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IN THE SUPREME COURT OF THE STATE OF UTAH

LEMAR S. WINEGAR and LEGRAND WINEGAR,

Plaintiffs and Appellants,

vs.

SMITH INVESTMENT COMPANY, a Utah Corporation,

Defendant and Respondent.

Case No. 1[illegible]

REPLY BRIEF OF PLAINTIFFS-APPEL[illegible]

Appeal from a Judgment
Of the Third Judicial District
Of Salt Lake County, Utah.
Honorable Peter L. Leary, Judge

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POINT I

THE FACT THAT THE WINEGARS RECEIVED THE LEASE BY AN ASSIGNMENT DOES NOT CURE THE AMBIGUITY CONTAINED IN THE AGREEMENT

The major thrust of defendant's fourth point in its brief is that the ambiguity in the lease is cured by the assignment of the amended lease from the Doxeys to the Winegars. A review of the proceedings in the trial court clearly shows that the decision of the trial judge is primarily influenced by the court's concern that the assignment of the lease should now preclude the existence of an ambiguous term in the agreement. At page 243 of the record the trial judge stated:

> --my question goes No. 1, you're claiming that there's an ambiguity, and it's between the parties, and that needs to be straightened around.
>
> Well, the parties to the amendment were Mr. Doxey and Smith Investment Company. The people that came in subsequently were not parties to the amendment. They took an assignment of the lease. If they take an assignment of the lease, don't they take subject to whatever the terms and conditions of that lease are? And if so, if they have read the lease, then where is there any ambiguity between the parties?
>
> After all, the--really the assignees are not parties to the lease in the sense that you're talking about. They're taking an interest of someone else under the terms of the lease.
>
> Now, how do you get the ambiguity down to the plaintiff?

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The trial court was not justified in relying upon the assignment of the lease as being an exception to the rule that a court must properly construe an ambiguous provision of a lease. In its brief, the defendant fails to cite any legal authority for such a position. After deligent research, the plaintiffs assert that there is none.

Case law is frequently cited to the effect that an assignee has no greater rights than his assignor. See Pierce vs. Ackerman, 488 P.2d 1118 (Colo. App. 1971). The converse of this statement is the controlling rule that pinpoints the error of the trial court and entitles plaintiffs to a reversal of the ruling of the trial court on the question of the ambiguity of the lease.

If the assignor had no greater right than the assignee, then an assignee would be entitled to compel a court of law to construe an ambiguous lease provision just as his assignor would have had such right. Plaintiffs submit that an assignee steps into the shoes of his assignor and is entitled to bring an action to compel the proper construction of an ambiguous lease.

Numerous cases recite the rule that the assignee "steps into the shoes" of his assignor. See Lundstrom vs. Radio Corporation of America, 405 P.2d 339, 341, 17 Utah 2d 114 (1965), and Paullos vs. Fowler, 367 P.2d 130, 135, 59 Wash. 2d 204 (1961). By such a statement

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it cannot be inferred that the assignee, in any way, losses a single right which was previously held by the assignor.

The plaintiffs' position is supported by the case of Mobile Acres, Inc. vs. Kurata, 508 P.2d 889 (Kan. 1973), which case is practically identical to the matter now before this Court. In Mobile Acres, the defendant entered into a lease agreement with Messrs. Hill and Webster, who subsequently assigned the lease to the plaintiff, Mobile Homes, Inc.

These arrangements were completely satisfactory until an assessment of property taxes against the defendant and improvement taxes against the plaintiff gave rise to a dispute regarding the meaning of a provision of the lease relative to the payment of taxes. The Supreme Court of Kansas ruled, as a matter of law, that the lease was ambiguous as between the defendant-lessor and the plaintiff-assignee and the Court remanded the matter to the trial court for the development of evidence as to the proper construction of the lease.

As in the Mobil Acres case, the Winegars, as assignees of the lease, are entitled to obtain a proper construction of their ambiguous lease with the defendant. The ambiguity in the lease is not cured by the assignment.

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THIS COURT IS NOT BOUND BY THE FINDINGS OF THE LOWER COURT REGARDING PLAINTIFFS' CLAIM FOR REFORMATION OR PLAINTIFFS' CLAIM FOR PROPER CONSTRUCTION OF THE AMBIGUOUS LEASE.

On page 22 of its brief, the defendant refers to the findings of fact of the trial court and states that plaintiffs' claim of ambiguity and claim for reformation are both negated by such findings. Defendant then concludes its sixth point by citing language of a case relative to the standard of review by appellate courts. This Court, however, is free to consider both the facts and the law in this matter.

A suit for reformation is in equity. See Dobbs, Remedies, p. 752, and Mettler vs. Hedly, 338 P.2d 489, 491 (Cal. App. 1959). In equitable proceedings it is clear that the Utah Supreme Court sits in review of the facts, as well as the law. Salt Lake County vs. Kartchner, 552 P.2d 136 (Utah 1976).

As to their petition for reformation, plaintiffs' submit that there is a mutual mistake of fact. This assertion is born out by the testimony of the parties.

Mr. Doxey, who executed the amendment to the lease, testified that there was no question about the fact that;

> "the lease was extended and included in that extension was the fact that the renewal would be extended as well." (R. 148-149)

Mr. Smith's testimony for the defendant, or rather the lack of it, clearly shows that the true intention

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of the parties was to establish a three month notice of renewal. Mr. Smith's testimony is quoted on page 15 of the defendant's brief and is found at page 255 of the record.

This testimony deals solely with the extension of the lease from an eight year to a ten year term. No discussion or negotiation as to the renewal provision is mentioned. In the absence of any discussion or negotiation as to the time for the giving of the notice of renewal, the only meeting of the minds that was obtained by the parties on the question of notice is that such notice must be given within three months.

Defendant argues in its brief that because the defendant owned the entire adjacent shopping center, it was important for the defendant to know about a termination of the lease more than two years before the termination was to take place. This argument is belied by the fact that, on the day that Mr. Smith met with Mr. Doxey to sign the amendment to the lease, Mr. Smith offered to Mr. Doxey a lease which was prepared by the defendant and which contained a notice of renewal provision merely requiring a three month notice. Only after specific negotiation on the issue of the length of the term was Mr. Doxey able to obtain a ten year term. No discussion or negotiation

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as to the timing of the giving of notice to renew was had, and no change was made in the meeting of the minds of the parties on the issue of notice.

The only reasonable conclusion that can be made is that both parties, as a matter of mutual mistake, overlooked the provision relating to notice of renewal, and the parties failed to discuss, negotiate, or amend the three month notice provision. The notice provision should remain, therefore, a provision for a three month notice of renewal in order to conform to the understanding of the parties.

At no time did the defendant ask for, or obtain a notice provision of more than three months. By a reformation of the amendment to the lease, the Court can establish the true agreement of the parties.

Separate and distinct from plaintiffs' claim for reformation is the fact that the amendment to the lease is ambiguous and requires construction by the Court. Whereas reformation is an equitable matter, the construction of a contract is a matter determined by an action at law. In the case now before the court, the plaintiffs are entitled to a renewal of the lease for an additional five year term on either or both of these theories.

In considering the construction of the amended lease, this court is again not bound by the findings of

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the trial court. In the case of Advance Press Corporation vs. Chester, 551 P.2d 932, 933-4 (Colo. App. 1973), the Colorado Court of Appeals held that

> [t]he construction of a written instrument such as the agreement before us is a question of law; therefore, we are not bound by the finding of the trial court in this regard (citation omitted).

Numerous cases cite similar language and support the plaintiffs position. Particularly enlightening is the recent case of Iskres vs. Owens, 561 P.2d 1218, 1222 (Alaska 1977). In this case the Supreme Court of Alaska construed the provisions of a lease and stated that:

> [i]n analyzing this agreement, our standard of appellate review is that which we articulated in Day vs. A & G Construction Company, Inc., 528 P.2d 440, 448 (Alaska 1974). There we stated that the interpretation of words is a matter for the court, while resolution of a dispute is to the surrounding circumstances is for the trier of facts. Questions pertaining to the meaning to be given to the words of the contract are to be considered in the same manner as questions of law. Consequently, this court, in interpreting the words of a contract, is not bound by the lower court's views, and the "clearly erroneous" standard used in reviewing a trial court's factual findings is inapplicable.

After it is determined that a lease agreement is ambiguous, and in construing its terms, the appeals court generally must review factual circumstances aiding its construction of the lease. In such a case the court is faced with mixed questions of fact and law and the

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same standard of review is applicable. The appeals court in the case of Schuldes vs. Wubbolding, 489 P.2d 1229, 1931-2, 15 Ariz. App. 527 (1971), in construing a lease held that:

> The construction of a written agreement involves questions of law, or mixed questions of fact and law, neither of which are binding on this court on review. (Other citations ommitted, but see Waldorf vs. Elliott, 330 P.2d 355, 357 (1958).

CONCLUSION

The ambiguity of the lease provision regarding the giving of notice of renewal, is discussed in the first point of the Brief of Plaintiffs - Appellants and will not be reiterated here. Plaintiffs refer to the foregoing arguments and to the argument in their first brief to substantiate the fact that the parol evidence relating to the execution of the lease amendment, and the practical construction of the lease in light of the actions of the parties, clearly indicate that the trial court erred in failing to grant the plaintiffs a renewal of five years on their lease.

In conjunction with a holding establishing the proper construction of the lease or, in the alternative, that the plaintiffs are entitled to a reformation of the lease to establish the true agreement of the parties,

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the plaintiffs are entitled to the other relief sought on appeal as set forth in the Brief of Plaintiffs-Appellants.

Respectfully submitted this 8th day of November, 1978.

EARL S. SPAFFORD

BRUCE LAVAR DIBB

I hereby certify that I hand delivered, two copies of the foregoing to Harry Pugsley, Attorney for the Defendant, Suite 1200, South Main Street, Salt Lake City, Utah 84101, this 8th day of November, 1978.

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