

1977

# Woodland Theatres, Inc., a corporation v. ABC Intermountain Theatres, Inc., a corporation, and Plitt Intermountain Theaters, Inc., a corproation : Petition for Rehearing

Utah Supreme Court

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14440

IN THE SUPREME COURT  
OF THE STATE OF UTAH

WOODLAND THEATRES, INC.,  
a corporation,

Plaintiff-Appellant,

vs.

ABC INTERMOUNTAIN THEATRES,  
INC., a corporation, and  
PLITT INTERMOUNTAIN THEATRES,  
INC., a corporation,

Defendants-Respondents.

Case No. 14440

Case No. 14441

APPEAL FROM JUDGMENT OF THE  
DISTRICT COURT OF SALT LAKE COUNTY  
HONORABLE MARCELLUS K. SNOW, DISTRICT JUDGE

PETITION FOR REHEARING

and

BRIEF IN SUPPORT OF PETITION FOR REHEARING

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## TABLE OF CONTENTS

	<u>PAGE</u>
<u>PETITION FOR REHEARING</u> . . . . .	1
<u>BRIEF IN SUPPORT OF PETITION FOR REHEARING</u> . . . .	4
INTRODUCTION . . . . .	4
QUESTION PRESENTED . . . . .	6
Should the plaintiff-appellant be allowed to proceed on its claims for actual damages resulting from breaches of the lease agreement which were not waived by plaintiff-appellant's acceptance of rent?	
STATEMENT OF FACTS . . . . .	6
ARGUMENT . . . . .	7
I. <u>Plaintiff-Appellant Should Be     Allowed to Proceed on Its Claims     for Actual Damages Arising from     Defendants-Respondents' Breach of     the Leasehold Agreement.</u> . . . . .	7

TABLE OF AUTHORITIES

CASES CITED:

PAGE

<u>Wollard v. Schaffer Stores Company</u> , 272 N.Y. 304, 5 N.E.2d 829 (1936) . . . . .	8
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WOODLAND THEATRES, INC.,  
a corporation,  
  
Plaintiff-Appellant,  
  
vs.  
  
ABC INTERMOUNTAIN THEATRES,  
INC., a corporation, and  
PLITT INTERMOUNTAIN THEATRES,  
INC., a corporation,  
  
Defendants-Respondents.

Plaintiff-Appellant Woodland Theatres, Inc. hereby respectfully petitions the Court for a rehearing on one of the issues raised in its appeal from the District Court Order granting defendants-respondents' Motion for Summary Judgment. The single issue upon which plaintiff-appellant seeks rehearing is the dismissal of its claims for actual damages arising out of breaches of its leasehold agreement.

The District Court in granting summary judgment for defendants-respondents, held that plaintiff-appellant's acceptance of rent subsequent to the breaches of its lease waived its claims for damages. The Supreme Court in its

opinion in this action disagreed, holding that plaintiff-appellant's actions did not constitute a waiver of any damage claims arising under the lease. Nevertheless, the Court held that plaintiff-appellant could not state a claim for relief based upon an implied duty upon the lessee to produce profit from which the plaintiff-lessor would participate through a percentage lease agreement.

In its Opinion and Order, however, the Court overlooked plaintiff-appellant's substantial damage claims relating solely to the actual damages arising from breaches of the lease. Specifically, in paragraph 9 of plaintiff-appellant's complaint in Civil Action No. 222497, the plaintiff-appellant claims breach of the lease by failure "to improve, properly care for, and maintain the theatre in a good state of repair and by allowing the theatre to deteriorate and remain in a position of disrepair." Plaintiff-appellant makes further specific claims respecting such breaches which it has claimed resulted in actual damage to the plaintiff-appellant as lessor, measured by the cost of repair and/or the decline in the value of the premises by reason of the lessee's breach.

Consistent with the Supreme Court's opinion in this action, such damage claims are not waived by the plaintiff-appellant's acceptance of rent. Accordingly, plaintiff-

appellant petitions for rehearing on this issue and respectfully prays that the Court modify its Order so as to allow plaintiff-appellant to proceed on its claims for actual damage.

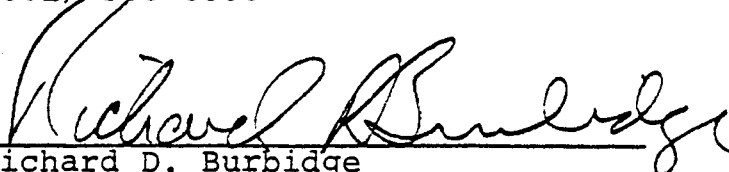
This Petition is supported by the appended Brief and by the record on appeal before the Court.

DATED this 4<sup>th</sup> day of February, 1977.

Respectfully submitted,

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IN THE SUPREME COURT  
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WOODLAND THEATRES, INC.,	)	
a corporation,	)	
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Plaintiff-Appellant,	)	Case No. 14440
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INC., a corporation,	)	
	)	
Defendants-Respondents.	)	

BRIEF IN SUPPORT OF PETITION FOR REHEARING

INTRODUCTION

The plaintiff-appellant Woodland Theatres, Inc. petitions for rehearing on the sole issue of whether it can maintain its claims for actual damages arising from breaches of its leasehold agreement with the defendants-respondents.

In this action, plaintiff-appellant sought relief on the basis of three claims:

1. That the leasehold agreement with defendants-respondents should be forfeited and terminated by reason of breaches of the lease;



2. That plaintiff-appellant should recover actual damages resulting from a failure to repair and maintain the theatre; and,

3. That plaintiff-appellant should recover consequential damages resulting from defendants-respondents' breach of an implied covenant to operate the theatre in a reasonable manner so as to produce income in which the plaintiff-appellant would participate through a percentage lease agreement.

On appeal from the District Court's Order granting summary judgment for defendants-respondents with respect to all of plaintiff-appellant's claims, this Court held:

1. Plaintiff-appellant's acceptance of rent waived its claim for termination or forfeiture of the lease;

2. Plaintiff-appellant's acceptance of rent did not constitute a waiver of claims for damages; and,

3. Plaintiff-appellant's claim for consequential damages arising from an alleged, implied covenant to operate the theatre in a reasonable manner did not state a claim upon which relief could be granted.

The Court, however, erred in overlooking plaintiff-appellant's claims for actual damages arising from the failure to maintain and repair specifically set forth in paragraph 9 of the complaint in Civil Action No. 222497.

### QUESTION PRESENTED

Should the plaintiff-appellant be allowed to proceed on its claims for actual damages resulting from breaches of the lease agreement which were not waived by plaintiff-appellant's acceptance of rent?

### STATEMENT OF FACTS

Plaintiff-appellant's complaint in Civil Action No. 222497 states a claim, in paragraph 9 thereof, for actual damages which resulted from a failure of the defendants-respondents to improve, repair and maintain the theatre premises in specific respects set forth in that paragraph. Such damages are substantial and plaintiff-appellant has significant material facts in support of the lessees' flagrant disregard of their obligations to repair and improve the theatre resulting in substantial damage to the lessor measured by the cost of making the repairs as well as the decline in value of the theatre assets which were not properly maintained and repaired.

Defendants-respondent's sole basis for its Motion for Summary Judgment with respect to the claims is the assertion that plaintiff-appellant waived such claims of breach by its acceptance of rent.

## ARGUMENT

### I. Plaintiff-Appellant Should Be Allowed to Proceed on Its Claims for Actual Damages Arising from Defendants-Respondents' Breach of the Leasehold Agreement.

In its opinion in this action, the Supreme Court has held that the acceptance of rent by plaintiff-appellant did not waive its right to recover damages for breach of the lease. In that respect, the Court stated:

Lessor further contests the ruling of the trial court in so far as it has the effect of barring its right to recover damages for breach of the covenants by accepting rental payments. This point is valid.

The Court, however, construed plaintiff-appellant's damage claims to consist solely of a claim for consequential damages arising from an implied covenant on the part of the lessees to operate the theatre in a prudent manner so as to produce profit in which the plaintiff-appellant would participate through a percentage lease provision. Plaintiff-appellant respectfully submits that its claims set forth in the above-said paragraph 9 of the complaint states a claim for actual damages arising from the failure by the lessees to repair and maintain the theatre as set forth above.

Claims of actual damages resulting from breaches of express provisions of a lease clearly state a claim upon which relief can be granted as the Court acknowledged in its discussions of the case of Wollard v. Schaffer Stores Company, 272 N.Y. 304, 5 N.E. 2d 829, (1936). The damage claims in that case, which were held not to be waived, related to a violation of the lease against making structural changes, which structural changes damaged the lessor in the cost of restoration.

The lessees' breaches in this action, with respect to which plaintiff-appellant makes its claims for actual damages, concern omissions on the part of the lessees to improve and maintain the theatre. As a result of such breaches of the lease, the plaintiff-appellant has been damaged in the cost of restoration and in the decline in the value of the premises. Such damages do not derive from an implied covenant and are not "consequential" in nature. The damages represent actual loss resulting directly from breach of express covenants of the lease. Dismissal of plaintiff-appellant's actual damage claims is, therefore, inconsistent with the position taken by the Supreme Court that such claims are not waived by acceptance of rent.

Plaintiff-appellant respectfully requests the Court to grant rehearing on this issue and modify its opinion so

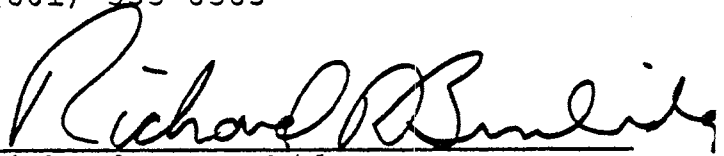
as to allow plaintiff-appellant to pursue its actual damage claims.

DATED this 4<sup>th</sup> day of February, 1977.

Respectfully submitted,

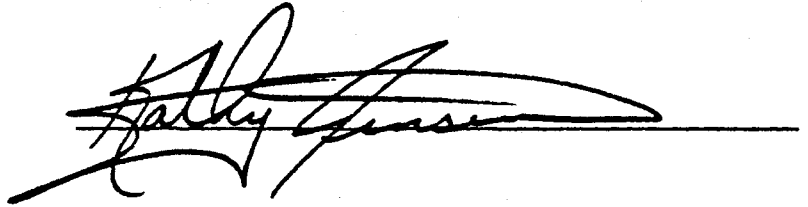
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Woodland Theatres, Inc.

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on this \_\_\_\_\_ day of February, 1977, two copies of the foregoing PETITION FOR REHEARING and BRIEF IN SUPPORT OF PETITION FOR REHEARING were served upon counsel for Defendants-Respondents, Roger P. Christensen; Christensen, Jensen, Gardiner & Evans; 900 Kearns Building; Salt Lake City, Utah, 84101, by personal hand delivery of same.

A handwritten signature in dark ink, appearing to read "Sally Jensen", is written over a horizontal line. The signature is stylized with a large, looping initial 'S'.