

2007

Maxine B. Nickel Trust, Palatial Living Mobile Home Park v. Craig Carlsen, D. Craig Carlsen, David Craig Carlsen : Brief of Appellant

Utah Court of Appeals

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David, Craig, Carlsen.

Robert W. Thompson; Snow, Christensen & Martineau.

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IN THE UTAH COURT OF APPEALS

THE MAXINE B. NICKEL TRUST, dba
PALATIAL LIVING MOBILE HOME
PARK,

Plaintiff-Appellee,

-vs-

CRAIG CARLSEN, also known as
D. CRAIG CARLSEN, also known as
DAVID CRAIG CARLSEN,

Defendant-Appellant .

Case No. 20070621-CA

District Court Case No. 040100970

BRIEF OF APPELLANT

NO ORAL ARGUMENT REQUESTED

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Defendant-Appellant in Pro Se

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**FILED
UTAH APPELLATE COURTS**

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-VS-

CRAIG CARLSEN, also known as
D. CRAIG CARLSEN, also known as
DAVID CRAIG CARLSEN,

Defendant-Appellant,

-VS-

J.S. OLSEN; BILL (Last name unknown);
TAWNIA FRANCKOWIAK, Individually
and in her capacity as Manager of Palatial
Living; LYLE COOPER; MILES P.
JENSEN; OLSON & HOGAN, a
Professional Corporation; and JOHN and
JANE DOES, I through XX,

Third-Party Defendants.

Case No. 20070621-CA

District Court Case No. 040100970

BRIEF OF APPELLANT

NO ORAL ARGUMENT REQUESTED

JURISDICTION

Jurisdiction is conferred upon Utah Court of Appeal under assignment by the

Supreme Court of the State of Utah in this matter under the provisions of Utah Code Ann. § 78-2-2(4).

STATEMENT OF ISSUES TO BE PRESENTED ON APPEAL.

I. Whether the Reviewing Judge's Decision on the Affidavit of Prejudice was improperly influenced and tainted by the Palatial Living's written Objections which were not appropriately filed under Rule 63(b) of the Utah Rules of Civil Procedure and improperly submitted to the court for a decision under Rule 7, and whether the Affidavit was sufficient to disqualify Judge Hadfield. *Barnard v. Murphy*, 852 P.2d 1023, (Utah App. 1993); and *Young v. Patterson*, 922 P.2d 1280 (Utah 1996).

The standard of review to review this issue on appeal is that a judge's authority to review the affidavit under Rule 63(b) is a question of law that the appellate court reviews for correctness, affording no deference to the trial court. *Pugh v. Dozzo-Hughes*, 2005 UT App 203, ¶ 17, 112 P.3d 1247.

Carlsen adequately preserved this issue for appeal by filing a Reply Memorandum to Palatial Living's Objections to the Affidavit of Prejudice and by filing Objections to Palatial Living's Notice to Submit their Objections to the trial court for a decision. (R. 409, 424, 463, 470, 480, 483, and 946).

II. Whether the trial erred in granting the Palatial Living's motion for summary judgment because the court reviewed the evidence and all reasonable inference in the light most favorable to them rather than Carlsen and Palatial Living was not entitled to

summary judgment as a matter of law. Utah Mobile Home Park Residency Act, Utah Code Ann. § 57-16-9; § 57-16-4; 57-15-12. ***Brookside Mobile Home Park, Ltd. v. Peebles***, 2000 UT App 314, 14 P.3d 105, *affirmed*, 2002 UT 48, ¶¶ 28-32, 48 P.3d 968; ***Coleman v. Thomas***, 2000 UT ¶ 21, 4 P.3d 783; ***Secor v. Knight***, 716 P.2d 790 (Utah 1986); ***Dean v. Tasulis***, 2002 UT 52, 48 P.3d 235; ***King v. Firm***, 3 Utah 2d 419, 285 P.2d 1114 (Utah 1955); ***Rancho Santa Paula Mobile home Park v. Evans***, 26 Cal. App. 4th 1139, 32 Cal Rptr. 2d 464 (Cal App. Dist. 2, 1994); ***Pleasant View Campground, Inc. v. Hood***, 120 N.H. 86, 411 A.2d 1104 (N.H. 1980); and ***Mobile Home Brokers, Inc. v. Alvin Colvin, Jr. dba, Lazy Oaks Mobile Home Park***, 566 S.W.2d 68 (Tex App. 1978).

The standard of review to review this issue on appeal is that an appellate court reviews the trial court's grant of a motion for summary judgment for correctness, affording no deference to the trial court. ***Ford v. American Express Fin. Advisors***, 2004 UT 70 ¶ 21, 98 P.3d 540. Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Utah R.Civ. 56(c). When considering a motion for summary judgment, the appellate court views the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party. ***Carrier v. Salt Lake County***, 2004 UT 98 ¶ 3, 104 P.3d 1208.

Carlsen adequately preserved this issue for appeal by filing a Memorandum in Opposition to the Motion for Summary Judgment and a Motion to Strike Palatial Living's Memorandum in support of Motion for Summary Judgment as being in non compliance

with Rule 7 and Rule 56 of the Utah Rules of Civil Procedure. (R. 1292, 1298, 1300, 1304, 1310, 1349, 1360).

III. Whether Carlsen was denied his rights to access to the courts as provided under Article I, § 11 of the Utah Constitution when the trial court failed to render a decision on all issues in his counterclaim and his Third-Party Complaint. Whether Carlsen was also denied his rights to access to the courts when he was denied access to the records in this case when the record was transferred from the Clerk of the Court of the First District Court of Cache County to the Clerk of the Court of the First District Court of Box Elder County in violation of Rule 4-205(3) of the Utah Code of Judicial Administration and Utah Code Ann. § 78-3-30 when no change of venue was granted under the provisions of Utah Code Ann. § 78-13-11, and no appeal was pending.

The standard of review to review this issue on appeal is that an appellate court reviews a question of law for correctness and affords no deference to the trial court.

Pugh v. Dozzo-Hughes, 2005 UT App 203, ¶ 17, 112 P.3d 1247.

Carlsen adequately preserved this issue for appeal by filing Objections to the Memorandum Decision and Order Granting Summary Judgment. (R. 1360).

IV. Whether the trial court abused its discretion in denying the defendant's two motion to amend the counterclaim based upon newly discovered evidence. The January 30, 2001 letter from Palatial Living's attorney to Brannick Larsen, Shi Dean, and Lyle Cooper. [Exhibit V] (R. 696, 703). Rule 15(a) mandates that leave to amend pleadings

“shall be freely given when justice so requires.” Utah R.Civ.P 15(a). Moreover, “rule 15 should be interpreted liberally so as to allow parties to have their claims fully adjudicated.

Timm v. Dewsnap, 851 P.2d 1178, 1183 (Utah 1993).

The standard of review of a denial to amend pleadings is abuse of discretion.

Kasco Servs. Corp., Benson, 831 P.2d 86, 92 (Utah 1992).

Carlsen adequately preserved this issue for appeal by filing two different motions to amend the third-party complaint and counterclaim with supporting memoranda. (R. 272, 347, 365, 696, 703, and 780).

V. Whether the trial court violated the provisions of Rule 77(b) of the Utah Rules of Civil Procedure by conducting hearings over Carlsen’s written and verbal objections outside the county in which the matter was pending in Cache County, State of Utah.

The standard of review to review this issue on appeal is that an appellate court reviews a question of law for correctness and affords no deference to the trial court.

Pugh v. Dozzo-Hughes, 2005 UT App 203, ¶ 17, 112 P.3d 1247.

Carlsen adequately preserved this issue for appeal by filing written Objections to the hearings being held outside of Cache County. (R. 826).

DETERMINATIVE CONSTITUTIONAL, STATUTORY PROVISIONS

The following determinative constitutional, statutory, and rules are set out verbatim in the Addendum.

Utah Mobile Home Residency Act, Utah Code Ann. § 57-16-1, et seq.

Utah Code Ann. § 57-16-2.

Utah Code Ann. § 57-16-7.

Utah Code Ann. § 57-16-9.

Utah Code Ann. § 57-16-12.

Utah Code Ann. § 57-16-13.

Utah Code Ann. § 76-8-512.

Utah Code Ann. § 53-13-103.

Utah Code Ann. § 78-3-30.

Utah Code Ann. § 78-13-11.

Rule 15 of the Utah Rules of Civil Procedure.

Rule 63(b) of the Utah Rules of Civil Procedure.

Rule 77 of the Utah Rules of Civil Procedure.

Rule 4-205(3), Utah Code of Judicial Administration.

Rule 3-104 of the Utah Code of Judicial Administration

Rule 3-108 of the Utah Code of Judicial Administration

Article I, § 10 of the Utah Constitution.

Article I, § 11 of the Utah Constitution.

STATEMENT OF THE CASE

NATURE OF PROCEEDINGS:

This is an appeal from Order Granting Summary Judgment in favor of the plaintiff

and against the defendant on all issues in the Defendant's Counterclaim from the First Judicial District Court of Cache County, State of Utah, Case No. 040100970.

COURSE OF PROCEEDINGS:

This appeal involves a counterclaim regarding a dispute between a mobile home park and a tenant under the Mobile Home Residency Act.

DISPOSITION IN LOWER COURT:

The trial court granted summary judgment in favor of the mobile home park against the tenant on all issues in the counterclaim including issues that were not raised in the Motion and Memorandum for Summary Judgment.

STATEMENT OF FACTS:

1. The pleadings in this case shows that the mobile home located at 481 West 640 North, Logan, Utah was sold to the Carlsen on June 6, 2001 by the lienholder. Lyle Cooper, under the provisions of Utah Code Annotated, § 57-16-9, after the mobile home had previously been abandoned by the previous owner, Brannick Larsen and his family. "Defendant's Exhibit "H" incorporated into defendant's Memorandum in Support of Motion for Judgment on the Pleadings making reference to Brannick Larsen and Our File No. N-4300.15." (R. 127, 129).

2. Carlsen entered into Earnest Money Receipt and Real Estate Purchase Contract on May 30, 2001 through the Brokerage Firm of Town and Country Real Estate, to purchase upon condition of Palatial Living acceptance and immediate possession. a 1974

Hacienda, Model 519, Mobile Home, VIN # 518733U/X which is located at 481 West 640 North, Logan, Utah, from Lyle Cooper. Shi Dean was not a licensed motor vehicle dealer under the laws of the State of Utah at the time of the sale of the mobile home. The Earnest Money Receipt and Purchase Agreement is marked Defendant's Exhibit "A" which is attached to the original Counterclaim and made a part thereof. (R. 017). There was no disclosure by the real estate broker and agent, Shi Dean to Carlsen, before entering into the earnest money purchase agreement of the contents of a January 30, 2001 letter which informed her and the lienholder, Lyle Cooper that Palatial Living Mobile Home Park demanded that the mobile home be moved from the park or substantial repairs made to the home before being sold. No repairs were made by Lyle Cooper during the period between January 30, 2001 and May 30, 2001.

3. Carlsen on the 30th day of May, 2001, submitted an application for a lease agreement to Palatial Living Management, together with a excellent credit report that verified his employment. Carlsen was required to pay a \$ 25.00 application fee to Palatial Living. There was no disclosure to Carlsen at the time of Palatial Living accepting the lease application and receiving the \$ 25.00 fee of the contents of the January 30, 2001 letter from Palatial Living to Brannick Larsen, Lyle Cooper and Shi Dean. Palatial Living demanded under paragraph number three (3) of the letter that the mobile home be moved or substantial repairs made to the home before being sold. The January 30, 2001 letter which is incorporated as Defendant's Exhibit "V" into the defendant's proposed

Second Amended Counterclaim (R. 696, 703), was not known to Carlsen and was discovered by Carlsen through discovery in this pending case. There was no prior disclosure by Palatial Living at the time of submitting the lease application of the requirement of a \$ 380.00 security deposit nor was there any disclosure by Palatial Living of the Rules and Regulations that would be required to abide by if the application for a lease was approved. The Mobile Home Residency Act was not posted in a conspicuous place in the park and were not furnished to Carlsen. The Rules & Regulations were not disclosed until six weeks after Carlsen purchased the mobile home on June 6, 2001.

3. Lyle Cooper and Shi Dean of Town & Country Real Estate during the period of the sale of said mobile home were represented by Stephen W. Jewell, Attorney at Law and Carlsen at such time was not represented by counsel.

4. An inspection of said mobile home occurred on the 6th day of June, 2001 between Palatial Living, Lyle Cooper, Shi Dean, and their attorney, Stephen Jewell. Carlsen having previously submitted a lease application to Palatial Living on May 30, 2001, which gave notice that he intended to purchase the mobile home was not given any notice by Palatial Living or any other party of such inspection.

5. An Addendum to the Earnest Money Purchase Agreement prepared by the Real Estate Broker. Shi Dean was entered into between Carlsen and Lyle Cooper after the inspection of the mobile home on the 6th day of June, 2001. The Addendum disclosed that the siding and porch on the east side of the mobile home would be painted by Carlsen

and Lyle Cooper would furnish the paint. Lyle Cooper was to replace the north west corner seam. The Addendum also disclosed that the skirting on the south side would need to be replaced and Carlsen agreed to pay \$ 300.00 for such skirting. Lyle Cooper was to replace the outside carpet on the eastside porch and repair the porch of which he failed to do so. The Addendum is marked as Defendant's Exhibit "B" which is attached to the original Counterclaim. (R. 017). Carlsen affirmatively asserted in the trial court that Lyle Cooper failed to make any repairs other than furnishing paint and his partial payment toward the skirting to be replaced. Cooper failed to replace the carpet on the porch, repair the porch, and the north west corner post was not replaced by Cooper.

6. Carlsen on the 6th day of June, 2001 entered into an Installment Promissory Note, whereby he agreed to pay Lyle Cooper the sum of \$ 32,500.00, on monthly installments of \$ 300.00 per month at a interest rate of 9.35% for the mobile home located at 481 West 640 North, Logan, Utah. Lyle Cooper on the 6th day of June, 2001 also executed a Bill of Sale. The Installment Promissory Note is marked Defendant's Exhibit "C" and the Bill of Sale is marked Defendant's Exhibit "D" which is attached to the original Counterclaim. (R. 017). Carlsen was thereupon informed by Shi Dean that it would be a couple of days before he could move into the mobile home.

7. Carlsen as a condition of acceptance by Palatial Living as the new owner and permitting him to move in was required to execute an agreement on June 13, 2001 to make numerous repairs to the mobile home that substantially differ from the disclosure of

repairs in the Addendum to the Earnest Money Purchase Agreement. Defendant's Exhibit "E" which is attached to the original Counterclaim. (R. 017).

8. Carlsen as a condition to acceptance by Palatial Living as the new owner and permitting him to move in was also required to execute an additional agreement on June 13, 2001, to reside the entire mobile home that he was required to repair and paint before the mobile home could be subsequently sold. Defendant's Exhibit "F" which is attached to the original Counterclaim. (R. 017). This agreement prevented and barred Carlsen from selling the mobile home since June 13, 2001. Furthermore, the parks rules prevented Carlsen from renting the mobile home. Carlsen was informed thereafter by the Real Estate Broker, Shi Dean that he could move into the mobile home. Carlsen moved into the mobile home and discovered that his move in occurred over Palatial Living's objections.

9. Carlsen, two months after submitting his lease application, entered into a lease agreement with Palatial Living on the 27th day of July, 2001 and at that time was required to pay a \$ 380.00 security deposit. The lease is incorporated into Palatial Living's complaint. (R. 003).

10. While Carlsen was in good faith working on and making repairs on the west side of the mobile home on August 6, 2001, he received a letter attached to the door on the east side of the mobile home from the manager, Tawnya Franckowiak. The letter demanded that he make repairs to the mobile home that he was in the process of making.

Carlsen on August 7, 2001, received an identical letter through the United States Mail, both letters having original signatures. Defendant's Exhibit "G1" and Exhibit "G2" which is attached to the original Counterclaim. (R. 017).

11. Carlsen thereafter received a letter, dated, August 9, 2001 from the attorney representing Palatial Living authorizing an extension of time at the request of Stephen Jewell, attorney for Lyle Cooper. Defendant's Exhibit "H" which is attached to the original Counterclaim. (R. 017). This letter placed a condition for an extension of time to make repairs to require Carlsen and not Lyle Cooper to make additional repairs that were not included the repair document, dated June 13, 2001. (R. 017, Defendant's Exhibit "E").

12. Carlsen on August 13, 2001, received a Notice from the manager, Tawnya Franckowiak, demanding that Carlsen remove his vehicle from the park and repair his vehicle because of a minor power steering fluid leak before returning the vehicle to the park property. Exhibit "I" which is attached to the original Counterclaim. (R.017).

Carlsen's vehicle at the time was parked on a roadway inside Palatial Living that had previously been maintained and resurfaced by the Logan City Street Department and was a right of way for adjacent property owners who were not living inside Palatial Living Mobile Home Park..

13. Carlsen as ordered by Tawnya Franckowiak, caused repairs to be made to his vehicle in the sum of \$ 413.63. Defendant's Exhibit "J" which is attached to the original

Counterclaim. (R. 017).

14. Carlsen since June 6, 2001, did make substantial upgrades and improvements to the mobile home such as replacement of a 28 year old water heater; replacement and upgrade of the cook top; replacement and upgrade of the fan over the cook top; replacement of heat tape; replacement of west side exterior light fixture; replacement of furnace room door for better ventilation; repairs to both toilets and swamp cooler; a substantial amount of caulking and insulation, both inside and outside of the mobile home; substantial repairs and painting of both the east side and west side porches and he was required to pay for such paint; caulking and painting of the entire exterior siding of mobile home; painting of the exterior of the east side door; repair of the northwest seam; payment of \$ 300.00 towards skirting of entire mobile home; removal of all creeping vines; substantial changes in landscape; and the painting of the door and roof to storage shed.

15. During the entire period of Carlsen's tenancy, he has received numerous documents from the Palatial Living Management attached to his door, Defendant's Exhibits K1, K2, K3, K4, K5, and K6 attached to the original Counterclaim. (R. 017). The documents shows an unauthorized exercise, dominion and control over Carlsen's personal property to exclusion of or inconsistent with his ownership rights as follows:

(a). Unauthorized dominion and control over Carlsen's heat tape and its use and the conversion of the electricity used for the heat tape that Carlsen purchased directly

from Logan City Utilities. The documents informed Carlsen when to turn on and off the heat tapes. That such dominion and control over the use of the heat tape would be similar to a landlord telling a tenant when they can turn on and off their lights when the electricity is purchased by the tenant directly from a utility company.

(b). Unauthorized dominion and control over the water that Carlsen purchased directly from Logan City Utilities. The documents informed Carlsen at what time of the day that he could water the lawn, but Palatial Living violated their own water restrictions policies by watering the lawns in vacant spaces during their prohibited hours. Carlsen's water was purchased directly from Logan City. (R. 017, Defendant's Exhibit "K3", ¶ 4. Defendant's Exhibit "K6", ¶ 4).

(c). Unauthorized dominion and control over Carlsen's swamp cooler and its use.

(d). Unauthorized dominion and control over the Carlsen's garden hoses and their use. The documents would instruct Carlsen as to when to place the garden hose in the storage building.

(e). Unauthorized dominion and control over the defendant's Dish Network Satellite System whereby such dominion and control is preempted by FCC Regulations, 47 C.F.R. Section 1.4000. (R. 017, Defendant's Exhibit "K6", ¶ 7). See, FCC Fact Sheet at page 8. Franckowiak under ¶ 14, § I of the Rules and Regulations, ordered the Carlsen to remove his satellite system when he first installed in the year 2001, and at a time when a substantial number of other Palatial Living residents had a dish satellite system. Upon

furnishing Franckowiak with the FCC Fact Sheet, Carlsen was ordered to move the satellite dish from the storage shed that he owned to a different location in violation of the FCC rule as per Defendant's Exhibit "T" and Defendant's Exhibit "U" attached to defendant's proposed Second Amended Counterclaim. (R. 696, 703). Carlsen requested the trial court to take Judicial Notice of the contents of Defendant's Exhibit "T" and Defendant's Exhibit "U" regarding satellite dish systems in mobile home parks.

(f). Unauthorized dominion and control over the Carlsen's mobile home and its use.

16. Palatial Living, together with Lyle Cooper and Shi Dean on the 21st day of April, 2004, without any valuable consideration, attempted to obtain possession, title, and ownership rights to Carlsen's mobile home and personal property. Palatial Living through their attorney, together with Lyle Cooper, and Shi Dean attempted to have the lien holder's attorney, Stephen Jewell, sign a stipulation without any notice to Carlsen, authorizing conveyance of his title and possession of such personal property to the lienholder, Lyle Cooper without any consideration, and without payment for any required repairs and improvements made by Carlsen as per Defendant's Exhibit "P" attached to the original Counterclaim. (R. 017).

17. The court separated the Palatial Living's complaint from Carlsen's counterclaim which included a third-party complaint and a demand for a jury trial. (R. 780, 959).

Carlsen filed two motions to amend the counterclaim and third-party complaint, but each motion was denied by the trial court. (R. 266, 272, 696, 703, 780, 959) The third-party complaint was dismissed by the court upon Palatial Living's motion and not upon the motion of any third-party defendants. (R. 335, 375, 780, 959).

18. Judge Hadfield was assigned to the case on July 1, 2004.

19. Upon discovery of Judge Hadfield's assignment to the case, Carlsen filed a Motion for a Change of Judge and Affidavit of Prejudice against Judge Hadfield on July 26, 2004. (R. 409) and a Certificate of Good Faith (R. 424).

20. Palatial Living filed Objections to the Motion for Change of Judge and Affidavit of Prejudice on August 5, 2004. (R. 463). Palatial Living's objections related to other cases involving Carlsen of which Judge Hadfield was not assigned. (R. 463).

21. Carlsen filed a Reply Memorandum to Palatial Living's Objections to Carlsen's Motion to Disqualify Judge Hadfield on August 9, 2004. (R. 470).

22. Palatial Living under Rule 7 of the Utah Rules of Civil Procedure, filed a Notice to Submit for Decision on August 14, 2007, Carlsen's Affidavit of Prejudice together with their Objections and Carlsen's Reply. (R. 480).

23. Carlsen filed Objections to the Palatial Living's Notice to Submit the Affidavit of Prejudice for Decision as being in contravention to Rule 63(b) of the Utah Rules of Civil Procedure on August 16, 2004. (R. 483).

24. Judge Hadfield entered an Order Certifying Motion and Affidavit to a Reviewing Judge for Decision on October 14, 2004. (R. 726).

25. Judge Jones entered an Opinion on November 24, 2004 denying Carlsen's Motion for Change of Judge and Affidavit of Prejudice. (R. 763).

26. An Order and Findings Denying Defendant's Motion to Disqualify Judge Hadfield was entered on February 1, 2005. (R. 946).

27. Upon Judge Hadfield's assignment to this case, the entire record was transferred by the Clerk of the Court for Cache County to the Clerk of the Court of the Court for Box Elder County. The record in this case remained in the possession of the Clerk of the Court for Box Elder County after Judge Hadfield granted a final decision by entering a Order Granting Summary Judgment in favor of Palatial Living and against Carlsen on his counterclaim. (R.1355, 1368). The record reflects that Carlsen was denied complete access to and copies of documents in the record of this case because of the transfer of the record. (R. 1375).

28. The trial court during the pendency of this matter gave notice and conducted numerous hearings over Carlsen's written objections in the courtroom in Box Elder County wherein the case was filed and pending in the First Judicial District Court of Cache County, State of Utah. (R. 810, 812, and 826).

SUMMARY OF ARGUMENT

I. Carlsen first claims that Judge Hadfield's assignment to this case was improper.

Carlsen next argues that Palatial Living improperly filed Objections to his Affidavit of Prejudice against Judge Hadfield to improperly taint and prejudice the reviewing judge in determining the legal sufficiency of the Affidavit. Carlsen also argues that the Affidavit of Prejudice was legally sufficient to disqualify Judge Hadfield.

II. Carlsen argues that the trial court's granting of summary judgment in favor of Palatial Living on Carlsen's Counterclaim was improper because Judge Hadfield viewed all evidence and reasonable inferences in favor of Palatial Living rather than Carlsen. Carlsen next argues that Palatial Living was not entitled to summary judgment as a matter of law.

III. Carlsen argues that he was denied access to the court under Article I, § 11 of the Utah Constitution and his right to a jury trial by Palatial Living being granted summary judgment on all seven counts in the counterclaim when their Motion and Memorandum for Summary Judgment addressed only three of the seven counts. Carlsen also argues that he was denied access to the courts by being deprived of access to the court records in the case.

IV. Carlsen argues that the trial court abused its discretion by denying his Motion to Amend his Counterclaim and by dismissing his Third-Party Complaint upon the motion of Palatial Living who lacked any standing.

V. Carlsen argues that the trial court erred by conducting numerous hearing in Box Elder County over Carlsen's objections when the matter was pending in Cache

County in violation of Rule 77 of the Utah Rules of Civil Procedure.

ARGUMENT

POINT I

WHETHER THE REVIEWING JUDGE WAS TAINTED BY THE PLAINTIFF'S WRITTEN OBJECTIONS TO THE RULE 63(b) MOTION AND AFFIDAVIT THAT WAS SUFFICIENT TO DISQUALIFY JUDGE HADFIELD.

As a threshold matter, Carlsen claimed in his Objections to the Proposed Order Implementing the Memorandum Decision of December 15, 2004 (R. 815), that this case was transferred to Judge Hadfield on July 1, 2004 when he was not appropriately assigned by the presiding judge, associate presiding judge, or by any person with any authority to assign him as required under Rule 3-104, and Rule 3-108 of the Utah Code of Judicial Administration which is reversible error. *Hi-Country Estates v. Bagley*, 2000 UT 27, ¶ 16.

It is Carlsen's contention that there was no legal basis for Palatial Living's written Objections to Carlsen's Motion for Change of Judge and Affidavit of Prejudice.

Carlsen filed a Motion for Change of Judge and Affidavit of Prejudice against Judge Hadfield together with a Certificate of Good Faith upon his discovery that Judge Hadfield was assigned to the case. Palatial Living filed written Objections to the Motion for a Change of Judge and Affidavit of Prejudice. Paragraph four (4) of their written objections makes reference to a Logan City Municipal Justice Court case no. CLC CR-M-01-00559 involving Carlsen but did not involve Judge Hadfield where Palatial Living

claims Carlsen had Judge Cheryl A. Russell disqualified and excused on July 20, 2001.

The record in that case shows that Palatial Living's claims is not true in that Judge Russell recused herself from the case before any proceedings because she was previously a Logan City Prosecutor against Carlsen.

Palatial Living under paragraph four (4) of their written Objections states as a fact from the records that during proceedings before that court, Carlsen made threats regarding Judge Stevens. These allegations are not true and should have been stricken under Rule 12(f) of the Utah Rules of Civil Procedure. Carlsen did file a Motion for Change of Judge and Affidavit Prejudice against Judge Stevens in that case and Judge Stevens without certifying the matter to another judge to determine the legal sufficiency of the affidavit, recused himself from the case.

The Utah Supreme Court in *Young v. Patterson*, 922 P.2d 1280, 1281 (Utah 1996) stated:

In *Barnard v. Murphy*, 852 P.2d 1023) (Utah App. 1993), the court of appeals correctly observed, "The clear import of Rule 63(b) is that a judge against whom the affidavit is directed must either recuse him or herself, or if he or she questions the legal sufficiency of the affidavit, certify the matter to another named judge for a ruling on its legal sufficiency." *Id.* at 1025. That court also correctly held that it was improper for the certification order to contain what amounted to argument or comment on the necessity for disqualification, including in that case references to decisions by the referring judge in other cases.

Palatial Living's written Objections to Carlsen's Affidavit of Prejudice against Judge Hadfield was submitted by Palatial Living to the court for a decision under Rule 7 U.R.Civ.P. over Carlsen's written objections. It is Carlsen's contention that their

Objections was submitted in an improper attempt to influence, taint, and prejudice the reviewing judge when he reviewed their written objections and the Affidavit of Prejudice.

Because it is improper for a judge certifying an Affidavit of Prejudice to a reviewing judge to include matters relating to other cases, it should also be improper for Palatial Living to perform the same acts that a certifying judge is prohibited under Rule 63(b).

To support a claim of bias based on a judge's presiding over prior proceedings, "it must appear that apart from the judge's analysis of the issues of fact or law in those proceedings, he had such a bias in favor of one party or prejudice against the other that he could not fairly and impartially determine the issues.: *Poulsen v. Frear*, 946 P.2d 738, 742 (Utah App. 1997) (quoting *Ordenville Irrig. Co. v. Glendate Irrig. Co.*, 17 Utah2d 282, 288, 409 P.2d 616, 621 (1965); this is, the affidavit must allege facts indicating that "the judge's behavior toward a party during those prior proceedings was extreme" and reflected a "deep seated antagonism" toward the party requesting recusal. *State, In re M.L.*, 965 P.2d 551, 556 (Utah App. 1998).

Carlsen's Affidavit of Prejudice states facts that Judge Hadfield's conduct in two other cases involving Carlsen was extreme and reflected a deep seated antagonism towards Carlsen that warrants his disqualification in this case.

Carlsen's Affidavit states that he verily believed Judge Hadfield was bias and prejudice against him because he denied each and every motion, request, and objection

made by Carlsen in those two cases. The record in the instant case reflects that Judge Hadfield with the exception of partially granting a motion in limine has denied each and every motion, request, and objection made by Carlsen.

Carlsen further states in his Affidavit that he verily believed Judge Hadfield was bias and prejudice against Carlsen by his failure to render decisions in the Riley case on Carlsen's Objections to proposed Orders relating to Memorandum Decisions of the court for a period of over two years. That Judge Hadfield caused the record to be removed from the Clerk of the Court in Cache County to Box Elder County whereupon Carlsen was denied access to the records and to copies of documents and Judge Hadfield's conduct prevented him from timely prosecuting the Riley case pending before Judge Hadfield.

Carlsen Affidavit states that Judge Hadfield in a Circuit Court case allowed a prosecution witness, Tim Gil Duron in open court and on the record to impersonate a peace officer to deceive the jury which constitutes a criminal offense in the State of Utah. Utah Code Ann. § 76-8-512. Duron testified that on the date of the trial in that case that he was employed by the United States Forest Service as a laborer and he was not employed by any law enforcement agency in the State of Utah as a peace officer. Utah Code Ann. § 53-13-103. A trial judge clearly has the discretion to determine what evidence is admitted at any trial, but the Utah Constitution, rules or statutes does not authorize any judge in the State of Utah to allow a crime to be committed in the

courtroom to deceive and improperly influence a jury such as a person unlawfully impersonating a peace officer.

Judge Hadfield's conduct in the two prior cases that is referenced in Carlsen's Affidavit of Prejudice shows that his conduct was extreme and reflected a deep seated antagonism towards Carlsen.

The Defendant is not required to show actual bias, but is only required to show a reasonable appearance of bias to require recusal of the Judge Ben H. Hadfield under Canon 3E. *State, Department of Human Services v, Oddone*, 2004 UT 8, ¶ 3, 84 P.2d 1170.

Carlsen's Affidavit of Prejudice was legally sufficient to require the disqualification of Judge Hadfield in this case.

POINT II

PALATIAL LIVING WAS NOT ENTITLED TO SUMMARY JUDGMENT ON DEFENDANT'S COUNTERCLAIM.

The pertinent part of Rule 56(c) of the Utah Rules of Civil Procedure provides: The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

The Judgment Roll and Index in this case shows that there was substantial pre trial

discovery conducted between the parties. The Index also shows that Carlsen's deposition regarding his counterclaim was taken by Palatial Living's attorney in February, 2005. (R. 964, 988).

Palatial Living in its Memorandum in Support of the Motion for Summary Judgment failed to include the deposition and other discovery material in support of the Motion for Summary Judgment. It does appear that the trial court granted summary judgment based upon the pleadings while excluding the deposition and discovery material.

Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Utah R.Civ. 56(c). When considering a motion for summary judgment, the appellate court views the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party. *Carrier v. Salt Lake County*, 2004 UT 98 ¶ 3, 104 P.3d 1208.

The Memorandum Decision granting summary judgment shows that the trial court viewed the facts and all reasonable inferences in favor of Palatial Living rather than in the light most favorable to Carlsen the non moving party.

A. Palatial Living was not entitled to Summary Judgment under Count I of the Counterclaim.

Carlsen claims under Count I of his Counterclaim that he is entitled to a judgment against Palatial Living for all damages caused by the unlawful agreement regarding

repairs to the mobile home that he was required to enter into as a condition of acceptance by Palatial Living as a resident that was in violation of the Utah Mobile Home Park Residency Act.

It is a general rule that contracting parties are presumed to contract in reference to the existing law, indeed, they are presumed to have in mind all of the existing laws relating to the contract and or lease, or to the subject matter thereof. Thus, it is commonly said that all existing applicable or relevant and valid statutes, ordinances, regulations, and settled law of the land at the time a contract is made becomes a part of it and must be read into it just as if an express provision to the effect were inserted therein, except where the contract discloses a contrary intention. *Hall v. Warren*, 632 P.2d 848 (Utah 1981).

Carlsen purchased the mobile home located at 481 West 640 North, Logan, Utah from the lienholder, Lyle Cooper on June 6, 2001. The mobile home had previously been abandoned by the previous owner, Brannick Larsen because of the failure to pay rent and when he and his family moved from the premises to Joseph City, Arizona in December, 2000.

The pertinent part of the Utah Mobile Home Park Residency Act under Utah Code Ann. § 57-16-9 provides as follows:

(2) If the lienholder pays rent and service charges as provided by this section, the lienholder shall have the unconditional right to resell the mobile home within the park, **subject to the purchaser being approved for residency by the park, which approval cannot be unreasonably withheld, and subject to Subsection (4).** “Emphasis added”

Subsection (4) provides:

(4) The mobile home park may require the lienholder to remove a mobile home covered by this section from the park if the mobile home, at the time of sale, is in rundown condition or in disrepair, if the mobile home does not meet the park's minimum size specifications, or if the mobile home does not comply with reasonable park rules. **The lienholder shall have 60 days to make repairs and comply with park rules after notice of required repairs and rule violations is given the lienholder by the park owner or its agents.** "Emphasis added"

Lyle Cooper, the lienholder in this case, and his real estate agent, Shi Dean received a copy of the written notice by Miles P. Jensen, attorney for Palatial Living in a letter addressed to the former owners, Brannick and Emily Larsen, dated January 30, 2001, [R. 696, 703, Defendant's Exhibit "V"] whereby under paragraph number three (3.) it states: Pursuant to paragraph 11.b of the Lease, the Park has made the determination that the mobile home is not in sufficiently good condition to remain in the Park and is in disrepair and rundown condition and must be moved. The items which are unacceptable are the siding on the home, the skirting and east side porch.

Page two of the January 30, 2001 letter, Exhibit "V" shows that both Lyle Cooper and Shi Dean received the letter and they were at that time in the process of selling the mobile home. There was no attempt by Lyle Cooper to make any repairs to the mobile home after receiving the letter of January 30, 2001 and when Carlsen entered into the Earnest Money Purchase Agreement to purchase the mobile home on May 30, 2001. There was no disclosure by Palatial Living to Carlsen of the contents of the January 30, 2001 letter requiring removal or repairs to the mobile home when they accepted the lease application and the lease application fee of \$ 25.00. The question arises as to why the

management of any mobile home park would accept a lease application and a fee while at the same time requesting the removal of the mobile home from the park. The Earnest Money Purchase Agreement, dated, May 30, 2001, and the Addendum to the Earnest Money Purchase, dated June 6, 2001 fails to disclose the contents of the January 30, 2001 letter for the need of repairs or removal. The failure of Palatial Living, Lyle Cooper, and Shi Dean to disclose to Carlsen, the contents of the January 30, 2001 letter before accepting the lease application and Earnest Money Purchase Agreement clearly constitutes a fraudulent non-disclosure of a material defects of the mobile home.

Mitchell v. Christensen, 2001 UT 80, 31 P.3d 572; *Secor v. Knight*, 716 P.2d 790 (Utah 1986); and *Dean v. Tasulis*, 2002 UT 52, 48 P.3d 235.

Carlsen alleged in his amended counterclaim that he would not have entered into the purchase agreement to purchase the mobile home and submitted the application for the lease agreement with Palatial Living Mobile Home Park if he had knowledge of the contents of the January 30, 2001 letter pertaining to removal or repairs to the mobile home.

The pertinent part of Utah Code Ann. § 57-16-4, provides:

(4) Any rule or condition of a lease purporting to prevent or unreasonably limit the sale of a mobile home belonging to a resident is void and unenforceable. The mobile home park may, however, reserve the right to approve the prospective purchaser of a mobile home who intends to become a resident, **but such approval may not be unreasonably withheld.** “Emphasis added”

(8) In order to upgrade the quality of a mobile home park, it may require that a mobile home be removed from the park upon sale if:

- (a) the mobile home does not meet minimum size specifications; or
- (b) the mobile home is in rundown condition or in disrepair.

The California Court has held under similar statutory provisions, that a mobile home park owner is compelled to accept as a new tenant a person who purchases a mobile home from an existing tenant unless the new tenant does not have the financial ability to pay rent or, based upon past tenancies, has demonstrated he or she will not comply with the park rules and regulations. (Civ. Code 798.74). *Yee v. City of Escondido*, 224 Cal. App. 3d 1349, at 1352, 274 Cal Rptr. 551, (Cal. App. Dist. 4 (1974), affirmed 503 U.S. 519, 112 S. Ct. 1522, 118 L. Ed.2d 153 (1992).

This is consistent with the decisions of the Utah Courts on the issue that approval may not be unreasonably withheld and the applicant clearly has a cause of action if approval is unreasonably withheld. *Brookside Mobile Home Park, Ltd. v. Peebles*, 2000 UT App 314, 14 P.3d 105, *affirmed*, 2002 UT 48, ¶¶ 28-32, 48 P.3d 968.

Carlsen's approval for residency was unreasonably withheld by Palatial Living Mobile Home Park. (R. 017, Defendant's Exhibit "E" and Exhibit "F" incorporated into Defendant Counterclaim). Carlsen claimed in his counterclaim that he was coerced and subjected to unlawful duress by being required to sign and execute both agreements for acceptance and approval for residency, dated June 13, 2001 after negotiations between Steve Jewell, attorney for the lienholder, Lyle Cooper and Palatial Living's attorney, Miles P. Jensen.

The pertinent part of Defendant's Exhibit "E" (R. 017) states:

Dear Steve: This will confirm our agreement and understanding reached by telephone on Tuesday, June 12, 2001 in the above-captioned matter. As a condition to acceptance of the new owner and permitting him to move into the park, he has agreed as follows:

The pertinent part of Defendant's Exhibit "F" (R. 017) states:

Dear Steve: There is one item I neglected to mention in my last letter and that is that the mobile home will probably need to be resided when it is subsequently sold that this has been disclosed to the Buyer and is accepted. Please sign below and return along with the other letter.

Under Utah law, duress exists when a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative. *Andreini v. Hultgren*, 860 P.2d 916, 921 (Utah 1993) (quoting Restatement (Second) of Contracts § 175(1) (1979).

Two elements must be shown to exist in order to prove duress. First, there must be some improper threat made by the other party. Second, that threat must leave the victim with no reasonable alternative but consent to the contract.

Carlsen's counterclaim satisfied both elements in this case. First, there was an improper threat by Palatial Living that was negotiated with the lienholder that violated Utah's Mobile Home Residency Act because the agreement required the buyer, a third party who was no part of the negotiations rather than the lienholder to make the repairs.

Secondly, Carlsen had no alternative in this case except to sign both agreements because he had previously entered into the agreement on the 6th day of June, 2001 with the lienholder, Lyle Cooper to purchase the mobile home and on June 13, 2001, he was being deprived of the possession and use of the mobile home. The Earnest Money Purchase Agreement (Exhibit "A" incorporated into Counterclaim. (R.017)), shows that Carlsen's agreement to purchase the mobile home was on the condition that he would be approved for residency by Palatial Living on or before June 6, 2001, and that he would also be entitled to immediate possession of the mobile home on that date and within one hour of closing.

The Earnest Money Purchase Agreement also provided that Carlsen would be allowed a walk through inspection of the mobile home one hour before closing. An inspection of said mobile home occurred on the 6th day of June, 2001 between Palatial Living, Lyle Cooper, Shi Dean, and their attorney, Stephen Jewell one hour before closing. Carlsen having previously submitted a lease application to Palatial Living on May 30, 2001, which gave notice that he intended to purchase the mobile home was not given any notice by Palatial Living or any other party of such inspection. Carlsen was required to enter into the Addendum to the Earnest Money Purchase Agreement, dated, June 6, 2001 as a condition to purchase the mobile home. (Defendant's Exhibit "B", (R. 017)). The repairs disclosed in the Addendum, dated, June 6, 2001 differ substantially from the repairs required in the agreement, dated June 13, 2001, Exhibit "E" (R. 017).

The provisions of Utah Code Ann. § 57-16-12, provides:

No park or resident may agree to waive any right, duty, or privilege conferred by this chapter. “Emphasis added”

There should be no question in this case that both Palatial Living and Lyle Cooper could not waive any of their rights, duties and privileges as conferred under the Utah Mobile Home Park Residency Act that required the lienholder, Lyle Cooper to make the required repairs within sixty (60) days after he received notice. *Coleman v. Thomas*, 2000 UT 53, ¶ 21, 4 P.3d 783. The trial court in its Memorandum Decision granting summary judgment to Palatial Living held otherwise. Lyle Cooper and his real estate agent and broker, Shi Dean could not as a part of any Addendum to the purchase agreement require Carlsen to make the same repairs that the lienholder, Lyle Cooper was required to be make under § 57-16-9(4). The duties of Lyle Cooper to make the repairs as required under the Mobile Home Residency Act could not be waived by him by entering into the Addendum to the Earnest Money Purchase Agreement which was contrary to § 57-15-12. Palatial Living also could not lawfully require Carlsen as a condition of acceptance by the Mobile Home Park as a resident and being allowed to move in, to enter into any agreement that required Carlsen rather than the lienholder to make the necessary repairs for the sale of the home under Utah’s Mobile Home Residency Act. The improper and unlawful coercion on the part of Palatial Living after negotiations with the lienholder, renders the agreement of June 13, 2001, Defendant’s Exhibit “E” incorporated into Defendant’s Counterclaim, null and void. Carlsen was therefore entitled to a judgment on

the pleadings in his favor and against the Palatial Living as to Count I of the Counterclaim as a matter of law and to an award of damages. The trial court erred by granting summary judgment as to Count I of the counterclaim to Palatial Living as a matter of law. Palatial Living is liable for their violations of the Mobile Home Park Residency Act, in the same degree as Lyle Cooper. Cooper's wrongful acts in this case could not have been accomplished without the aid and assistance of Palatial Living Mobile Home Park.

Subsection (6) of § 57-16-9 provides:

(6) The prevailing party is entitled to court costs and reasonable attorney fees for any action commenced to enforce any rights under this section.

B. Palatial Living was not entitled to Summary Judgment as to Count II of the Counterclaim.

Carlsen claimed under Count II of his Counterclaim that he was entitled to a judgment against Palatial Living for all damages caused by being barred and prevented from selling the mobile home unless he first replaced all of the siding on the mobile home under June 13, 2001 agreement. (Defendant's Exhibit "F" (R. 017)) . The June 13, 2001 agreement violated the Utah Mobile Home Residency Act because it required Carlsen to replace all of the siding on the mobile home as a condition of any subsequent sale of the mobile home. Carlsen as previously argued, was also required to repair and repaint the same siding as a condition of acceptance by Palatial Living as a resident.

The pertinent part of Utah Code Ann. § 57-16-4, provides:

(4) Any rule or condition of a lease purporting to prevent or unreasonably limit the sale of a mobile home belonging to a resident is void and unenforceable.

(6) A mobile home park may not restrict a resident's right to advertise or to sell his mobile home. "Emphasis added."

The provisions of Utah Code Ann. § 57-15-12, provides:

No park or resident may agree to waive any right, duty, or privilege conferred by this chapter. "Emphasis added"

The pertinent part of Defendant's Exhibit "E", (R. 017), incorporated into Defendant's Counterclaim states:

This will confirm our agreement and understanding reached by telephone on Tuesday, June 12, 2001 in the above captioned matter. *As a condition to acceptance of the new owner and permitting him to move into the park, he has agreed as follows:*
"Emphasis added"

3. To repaint the entire mobile home.
6. To repair dents and separating seams in the siding.

The pertinent part of Defendant's Exhibit "F" (R. 017), incorporated into Defendant's Counterclaim states:

There is one item I neglected to mention in my last letter and that is that the mobile home will probably *need to be resided when it is subsequently sold and that this has been disclosed to the Buyer and is accepted.* Please sign below and return along with the other letter.
"Emphasis added"

Carlsen as argued above claims that he was coerced into signing and executing these two agreements, dated, June 13, 2001 that were negotiated between the lienholder's attorney and Palatial Living's attorney in violation of the Utah Mobile Home Residency Act. Carlsen was also as a condition of acceptance by Palatial Living and being permitted

to move into the park was first required to repair dents and separating seams in the siding and repaint the entire mobile home. At the same time, he was also barred, restricted, and or prevented from selling the mobile home unless the same siding that he was required to repair and repaint was subsequently replaced at a substantial cost as a condition of any subsequent sale.

Carlsen not only claims that this is a clear violation of the Utah Mobile Home Park Residency Act, but also claimed in his counterclaim that this was also an unreasonable restraint upon alienation of the mobile home which was and is against public policy.

Rancho Santa Paula Mobile home Park v. Evans, 26 Cal. App. 4th 1139, 32 Cal. Rptr. 2d 464 (Cal. App. Dist. 2 1994).

Paragraph number two of § IV. of the Rules and Regulations of Palatial Living incorporated into Palatial Living's Complaint (R. 003) states:

2. No subletting, renting, or occupation by more than the permitted number of individuals will be permitted. ***This park is exclusively for owner occupied homes.***
"Emphasis added"

Not only was Carlsen barred, restricted, or prevented from selling the mobile home in this case as per Defendant's Exhibit "F" (R. 017), but he was also prevented from renting or subletting the mobile home by Palatial Living.

The California Court in ***Rancho Santa Paula Mobile home Park v. Evans***, stated:

Rules and regulations for mobile home parks can effect various uses. They may regulate and restrict parking, noise, use of common area facilities, trash dumping and the like. A homeowner may expect such rules to change as conditions change. However, a rule prohibiting subleasing goes to the very heart of ownership and residency. ***Because of***

the home's immobility, an owner who finds living in the park no longer desirable, practical, or possible, would be forced to either sell his home or leave it vacant.

“Emphasis added”

Carlsen as alleged in his Counterclaim, found living in Palatial Living Mobile Home Park no longer desirable, practical or possible. Carlsen was not only prevented or restricted from selling the mobile home as per Defendant's Exhibit “F” (R. 017), but he was also barred from renting or subleasing the mobile home which was an unreasonable restraint of alienation of the mobile home which is against public policy.

The United States Supreme Court in *Yee v. City of Escondido, supra*, stated: “The term “mobile home” is somewhat misleading. Mobile homes are largely immobile as a practical matter, because of the cost of moving one is often a significant fraction of the value of the mobile home itself. They are generally placed permanently in parks; once in place, only about one in every hundred mobile homes is ever moved.

Carlsen should have been granted judgment against Palatial Living on the pleadings and exhibits under Count II of his Counterclaim as a matter of law. The trial court erred by granting Palatial Living summary judgment on count II in the counterclaim against Carlsen as a matter of law.

C. Palatial Living was not entitled to Summary Judgment as to Count III of the Counterclaim.

Carlsen claims under Count III of his Counterclaim that he is entitled to a judgment against Palatial Living for all damages caused by their unlawful conversion of his personal property, including the mobile home located at 481 West 640 North, Logan,

Utah to their own use.

Carlsen contends that Palatial Living and their agents unlawfully converted such personal property to their own use when they exercised unauthorized dominion and control over the mobile home located at 481 West 640 North, Logan, Utah to the exclusion of Carlsen's rights. *Pleasant Valley Campground, Inc. v. Rood*, 120 N.H. 86, 411 A.2d 1104 (N.H. 1980). *Mobile Home Brokers, Inc. v. Alvin Calvin, Jr. d.b.a., Lazy Oaks Mobile Home Park*, 566 SW. 2d 68 (Tex App. 1978).

Palatial Living through their agent and attorney as per Defendant's Exhibit "F", (R. 017) incorporated into Defendant's Counterclaim unlawfully converted such property to their own use when they exercised unauthorized dominion and control over said personal property to the exclusion of Carlsen's rights by unlawfully restricting and or preventing him from selling the mobile home.

Palatial Living and their agents and attorney, unlawfully converted such personal property to their own use when they exercised unauthorized dominion and control over such personal property to the exclusion of Carlsen's rights as per Defendant's Exhibit "P" incorporated into Defendant's Counterclaim. They unlawfully converted such property when they attempted to defraud Carlsen of his possession, title, and ownership to such personal property by having the lienholder's attorney, Steven Jewell, sign a stipulation without any Notice to Carlsen, authorizing conveyance of title and possession of such personal property without any valuable consideration. The Defendant's Exhibits

incorporated into Defendant's Counterclaim shows that Steven Jewell has never been Carlsen's attorney, and that Steven Jewell has always acted against Carlsen in favor of his client, the lienholder, Lyle Cooper as per Defendant's Exhibit "E" and Exhibit "F".

Steven Jewell was barred under Rule 1.7 and Rule 1.9 of the Utah Rules of Professional Practice from representing Carlsen due to the substantial conflict of interest because of his representation of the lienholder, Lyle Cooper. Any representation by Steven Jewell as an attorney for Carlsen would be materially adverse to the interests of his client, Lyle Cooper as the lienholder and vice versa. Such conflict of interest should have been apparent and obvious to Miles P. Jensen, counsel for Palatial Living, when preparing, signing, and submitting Exhibit "P" incorporated into the counterclaim, (R.017) to Mr. Jewell for his signature.

Palatial Living through their own admissions in their Reply and Answer to the Counterclaim, knew or should have known that Steven Jewell was not Carlsen's attorney. Palatial Living in this case attempted to gain title and possession of Carlsen's property and the mobile home space without legal process through fraud, trickery, and deceit which constitutes an additional tort action under the principles announced in the case of *King v. Firm*, 3 Utah 2d 419, 285 P.2d 1114 (1955).

Palatial Living and their agents unlawfully converted Carlsen's personal property to their own use when they exercised unauthorized dominion and control over such personal property to the exclusion of Carlsen's rights as per all of the Exhibits

incorporated into the Defendant's Counterclaim and particularly Exhibits "K1", "K2", "K3", "K4", "K5", and "K6", (R. 017).

Exhibits "K1", "K2", "K3", "K4", "K5", and "K6" are documents that Carlsen received from Palatial Living management, requiring Carlsen to perform certain acts regarding his personal property.

The pertinent part of the Exhibits, dated, October 12, 2001; October 31, 2002; and October 30, 2003 addressed to Palatial Living Mobile Home Residents states: The time has come to get our homes and yards ready for winter. Here are a few reminders about what needs to be done before it gets too much colder.

Turn heat tapes on and test to be sure they are functioning properly.

Drain and cover you swamp coolers.

Take hoses off the outside water shutoff and store.

Continue to mow **AND TRIM** your yard.

The pertinent part of the Exhibits, dated, April 24, 2002; May 1, 2003; and April 19, 2004 states: Here are a few reminders of what needs to be done at the end of winter seasons.

Heat tapes can be turned off.

Always trim your yard following mowing. This is not optional!

Yards should be watered regularly and during early morning or early evening hours in order to maximize the use of our water. "Emphasis Added"

The water and electricity at Palatial Living Mobile Home Park is purchased by the residents directly from Logan City Utilities. Palatial Living has improperly and unlawfully invoked the provisions of Utah Code Ann. § 57-16-7 to authorize Palatial Living to regulate the use of water and electricity directly purchased by the resident from the City of Logan. Palatial Living ordering a tenant when to turn on and off a heat tape would be similar to any landlord ordering a tenant as to when he can turn on or off his or her lights. Palatial Living has converted to their own use, the water purchased by Carlsen directly from the City of Logan when they claim that it is their water to regulate its use.

The Exhibit, dated April 19, 2004 also states: Satellite dishes are only to be installed on the **rear center** of the home. If you have a satellite dish that is not in this location, you will need to move it. This is considered to be an alteration to the exterior of the home and all changes must first be approved by management, according to your lease agreement. We will not allow more than one satellite dish per residence.

This rule regarding satellite dishes and their placement clearly violated The Over-the-Air Reception Devices Rule 47 C.F.R. § 1.4000 of the Rules of the Federal Communications Commission as shown by the Exhibits in the Addendum. Carlsen requested the trial court to take judicial notice of the FCC Rules and Regulations. Palatial Living's attempts to regulate the use of satellite dishes and their placement violated such FCC Rules and Regulations.

The trial court correctly observed in its Memorandum Decision granting summary

judgment to Palatial Living: *A conversion is an act of wilful interference with a chattel, done without lawful justification by which the person entitled thereto is deprived of its use and possession. Benton v. State, Div. Of State Lands & Forestry, Dep't of Natural Resources*, 709 P.2d 362 (Utah 1985).

Palatial Living's wilful interference with Carlsen's use of electricity, water, and satellite dishes, and their wilful interference regarding their restrictions on Carlsen's sale of the mobile home together with Palatial Living's attempts to obtain title and possession to the mobile home for the lienholder, Lyle Cooper through fraud, trickery and deceit constituted the acts necessary for a cause of action against Palatial Living for conversion.

Carlsen was entitled to judgment on the pleadings under Count III of his Counterclaim as a matter of law against Palatial Living for the unlawful conversion of his personal property. *Mobile Home Brokers, Inc. v. Alvin Calvin, Jr. d.b.a., Lazy Oaks Mobile Home Park, supra*. The trial court erred by granting Palatial Living summary judgment on Count III of the Counterclaim as a matter of law.

POINT III

WHETHER CARLSEN WAS DEPRIVED OF ACCESS TO THE COURTS.

Palatial Living's Motion and Memorandum for Summary Judgment on Carlsen's counterclaim addressed only three (3) of the seven (7) counts that Carlsen had against Palatial Living in his counterclaim. One of the counts not addressed by the court, claimed that Palatial Living breached the lease agreement and deprived Carlsen of the use of his

mobile home and mobile space by allowing the adjacent neighbor, June Olson to intentionally place a boom box radio next to a window less than twenty-five feet from Carlsen's main entrance to his mobile home, and play extremely loud and offensive classical or gospel music from early in the morning until late at night on a daily basis for the entire period of Carlsen's tenancy which was in violation of the Rules and Regulations of the Park.

The Order granting summary judgment in favor of Palatial Living was on all seven (7) counts in Carlsen's counterclaim without the court addressing four (4) of the counts. Carlsen also filed and paid the statutory fees for jury trial on all issues in Palatial Living's Complaint, his Counterclaim and Third-Party Complaint which was objected to by Palatial Living. (R. 125, 155).

Carlsen's original counterclaim filed with the court and the subsequent proposed Amended Counterclaims included a Third-Party Complaint involving other parties such as Lyle Cooper and his real estate agent and broker, Shi Dean. The Third-Party Complaint was dismissed by the trial court upon the motion of Palatial Living and not upon any motion filed by a Third-Party Defendant over Carlsen's objections. Carlsen's objections claimed that Palatial Living lacked any standing to request the court to dismiss the Third-Party Complaint against other parties. (R. 335, 338, 375, 780).

Carlsen was denied his rights to access to the courts as provided under Article I, § 11 of the Utah Constitution. *Miller v. USAA Casualty Insurance Company*, 2002 UT 6,

¶¶ 41-42, 44 P.3d 663. Carlsen also contends that his right to a jury trial as provided under Article 1, § 10 of the Utah Constitution was denied when the trial court failed to provide a jury trial on all issues in his counterclaim and his Third-Party Complaint that was dismissed upon the motion of Palatial Living and not a Third-Party Defendant.

Carlsen's final contention regarding the denial of his rights to access to the courts occurred when he was denied access to the records in this case when the record was transferred from the Clerk of the Court of the First District Court of Cache County to the Clerk of the Court of the First District Court of Box Elder County in violation of Rule 4-205(3) of the Utah Code of Judicial Administration and Utah Code Ann. § 78-3-30. No change of venue was granted under the provisions of Utah Code Ann. § 78-13-11, and no appeal was pending. (R. 1375) to justify the transfer of the record.

POINT IV

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING CARLSEN'S MOTIONS TO AMEND COUNTERCLAIM.

Carlsen next contends that the trial court abused its discretion in denying Carlsen's motion to amend the counterclaim based upon newly discovered evidence. The January 30, 2001 letter from Palatial Living's attorney addressed to Brannick Larsen, and copies mailed to Lyle Cooper and Shi Dean. [Exhibit V] (R. 272, 347, 365, 696, 703, and 780) Carlsen also sought to amend the counterclaim to include claims that occurred after the filing of the original counterclaim and join Lyle Cooper and Shi Dean as Third-Party Defendants. Rule 15(a) mandates that leave to amend pleadings "shall be freely given

when justice so requires.” Utah R.Civ.P 15(a). Moreover, “rule 15 should be interpreted liberally so as to allow parties to have their claims fully adjudicated. *Timm v. Dewsup*, 851 P.2d 1178, 1183 (Utah 1993).

The trial court abused its discretion by denying Carlsen’s motion to amend the counterclaim to include allegations relating to the newly discovered evidence [January 30, 2001 letter], and to include allegations of claims that occurred after the filing of the original counterclaim and to join additional parties.

POINT V

WHETHER THE TRIAL COURT ERRED BY CONDUCTING HEARINGS OUTSIDE OF CACHE COUNTY.

The complaint, counterclaim and Third-Party Complaint was filed in the First Judicial District Court of Cache County, State of Utah.

The trial court in this case scheduled court hearings and held hearings in Box Elder County with the approval of and some times at the request of counsel for Palatial Living.

Carlsen filed written objections to the place of the hearings being held in Box Elder County rather than Cache County. (R. 812).

The pertinent part of Rule 77(b) of the Utah Rules of Civil Procedure provides: All trials upon the merits shall be conducted in open court and so far as convenient in a regular courtroom. All other acts or proceedings may be done or conducted by a judge in chambers without the attendance of the clerk or other court officials and at any place within the state, either within or without the district, **but no hearing, other than one ex**

parte, shall be conducted outside the county wherein the matter is pending without the consent of all the parties to the action affected thereby. (Emphasis Added).

Carlsen therefore contends that the trial court erred under Rule 77(b), UtahRCiv. P. by conducting hearing in Box Elder County rather than Cache County where the action was pending.

CONCLUSION

Carlsen respectfully submits that the Affidavit of Prejudice was legally sufficient to disqualify Judge Hadfield in this case. The trial court abused its discretion by denying Carlsen's motion to amend the pleadings and by dismissing the Third-Party Complaint. It was error for Judge Hadfield to grant Palatial Living summary judgment on all claims in Carlsen's counterclaim and the order granting summary judgment should be reversed and the case remanded to the lower court for further proceedings consistent with this court's decision.

DATED this 7th day of November, 2007.


DAVID CRAIG CARLSEN

CERTIFICATE OF SERVICE

I certify that I mailed two true and correct copies of the foregoing BRIEF OF APPELLANT and ADDENDUM TO APPELLANT'S BRIEF, postage prepaid to the following listed below on this 7th day of November, 2007:

Robert W. Thompson
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DAVID CRAIG CARLSEN