

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, INC., a  
Nevada corporation d-b-a Dan's Campers N'  
Trailers; and HUSKY OIL COMPANY OF  
DELAWARE, a Delaware corporation : Reply Brief

Utah Supreme Court

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1 the Supreme Court of the State of Utah

DEC 6 1975

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

BRIGHAM YOUNG UNIVERSITY,  
J. Reuben Clark Law School

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

REPLY BRIEF  
of  
GEORGE ZEESE and EMILY ZEESE

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

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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

v.

ESTATE OF MAX SIEGEL; DAN  
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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

## REPLY BRIEF

of

GEORGE ZEESE and EMILY ZEESE

Defendants-Respondents, hereinafter referred to as defendants, in their brief, do not state the facts in the chronological sequence in which they occurred. This causes several distortions of fact. Defendants further raise the issues: 1) that the lease in question does not contain restrictive use covenants limiting the use of the premises to an oil and gasoline filling station and businesses incidental thereto, and 2) that defendant Husky

Oil Company of Delaware pleaded the defense of waiver and estoppel by implication. Because Plaintiffs-Appellants, hereinafter referred to as plaintiffs, did not treat these issues in their original brief, this reply brief is filed pursuant to Rule 75(p) of the Utah Rules of Civil Procedure.

## POINT I

### DEFENDANTS' FAILURE TO STATE THE FACTS IN THEIR BRIEF, IN THE CHRONOLOGICAL SEQUENCE IN WHICH THEY OCCURRED, RESULTS IN TWO MISREPRESENTATIONS OF FACT.

Defendants, in their brief, begin by stating facts which occurred in 1969 and then, through a series of flashbacks juxtaposed with events occurring later, materially distort the following facts:

1) Defendants' allegation that the lease was never discussed by the parties and refuted by George Zeese, until notices to quit were served four years and two months after Trailer Mart, Inc., moved onto the Zeese property, is in error. Defendants would have this Court believe that George Zeese acquiesced when presented with the Estate of Max Siegel's claim to a \$73,799.00 leasehold interest. (Exhibit 9P, the appraisal) The facts are uncontroverted that when the appraisal was discussed during the Fall of 1972 and

the Spring of 1973, negotiations to sell the property to Valerie Richter, Dan Siegel's seven year old niece, George Zeese denied that the property was subject to a leasehold interest and refused to discount the selling price (TR. 512). Indeed, the facts are uncontroverted that the defendants' business agent, Dan Siegel, acquiesced that the Zeese property was not subject to a \$73,799.00 leasehold interest. In the Spring of 1973, he agreed to purchase the property for \$150,000.00, a figure \$7,000.00 above the appraised value of \$143,000.00 for the entire Zeese property, as trustee for his niece, without discounting the selling price (See the terms of the proposed sale which Dan wrote on the back of his business card, Exhibit 10P). Therefore, the evidence is conclusive that the Zeeses had informed the defendants that the lease had lapsed.

Defendants confuse the issue by arguing that if the Zeeses had responded to Eva Siegel's letter regarding the exercise of the lease option on behalf of the Estate of Max Siegel (Exhibit 8P), the Estate of Max Siegel would have probated the lease. This non sequitor argument is simply a smoke screen to camouflage the decision of Eva Siegel, as Executrix of the Estate of Max Siegel, to let the oil and gasoline filling station lease lapse rather than pay the estate taxes which would have been assessed against the estate if the option were exercised.

2) Defendants' allegation that extensive improvements were made by Trailer Mart, Inc., in reliance

upon a leasehold interest, is in error. Defendants leave the Court with the impression that the routine maintenance costs expended to keep the weeds down by blacktopping, and the fencing to keep the garage next door from dumping junk onto the property are "extensive improvements" to the property which the Zeeses are trying to claim by forfeiting the lease. There is nothing in the record which indicates that these expenditures have any present value, or that they were made to benefit the Zeeses. Indeed, a comparison of the aerial photograph of the property taken in April, 1972 (Exhibit 56P) with the aerial photograph taken in July, 1973 (Exhibit 44P) indicates that most of these expenditures were made sometime after April, 1972, and not at the time Trailer Mart, Inc., moved onto the property, as alleged in defendants' brief. Presumably these maintenance costs were part of Trailer Mart, Inc.'s change of its assumed business name from "Dan's Campers N' Trailers" to "Patton's Travelers" in February, 1973 (Exhibit 48P), which occurred well after the Zeeses indicated to the defendants that they had no lease. Therefore, the allegation that extensive improvements have been made to the property is in error.

In summary, defendants failure to state the facts in their brief, in the chronological sequence in which they occurred, results in two material misrepresentations of fact.<sup>1</sup>

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<sup>1</sup> One further comment regarding defendants' statement of facts must be made. On page 20 of defendants' brief, it is alleged that defendants never claimed or proved (except in their alternative pleadings) that Trailer Mart, Inc., was a subtenant of the



## POINT II

**THE CONCLUSION OF LAW IS IN ERROR THAT DEFENDANT TRAILER MART, INC.'S USE OF THE PREMISES FOR ITS BUSINESS DOES NOT VIOLATE THE USE PROVISIONS CONTAINED IN THE LEASE.**

The first conclusion of law, which was objected to by plaintiffs' counsel, is in error and does not properly reflect the District Court's decision. On page 613 of the transcript of the Hearing for Clarification of the Memorandum Decision, the District Court ruled:

"I think it is a classic estoppel. That's the basic thing and I probably didn't say it in my memorandum but I was kind of trying to clean up a few loose ends myself before I went on vacation and I was dictating into that thing. I cleaned up about twenty cases in one day."

On page 621 of the transcript, the District Court reiterated its position that a breach had occurred, but that the plaintiffs were estopped from enforcing the breach:

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Estate of Max Siegel. Defendants further allege that at trial, they consistently claimed that Trailer Mart, Inc., possessed the premises as an assignee of Husky Oil Company of Delaware. Not only does this statement ignore the cross-claims filed by Husky Oil Company of Delaware against its assignee's successor, the Estate of Max Siegel, it also ignores Mr. Nielsen's closing argument:

"The fact of the matter is that Husky Oil Company as far as this evidence is concerned assigned this lease to Max Siegel, an individual . . ." (TR. 591)

Only one question need be asked, "How did Trailer Mart, Inc. become the assignee of Husky Oil Company of Delaware?"

**“MR. DAVIS:** That clarifies two points which were raised in our written motion.

**THE COURT:** What is the other one?

**MR. DAVIS:** The lease provisions. The use of the property.

**THE COURT:** Well, I think there was an estoppel there. I think that he knew that the property wasn't being used in conformance with the actual —

**MR. DAVIS:** In other words, they were restricted—”

From the foregoing, it is evident that the basis for the District Court's decision was estoppel. Therefore, for an estoppel to arise, there must be, by implication, a breach of the lease covenants by the defendants' use of the premises. Otherwise, there is no need to invoke equitable doctrines to prevent the enforcement of a non-existent right. Consequently, the first conclusion of law is in error, and should have reflected that Trailer Mart, Inc.'s use of the premises violated the lease provisions, but that plaintiffs were estopped from enforcing the breach.

If the first conclusion of law is correct, the District Court erred in concluding that Trailer Mart, Inc.'s use of the premises for a trailer and recreational vehicle sales outlet did not violate terms of the lease. Applying the following four rules of construction promulgated by this Court, it is evident that the lease drafted by Sa-

turn Oil Company was restricted to a gasoline and oil filling service station operation:

1. *The entire document must be construed to interpret its meaning.*

In a dispute over the assignability of an oil and gasoline filling station lease, this Court ruled in *Powerine Co. v. Russell's, Inc.*, 103 U. 441, 135 P. 2d 906 (1943) at page 913:

“When possible, the court should give effect to all words and clauses of the lease, and construe the lease as a whole. *United States v. Bostwick*, 94 U. S. 53, 24 L.Ed. 65; *F. B. Fountain Co. v. Stein*, 97 Conn. 619, 118 A 47, 27 A.L.R. 976; *S. Gumble Realty and Security Co. v. L. Feibleman and Co.*, 183 La. 865, 164 So. 627.”

Therefore, the following paragraphs in the lease dealing with the use of the premises must be construed together to arrive at the meaning of the restrictive use covenants: ,

“TO HAVE AND TO HOLD all of the same unto Lessee, subject to the conditions herein contained, and *for no other purpose or business* than that of the construction, installation, maintenance and operation of the necessary buildings, structures, driveways, approaches, tanks, pumps, signs, lighting equipment, or appliances for the operating upon said premises the business of storing, marketing and distributing petroleum products and commodities marketed in connection therewith, for the operation of a gasoline

and oil filling service station, a trucker's lodge, and a restaurant, and for the dealing in generally of such goods, wares, and merchandise as are customarily displayed, purchased and sold at the establishments of the type herein referred to, or any other lawful business." (emphasis added)

See the last paragraph on page one of the lease.

"... The LESSEE may also *sublet the premises for the operation of a gasoline and oil filling and service station* to any person or persons *without the consent of the LESSOR* so long as the LESSEE shall be liable for the faithful performance of this Lease." (emphasis added)

See the last paragraph on page two of the lease.

"... and it is further agreed that, should LESSEE be unable to obtain the necessary building permits and permits for curb cuts to operate the *business of a gasoline filling station and other business incidental thereto in accordance with LESSEE'S plans, specifications and requirements*, then and in that event this Lease shall, at the option of the LESSEE become null and void. Should LESSEE be unable at any time during the term of this Lease *to continue to operate such filling station* due to any laws, Federal, City or State, or rules and regulations of any Government authority, such inability to operate shall cause an abatement of the rental herein provided." (emphasis added)

Also see the first paragraph on page five of the lease.

The three paragraphs above clearly indicate that the

lease was drafted to accomodate an oil and gasoline filling station operation, and other businesses incidental thereto. Defendants completely ignore the following language in the last paragraph on page one of the lease:

“TO HAVE AND TO HOLD all of the same subject to the conditions herein contained, and *for no other purpose or business than . . .*” (emphasis added)

and argue that the lease restrictions are permissive in nature. However, they concede that if a lease provision reads:

“... for filling station, general store, and living quarters *and for no other purpose.*”

that the lease would be restrictive in nature as decided in the *Britt v. Luce* case, 114 S. W. 2d 267 (Tex. App. 1938). It is difficult to see any distinction between the restrictive language in the lease in dispute and the one in the Britt case, supra, which defendants cite on page 18 of their brief.

Nor does the subletting restriction found in the last paragraph on page two of the lease for businesses, other than gasoline and oil filling and service stations, make any sense, if there are no restrictive covenants contained in the lease. It is also obvious from the first paragraph on page five of the lease that Saturn Oil Company negotiated the lease to operate an oil and gasoline filling

station, and other businesses incidental thereto, in accordance with its plans and specifications.

Therefore, construing the three paragraphs together, there is no ambiguity on the face of the lease that the use of the premises is restricted to the operation of an oil and gasoline filling station, and businesses incidental thereto.

2. *The intent of the parties entering into the document must be ascertained.*

This Court in the *Maw v. Noble* case, 10 U. 2d 440, 354 P. 2d 121 (1960) further promulgated the following rule of construction for contracts on page 443:

“The primary and more fundamental rule is that the contract must be looked at realistically in light of the *circumstances under which it was entered into*, and if the intent of the parties can be ascertained with reasonable certainty it must be given effect.” (emphasis added)

The facts are undisputed that Saturn Oil Company drafted the lease in question, erected an oil and gasoline filling station on the leased premises, and operated it for over five years from October, 1959 through March, 1965. Certainly the actions of the parties entering into the lease indicate that the premises were to be used for a gasoline and oil filling service station. Nor are the facts in dispute that J. L. Terborg & Company, and Husky Oil Company of Delaware continued to operate oil and

gasoline filling service stations on the premises until April, 1969. Therefore, where, for more than nine years and seven months the premises were used exclusively for gasoline and oil filling service stations, there is no doubt that the parties entering into the original lease intended the lease to be restricted to an oil and gasoline filling service station operation.

See *Hardinge Co. v. Eimco Corp.*, 1 U. 2d 320, 266 P. 2d 494 (1954); and *California Building Co. of San Diego v. Halle*, 80 C. A. 2d 229, 181 P. 2d 404 (1947) for further authority on the proposition that the conduct of the parties entering into a contract should be looked at to construe any ambiguity in the contract. It should be noted that defendants misapply this rule of construction by looking to the conduct of an assignee's subtenant which occurred more than nine years and seven months after the original parties entered into the lease.

### 3. *Ejusdem Generis Doctrine.*

The "Ejusdem Generis" rule of construction adopted by this Court in *Memorial Gardens of the Valley, Inc. v. Love*, 5 U. 2d 270, 300 P. 2d 628 (1956), citing 28 C.J.S. Ejusdem Generis; *W. S. Hatch Co. v. Public Service Commission*, 3 U. 2d 7, 277 P. 2d 809 (1954); *Donahue v. Warner Bros. Pictures Dist. Corp.*, 2 U. 2d 256, 272 P. 2d 177 (1954) negates defendants' contention that the phrase "or any other business" ending the last paragraph on page one of the lease implies the right to use the lease premises in any manner. The

ejusdem generis rule states that when specific terms are followed by general terms, the latter are limited to things of a like kind. Applying this rule to the lease provisions, where specific businesses which can be operated on the premises are followed by the general term "or any other business", this general term is limited to businesses of a like kind. Consequently this general phrase simply means that the tenant can operate businesses incidental to the operation of an oil and gasoline filling service station as stated in the first paragraph on page five of the lease above.

See *McCullough Realty v. Laemmle Film Service*, 181 Iowa 594, 165 N.W. 33 (1917) where the Iowa Court, in interpreting a lease, stated that the rule of construction of contracts is that a general term, or sweeping clause, following a specific term, is to be construed in light of the specific term which it follows, and is to include only matters of a like kind or nature; and further, *the general term must be read in light of the particular business about which the parties were concerned when the lease was made.*

4. *Construction of the document against the lessee that drafted it.*

This Court further ruled in the *Powerine Co. v. Russell's Inc.* case, supra, that where a lease was prepared by the lessee, any ambiguity in the language should be construed against him, as he was the one using the language. Therefore, where Saturn Oil Company



drafted the lease, if there were any ambiguities in the restrictive covenants contained in the lease, these ambiguities should be construed against Saturn Oil Company, and its successors. For additional authority on this rule of construction, see *Maw v. Noble*, supra; and especially *Shell Oil Company v. Stiffler*, 87 U. 176, 48 P. 2d 503, reh. den. 87 U. 197, 49 P. 2d 1150 (1935) where this Court ruled that a lease consignment service station contract must be most strongly construed against the oil company which drew the contract. The Court went on to state, at page 507, that there must be *consideration* moving from the company to the defendant-lessor *to sustain a modification or waiver of the provisions of the contract*. It is significant that defendants, throughout this case, have failed to show that any benefit or consideration was given to the Zeeses to modify the terms of the lease by their occupancy.

In Summary, if the first conclusion of law is correct, the District Court erred, for the reasons stated above.

### POINT III

HUSKY OIL COMPANY OF DELAWARE'S STATEMENT THAT IT IMPLIEDLY ARGUED THE DEFENSE OF WAIVER AND ESTOPPEL IN DEFENDING AGAINST PLAINTIFFS' COMPLAINT IS NOT SUPPORTED BY THE RECORD.

The record indicates that Husky Oil Company of Delaware's first defense of this lawsuit was that it had assigned the lease in question to Max Siegel as an individual. (TR. 591) When he died, the lease went into his estate so Husky Oil Company of Delaware cross-claimed against it for any liability resulting under the lease from the Estate of Max Siegel's or its subtenant Trailer Mart, Inc.'s operation.

Husky Oil Company of Delaware's second defense was that under the privity of estate doctrine, an assignee would not be liable for a subsequent assignee's conduct, if the original assignee was not bound by contract to do so. Husky Oil Company of Delaware then went on to argue that, as an assignee, it did not assume all of the covenants of its assignor, and, in particular, the provisions of the lease which state:

"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)

This Court rejected this argument that the assignee does not step into the assignor's shoes to assume all of the terms and conditions of the lease in the *Jensen v. OK Investment Corporation* case, 29 U. 2d 231, 507 P. 2d

713 (1973) where it ruled that an assignment of a lease occurs only when the entire estate passes.

Husky Oil Company of Delaware's third defense was that the lease option was not exercised, so the lease lapsed and, therefore, it was not liable for the actions of the Estate of Max Siegel and its subtenant Trailer Mart, Inc. Plaintiffs joined in this argument and conceded that if the lease had lapsed, Husky Oil Company of Delaware would not be liable under the provisions of the lease. (TR. 386, 387)

Nowhere in the record did Husky Oil Company of Delaware argue the affirmative defense of waiver and estoppel. Nor is any explanation offered as to why Husky Oil Company of Delaware changed its defense, on appeal, without amending its pleadings and dismissing its cross-claims. Plaintiffs are therefore entitled to judgment against Husky Oil Company of Delaware, provided the lease is still in effect and a breach of the lease has occurred.

## CONCLUSION

For the reasons stated herein, and in their original brief, 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 suf-

ferred by the plaintiffs, inasmuch as defendants still have made no attempt to remedy their wrongful use of the premises.

Respectfully submitted,

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