclaims against the plaintiffs should therefore be dismissed since the lease expired because of their own failure to take proper steps to preserve the lease.

For additional authorities on the necessity of presenting contingent claims against an estate to enforce the obligations entered into by a decedant, see: *Holloran-Judge Trust Co. vs. Heath et. al.*, 70 U. 124, 258 P. 342 (1927) holding that a building management contract entered into prior to the death of the principal must be filed as a contingent claim against his estate in order for the contract to be specifically enforced; *Lesser vs. Pomin*, 3 CA2d 117, 39 P.2d 451 (1934); *Joost vs. Castel*, supra, holding that rents to accrue under a lease must be filed as a contingent claim against an estate; *Tropico Land and Improvement Co. vs. Lambourn*, 170 Cal. 33, 148 P. 206 (1915); *Verdier vs. Roach*, 96 Cal. 467, 31 P. 554 (1892), holding that a covenant in a lease for indemnity from water damage must be presented as a contingent claim even though the breach has not yet occurred; and *Bancroft's Probate*

Practice, Vol. 3, §769, §772, §773, §774, and §786 (Second Edition 1950, 1974 Supp.) for a complete discussion of the necessity of presenting contingent claims against an estate to enforce the obligations entered into by a decedent prior to his death.

POINT III

THE DISTRICT COURT ERRED IN FINDING THAT EVA SIEGEL, EXECUTRIX NAMED IN THE LAST WILL AND TESTAMENT OF MAX SIEGEL, WAS ACTING AS AGENT FOR TRAILER MART, INC. WHEN SHE SENT THE LETTER REGARDING THE LEASE OPTION.

Plaintiffs contend that if the finding is correct that Husky Oil Company of Delaware assigned the lease directly to Trailer Mart, Inc., the District Court erred in finding that Eva Siegel, Executrix Named in the Last Will and Testament of Max Siegel, was acting as agent for Trailer Mart, Inc. when she sent to the Zeeses Exhibit 8P regarding the lease option.

First, the finding of Eva Siegel's agency is clearly contrary to the evidence introduced at trial. Not only does Exhibit 8P state that the letter was sent on behalf of the Estate of Max Siegel which claimed the lease in question, there is no other evidence in the record to support the finding of Eva Siegel's agency. When asked if Trailer Mart, Inc., ever sent a letter

regarding the lease option, Dan Siegel, current president of Trailer Mart, Inc., stated (TR. 533):

Q. (By Mr. Theodore) Okay. Did Trailer Mart, Inc., ever send a letter to the Zeeses exercising the option?

A. No.

Later, when asked why Eva Siegel sent the letter on behalf of the Estate of Max Siegel when Trailer Mart, Inc. was in possession of the property, Dan Siegel explained (TR. 560):

A. When Max died we were trying to cover a lot of loose ends. This seemed to be one of them. It seemed appropriate for the Executrix of the Estate to notify Mr. Zeese who had undoubtedly heard of Max's death that the business was going to be carried on and we did it in the form of an exercise of the option.

When you are doing business on a day-to-day basis you often don't look toward the niceties of the legal entities and we simply as you can see from the document exercised it in that manner.

This incredulous explanation of Exhibit 8P's meaning is even more perplexing when one notes that the letter was drafted by Dan and Eva Siegel's attorney, and that it contains no mention of the business. Nor was notice ever forwarded to the Zeeses indicating that the letter was in error. It is also disturbing to note that Dan Siegel represented to plaintiffs all during the negotiations to purchase the Zeese property that Max Siegel, an individual and his legal successors—the Estate of Max Siegel—had the lease in question, not Trailer

Mart, Inc. (see page 10 of Exhibit 9P which formed the basis of the purchase negotiations).

Hence, if the lease were assigned to Trailer Mart, Inc. by Husky Oil Company of Delaware, the finding that Eva Siegel, Executrix named in the Last Will and Testament of Max Siegel, exercised the lease option on behalf of Trailer Mart, Inc. is not supported by the record, and is therefore in error. Since Trailer Mart, Inc. did not exercise the lease option, the lease expired December 28, 1969.

Second, the law does not support Eva Siegel's agency. Apparently the District Court ignored the long established principle that death of an agent terminates the agency relationship; see Restatement of Law Second, *Agency*, Vol. 1, §121 (1958). Therefore, if Max Siegel were acting as agent for Trailer Mart, Inc. in taking the lease from Husky Oil Company of Delaware, upon his death the agency relationship terminated so that his executrix could not substitute as agent for Trailer Mart, Inc. Also, Eva Siegel as Executrix did not have the capacity to act as agent for Trailer Mart, Inc. without petitioning the Probate Court for permission to continue any business interests Max Siegel may have had in Trailer Mart, Inc. Section 75-11-8, U.C.A., 1953, as amended, states:

“75-11-8. Continuing decedent's business—When the interests of creditors are not prejudiced thereby, the court may prescribe that the business in which the decedent was engaged at the time of his death may be continued for such length of time as may be necessary to permit

the affairs of the estate to be wound up to the best advantage." (emphasis added)

When no petition was filed with the Probate Court to continue any business interests the decedent may have had in Trailer Mart, Inc. (assuming contrary to the evidence introduced that Trailer Mart, Inc. was the alter ego of Max Siegel), Eva Siegel as Executrix had no authority to act as agent for Trailer Mart, Inc. by sending her letter (Exhibit 8P).

The finding of Eva Siegel's "agency" is also contrary to the statute of frauds, sections 25-5-1 and 3, U.C.A., 1953, as amended, *supra*. Again, no evidence was presented:

1) That Trailer Mart, Inc. ever held a board meeting orally authorizing Eva Siegel as Executrix of the Estate of Max Siegel to exercise the lease option and extend the term on its behalf,

2) That Trailer Mart, Inc. gave written authorization to Eva Siegel as Executrix of the Estate of Max Siegel to act as its agent, which this Court required in the *Lee vs. Polyhrones* case, 57 U. 401, 195 P. 201 (1921); the *Baugh vs. Logan City* case, 27 U.2d 291, 495 P.2d 814 (1972), holding that the minutes of a Logan City Commission meeting were not sufficient authorization under the statute of frauds to allow the Mayor to bind the City inasmuch as the minutes were not subscribed by the principals; and the *Frandsen vs. Gerstner* case, 26 U.2d 180, 487 P.2d 697 (1971), holding that real estate agents must have separate written

authority from their principals to enter into contracts to sell land, which is listed with them for sale.

3) That Trailer Mart, Inc. ever held a Board meeting ratifying the sending of Eva Siegel's letter regarding the option.

4) That Eva Siegel had authority to act on behalf of Trailer Mart, Inc., without a meeting of its Board of Directors, or

5) That the defendants ever complied with the lease terms by operating a gasoline and oil filling station to take the lease out of the statute of frauds under the doctrine of part performance (see stipulation of counsel on page 462 of the Court Transcript).

Trailer Mart, Inc.'s claim of a leasehold interest is therefore barred under the statute of frauds, and the lease was either *void ab initio* or expired on December 28, 1969 when Trailer Mart, Inc. did not exercise the option to extend the lease.

In summary, if the lease were assigned directly to Trailer Mart, Inc. by Husky Oil Company of Delaware, the finding that Eva Siegel, Executrix named in the Last Will and Testament of Max Siegel, exercised the option to extend the lease on behalf of Trailer Mart, Inc. is not supported by the record or the law, and is therefore in error.

At this point it might be helpful to the Court to point out why the record fails to support the findings of Trailer Mart, Inc.'s involvement in the lease trans-

actions. Counsel's theory of proof is found on page 547 of the official transcript:

MR. HEYREND: Well, Mr. Siegel has testified he was an officer of Trailer Mart and is answering the questions in that regard. It is always a problem when you are dealing with a corporation because the corporation has no more substance than the officers themselves and, therefore, any intent of the corporation would be expressed in the intent of any of the officers. To that extent I think Mr. Siegel was directing himself.

Even the District Court rejected this manner of proof at trial (TR. 547):

THE COURT: Of course, he can only testify to his own intent.

MR. HEYREND: That's correct. That's correct as an officer.

THE COURT: As an officer?

MR. HEYREND: Yes.

THE COURT: As long as we understand we are talking about his own state of mind.

Apparently counsel tried to impute the agency of Max Siegel and Eva Siegel on behalf of Trailer Mart, Inc. through the testimony of Dan Siegel who did not participate in the assignment negotiations, and who was not authorized to direct Eva Siegel as Executrix to be an agent for Trailer Mart, Inc. without approval of the Probate Court. This witness was therefore not in privity with the lease, and was also incompetent to

testify as to the events which took place between Max Siegel and Husky Oil Company of Delaware.

For this Court to approve this manner of proof to transfer leases involving estates will result in numerous frauds and sham arrangements designed to bypass the Probate Court and the State Tax Commission. Indeed, it is quite obvious that Eva Siegel was either trying to avoid probating the lease in question, or she decided that it had little value in 1969 and elected to let it lapse. Defendants then tried to claim a leasehold interest in the property in 1972 when the construction of a new shopping center across the street inflated property values in the surrounding area (See Exhibit 56P, the April 1972 aerial photograph showing the beginning construction of the shopping center). This Court should therefore strike down this agency fiction designed to bypass the Probate Court, and reverse the judgment of the District Court.

POINT IV

THE DISTRICT COURT ERRED IN INVOKING THE DOCTRINE OF ESTOPPEL TO PRECLUDE PLAINTIFFS FROM ENFORCING THE RESTRICTIVE USE COVENANTS CONTAINED IN THE LEASE.

If the lease option were exercised, the defendants breached the lease by operating a trailer and recreational vehicle sales outlet on the premises, and the District Court erred in invoking the doctrine of estoppel to preclude plaintiffs from enforcing the restrictive use

covenants contained therein. The Utah law governing estoppel was outlined in *Migliaccio vs. Davis*, 120 U. 1, 232 P.2d 195 (1951) on page 198:

“Equitable estoppel or estoppel in pais is the principle by which a party who knows or should know the truth is absolutely precluded, both at law and in equity, from *denying or asserting the contrary of, any material fact, which*, by his words or conduct, affirmative or negative, intentionally or through culpable negligence, he has *induced another, who was excusably ignorant of the true facts and who had a right to rely upon such words and conduct, to believe and act upon them thereby, as a consequence reasonably to be anticipated, changing his position in such a way that he would suffer injury if such denial or contrary assertion were allowed.*” (Emphasis added)

Therefore, for an estoppel to arise, there must be:

- 1) Concealment or misrepresentation of a material fact,
- 2) Inducement of another to act,
- 3) Reliance by a party who at the time he acted had no way of acquiring the true facts through reasonable diligence, and who had a right to rely upon such words or conduct, and
- 4) Injury suffered as a consequence of his changed position if the contrary assertion were allowed.

Applying the facts of the present case to the above criteria for an estoppel to arise, several elements are missing:

a) The plaintiffs did not conceal or misrepresent any facts to the defendants. Indeed, if the District Court's findings are correct that Trailer Mart, Inc. received the lease from Husky Oil Company of Delaware, the only misrepresentations were made by the defendants representing that the Estate of Max Siegel had the lease in July 1969 (Exhibit 8P) through the Fall of 1972 and the Spring of 1973 (Exhibit 9P).

Nor did the plaintiffs conceal from the defendants that they did not have a valid lease. The evidence introduced concerning the parties' bargaining positions during the negotiations to sell the Zeese property in the Fall of 1972 and the Spring of 1973 clearly indicates that George Zeese refused to acknowledge that the property was subject to a leasehold interest. When Dan Siegel presented the appraisal prepared for him by Raymond S. Fletcher which indicated that *Max Siegel, an individual and his successors and heirs* had a \$73,779.00 leasehold interest in the Zeese property (Exhibit 9P), George Zeese completely rejected Dan Siegel's representations, and countered, instead, with a firm selling price of \$150,000.00 which was \$6,000.00 above the appraised value for the entire property. Dan Siegel, therefore, knew when George Zeese refused to discount the selling price in the Fall of 1972 that George Zeese believed that the lease had lapsed. Indeed, Dan Siegel also believed that the lease had lapsed inasmuch as he agreed in the Spring of 1973 that the selling price of \$150,000.00 would not be discounted \$73,779.00 for a leasehold interest [See Ex-

hibit 10P, Dan Siegel's business card containing the terms of the sale which he wrote on the back. Also note that Dan Siegel was negotiating to purchase the property on behalf of his niece, Valerie Richter, who had no interest in Trailer Mart, Inc. (TR. 514)].

Simply stated, would a reasonably prudent businessman deliberately waive a \$73,779.00 leasehold interest if he had a binding lease? Certainly not. There is no question that Dan Siegel knew that the lease had lapsed, and therefore George Zeese would not have a duty to inform him of that fact.

b) The plaintiffs did not induce Max Siegel to take an assignment of the lease in question, nor did they induce Trailer Mart, Inc. to expand its display area by moving onto the Zeese property from the contiguous Jensen property. Indeed, the Zeeses never met Max Siegel (TR. 448); and Trailer Mart, Inc., moved onto the Zeese property the first part of May 1969, over a week before the Zeeses were notified by Husky Oil Company of Delaware that the lease had been assigned to Max Siegel, an individual (Exhibit 6P).

c) The defendants at the time they acted were in a position to ascertain that the lease in question contained restrictive use covenants limiting the use of the premises to a gasoline and oil filling station since all parties had a copy of the lease. The defendants were also in a position to ascertain: 1) that Eva Siegel had not received letters testamentary to act on behalf of the Estate of Max Siegel when she sent the letter re-

garding the lease option, and 2) that Eva Siegel as Executrix of the Estate of Max Siegel did not list the lease as an asset or liability of the estate or petition for permission to exercise the option. Therefore, as outlined in *Coombs vs. Ouzounian*, 24 U.2d 39, 465 P.2d 356 (1970), since all parties had copies of the lease, and the means to ascertain Eva Siegel's incapacity to contract, the doctrine of estoppel should not be invoked (In the Coombs case, supra, this Court ruled that no estoppel arose to enforce a sale of property when a wife had not authorized her husband to sign a deed on her behalf, and the party claiming estoppel had means to ascertain whether she had done so).

Nor did the defendants have a right to rely on a leasehold interest since:

i) Dan Siegel, President of Trailer Mart, Inc., testified that the corporation did not exercise the option to extend the term of the lease. Therefore, if Husky Oil Company of Delaware assigned the lease to Trailer Mart, Inc., the lease lapsed when Trailer Mart, Inc., failed to exercise the lease option.

ii) If the lease passed into Max Siegel's Estate upon his death because Husky Oil Company of Delaware assigned the lease to *Max Siegel as an individual*, Trailer Mart, Inc., was a subtenant of the Estate of Max Siegel and therefore not entitled to rely upon an extension of the lease unless the lease were probated. As outlined in *Cifelli vs. Santamaria*, 79 N.J.L. 354, 75 At. 434 (1910):

“Nor was appellant entitled, as a subtenant, to a renewal of the lease. He had no privity with the landlord, is not liable on the tenant’s covenants, and cannot take advantage of the landlord’s covenants with the lessee . . .

So, while a lawful assignee of the lease may exercise his assignor’s option of renewal, I find no authority holding that its option may be exercised by an undertenant as such and it is quite clear that no such right exists. Hence, even if it be considered that the acceptance of rent directly from the appellant as subtenant, and notice to quit served on him, amounted to a recognition of his subtenancy, such recognition did not give him the rights of the original tenant to a renewal.”

Also see *Audubon Hotel Co. vs. Braunnig*, 120 La 1089, 46 So. 33 (1908) :

“The sublease is a new contract . . . The lessor is not a party to the sublease, and the subtenant is not a party to the original lease. There is no contractual tie between the subtenant and the owner or lessor. The lease of the subtenant terminates with the lease from whom he holds as tenant. *The lessee of the owner stands between the subtenant and the lessor, the owner. It is as to the former, his lessor, that the subtenant must address himself in asserting his rights.* The subtenant cannot defeat the original lessor suing to be reinstated in the possession of the property after his lease has expired. It is true that the subtenant has all the lessee’s right to enjoy the property. This right does not go further. It does not include in addition the right of renewal given by the first lessor to his lessee. A subtenant has no action against the owner or original lessor for

a renewal of the lease by reason of the fact that there is no contract between him and the original lessor, and no legal tie which he can invoke.” (emphasis added)

and *M. B. Zeidman vs. A. Davis*, 161 Tx 496, 342 S.W.2d 555 (1961):

“There is no privity of contract between a sublessee and the original lessor . . . And so it is held that a sub-lessee does not acquire or succeed to the option of a lessee to purchase the premises . . . or to his option to renew the lease.

Since Davis (sublessee) had no legal right to exercise the option and thus to extend the term of the lease, his misinterpretation of the lease and detrimental conduct under the misinterpretation would not confer on him the right to exercise the option belatedly or estop the lessors from asserting that the option had not been timely exercised by Landry (lessee, sublessor).”

This privity of contract principle is also found in *Lou-dave Estates, Inc. vs. Cross Roads Improvements Co. Inc.*, 28 M.2d 54, 214 N.Y. Supp. 2d 72 (1961); *Novosad vs. Clary*, 431 S.W.2d 422 (1968); *Hart et al vs. Walker*, supra, where the New Mexico Supreme Court ruled that even the heirs of a deceased lessee could not exercise a renewal option if the administrator refused to renew a state land lease; 127 A.L.R. 948, and 51 A.L.R.2d 1404.

Therefore, since Trailer Mart, Inc. as a subtenant was not in privity with the lease to exercise the option, and Eva Siegel did not exercise the option to extend the lease on behalf of the Estate of Max Siegel, the

lease terminated December 28, 1969. The Estate of Max Siegel and its subtenants then became month to month hold over tenants.

iii) No consideration was given to the plaintiffs to exercise the option and extend the lease for an additional term, or to modify its restrictive use covenants. As the Supreme Court of the State of Washington observed in construing a gasoline and oil filling station lease identical to the one in question, the option provisions lack mutuality since no additional benefit or consideration is conferred on the lessor to extend the lease when the lessee merely sends written notice of his intention to extend the lease, see *Logan vs. Time Oil Company*, 73 Wash.2d 161, 437 P.2d 192 (1968). That Court recognized the grave inequities which arise where a lessee attempts to overdraft a lease and get something for nothing. This dispute presents a sublessee which not only refused to pay anything for the right to extend the lease term, but refused to pay anything for the right to modify the restrictive use covenants. Indeed, defendant Trailer Mart, Inc. claims extensive damages if it loses a leasehold interest; not for damages incurred, but for the loss of a bargain! (Note the method of computing the \$780,000.00 counterclaim on page 6 of Dan Siegel's Answers to Interrogatories.) No better example can be found of a party trying to take advantage of an overdrafted lease taken behind the back of the lessor who was negotiating with the lessee Husky Oil Company of Delaware to cancel the lease (TR. 444). This Court is therefore strongly urged to cancel

the lease as lacking mutuality as it did the employment contract in the *Allen vs. Rose Park Pharmacy* case, 120 U. 608, 237 P.2d 823 (1951).

In summary, the elements of estoppel are not supported by the evidence, and the District Court erred in invoking the doctrine. The District Court apparently confused the doctrine of estoppel with the doctrine of waiver which is discussed in Point V.

POINT V

THE DISTRICT COURT ERRED IN INVOKING THE DOCTRINE OF WAIVER TO PRECLUDE PLAINTIFFS FROM ENFORCING THE RESTRICTIVE USE COVENANTS CONTAINED IN THE LEASE.

If the lease option were exercised, the defendants breached the lease, and the District Court erred in invoking the doctrine of waiver to preclude the plaintiff's from enforcing the restrictive use covenants.

In the second paragraph on page 4 of the lease, the parties covenanted that:

"No waiver of any forfeiture, by acceptance of rent or otherwise shall waive any subsequent breach of any conditions of this Lease; nor shall any consent to any assignment or subletting of said premises, as aforesaid, be held to waive or release any assignee or sublessee from any of the foregoing conditions or covenants as against him

or them, but every such assignee or sublessee shall be expressly subject thereto."

All parties therefore understood that the use of the premises was to be governed strictly by the lease provisions when they agreed that there would be no waiver of any forfeiture, by acceptance of rent or otherwise. Indeed, Saturn Oil Company specifically negotiated for the right to erect and operate a gasoline and oil filling station and drafted the lease accordingly. Saturn Oil Company, its successors and assigns, further covenanted in the sixth paragraph on page 3 of the lease to remedy any breach of the restrictive use covenants within 30 days from the date of notice of termination:

"... failure of the LESSEE to promptly keep and perform each and every covenant, agreement and obligation of this Lease on the part of the LESSEE to be kept and performed, shall, at the option of the LESSOR, cause the forfeiture of this Lease. If the LESSEE shall be in default of any of its obligations under this Lease, LESSEE shall have thirty (30) Days from date of notice by LESSOR to correct such default, and if such default shall not be corrected, possession of the within demised premises and all additions and permanent improvements thereof shall be delivered to the LESSOR, and thereupon LESSOR shall be entitled to and may take possession of the demised premises, any other notice or demand being hereby waived."

Therefore, the plaintiffs, by accepting rent, did not waive the right to object to the defendants' continuing breach of the lease in maintaining a recreational vehicle

and trailer sales outlet on the premises after notice of plaintiffs' election to enforce strictly the provisions of the lease.

As outlined in *Robinson vs. Hadley*, 351 F.2d 385 (1965) (9th Cir. C.A.):

"This rule is especially applicable where the lease expressly provides that the waiver of any breach should not be deemed a waiver of a subsequent breach."

Also, see *Thompson On Real Property*, Vol. 3A, §1328 (Fourth Edition 1959, 1965 Supp., p. 578:

"Yet, even after an estoppel, if the covenantee gives notice that he intends henceforth to stand upon his legal right, it has been held that he may enforce the terms of the contract strictly from that time on."

and p. 581:

"Any inference of a waiver by the landlord of a forfeiture of the lease by acceptance of the rent with knowledge of a breach of condition or covenant is rebutted by a provision in the lease that the receipt of rent with knowledge of any breach shall not be deemed a waiver."

This general rule is outlined in 49 Am.Jur.2d §1063, page 1027:

"But the general rule is that a waiver of a right of forfeiture for breach of a covenant in a lease does not operate as a waiver with respect to a continuance of the breach, where the breach is a continuing one, and it does not operate as a waiver of the right of forfeiture for a subsequent

breach of the covenant. Thus the receipt of rent by a landlord with knowledge of the breach of conditions in a lease does not estop him from declaring a forfeiture for a continuance of the cause of the forfeiture after the acceptance of rent or for subsequent breaches of the covenant."

and also found in 51C Corpus Juris Secundum, *Landlord and Tenant* §117 (6).

The plaintiffs were therefore not precluded from enforcing the restrictive use covenants contained in the lease, since the defendants are unable to raise the defense of waiver without breaching the lease. Clearly the District Court erred in sustaining the defense of waiver.

The District Court's election to divide the trial of plaintiffs' cause of action into the issue of liability, and the issue of damages was unfortunate since plaintiffs were not given the opportunity of presenting evidence of their damages resulting from the defendants operation of a trailer and recreational vehicle sales outlet. The importance of these restrictive use covenants was consequently lost to the District Court. Plaintiffs would have established that the recreational vehicle and trailer displays act as a wall isolating the rear portion of the property from further commercial development which can be seen from the aerial photograph taken in July 1973 (Exhibit 44P). A gasoline and oil filling station operation allows traffic to flow from State Street through the frontage of the property thereby allowing further commercial development of the rear of the prop-

erty. The District Court's ruling leaves the plaintiffs with landlocked property without any compensation from the defendants for the right to modify the restrictive use covenants which were negotiated by the defendants' predecessor, Saturn Oil Company.

It is also difficult to understand the District Court's reasoning for invoking waiver. The ruling emphasized that the defendants acted in reliance upon a lease even though they never complied with its restrictions or paid to have them modified. In effect, the District Court ruled that the plaintiffs had been generous in allowing the defendants to use their property contrary to the lease restrictions without compensation, and now that the plaintiffs need the property utilized in conformance with the lease provisions which the defendants agreed to, it is too much of a hardship for the defendants to comply with their bargain!

The ruling also emphasized that the plaintiffs didn't inform the defendants of the lease restrictions with which defendants' attorney assured the Zeeses that they would comply. Again, the District Court in effect ruled that plaintiffs had a written lease agreement with the defendants outlining the terms and conditions for the use of the property, but they should have explained those terms and conditions to the defendants and their counsel! Simply put, would a landlord respond to a letter of assurances sent by lessee's attorney (See the last paragraph in Exhibit 7P) :

“Please be assured that both Mr. Siegel and Trailer Mart, Inc., will comply with all of the

obligations of the Lessee under the lease referred to hereinabove.”

by explaining the lease terms to his attorney?

Plaintiffs therefore urge this Court to enforce the lease restrictions originally bargained for, and reverse the District Court’s invocation of the doctrine of waiver to preclude the enforcement of the restrictive use covenants contained in the lease.

POINT VI

THE DISTRICT COURT ERRED IN INVOKING THE DOCTRINE OF ESTOPPEL AND WAIVER TO PRECLUDE PLAINTIFFS FROM JUDGMENT AGAINST HUSKY OIL COMPANY OF DELAWARE FOR BREACH OF THE LEASE BY ITS ASSIGNEE, TRAILER MART, INC.

If the District Court’s findings are correct that Trailer Mart, Inc. exercised the lease option but breached the restrictive use covenants contained in the lease, the District Court erred in precluding plaintiffs from judgment against Husky Oil Company of Delaware by invoking the doctrine of waiver and estoppel. Plaintiffs based their causes of action against Husky Oil Company of Delaware on the sixth paragraph on page 2 of the lease which states:

“This lease shall be assignable by the LESSEE without the consent of the LESSOR *provided*

that LESSEE shall at all times be liable for the faithful performance of all the covenants of this Lease, and any assignment of the Lease as aforesaid shall not operate to release the LESSEE from any of its obligations hereunder.” (emphasis added)

Therefore, when the District Court found that Husky Oil Company of Delaware’s assignee Trailer Mart, Inc. breached the lease by operating a trailer and recreational vehicle sales outlet on the premises, the District Court erred in not awarding judgment to the plaintiffs against Husky Oil Company of Delaware based on its contractual liability, especially when Husky Oil Company of Delaware did not plead waiver and estoppel as an affirmative defense under Rule 8(c) of the Utah Rules of Civil Procedure. Clearly the District Court erred in finding waiver and estoppel when it was not pleaded; see *Parowan Mercantile Co. vs. Gurr*, 83 U. 463, 30 P.2d 207 (1934); *Brittain vs. Gorman*, 42 U. 586, 133 P. 370 (1913).

POINT VII

THE *JENSEN VS. OK INVESTMENT CORPORATION* CASE DISTINGUISHED.

Because the District Court confused this Court’s ruling in the *Jensen vs. OK Investment Corporation* case, supra, with the issues in the present case, plaintiffs offer a brief outline of the main differences between the two cases:

1) The Jensen case decided the issue as to when a subtenant becomes a lessee in privity of contract with the landlord to have standing to exercise a lease option. The present case involves the issue of the capacity of an executrix to exercise a lease option, and the issue of forfeiture for breach of restrictive use covenants contained in a lease.

2) In the Jensen case, the original lessee OK Investment Corporation disclaimed all interest in the lease in favor of its subtenant Trailer Mart, Inc. when approached by the landlord for the delinquent rent. This disclaimer produced a two party transaction wherein the subtenant and the lessor were able to negotiate an extension of the lease directly. In the present case, not only did the original lessee Estate of Max Siegel not disclaim all interest in the lease in favor of its subtenant Trailer Mart, Inc.; the Estate of Max Siegel filed a counterclaim against the lessors for loss of the lease. Therefore, without a disclaimer, a three party transaction evolved, wherein the consent of the lessor, lessee, and the subtenant were all needed before an assignment could bind the parties, see *Shell Oil Company vs. Stiffler*, 87 U. 176, 48 P.2d 503, reh, den. 87 U. 197, 49 P.2d 1150 (1935). Since no evidence was presented that the Estate of Max Siegel and George and Emily Zeese consented to an assignment of the lease to Trailer Mart, Inc., an assignment and extension of the lease could not arise by a subtenant's reliance upon a leasehold interest.

3) In the Jensen case, the subtenant Trailer Mart,

Inc. sent a written offer including additional consideration to extend the lease at an increased rental. The Jensens accepted this offer from their subtenant and cashed the enclosed check for the delinquent rent and nine subsequent checks at the increased rental before objecting to their subtenant's inability to exercise the lease option. In the present case, the subtenant Trailer Mart, Inc. did not present a written claim to the lease (Exhibit 12P) until after notice of termination had been sent. Nor did Trailer Mart, Inc., the subtenant, or the Estate of Max Siegel, the lessee, exercise the lease option.

4) The Jensen case did not involve parties unable to contract. The present case concerns an executrix having limited powers to contract independent of the Probate Court.

In summary, the Jensen case did not involve a breach of a lease or the incapacity of a party to contract. The Jensen case decided solely the issue of when a subtenant becomes a lessee in privity of contract with the lessor to have standing to exercise a lease option.

CONCLUSION

Plaintiffs, George and Emily Zeese, submit that the District Court erred in finding that Max Siegel acted as agent for Trailer Mart, Inc. when he took the assignment of the lease in question from Husky Oil Company of Delaware. Plaintiffs further submit that the District Court erred in finding that Eva Siegel,

Executrix named in the Last Will and Testament of Max Siegel, exercised the option to extend the lease on behalf of Trailer Mart, Inc. As the assignment, Exhibit 6P, indicates, the lease was assigned to Max Siegel as an individual. It subsequently passed into the hands of his legal representative, Eva Siegel as Executrix of the Max Siegel Estate, upon his death. Since the lease was not probated as personal property, the lease lapsed and the defendants became month to month tenants. Therefore, since the District Court's findings are in error, the judgment must be reversed.

If the findings of Max Siegel's and Eva Siegel's "agency" are not in error, the District Court erred in precluding plaintiffs from enforcing the restrictive use covenants contained in the lease by invoking the doctrine of waiver and estoppel—especially when the parties agreed in the lease to remedy any breach of the covenants within 30 day's notice, and that there would be no waiver or forfeiture of the covenants by acceptance of rent or otherwise. Nor did defendant Husky Oil Company of Delaware even plead the affirmative defense of waiver and estoppel!

This case is also one of first impression in Utah and severely affects the tax collection procedures in the State of Utah. For this Court to allow a person to lease property and then to permit his successors and heirs to bypass the Probate Court upon his death will circumvent the statutory rules governing the descent and distribution of personal property in Utah. Uncertainty will arise so that creditors will never know if

they are dealing with an obligation of an estate or with an obligation of parties to a secreted lease. Inequities will also result, as in this instance, wherein an executrix acted as agent for a hidden lessee to prevent the lessor from enforcing agreed upon restrictive covenants governing the use of the property.

In consideration of the facts and the law presented in the foregoing Argument, plaintiffs urge this Court to reverse the judgment of the District Court and declare the lease void. Plaintiffs also request that the counterclaims of the defendants be dismissed as a matter of law, and that the case be remanded for a determination of the damages suffered by plaintiffs.

Respectfully submitted,

STONE & THEODORE

Marcus G. Theodore, Esq.

P.O. Box 8007

Salt Lake City, Utah 84108

MERRILL K. DAVIS, Esq.

72 East 400 South

Salt Lake City, Utah 84111

Attorneys for Appellants

George and Emily Zeese