

1988

# LCI Enterprises v. Norman R. Chesler and Shawn David Nelson : Brief of Respondent

Utah Court of Appeals

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**BRIEF**

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DOCKET NO.

880146 CA

**IN THE UTAH COURT OF APPEALS**

LCI ENTERPRISES,

Plaintiff/Appellant,

vs.

NORMAN R. CHESLER and SHAWN  
DAVID NELSON,

Defendants/Respondents.

)  
)  
) Docket No. 880146-CA

)  
) Priority No. 14(b)  
)  
)  
)

**BRIEF OF RESPONDENTS**

APPEAL FROM THE ORDER OF DISMISSAL OF THE  
THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY  
THE HONORABLE JAMES S. SAWAYA, JUDGE

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**IN THE UTAH COURT OF APPEALS**

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**BRIEF OF RESPONDENTS**

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**JURISDICTION**

The Utah Supreme Court is authorized by Section 78-2-2(3)(i), Utah Code Annotated (1953 as amended) to hear this appeal from the District Court because this Court does not have original jurisdiction under Section 78-2a-3, Utah Code Annotated (1953 as amended); however, by Order dated March 3, 1988, this case was "poured-over" to this Court by the Utah Supreme Court under Section 78-2a-3(h).

**NATURE OF PROCEEDINGS**

This is an appeal from a final Order granting summary judgment of dismissal in favor of Defendants and against Plaintiff entered in the District Court of the Third Judicial District in and for

Salt Lake County, Utah, by the Honorable James S. Sawaya. Plaintiff sought recovery for damage to real property caused by Defendants.

**STATEMENT OF ISSUES PRESENTED ON APPEAL**

The Plaintiff/Appellant has raised the following issues on appeal:

1. Whether any factual issues existed at the summary judgment proceeding to preclude the District Court's grant of summary judgment.

2. Whether the District Court correctly interpreted the lease agreement existing between Plaintiff LCI ENTERPRISES (hereinafter "LCI") and Theatre Candy Distributing Company.

a. Whether the subrogation waiver provisions of the lease extended beyond the landlord and tenant to Defendants NORMAN R. CHESLER and SHAWN DAVID NELSON (hereinafter "CHESLER" and "NELSON").

b. Whether CHESLER is entitled to the benefits of the subrogation waiver agreement in view of the allegations of improper conduct which were raised in the original Complaint.

### STATEMENT OF THE CASE

NATURE OF THE CASE. Plaintiff instituted this action against Defendants on or about August 13, 1987 alleging that Defendants are liable for damage to Plaintiff's real property.

DISPOSITION IN THE LOWER COURT. Defendants moved the District Court for summary judgment seeking dismissal of Plaintiff's case. The motion was duly briefed and argued to the Court on November 2, 1987. Judge Sawaya granted the motion in a minute entry dated November 25, 1987 and the formal Order dismissing Plaintiff's case was entered December 9, 1987. (Order, Record at 81, reproduced at A - 1). Plaintiff's appeal followed.

### STATEMENT OF FACTS

For purposes of the Motion for Summary Judgment only, Defendants' counsel argued to the District Court that if every allegation in the Plaintiff's Complaint was true -- thus eliminating all issues of fact -- Defendants were still entitled to summary judgment as a matter of law; therefore, appellate review of the summary judgment proceeding should focus on matters of law rather than issues of fact. For this reason, Defendants do not recite their version of the facts herein.

### SUMMARY OF ARGUMENT

In the motion for summary judgment proceeding there were no issues of fact. Therefore, this Appellate Court should disregard all references to issues of fact in Plaintiff's Brief and limit its review to the rules of law which the District Court utilized in granting summary judgment.

Any ambiguity which may be found in a landlord and tenant lease should be strictly construed against the landlord who furnished the lease and required the tenant to sign.

The parties' lease agreement contained a subrogation waiver clause which the District Court ruled to extend to the Defendants and, therefore, ruled that Plaintiff's claim against Defendants was thereby waived. The purpose of subrogation waivers is to help the parties avoid continuing dispute and litigation that is often the result of subrogation claims.

The District Court's interpretation of the subrogation-waiver clause is correct and should be affirmed. In the lease, Plaintiff expressly "released" and "relieved" the employer and its "representatives" and Plaintiff "waived" its "entire claim" or "recovery for loss" arising out of a fire.

Defendants were "representatives" of Theatre Candy Co. (tenant; and their employer) and, as such, were legal beneficiaries of the waiver agreement.

Defendants were intended third-party beneficiaries of the lease agreement; therefore, the leasehold rights owned by the tenant extend to Defendants. Plaintiff did not raise an issue in this regard on appeal.

The subrogation waiver by Plaintiff was effective even if the fire was caused by the negligence of Theatre Candy Company's "agents or employees or otherwise."

Plaintiff identifies "theories" in its Brief which were not presented to the lower court during the summary judgment proceeding. Consequently, on appeal the Plaintiff cannot utilize such new "theories" in an effort to show that the lower court erred.

The District Court did not rewrite the subrogation-waiver clause or reform the lease as Plaintiff suggests.

Defendant Nelson was an employee of Theatre Candy Distributing Company; although Plaintiff questions that on appeal, Plaintiff admitted it by means of allegations made in its Complaint.

### ARGUMENT

1. **IN THE MOTION FOR SUMMARY JUDGMENT PROCEEDING THERE WERE NO ISSUES OF FACT. THEREFORE, THIS APPELLATE COURT SHOULD DISREGARD ALL REFERENCES TO ISSUES OF FACT IN PLAINTIFF'S BRIEF AND LIMIT ITS REVIEW TO THE RULES OF LAW WHICH THE DISTRICT COURT UTILIZED IN GRANTING SUMMARY JUDGMENT.**

At the summary-judgment hearing, Defendants' counsel admitted the truth of all allegations raised by Plaintiff in the pleadings (Transcript, p. 3, l. 6-11). Such admission was made for the limited purpose of enabling the District Court to rule on the law applicable to the facts.

Thus, pursuant to Rule 56 of the Utah Rules of Civil Procedure the District Court was empowered to apply rules of law to such facts and grant summary judgment against Plaintiff and in favor of Defendants.

Plaintiff acknowledges that for the limited purpose of the summary-judgment motion the truth of Plaintiff's allegations was admitted by Defendants. In the same breath, however, Plaintiff refers to the existence of questions of fact which should preclude summary judgment. (Brief for Appellant at 16 & 17).

Therefore, this Appellate Court should disregard all references to issues of fact in Plaintiff's Brief and limit its review to the rules of law which the District Court utilized in granting summary judgment.



**2. ANY AMBIGUITY WHICH MAY BE FOUND IN A LANDLORD  
& TENANT LEASE SHOULD BE STRICTLY CONSTRUED  
AGAINST THE LANDLORD WHO FURNISHED THE LEASE  
AND REQUIRED THE TENANT TO SIGN.**

In a 1977 case strikingly similar to the present case, the Utah Supreme Court reviewed a case where a landlord sued his tenant alleging that the tenant negligently caused a fire on the leasehold premises. The tenant's motion for summary judgment was granted by the district court on the ground that the lease absolved the tenant from liability. Plaintiff appealed contending that summary judgment should not have been granted because of an alleged ambiguity in the lease. The Supreme Court affirmed the district court's summary-judgment dismissal reasoning that "any doubt or uncertainty in the language ... should be strictly construed against the landlord, who furnished the lease and required the tenant to sign." Bonneville on the Hill Co. v. Sloane, 572 P.2d 402, 403 (Utah 1977) (citing Cont. Bank & Trust Co. v. Bybee, 6 Utah 2d 98, 306 P.2d 773 (Utah 1957) and 1 Restatement of Contracts (Second), Sec. 236 (1982)).

During the summary judgment proceeding, Defendant CHESLER'S affidavit (Record at 69, 70) stated that the lease was provided by Jay Liljenquist (i.e, of LCI ENTERPRISES) and that the subrogation waiver clause was standard in all of his leases; that fact was not controverted by Plaintiff in the summary judgment proceeding.

Thus, the lease provisions should be strictly construed against Plaintiff.

**3. THE PURPOSE OF SUBROGATION WAIVERS IS TO HELP THE PARTIES AVOID CONTINUING DISPUTE AND LITIGATION THAT IS OFTEN THE RESULT OF SUBROGATION CLAIMS.**

Plaintiff cites Henry Shenk Co. v. City of Erie, 352 Pa. 481, 43 A.2d 99 (1945) and Urich General Accident and Liability Insurance Company v. Klein, 181 Pa. Super. 48, 121 A.2d 893 (1956), (Brief for Appellant at 15), for the proposition that waivers should be strictly construed so as to not bar Plaintiff's claim.

However, it is well settled that where the terms of a release or waiver -- and the facts and circumstances existing at the time of its execution -- indicate the parties had in mind a general settlement of accounts, the release will be given effect according to its terms. In re Brill's Estate, 12 A.2d 50, 52 (Pa. 1940) (citing Flaccus v. Wood, 260 Pa. 161, 167, 103 A. 549). Further, it was held in Young v. Robertshaw Controls Co., 430 F.Supp. 1265, 1269 (E. D. Pa. 1977) that "If a release is to be lightly set aside for no other reason than the parties were mistaken as to the extent of the injuries, the effect of the release and the advantage of settlement would be lost."

In the present case, both parties carried insurance and the insertion of the subrogation waiver in the lease enabled them, upon the occurrence of a damaging fire, to walk away from continuing disputes and litigation that is often result of insurance subrogation claims.

As the subrogation-waiver clause in the present case states, the landlord and tenant waived their "entire claim or recovery" for "loss, damage, or injury" "arising out of or incident to fire". This language leaves nothing to the imagination; it is clear and concise.

**4. THE DISTRICT COURT'S INTERPRETATION OF THE SUBROGATION-WAIVER CLAUSE IS CORRECT AND SHOULD BE AFFIRMED.**

- a. DEFENDANTS ARE IMMUNE FROM LIABILITY; PLAINTIFF'S LEASE WITH THEATRE CANDY CO. CONTAINED A WAIVER OF LIABILITY WHICH EXTENDED TO CHESLER AND NELSON.**
- b. IN THE LEASE, PLAINTIFF EXPRESSLY "RELEASED" AND "RELIEVED" THEATRE CANDY CO. AND ITS "REPRESENTATIVES" AND "WAIVED" ITS "ENTIRE CLAIM" OR "RECOVERY FOR LOSS" ARISING OUT OF A FIRE.**
  - 1) CHESLER AND NELSON WERE "REPRESENTATIVES" OF THE THEATRE CANDY CO. AND, AS SUCH, WERE LEGAL BENEFICIARIES OF THE WAIVER AGREEMENT.**

LCI leased commercial property to Theatre Candy Distributing Company. During the term of the lease, a fire occurred which destroyed portions of Theatre Candy's personal property and LCI's (landlord's) real-property improvements. (Brief for Appellant at 3-4).

Plaintiff admitted in its Complaint that at the time of the fire, CHESLER was an officer and employee of Theatre Candy and NELSON was an employee. (Record at 2).

Plaintiff's action is a subrogation claim brought on behalf of Plaintiff's insurer against CHESLER and NELSON.

CHESLER and NELSON are immune from liability because they are proper included and named beneficiaries of the subrogation-waiver clause contained in the LCI - Theatre Candy Co. lease which provides as follows:

SUBROGATION WAIVER AGREEMENT

17. The Lessor and Lessee do each hereby and herewith release and relieve the other, and waive their entire claim or recovery for loss, damage or injury arising out of or incident to fire, explosion or any other perils included in the extended coverage endorsement in, on or about the said premises, whether due to the negligence of any of said parties, their agents or employees or otherwise. It is mutually agreed that each of the covenants and agreements of this subrogation waiver agreement shall extend to and be binding upon the representatives, successors, heirs, administrators and assigns of the parties hereto. (Emphasis added).

Addressing the elements of the foregoing provision:

1. The waiver was expressly mutual with the landlord and tenant releasing and relieving the other.
2. The landlord and tenant clearly waived "their entire claim or recovery for loss, damage or injury."
3. The waiver specifically applied to "loss, damage or injury arising out of or incident to fire."
4. The waiver was operative whether a fire was due to the negligence of a party or its agents or employees, or any other reason.

5. It was "mutually agreed" that each covenant and agreement of the "subrogation waiver agreement" was to "extend to and be binding upon" the "representatives" of the parties.
6. The term "representative" is commonly and traditionally a broad and general term. Definitions of the term include:
  - a. Representative includes an agent, an officer of a corporation or association, ... or any other person empowered to act for another. Utah Commercial Code, 70A-1-201(35) (1953)<sup>1</sup> (Emphasis added).
    - 1) Corporate Officer as Representative. By definition, "representative" includes "an officer of a corporation." A corporate officer is a "representative" of the corporation as that term is used in the Uniform Commercial Code art. 1, section 201(35). Rosedale State Bank & Trust Co., v. Stringer, 579 P.2d 159, 161 (Kan.App. 1978). See Fitch v. Kentucky-Tennessee Light & Power Co., 136 F.2d 12, 15 (6th Cir. 1943).
    - 2) Employees as Representative. By definition, "representative" includes "an agent" or "any other person empowered to act for another."
      - a) Agency. Relation in which one person acts for or represents another by latter's authority, either in the relationship of principal and agent, master and servant, or employer or proprietor and independent contractor. Black's Law Dictionary 59 (5th ed. 1979) (citing Gorton v. Doty, 57 Idaho 792, 69 P.2d 136, 139 (1937) (Emphasis added)).

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<sup>1</sup> Although the construction of the commercial lease in this case is not governed by the provisions of the Commercial Code, the quoted definition from the Commercial Code is indicative of the general and broad meaning of the term "representative."

In Fitch v. Kentucky-Tennessee Light & Power Co., 136 F.2d 12, 15 (6th Cir. 1943), the term "representative" was found to include the President of a company who conducted business dealings for the company and, regardless of his conduct, he was also an "agent" of the company. Id. at 15.

In Saums v. Parfet, 258 N.W. 235, 237 (Mich. 1935), it was decided that an employee is often found to be the "agent and hence the 'representative'" of his employer.

Now, with respect to the definitions of "representative" contained in Plaintiff's Brief, Defendants respond as follows:

1. The Plaintiff's reference to Jackson v. Tibbits, 9 Cow. 241 (N.Y. 1828), (Brief for Appellant at 14), does not support a conclusion that "representatives" means "heirs or executors." Rather, Jackson states that "'representatives' has no technical meaning in the law." In other words, "representatives" is a broad and generally-inclusive term rather than a specific term. Jackson then generally discusses a few of the terms which are included within the term "representatives." However, the conclusion of Jackson is that "[representative] never signifies a grantee." Id. at 251. Inasmuch as the present case does not involve the relationship between "representative" and "grantee" the rule of law for which Jackson stands is not applicable to the present case and Plaintiff's citing that case is not appropriate.

2. The Plaintiff's reference to Zych v. Zych, 183 Neb. 708, 163 N.W.2d 882 (1969), (Brief for Appellant at 14), does not support a conclusion that the term "representatives" excludes the more specific terms "employees" or "corporate officers." Rather, Zych simply states that 'representatives' "include[s]" (emphasis added) persons succeeding to the rights of a decedent. Zych does not say that "representatives" excludes "employees" or "corporate officers." Id. at 885. The rule of law in Zych recognizes the inclusion of certain words within the meaning of "representatives" but it does not attempt to say that those are the only words that qualify for inclusion and it does not attempt to identify words which are excluded. Therefore, following a reading of the Zych case one can still properly conclude that "officers" and "employees" fit within the broad and general term "representatives."
3. Plaintiff next cites Husers v. Papania, 22 So.2d 755 (La.Ct.App. 1945), (Brief for Appellant at 14), for the proposition that "representative," when used in a phrase with "successor," means someone like a "receiver, liquidator, executor, administrator, guardian or tutor." Husers at 757. Interestingly, the rules of law set forth in Husers are dependent upon the narrow factual situation that was involved -- the Louisiana Court of Appeal was considering whether criminal provisions of the Emergency

Price Control Act of 1942 extended beyond the seller of goods to the seller's agent. The regulated price of used refrigerators was \$12. Defendant sold her son's refrigerator to Plaintiff for \$210. Defendant (son's mother) claimed Plaintiff had no cause of action because she was acting as the agent of the owner (her son) and carrying out his instructions. The applicable statute extended over-charge liability to persons including 'individual, corporation, partnership, association, or any other organized group of persons, or legal successor or representative of the foregoing.' Id. at 757. The Court narrowly construed the word "representative" and tied its meaning to "legal successor" and refused to extend the meaning to include agents and noted that a penal statute "should be strictly construed" because "liability cannot be established or extended by implication." Id. at 757-758. However, the rule in Husers is not to say that courts are powerless to make implications; to the contrary, because courts are so frequently called upon to interpret, infer and imply, sundry rules of construction and interpretation have been developed to those ends. See Langer v. Iowa Beef Packers, Inc., 420 F.2d 365 (8th Cir. 1970); Restatement of Contracts, Sec. 226. Further, the court in Husers was restrained by the fact that it did not want to extend criminal liability to a seemingly innocent mother and so



the court opted for the narrowest reading of the statute it could possibly make.

4. Plaintiff cites Briggs v. Walker, 171 U.S. 466 (1898), (Brief for Appellant at 14), to conclude that "representatives" means "executors or administrators." However, the terminology in Briggs which was in issue was more specific and limited than "representatives;" the question concerned the meaning of "legal representatives." Briggs at 471 (emphasis added). Briggs did not state that "representatives" only means "executors or administrators;" it merely said that those are two of the meanings within the more general term. Again, as in Zych v. Zych supra, the rule of law in Briggs focuses on inclusion rather than on exclusion. Also, it should be observed that Briggs was decided in 1898 at a time when the American economy was primarily agrarian and the existence of employment relationships amid the populace was limited; the idea of a man representing another was more limited than it is today. Since that time, much litigation and development in the law has involved the relationship between employers and employees and the representational relationship between the two. Therefore, ninety years after Briggs, it is more likely for persons to include in their contracts the general term "representative" and to have that term include the more specific terms "employee" or "officer."

A word, such as "representative," is a collection of meanings just like a picture is an image of meanings. By concluding, as Plaintiff does, that "representative" means "executors or administrators" (Brief of Appellant at 14-15) Plaintiff is covering up a large part of the picture. "Representative" is a very broad and a very general term that includes many meanings and for it to take on a specific meaning it must be joined to words of limitation. For example, the more limited term "personal representative" means "an executor or administrator of a person deceased." Unsatisfied Claim and Judgment Fund v. Hamilton, 259 A.2d 303, 306 (Md. 1969). See, 2 Bouv Law Dict. 1911, Rawle's Third Revision.

**5. DEFENDANTS CHESLER AND NELSON WERE INTENDED THIRD-PARTY BENEFICIARIES OF THE LEASE AGREEMENT; THEREFORE, THE LEASEHOLD RIGHTS OWNED BY THE TENANT EXTEND TO CHESLER AND NELSON.**

Plaintiff has not raised an issue, on appeal, with respect to Defendants' argument to the lower court (Record at 75-76) that Defendants CHESLER and NELSON were, at law, third-party beneficiaries of the landlord-tenant lease agreement; therefore, that theory of the case should be upheld in Defendants' favor.

**6. THE SUBROGATION WAIVER BY LANDLORD WAS EFFECTIVE EVEN IF THE FIRE WAS CAUSED BY THE NEGLIGENCE OF THEATRE CANDY COMPANY'S "AGENTS OR EMPLOYEES OR OTHERWISE."**

Plaintiff argues in its "POINT I (C)" and "POINT II" (Brief for Appellant at 15-17) that the District Court interpreted the

subrogation-waiver clause too broadly in that it sheltered CHESLER from the commission of acts which were more than negligent. Plaintiff states that CHESLER'S actions were grossly negligent or that they evidenced a disregard for the safety of Plaintiff's premises.

Again, for the limited purpose of the summary proceeding all facts alleged by Plaintiff were admitted so that the District Court could bypass any issues-of-fact determination and proceed directly to a determination of the governing law.

The District Court ruled that the subrogation-waiver clause precluded all of the Plaintiff's claims -- including the claims referred to immediately above. The waiver clause clearly manifests the parties' intent in that it states that the landlord and tenant waive "their entire claim or recovery for loss ... whether due to ... negligence ... or otherwise." (See Lease Agreement, par. 17, *supra*).

7. THE PLAINTIFF IDENTIFIES "THEORIES" IN ITS BRIEF WHICH WERE NOT PRESENTED TO THE LOWER COURT DURING THE SUMMARY JUDGMENT PROCEEDING. CONSEQUENTLY, ON APPEAL THE PLAINTIFF CANNOT UTILIZE SUCH NEW "THEORIES" IN AN EFFORT TO SHOW THAT THE LOWER COURT ERRED.

Appellate courts are courts of review; they review the proceedings of the lower court; review does not include matters raised on appeal which were not presented at the lower court. Swayne v. L.D.S. Social Services, 91 Utah Adv. Rep. 17 (Utah Ct. App. September 27, 1988); Rekward v. Indus. Comm'n, 755 P.2d 166,

168 (Utah Ct. App. 1988); James v. Preston, 746 P.2d 799, 801 (Utah Ct. App. 1987).

This Court has ruled that "[o]rdinarily an appellant cannot change his theory of the case on appeal from that presented to the court below." Davis v. Mulholland, 475 P.2d 835 (Utah 1970). In that case, Davis sought to recover money he had paid for an option to buy land. In support of his request for rescission, his theory or reason at trial was "mutual" mistake; on appeal he added a new reason -- i.e., "unilateral" mistake. The Supreme Court seemed to disapprove of that tactic concluding that even if Davis had presented the "unilateral-mistake" theory at trial he could not have prevailed. Id.

In Simpson v. General Motors Corp., 470 P.2d 399 (Utah 1970) the Utah Supreme Court stated that the reason the above-stated rule is followed in Utah is to maintain orderly procedure in the courts with the ultimate purpose being the final settlement of controversies. The Court reasoned that a party must present his entire case and theory to the trial court, and, having done so, he cannot thereafter change to some different theory and thus "attempt to keep in motion a merry-go-round of litigation." Id. at 401.

See also First Equity Corp. of Florida v. Utah State University, 544 P.2d 887, 892 (Utah 1975).

The above-stated Utah rule applies to the present case as follows.

At the lower court, Plaintiff's Memorandum in Opposition to Summary Judgment (Record at 40-45) stated 2 relatively short and

general reasons why its case should not be dismissed; the 2 arguments are summarized under the following 2 headings:

1. CLEAR LANGUAGE. That the language of the lease was clear and the lease included no language that could be construed as meaning that the lessor waived any claim as against Defendants CHESLER and NELSON (Record at 43).

Plaintiff failed to make any mention at all concerning Defendants' interpretation of the word "representative" or their argument that such general term, by definition, included the more specific terms "officer" and/or "employee."

PRESENT APPEAL. On appeal, Plaintiff changes its approach as follows:

- 1) Plaintiff now argues, for the first time, that the definition of "representative" should come from its context and should mean "successor in interest" and/or "executors or administrators" rather than "employees." (Brief for Appellant at 10-13).
- 2) Plaintiff now argues, for the first time, that, as a matter of law, a waiver clause should not bar a claim which had not accrued as of the date of the lease (Brief for Appellant at 15-16).
- 3) Plaintiff now argues, for the first time, that application of the waiver to include officers

and/or employees of the lessee exceeds the contemplation and/or intent of the parties.

(Brief for Appellant at 13-15).

2. BREACH. That the lessee (Theatre Candy Distributing Co.) breached the lease in not maintaining property damage insurance to protect the lessor (Plaintiff) and that such breach precludes Defendants from benefitting from the subrogation-waiver clause (Record at 43).

PRESENT APPEAL. On appeal, Plaintiff abandons that theory.

**8. SUMMARY JUDGMENT WAS APPROPRIATE IN THIS CASE.**

Appellant in its "POINT III" cites three authorities<sup>2</sup> in support of a proposition that summary judgment is a drastic remedy to be utilized only where there exists no genuine issue of material fact. Plaintiff argues from these three cases that the District Court should resolve uncertainties concerning issues of fact in a light favorable to the party opposing summary judgment. (Brief for Appellant at 19).

Defendants contend that motions for summary judgment should be granted when the material facts in a case are not in dispute and the moving party is entitled to judgment as a matter of law.

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<sup>2</sup> Webster v. Sill, 675 P.2d 1170 (Utah 1983); Spor v. Crested Butte Silver Mining, Inc., 740 P.2d 1304 ([sic] 1987). Brigham Truck and Implement Company v. Fridal, 746 P.2d 1171 (Utah 1987).

Summary judgment eliminates "the time, trouble and expense of trial when it is clear as a matter of law that the [parties] ruled against [are] not entitled to prevail." Amjacs Interwest Inc. v. Devyn Associates, 635 P.2d 53 (Utah 1981). The Utah Supreme Court has also stated:

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, admissions, and affidavits show that there is no genuine issue of fact and that the moving party is entitled to judgment as a matter of law. Jensen v. Mountain States Telephone & Telegraph Co., 611 P.2d 363 (Utah 1980).

In the present case, the lower court was not called upon to decide whether there were any issues of fact; for the limited purpose of the summary-judgment proceeding, counsel for Defendant CHESLER argued to the District Court (Transcript at 3) that even if every allegation raised in the Plaintiff's pleadings was true, Plaintiff's claim must still fail as a matter of law.

**9. THE DISTRICT COURT DID NOT REWRITE THE SUBROGATION-WAIVER CLAUSE OR REFORM THE LEASE.**

Appellant in its "POINT I" (Brief for Appellant at 8-9) and "POINT III" (Brief for Appellant at 18-19) argues that the District Court rewrote the subrogation-waiver clause and reformed the contract when in the minute entry Judge Sawaya wrote "the Lessor and Lessee do each hereby and herewith release and relieve the other and their respective employees . . . ."

Judge Sawaya was stating his interpretation of the contract as a matter of law. In a summary judgment proceeding, it is

essential that the trial court indicate, as a matter of law, how the contract language applies to the undisputed facts.

**10. THE INTENT OF THE LANDLORD AND TENANT WAS  
MANIFEST IN THE LEASE DOCUMENT.**

Appellant in its "POINT III" argues that at the summary judgment hearing "the trial court had no evidence whatsoever of the parties' intent." (Brief for Appellant at 19).

To the contrary, the trial court had before it in clear and unambiguous terms the clear intent of both parties as they expressed it in paragraph 9 of the lease (i.e., the landlord agreed to insure the leased building and premises against fire) and in paragraph 17 (i.e., the subrogation-waiver clause).

Also, as to the issue of intent in subrogation cases involving landlord-tenant relationships, a clear and definite line of cases has held that the tenant is not liable for damages caused, even by his own negligence. The rationale for these decisions is that the landlord's insurance on the premises is presumed to insure the tenant also. See Alaska Insurance Co. v. RCA Alaska Communications, 623 P.2d 1216, 1218 (Alaska 1981); Rock Springs Realty, Inc. v. Waid, 392 S.W.2d 270 at 277 (Mo. 1965); R. Keeton, Insurance Law, 4.4(b) at 210 (1971).

Other courts have noted that such insurance is purchased for both parties' benefit. Fry v. Jordan Auto Co., 224 Miss. 445, 80 So.2d 53, 58 (1955); Monsanto Chemical Co. v. American Bitumuls Co., 249 S.W.2d 428 (Mo. Ct. App. 1952); see generally M. Friedman,



"Landlords, Tenants and Fires--Insurer's Right of Subrogation," 43 Cornell L.Q. 225, 228 & n. 12 (1957).

More recent cases have developed the theory, in holding tenants harmless for landlord's damages, that by paying rent the has paid for his possible negligence in advance -- the rent being set at an amount sufficient to cover the landlord's fire insurance expenditures. Liberty Mutual Fire Insurance Co. v. Auto Spring Supply Co., 59 Cal. App. 3d 860, 131 Cal.Rptr. 211, 214-15 (Cal.Ct.App. 1976); Rock Springs Realty, *infra*; Sutton v. Jondahl, 532 P.2d 478, 482 (Okla.App. 1975).

In addition, courts have noted that permitting a subrogation action against a tenant would give insurers a windfall since fire insurers expect to pay fire losses for fires and their rates are calculated upon that basis. Rock Springs Realty, *infra*; Liberty Mutual Fire Insurance Co., *infra*; Million, "Real and Personal Property," 33 N.Y.U.L.Rev. 552, 586 (1958).

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**11. DEFENDANT NELSON WAS AN EMPLOYEE OF THEATRE CANDY DISTRIBUTING COMPANY; ALTHOUGH PLAINTIFF QUESTIONS THAT ON APPEAL, PLAINTIFF ADMITTED IT BY MEANS OF ITS COMPLAINT.**

In "POINT III" of its Brief, Plaintiff contends that Defendant Nelson may not have been an employee of Theatre Candy Distributing Co. and, thereby, not entitled to the protection of the subrogation-waiver clause in the lease. (Brief for Appellant at 19).

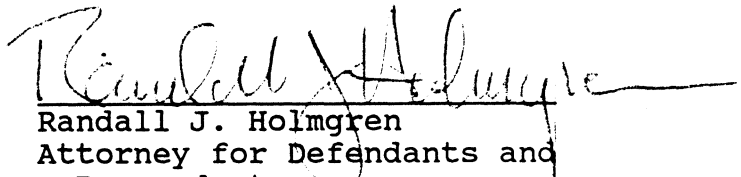
It is improper for Plaintiff to point to Defendant NELSON'S employment status on appeal because in its Complaint Plaintiff

alleged that NELSON was an employee (Record at 2) and in his Answer to the Complaint Defendant CHESLER (Record at 14) admitted that NELSON was an employee. Further, Plaintiff admitted in its Docketing Statement on file herein that NELSON was an employee. (Docketing Statement at 2).

#### CONCLUSION

The District Court ruling was correct and for the foregoing reasons the dismissal of the Plaintiff's claims should be upheld and costs and attorney fees awarded to Defendants pursuant to the contractual provisions of the lease agreement.

DATED this 6 day of October, 1988.

  
Randall J. Holmgren  
Attorney for Defendants and  
Respondents

## **ADDENDUM**

H. Dixon Wood, Jr., District Court  
by [Signature]  
Clerk

IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF UTAH  
IN AND FOR SALT LAKE COUNTY

Judge: Sawaya

The matter was heard by the Court, Judge James S. Sawaya, on Monday, November 2, 1987. Plaintiff was represented at the hearing by Marcella Keck, Esq. and Defendants were represented by Randall J. Holmgren, Esq. and Robert D. Dahle, Esq.

Having reviewed the pleadings, memoranda and affidavits on file and having heard the arguments of counsel, and good cause appearing,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. That the Defendants and each of them are entitled to the benefits of the subrogation-waiver agreement as contained within the written lease agreement existing between LCI Enterprises and Theatre Candy Distributing Co.

2. That based upon said subrogation-waiver agreement, Defendants are not liable to Plaintiff for damages, or otherwise, arising out of the fire which is alleged in the Plaintiff's Complaint.

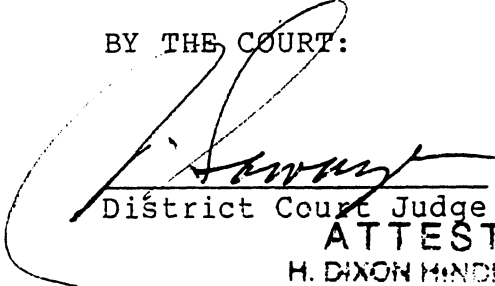
3. That Defendants are not liable for any of the claims contained in the Plaintiff's Complaint.

4. That Defendants' Motion for Summary Judgment is granted.

5. That Plaintiff's Complaint is dismissed with prejudice.

Date: Dec 9, 1987.


BY THE COURT:

  
District Court Judge

ATTEST

H. DIXON HINDLEY

Clerk

By   
Deputy Clerk

000082

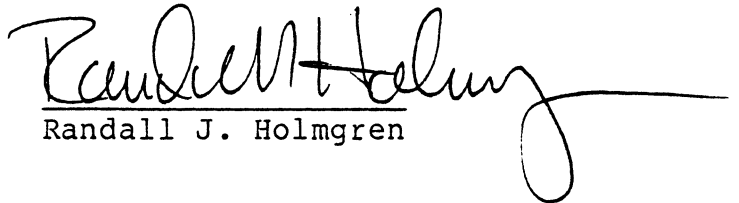
CERTIFICATE OF MAILING

I hereby certify that I personally mailed a true and correct copy of the foregoing ORDER OF DISMISSAL to the following, postage prepaid, five (5) days before submitting the same to the Court for its signature, in accordance with Rule 2.9 of the Rules of Practice.

John D. Parken, Esq.  
Marcella Keck, Esq.  
Parken & Keck  
Attorneys for Plaintiff  
Suite 808 Boston Building  
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Robert D. Dahle, Esq.  
Attorney for Defendant Nelson  
7050 Union Park Center, Suite 106  
Midvale, Utah 84047

DATE: November 30, 1987.

  
Randall J. Holmgren

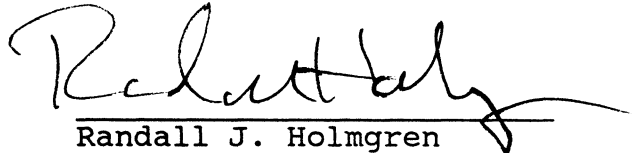
**CERTIFICATE OF MAILING**

I hereby certify that I personally caused to be mailed four (4) true and correct copies of the foregoing BRIEF OF RESPONDENT to the following, postage prepaid.

John D. Parken  
Marcella L. Keck  
PARKEN & KECK  
Suite 808 Boston Building  
#9 Exchange Place  
Salt Lake City, Utah 84111

Attorneys for Appellant

Date: October 6, 1988.

  
Randall J. Holmgren