

1997

# Imperial Mobile Home Park, L.L.C. v. Michael Kelsch, personal representative to the estate of LaRue Griffin, deceased; Ruth Williamson; John Does 1 through 10 : Brief of Appellee

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca2](https://digitalcommons.law.byu.edu/byu_ca2)

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Chris Greenwood; Greenwood & Black; Attorney for Appellant.

James R. Boud; Ashton, Bruanberger & Boud, P.C.; Attorney for Appellees.

James R. Boud, USB #A0388 ASHTON, BRAUNBERGER & BOUD, P.C. Attorneys for Appellees  
302 West 5400 South, Suite 103 Murray, Utah 84107 Telephone: (801) 263-0300

Chris Greenwood GREENWOOD & BLACK 1840 North State St., Suite 200 Provo, Utah 84604  
Attorney for Appellant

---

## Recommended Citation

Brief of Appellee, *Imperial Mobile Home Park v. Kelsch*, No. 970591 (Utah Court of Appeals, 1997).  
[https://digitalcommons.law.byu.edu/byu\\_ca2/1131](https://digitalcommons.law.byu.edu/byu_ca2/1131)

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

IN THE UTAH

OF

C

IMPERIAL MOBILE HOME PARK, )  
L.L.C., a Utah Limited )  
Liability Company, )  
)  
Plaintiff/Appellee, )

vs. )

MICHAEL KELSCH, Personal )  
representative to the Estate of )  
LaRue Griffin, Deceased; )  
RUTH WILLIAMSON; and JOHN )  
DOES 1 through 10 )  
)  
Defendants/Appellant. )

No. 970591-CA

Priority No. 15

[CONTINUED ON INSIDE COVER]

OF APPELLEE

On Appeal from the Fourth Judicial District Court  
American Fork Department, Utah County  
Honorable John C. Backlund

James R. Boud, USB #A0388  
ASHTON, BRAUNBERGER & BOUD, P.C.  
Attorneys for Appellees  
302 West 5400 South, Suite 103  
Murray, Utah 84107  
Telephone: (801) 263-0300

Chris Greenwood  
GREENWOOD & BLACK  
1840 North State St., Suite 200  
Provo, Utah 84604  
Attorney for Appellant

\_\_\_\_\_  
MICHAEL KELSCH, Personal  
representative to the Estate of  
LaRue Griffin, Deceased,  
RUTH WILLIAMSON and JOHN  
DOES 1 through 10,

Counterclaimants/Appellant,

vs.

IMPERIAL MOBILE HOME PARK,  
L.C., PATTON KWAN and JANET  
KWAN, doing business as IMPERIAL  
MOBILE HOME PARK,  
SCOTT A. MADSEN, RON CLARK,  
and DOES I through X,

Counter-Defendants

## IN THE UTAH COURT OF APPEALS

---

IMPERIAL MOBILE HOME PARK, )  
L.L.C., a Utah Limited )  
Liability Company, )

Plaintiff/Appellee, )

vs. )

MICHAEL KELSCH, Personal )  
representative to the Estate of )  
LaRue Griffin, Deceased; )  
RUTH WILLIAMSON; and JOHN )  
DOES 1 through 10, )

Defendants/Appellant. )

**No. 970591-CA**

**Priority No. 15**

[CONTINUED ON INSIDE COVER]

---

## BRIEF OF APPELLEE

---

On Appeal from the Fourth Judicial District Court  
American Fork Department, Utah County  
Honorable John C. Backlund

---

James R. Boud, USB #A0388  
ASHTON, BRAUNBERGER & BOUD, P.C.  
Attorneys for Appellees  
302 West 5400 South, Suite 103  
Murray, Utah 84107  
Telephone: (801) 263-0300

Chris Greenwood  
GREENWOOD & BLACK  
1840 North State St., Suite 200  
Provo, Utah 84604  
Attorney for Appellant

---

MICHAEL KELSCH, Personal  
representative to the Estate of  
LaRue Griffin, Deceased,  
RUTH WILLIAMSON; and JOHN  
DOES 1 through 10,

Counterclaimants/Appellant,

vs.

IMPERIAL MOBILE HOME PARK,  
L.C., PATTON KWAN and JANET  
KWAN, doing business as IMPERIAL  
MOBILE HOME PARK, L.L.C.,  
SCOTT A. MADSEN, RON CLARK,  
and DOES I through X,

CounterDefendants/Appellees  
and Third-Party Defendants.

---

### **PARTIES TO THIS APPEAL**

Michael Kelsch, personal representative to the Estate of LaRue Griffin, is the only Party/Appellant to this Appeal. Defendant Ruth Williamson has not joined as a party to this appeal, and no other parties were joined prior to judgment being entered against Mr. Kelsch. Any and all of the Appellant's references made to or reliance upon the Appellee's judgment against Mrs. Williamson should be disregarded.

## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	iv
JURISDICTIONAL STATEMENT .....	1
STATEMENT OF THE ISSUES .....	2
STATEMENT OF THE CASE .....	3
A.    Nature of the case .....	3
B.    Statement of Facts .....	3
SUMMARY OF ARGUMENTS .....	6
ARGUMENT .....	8
Standards governing motions for summary judgment .....	8
I.    The trial court made no finding that the Estate had a lease, because the Appellant never asked the Court to make such a ruling. The trial court did rule that Mr. Kelsch had certain rights under the June 10, 1996 letter .....	9
II.   No Error Was Committed By The Trial Court In Ruling, As A Matter Of Law, That The Mobile Home Park Residency Act Authorizes Parks To Set And Enforce Minimum Size Specifications .....	12
A.    Interpretation and construction of Section 57-16-4(7) .....	15
B.    Balancing approach to statutory construction .....	16
C.    Enforcement of the Park Rule is not Unconscionable .....	19
III.  The trial court correctly ruled, as a matter of law, that the Mobile Home Park did not breach the covenant of good faith and fair dealing by exercising its contractual rights. ....	22
IV.  There have been no violations of the Utah Consumer Sales Practices Act, assuming it applies to this setting .....	27

V. The Park has not intentionally interfered with the Estate’s economic relations ..... 28

VI. Appellant was required, as a matter of Utah law, to demonstrate the existence of material fact ..... 30

VII. Mitigation of damages ..... 31

CONCLUSION ..... 31



## **TABLE OF AUTHORITIES**

### Case Law:

<u>Beaver County v. Utah State Tax Com'n</u> , 916 P.2d 344 (Utah 1996) . . . . .	17
<u>Bekins Bar V Ranch v. Huth</u> , 664 P.2d at 462 (Utah 1983) . . . . .	20, 21
<u>Blue Cross &amp; Blue Shield v. State</u> , 779 P.2d 634 (Utah 1989) . . . . .	25
<u>Bonham v. Morgan</u> , 788 P.2d 497, 499 (Utah 1989) . . . . .	8
<u>City of West Jordan v. Utah State Retirement Bd.</u> , 767 P.2d 530 (Utah 1988) . . . . .	25
<u>Clarkson v. Western Heritage, Inc.</u> , 627 P.2d 72 (Utah 1981) . . . . .	14
<u>Condemarin v. University Hosp.</u> , 775 P.2d 348, 377 (Utah 1989) . . . . .	13
<u>Consolidated Realty Group v. Sizzling Platter, Inc.</u> , 930 P.2d 268 (Utah App. 1996) . . . . .	11
<u>D &amp; L Supply v. Saurini</u> , 775 P.2d 420, 421 (Utah 1989) . . . . .	2
<u>Dean v. Rampton</u> , 556 P.2d 205, 206-07 (Utah 1976) . . . . .	13
<u>Dupler v. Yates</u> 10 Utah 2d 251, 351 P.2d 624 (1960) . . . . .	9
<u>Grant v. Utah State Land Bd.</u> , 485 P.2d 1035, 26 Utah 2d 100 (Utah 1971) . . . . .	19
<u>Heiner v. S.J. Groves &amp; Sons Co.</u> , 790 P.2d 107, 115 (Utah App.1990) . . . . .	22
<u>Holbrook Co. v. Adams</u> , 542 P.2d 191 (Utah 1975) . . . . .	14
<u>Holland v. Columbia Iron Mining Co.</u> , 4 Utah 2d 303, 293 P.2d 700 (1956) . . . . .	9, 30
<u>Howe v. Professional Maninvest, Inc.</u> , 829 P.2d 160 (Utah App. 1992) . . . . .	22
<u>James v. Preston</u> , 746 P.2d 799 (Utah App. 1987) . . . . .	15
<u>Krantz v. Holt</u> , 819 P.2d 352 (Utah 1991) . . . . .	8
<u>LDS Hospital v. Capitol Life Ins. Co.</u> , 765 P.2d 857 (Utah 1988) . . . . .	24

<u>Marbury v. Madison</u> , 1 Cranch 137, 2 L.Ed. 60 (1803) . . . . .	13
<u>Masich v. United States Smelting, Ref. &amp; Mining Co.</u> , 113 Utah 101, 126-27, 191 P.2d 612 625, app.dism'd, 335 U.S. 866, 69 S. Ct. 138 (1948) . . . . .	13
<u>Mountain States Tel. &amp; Tel. Co.</u> , 681 P.2d at 1261 (Utah 1984) . . . . .	8
<u>Osuala v. Aetna Life &amp; Casualty</u> , 608 P.2d 242, 243 (Utah 1980) . . . . .	18
<u>Peay v. Board of Ed. of Provo City Schools</u> , 377 P.2d 490, 492 (Utah 1962) . . . . .	17
<u>Reeves v. Gentile</u> , 813 P.2d 111, 115 (Utah 1991) . . . . .	17
<u>Resource Management Co. v. Weston Ranch</u> , 706 P.2d 1028, 1041 (Utah 1985) . . . . .	20
<u>Schurtz v. BMW of North America, Inc.</u> , 814 P.2d 1108 (Utah 1991) . . . . .	8
<u>Sosa v. Paulos</u> , 924 P.2d 357 (Utah 1996) . . . . .	20, 21
<u>State v. Larsen</u> , 865 P.2d 1355, 1357 (Utah 1993) . . . . .	17
<u>State v. Betensen</u> , 14 Utah 2d 121, 378 P.2d 669 (1963) . . . . .	13
<u>Sullivan v. Scoular Grain Co. of Utah</u> , 853 P.2d 877, 880 (Utah 1993) . . . . .	17
<u>Tanner v. Baadsgaard</u> , 612 P.2d 345 (Utah 1980) . . . . .	2
<u>Theros v. Metropolitan Life Insurance Company</u> , 407 P.2d 685 (Utah 1965) . . . . .	22
<u>Thornock v. Cook</u> , 604 P.2d 934 (Utah 1979) . . . . .	14
<u>Tobias v. Brasher's Mobile &amp; Motor Homes</u> , 584 P.2d 840 (Utah 1978) . . . . .	16
<u>Ulibarri v. Christenson</u> , 275 P.2d 170, 171 (Utah 1954) . . . . .	8
<u>Utah County v. Orem City</u> , 699 P.2d 707, 708 (Utah 1985) . . . . .	17
<u>Utah Manufacturers' Ass'n v. Stewart</u> , 82 Utah 198, 23 P.2d 229, 232 (1933) . . . . .	13
<u>Village Inn Apartments v. State Farm Fire &amp; Casualty Co.</u> , 790 P.2d 581 (Utah App.1990) . . . . .	25

Statutes:

U.C.A., 57-16-4(7)(a) .....	3, 25, 26
U.C.A., 57-16-4(7) .....	7, 12, 15, 16, 18
U.C.A., 57-16-4(4) .....	14, 16
U.C.A., 57-16-7(1) .....	20, 21
Provo City Ordinances .....	26

Other References:

2 G. Couch, Cyclopedia of Insurance Law §15.29 (rev. ed. 1984)) .....	25
---	----

### **JURISDICTIONAL STATEMENT**

Appellees agree with Appellant's statement of jurisdiction set forth in its opening brief.

## **STATEMENT OF THE ISSUES**

With respect to the thirteen (13) issues raised by the Appellant in his Brief, Appellee submits that the relevant and solitary issue before the court is whether the Park had legislative authority to adopt minimum size specifications relating to mobile homes in the park, and whether the Park had authority to require removal of any home upon sale.

Standard of Review: Because summary judgment by definition does not resolve factual issues, a challenge to summary judgment presents for review only questions of law, which are reviewed for correctness, according no particular deference to the trial court. D & L Supply v. Saurini, 775 P.2d 420, 421 (Utah 1989).

Furthermore, while a reviewable question of law may be present, the trial court's ruling is nevertheless based upon the evidence presented at trial and the findings derived therefrom. It is a well-established rule that "due to the advantaged position of the trial judge," the reviewing court will indulge considerable deference to the findings. Tanner v. Baadsgaard, 612 P.2d 345 (Utah 1980).

## **STATEMENT OF THE CASE**

### **A. Nature of the Case**

This is an action for declaratory relief by the Mobile Home Park asserting, in part, that its actions under the Utah Mobile Home Residency Act, § 57-16-4(7)(a), Utah Code Annotated, as amended, in setting minimum size requirements for mobile homes permitted in the Park is authorized by Utah law. This is not an action for termination of lease rights, but for the enforcement of the park rules.

Appellant asserted a Counterclaim against the Mobile Home Park, and its owners and agents alleging eight (8) causes of action, to wit: (1) Breach of Contract; (2) Violation of the Utah Mobile Home Park Residency Act; (3) Breach of the Covenant Good Faith and Fair Dealing; (4) Intentional Interference with Economic Relations; (5) Violation of the Utah Fair Housing Act; (6) Violation of the Federal Fair Housing Act; (7) Violation of the Utah Consumer Sales Practices Act; and (8) Punitive Damages. Appellee sought for and prevailed on summary judgment as to all counterclaims and its request for declaratory relief.

This matter has no involvement "of rights and obligations between a mobile home park, as landlord, and a resident mobile home owner, as tenant." Appellant's Brief, pg 5. [hereinafter "Aplt.Br."]. The relevant issue presented is whether the mobile home park is permitted, under Utah law, to establish minimum size specifications regarding mobile homes in the park.

### **B. Statement of Facts**

Appellee submits the following statements of fact relevant to the issues raised by the Appellant, with proper citation to the record where such matters are found:

1. On or about February 10, 1972, a "Rental Agreement" [hereinafter "Lease"] was executed by and between Mr. Layton Griffin (deceased) and his wife, LaRue Griffin (deceased) as lessees, and the Imperial Mobile Home Park as landlord. See Exhibit "C" to Appellant's Addenda [hereinafter "Aplt.Add."].

2. Said Lease expressed the terms and conditions of the parties' agreement, including the Park's Rules, Regulations, and Covenants, a copy of which were provided to the Griffins according to the terms of the Lease. Id. at ¶ 4.

3. The Lease contained the following language concerning the Park's Rules, Regulations, and Covenants:

*...This Rental Agreement is subject to the current Park Rules, Regulations, and Covenants, a copy of which has been furnished to Resident, and all future Park Rules, Regulations and Covenants as adopted from time to time by Landlord in its sole discretion. Each and every provision of the Rules, Regulations and Covenants which now or hereinafter exist is hereby made a part of this Rental Agreement, and any failure by Resident to observe each and every provision thereof shall be deemed a noncurable default which may result in the immediate termination of this Rental Agreement.*

Id. at ¶ 4.

4. The term of the Lease was for a tenancy from month to month. Id. at ¶ 1.

5. The Lease also provided that "*Resident shall not assign, transfer or sublet the site or any part thereof, or this Rental Agreement, without Landlord's prior written consent.*" Id. at ¶ 3.

6. In or about July, 1994, the Park implemented amendments to the Park Rules, which included the provisions governing minimum size requirements. [Aplt.Add. "B"].

7. In or about May, 1996, Mrs. LaRue Griffin died. [Mr. Griffin predeceased his wife by at least 20 years and is not a matter in contention in this lawsuit] [R.227<sup>1</sup>].

8. Defendant Michael Kelsch was Mrs. Griffin's Bishop in her Church and had known her since she moved into the subject mobile home park. [R.228].

9. Mr. Kelsch was appointed as the personal representative of Mrs. Griffin's estate by way of her Last Will and Testament. [R.227; 192].

10. Defendant Michael Kelsch has never been, is not presently, and does not plan on being a resident of the Plaintiff's mobile home park. [R.226].

11. Mr. Kelsch received from the Park a letter dated June 10, 1996, which provided:

*From our conversation in early May, I understand that you are charged with selling the mobile home formerly owned by La Rue Griffin, a 1972 Fleetwood located in Imperial Park space 119.*

*Since the subject home does not meet the minimum size specification of 65 feet for single wide homes as written in our Park Rules (see attached), the home can not remain in the Imperial Park, but would have to be removed by the buyer upon sale. We ask that when you consummate a sale that you notify us who will transport the home and on which day so that we may clear any charges for electricity owing and assist the transporter in the movement of the home out of the Park.*

*The space rent for June in the amount of \$224.76, due by June 5 has not been paid. If you pay this amount in full by June 15, I will not assess the late charge of \$20.00 or take any further action. [Italics added].*

[R.226 (Apl't.Add. "A")].

---

<sup>1</sup> Appellee's references to the Record [R.\_\_\_\_], where multiple pages are identified will be cited in reverse page order as the record is paginated in that fashion by the lower court.



12. The June 10, 1996, letter is, according to Mr. Kelsch, his only claim to a "lease" with the Park [R.227-226], where he has testified:

*Q. Do you have a written lease agreement with the park?*

....

*A. ...yes, I think I do have a statement, a letter from the Park saying that this 119 rent was due...*

13. The Griffin mobile home is 63 feet, 4 inches in length, inclusive of the tongue. [R.546].

### **SUMMARY OF ARGUMENTS**

The most prevailing undisputed fact in this matter is that Appellant has not, and never will reside in the mobile home park. [R.226]. Mr. Kelsch has no personal interest or stake in this matter and is acting purely as a personal representative on behalf of the LaRue Griffin Estate. Appellant has orchestrated rent payments to the Park through the LDS Church, and there is no obligation for the repayment of those funds by either the Estate or Mr. Kelsch personally. [R.221]. Irrespective of the Church and Mr. Kelsch, except for Mrs. Griffin's death, the Park would have required the same of her as it is requiring of Mr. Kelsch -- removal of the home upon its sale.

The Legislature has given mobile home parks the exclusive authority to set minimum size requirements. The parks in this State have a vested interest in the upkeep and quality of the Parks by requiring removal of mobile homes, even if they are in excellent condition, but undersized. The Legislature's giving the broad and express discretion to the Park to set its own standards would otherwise limit the Park's ability to conduct its own affairs.

The authority granted by the Legislature is not without limit as implied by the Appellant. The Legislative authority is limited in the sense that the Park may only require removal upon the sale of a mobile for two (2) distinct reasons: (1) undersized according to the Park's minimum standards; and (2) rundown condition or in disrepair. U.C.A. 57-16-4(7) If neither of the two criteria apply, the tenant may sell the home and leave it in the Park.

This is a matter of pure contract interpretation, and what rights and obligations exist between the parties. The Appellant has never before raised the issue of whether Mr. Kelsch enjoyed the full benefit of the Griffin leasehold. In fact, it is undisputed that Mr. Kelsch was only attempting to enforce, albeit by his own interpretation, the June 10, 1996, letter he received from the park's management. [R.227-225]. There is but one interpretation that attaches to the subject letter; i.e. when you sell the home, it must be moved. Reasonable minds cannot differ on that concept.

The original Griffin lease was never brought into this matter as extending any rights to Mr. Kelsch. This is a new issue that Mr. Kelsch has now raised to somehow bolster his argument. The lower court did not simply ignore the Griffin lease as suggested by Appellant. The matter was not completely plead and Mr. Kelsch, by his own admission, only relied upon the June 10, 1996 letter agreement. [R.227-225]. Nor was it the duty or obligation of the Court to make rulings for the Appellant that were not raised.

When the chaff is whittled away in this matter, the singular issue is whether the park has the statutory authority to set its own minimum size requirements for mobile homes in the Park. Once that issue is resolved, the Appellant's counterclaims melt away by the application of well grounded legal principles. This matter was resolved as a matter of law

based upon the admissions of Mr. Kelsch, the size of the mobile home in question, and the June 10, 1996, letter Mr. Kelsch considered as his lease with the Park, nothing more.

## ARGUMENT

### Standards governing motions for summary judgment.<sup>2</sup>

Appellant misconstrues the nature and effect of the standards governing motions for summary judgment. By its definition, summary judgment does not resolve factual issues, but is directed to issues of material fact to which no dispute remains. Appellant's statement that he still refutes the Park's legal contentions is not sufficient to raise a factual dispute. The Appellant was obligated to go beyond the pleadings and allegations and point to the record or evidence to demonstrate the existence of a factual dispute.

The purpose of a motion for summary judgment is to expedite procedure and obviate trials where no genuine issue of fact exists. Krantz v. Holt, 819 P.2d 352 (Utah 1991); Ulibarri v. Christenson, 275 P.2d 170, 171 (Utah 1954). Cases decided on summary judgment cannot, by definition, resolve factual disputes. Schurtz v. BMW of North America, Inc., 814 P.2d 1108 (Utah 1991). Judgment can be properly rendered against a party where it is obvious from the evidence that the party opposing judgment can establish no right to relief. Mountain States Tel. & Tel. Co., 681 P.2d at 1261 (Utah 1984).

---

<sup>2</sup> Throughout Appellant's argument, he complains that the "Park raised only a legal challenge...rather than a factual one." [Aplt.Br. 23, 32] Summary judgment does not resolve factual issues, but does ferret out the undisputed facts which lead to conclusions of law. There are no genuine issues of disputed material fact in this matter. Bonham v. Morgan, 788 P.2d 497, 499 (Utah 1989) [a challenge to summary judgment presents for review conclusions of law only, because, by definition, summary judgments do not resolve factual issues].

Even when viewed in a light most favorable to the Appellant, he has not established a right to prevail in this matter since there are no remaining issues. Despite Appellants urgency, the issues he considers as disputed are neither material nor genuine. See Dupler v. Yates 10 Utah 2d 251, 351 P.2d 624 (1960) [where opposing party fails to proffer any evidentiary matter when he is presumably in a position to do so, the courts should be justified in concluding that no genuine issue of fact is present, nor would one be present at the trial.].

Generally, a fact is considered to be "material" where it affects the rights or liabilities of the parties. An issue is "genuine" as to any material fact when all facts which affect the rights or liabilities of the parties are so conclusively shown that there is not the slightest doubt, and in order to sustain a judgment, such facts must show that the moving party is entitled to a judgment as a matter of law. Holland v. Columbia Iron Mining Co., 4 Utah 2d 303, 293 P.2d 700 (1956)(dissenting opinion)(citations omitted).

**I. The trial court made no finding that the Estate had a lease, because the Appellant never asked the Court to make such a ruling. The trial court did rule that Mr. Kelsch had certain rights under the June 10, 1996 letter.**

Here, Appellant suggests that the lower court erred by concluding that the Estate had no lease agreement with the Park. Appellant boldly states that "*[w]hile the trial court made no express ruling on this issue---*" [Aplt.Brief at 11], he does not refer to the record for any support where the trial court ignored his request to make such a ruling. There simply is no record that Appellant raised that contention at any time.

Appellant has set forth in sub-paragraphs "A-C", argument designed to create the impression that the Estate's lease was controlling, assigned, or in effect and enforceable.

Despite this rendition of what appear to be properly raised issues at the lower level, are, in fact, new arguments. These matters should be disregarded by the Court on its review.

Notwithstanding the newly raised matters, assuming, *arguendo*, that the Griffin full lease was at issue, the same size restrictions would have applied and the same result reached. The argument is nonsensical to the extent that the eventual outcome was that if the mobile home was to be sold, it had to be removed, no matter who sold it or in what capacity.

The trial court did make a specific finding that Mr. Kelsch had certain rights as the personal representative of the Griffin estate pursuant to the June 10, 1996, letter. [R.670]. The issue of whether the Griffin lease ever gave Mr. Kelsch rights beyond the June 10, 1996, letter was never raised.

There is but one interpretation for the June 10, 1996, letter upon which Mr. Kelsch bases his case; the mobile home must be removed upon its sale. There is no other reason for Mr. Kelsch's involvement in the Griffin estate, but to sell the mobile home, and he always intended to sell the mobile home. He was initially told the home had to be removed from the park upon its sale. [Aplt.Add. "A"] There is no other reasonable explanation, and Mr. Kelsch has offered none. If he believed that the June 10, 1996, letter gave him further rights, he should have made those factual arguments below. The eight causes of action plead by Mr. Kelsch concern purely matters of law and statutory construction as explained below.

Mr. Kelsch's fervor to create a lease with the Park would really give him no other rights than any other tenant who desired to sell their home, especially where the home does not comply with the Park Rules on size. Appellee has previously argued:

**Even assuming, arguendo, that Mr. Kelsch is the beneficiary of a lease agreement, Mr. Kelsch is nevertheless bound by the terms of the lease requiring removal of the home on its sale. No other interpretation can be advanced absent an ambiguity in the contract. Mr. Kelsch has not defended on the basis of an ambiguity in the June 10, 1996, letter. Assuming no ambiguity exists, Mr. Kelsch's claims for breach fail. [R.566].**

Appellant's reliance on the case of Consolidated Realty Group v. Sizzling Platter, Inc., 930 P.2d 268 (Utah App. 1996) is misplaced. Mr. Kelsch has neither "entered" nor "occupied" the subject Griffin mobile home, and, in fact, has not even paid the rent on the subject home. The mobile home was devised to the LDS Church, but the Church has not entered in this matter. Mr. Kelsch was a former Bishop of the Church and caused rent to be paid from the Church fast-offering fund. Mr. Kelsch, in his ecclesiastical position executed one of the drafts from the Church to pay the rent. [R.535]. Mr. Kelsch was acting in a dual capacity; i.e. for the Church and for the Griffin estate. The LDS Church has not yet asserted its property interest in the mobile home.

The Consolidated test relied upon by Appellant requires **both** occupancy and payment of rent. Mr. Kelsch essentially satisfies neither requirement. Mr. Kelsch simply cannot create a lease and demand fruit from an otherwise barren tree. This is not a matter of lease termination or eviction, but enforcement of the rules.

Appellant's first issue on appeal is essentially moot, because the lower court did rule that Mr. Kelsch enjoyed the benefit of an agreement with the Park pursuant to the June 10, 1996, letter. Mr. Kelsch never raised the specific issue below that he was the "successor" of

the Griffin lease. Even if he was, he would be subject to the same conditions set forth in the letter.

Mr. Kelsch has unequivocally conceded that his only claim that a lease exists is based upon three (3) facts: (1) the June 10, 1996, letter; (2) he has paid rent; and (3) the home has remained in the Park. [R.504, ¶12]. Technically speaking, the Park only wants the mobile home removed when it is sold, which is the extent of its authority under the challenged statute. The existence of some sort of a "lease" is undisputed, and Mr. Kelsch is simply arguing to argue.

**II. No Error Was Committed By The Trial Court In Ruling, As A Matter Of Law, That The Mobile Home Park Residency Act Authorizes Parks To Set And Enforce Minimum Size Specifications.**

Appellant's threshold argument is that the mobile home park's rule establishing minimum size specifications is invalid, void and unenforceable as a result of the manner in which the rule was adopted, the unreasonable requirements it imposes on park residents, and the inconsistent manner in which the rule is applied throughout the park. The thrust, therefore, of the Appellant's argument on appeal rises or falls upon the initial inquiry of whether the mobile home parks of this State have been granted discretionary authority to set minimum size requirements. The answer to that question is a simple "yes." Appellant has previously conceded the point, wherein he stated in opposition to the Motion for Summary Judgment:

**"Thus, although the MHPRA does give parks the authority to set minimum size specifications and to require undersized mobile homes to move from the park upon sale,...."**

[R.490] See also Appellant's Memorandum in Opposition to Motion for Summary Affirmance, pg. 6, footnote 3 ["Mr. Kelsch has never challenged the validity or constitutionality of Section 57-16-4(7)"]. Appellant's only contention otherwise is where there has been an alleged violation of "other provisions of the Act." [R.490]. Assuming such to be true, which Appellee asserts is a contrary interpretation of the Legislative intent, there has been no showing that any other provision of the Act has been violated here.

Appellant's request for this Court to determine what laws are reasonable to enforce creates a separation of powers problem. While it is the judiciary's responsibility to determine the constitutionality of the laws, Dean v. Rampton, 556 P.2d 205, 206-07 (Utah 1976) (citing Marbury v. Madison, 1 Cranch 137, 2 L.Ed. 60 (1803); State v. Betensen, 14 Utah 2d 121, 378 P.2d 669 (1963)), it is not within the province of the Courts to merely answer whether the laws are reasonable. Determining whether a particular law is reasonable is an invasion of the Legislature's jurisdiction to enact such laws. The Supreme Court has previously stated that "*[i]t is not our prerogative to question the wisdom, social desirability, or public policy underlying a given statute. Those are matters left exclusively to the legislature's judgment and determination.*" Condemarin v. University Hosp., 775 P.2d 348, 377 (Utah 1989) (Hall, J., dissenting) (citations omitted); accord Masich v. United States Smelting, Ref. & Mining Co., 113 Utah 101, 126-27, 191 P.2d 612, 625, appeal dismissed, 335 U.S. 866, 69 S. Ct. 138 (1948); Utah Manufacturers' Ass'n v. Stewart, 82 Utah 198, 23 P.2d 229, 232 (1933) ("fairly debatable questions as to reasonableness, wisdom, or propriety [of legislative action] are not for the courts, but for the Legislature"). Thus, it is violative of the



principle of separation of powers to allow the courts to determine whether it is reasonable to enforce any law duly passed by the legislature.

The Appellant argues that mobile home parks have Legislative authority to set minimum size requirements, but that the authority is only valid so long as no other provisions of the MHPRA are violated. [Aplt.Br. at 17]. In other words, as long as the Park does not violate any other provision of the MHPRA, it may properly require removal of a home upon its sale that is not in compliance with the minimum size requirements of the park.

Assuming such an approach, absent a showing on the part of the Appellant that the Park has violated other provisions of the MHPRA, Appellant would, arguably, concede his position with respect to the threshold issue before this Court. Appellant has not marshalled any evidence or inferences to support a showing that the Park has violated any such other rule or law. In support of this position, he simply suggests that the Park has violated Section 57-16-4(4), U.C.A., wherein the minimum size rule operates to limit or prevent the sale of the subject mobile home. No such "limiting" effect has occurred.

Typically, factual disputes are raised by sworn statements. See Holbrook Co. v. Adams, 542 P.2d 191 (Utah 1975) [party may not rely on allegations in his pleadings to defeat a motion for summary judgment]; Thornock v. Cook, 604 P.2d 934 (Utah 1979) [defendant cannot rely on mere allegations or denials... to avoid a summary judgment]; Clarkson v. Western Heritage, Inc., 627 P.2d 72 (Utah 1981) [Rule 56(e) requires opposing affidavit in order to create a genuine issue of material fact, and does not permit party to assert his pleading to create a disputed fact issue].

Appellant's "evidence" on this issue is limited to the allegation the Park would not approve applications for residency in the Park by potential purchasers of the subject home. [R.490]. The denial of an application for residency may be made for several reasons, and the Appellant has not proffered any evidence, affidavit, or foundation to even suggest that the Park denied the applications to prevent the sale of the subject mobile home. [R.244]. There simply is no evidence. Appellant is required to go beyond his pleadings and allegations, and point to specific instances of conduct, which he cannot do. Rule 56, U.R.C.P.

The Appellant's inconsistent argument clearly demonstrates the strained factual basis upon which he asserted eight (8) counterclaims against the Park. The Park attempted to work with Appellant, but he maintained that he could leave the home in the Park after it was sold, which is contrary to the express language of the June 10, 1996, letter. He had nothing to gain from the sale and yet maintained a lengthy litigation at the cost of the estate. The expenses now far exceed the value the mobile home even if it were to remain.<sup>3</sup>

**A. Interpretation and construction of Section 57-16-4(7)**

This entire argument submitted by the Appellant has never before been raised in this case. Appellant refers to "Audio Tape Recordings" concerning Utah Senate Bill No. 209. [Aplt.Br. pg. 18]. First, this argument and the references to the audio tapes was not raised below and may not properly be considered as part of the record on this appeal. James v. Preston, 746 P.2d 799, 801 (Utah App. 1987)[matters not put in issue before the trial court

---

<sup>3</sup> It should be noted that Mr. Kelsch had a buyer for the Griffin mobile home in an amount that would have satisfied the debts of the estate, but he did not pursue the offer. [R.223-221].

may not be raised for the first time on appeal]. The Appellant is supplementing the record and argument with matters raised for the first time.

Second, the Appellant suggests that the Legislature implied that the mobile home building standards and definitions are a reasonable basis to apply to the present statute on permitting minimum size requirements. [57-16-4(7), U.C.A.] That suggestion and the materials used to support the argument is untenable since the 1990 amendment, effective April 23, 1990, deleted former Subsections (2) and (3), defining "mobile home" and "manufactured home." The former Act relied upon by Appellant is not applicable to this matter and by no means should be construed to infer a legislative intent to set a minimum size standard.

It is well settled that sections of the Utah Code which are merely definitional in nature, imposes no affirmative duties. Tobias v. Brasher's Mobile & Motor Homes, 584 P.2d 840 (Utah 1978). The old law relied upon by Appellant is not operative and completely inapplicable here. In fact, the 1990 amendments completely removed from that Act the terms and references to "mobile homes," and the statute became known as the "Recreational Vehicles Act."

There is absolutely no basis in law or fact from which the Court could assume the Legislative intent where there is no evidence marshalled to demonstrate the intent was to impose a standard minimum size for mobile homes. Furthermore, mobile home parks are now required to give tenants 60 days notice prior to any rule change. Appellant's suggestion that the Park could arbitrarily change a rule to "fit a particular situation" is fatuous. [Aplt.Br. pg 18]. The simple truth is that no Park Rule can be modified without the proper

notice period of at least sixty days. The Park is not as miserly as Appellant would suggest.

**B. Balancing approach to statutory construction**

Appellant's "balancing approach" to Section 57-16--4(7) and Section 57-16-4(4) is patently misplaced. Appellant asserts throughout his brief that a mobile home park may not enforce any rule which unreasonably limits the sale of a mobile home belonging to a resident, thus constituting a violation of the act making any such Park rule invalid. [Aplt.Br. at 15, 16, 20, 21, and 22].

The imperfection in Appellant's argument is readily brought to light by examining when the "enforcement" of the subject Code sections become operative. Any act to "unreasonably limit the sale" by a mobile home resident would occur before the actual sale. On the other hand, the Park rule requiring removal of undersized mobile homes does not become operative until after a sale has occurred, and the sale is made with knowledge of the removal rule.

Appellant can hardly say that he was unaware that the Park was requiring removal of the subject home because of its size, regardless of whether he is a "resident," or personal representative. The Park's refusal to approve potential buyers of the subject home is premised upon its right to require removal of the home. Since potential buyers, if any, were interested in purchasing the subject mobile home, the applications for residency in the Park were not approved. [R.244-243].

Appellant suggests that the section governing the minimum size requirements should be read in harmony and in light of the entire Act. [Aplt.Br.21]. While that analysis is

appropriate when construing statutory language that is unclear on its fact, it has no application here. The statutory authority is clear and unambiguous.

The primary role of statutory interpretation is to *"give effect to the intent of the legislature in light of the purpose the statute was meant to achieve."* Sullivan v. Scoular Grain Co. of Utah, 853 P.2d 877, 880 (Utah 1993) (quoting Reeves v. Gentile, 813 P.2d 111, 115 (Utah 1991)). The best indicator of that intent is the plain language of the statute. State v. Larsen, 865 P.2d 1355, 1357 (Utah 1993). Furthermore, *"[a] general rule of statutory construction is that a statute should be construed as a comprehensive whole."* Beaver County v. Utah State Tax Com'n, 916 P.2d 344 (Utah 1996). An issue of statutory construction presents a question of law for the Court to determine. Id.

The Utah Supreme Court has set forth three (3) rules of statutory construction. First, the terms of a statute should be interpreted in accord with their usual and accepted meanings. Utah County v. Orem City, 699 P.2d 707, 708 (Utah 1985). Second, a statute should not be construed in a piecemeal fashion but as a comprehensive whole. Peay v. Board of Ed. of Provo City Schools, 377 P.2d 490, 492 (Utah 1962). Finally, *"[i]f there is doubt or uncertainty as to the meaning or application of the provisions of an act, it is appropriate to analyze the act in its entirety, in light of its objective, and to harmonize its provisions in accordance with its intent and purpose."* Osuala v. Aetna Life & Casualty, 608 P.2d 242, 243 (Utah 1980).

In his argument, the Appellant relies primarily upon the third rule for construing statutes. However, Appellant's analysis jumps a critical initial inquiry concerning the statute in question. Only where there is "doubt or uncertainty" as to the meaning or application of

an Act is it appropriate to analyze the entire Act. Having failed to demonstrate that there is "doubt or uncertainty" in Section 57-16-4(7), U.C.A. (relating to minimum size rules), the Appellant cannot jump to other provisions of the MHPRA to create conflicts. The subject statute is clear and unambiguous on its face.

In this setting, the statute (57-16-4(7), U.C.A.) authorizes Mobile Home Parks to set minimum size requirements. This section cannot be construed in light of any other provision of the Act, since the statute only becomes operative upon the termination of a lease. Effectively [and logically], the sale of a home terminates the lease. Section 57-16-4(7), U.C.A., provides:

*(7) 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. (Emphasis added).*

This section is only invoked upon a resident's sale of his or her home, and then only if the home satisfies one of the two criteria. Even if a mobile home is smaller than the minimum size specifications, the resident will not be forced to move the home until that person contemplates a forfeiture of the lease. The lease is only terminated by the resident upon selling their home or on thirty-days written notice according to the general terms contained in each lease agreement. In contrast, however, Park rules that relate to the "health, safety, and appropriate conduct of residents" are only effective and operative as to "residents" or leaseholders.

The Legislature has clearly provided mobile home parks with the statutory authority to set and enforce minimum size requirements. The statute does not mandate that the

authority be imposed as a "Park Rule," but the authority simply exists as a matter of law. The apparent intent of the legislature is demonstrated by the plain language of the statute itself: *...to upgrade the quality of a mobile home park,...* In other words, at the termination of a lease by reason of death or voluntary forfeiture, the Park **MAY** require that a home be removed if it is substandard either by size or the rundown condition of the home.<sup>4</sup>

**C. Enforcement of the Park Rule is not Unconscionable.**

Appellant argues that the statute governing authority to set minimum size specifications is unconscionable. [Aplt.Br.27]. Again, Appellant makes bald assertions of oppression and unfair surprise, but fails to marshal any evidence that such has occurred. Mr. Kelsch has never been a resident of the Park and no unfair surprise can be claimed. His only objection is that he will not be able to sell the Griffin home for an amount that he could possibly realize if the home remained in the Park. Mr. Kelsch has no authority, actual or implied, to seek the highest price. The LDS Church as owner may make such a demand.

The determination of whether a contract is unconscionable is a question of law for the court. See Resource Management Co. v. Weston Ranch, 706 P.2d 1028, 1041 (Utah 1985). The Appellant's arguments for substantive unconscionability focus on the contents of the Park's Rules as being oppressive. In Utah, when determining whether a contract is substantively unconscionable, consideration is given as to whether its *"terms [are] so one-sided as to oppress or unfairly surprise an innocent party"* or whether there exists *"an overall imbalance in the obligations and rights imposed by the bargain."* Sosa v. Paulos, 924

---

<sup>4</sup> The word "may" in its most usual meaning does not import certainty, but uncertainty; that is, that whatever is referred to either may or may not be, or occur. Grant v. Utah State Land Bd., 485 P.2d 1035, 26 Utah 2d 100 (Utah 1971).

P.2d 357 (Utah 1996) (quoting Bekins Bar V Ranch v. Huth, 664 P.2d at 462 (Utah 1983)). The terms of the contract should be considered "*according to the mores and business practices of the time and place.*" Resource Management Co. v. Weston Ranch, 706 P.2d 1028, 1042 (Utah 1985) (quoting 1 Corbin on Contracts § 128, at 551 (1963)).

Applying that standard to this case, the Appellant's argument that each Park Rule must be related to either the health, safety, and appropriate conduct of residents and to the maintenance and upkeep of such park is unpersuasive to rise to the level of substantive unconscionability. See Section 57-16-7(1), U.C.A.

Section 57-16-7(1) of the MHPRA simply states that the Park MAY promulgate rules related to health, safety and upkeep of the park, but the statute does not state that the Park shall only adopt rules that relate to such matters. This is apparently what the Appellant is attempting to create by his argument, that unless each rule relates to one of the three criteria in 57-16-7(1), then the Rule is void as unconscionable. [R.493]. The plain language of the statute does not restrict the Rules as suggested by the Appellant.

In fact, inspection of the subject Park Rules [Aplt.Add."B"] demonstrates that not all of the Rules relate to "health, safety, or upkeep of the Park." Rule 1 provides that Rent is due on the first day of each month; Rule 2 provides that no refund of rent will be made, and that thirty-days written notice is required when terminating a lease by the resident; Rule 13 simply requires that the Park have reasonable access to the electric meters on each mobile home for the purpose of easy reading; Rule 22 concerns prior written approval for subleasing; Rule 24 requires registration with the Park of all prospective residents; Rule 25 gives the Park the unconditional right to refuse approval of prospective residents for failure



to register with the Park; Rule 26 limits the size and quantity of "For Sale" signs placed on a mobile home; and Rule 28 affords a resident the right to raise complaints to the Park.

In this case, the Appellant has not presented any evidence that Mrs. Griffin was oppressed, or that there is likely oppression imposed upon the LDS Church by the minimum size rule. Mere assertions are not sufficient under Utah law. Sosa v. Paulos, 924 P.2d 357 (Utah 1996). The Appellant does not cite one case supporting the position that the Park's Rule governing minimum size requirements is substantively unconscionable. A conclusion that one Rule is "potentially advantageous" to one side or "unreasonable" is insufficient, standing alone, to support a determination of substantive unconscionability. As noted, a showing of substantive unconscionability requires evidence that a term is "*so one-sided as to oppress or unfairly surprise an innocent party.*" Bekins Bar V Ranch, 664 P.2d at 462 (Utah 1983).

The Appellant can hardly claim the benefit of surprise on behalf of the estate. It is undisputed that the lease agreement was entered into between the Park and the Griffins. [Aplt.Add. "C"]. Under Utah law, a contracting party is under a duty to read it before signing it, and will be considered bound by constructive knowledge of the contents thereof. This is merely an application of fundamental contract law. See Theros v. Metropolitan Life Insurance Company, 17 Utah 2d 205, 407 P.2d 685 (1965). Furthermore, the Rules of the park are incorporated within the lease, a copy of which was provided to the Griffins at the time they signed the lease. It is undisputed that Mrs. Griffin received a copy of the revised Park rules in 1994, which contained the minimum size requirements. [R.245-244].

**III. The trial court correctly ruled, as a matter of law, that the Mobile Home Park did not breach the covenant of good faith and fair dealing by exercising its contractual rights.**

Appellee has never refuted that an implied covenant of good faith and fair dealing exists in every contract. Appellant has, however, failed to identify any reasonable basis that the Park has breached this implied covenant. Utah law has put to rest this issue in Howe v. Professional Manivest, Inc., 829 P.2d 160 (Utah App. 1992), which held that there is no violation of the duty of good faith, as a matter of law, when a party is simply exercising its contractual rights. Id. at 163, citing Heiner v. S.J. Groves & Sons Co., 790 P.2d 107, 115 (Utah App.1990).

Appellant's entire argument on this point is perplexing. Appellant now suggests, again for the first time, that the Estate relied upon the June 10, 1996, letter as indicating that the Park would not take steps toward eviction. This case has never concerned itself with eviction. The Park has bent over backwards for Mr. Kelsch in carrying out his obligations to the Estate. There has been no eviction attempt at all in this matter, and raising that issue at this late date is improper, and should be stricken.

Appellant's "reasonable expectations" argument must fail. There are no reasonable expectations involved in the lease. Had the lease specified that the Park would do nothing to impair the rights of the lessee to have a perpetual binding leasehold on the mobile home space, then neither of the parties could ever be relieved of the lease obligation. This would also limit a Park's ability to modify its Rules and terms of the lease, and more importantly to upgrade the Park.

The reasonable expectations could, in Appellant's terms, be arbitrarily set by hundreds of lessees, each with his or her own definition of reasonable. A mechanic would find it reasonable to store junk vehicles on the property, and a dog lover would find it reasonable to accommodate fifty dogs. What is reasonable to one individual may not be so to the remaining lessees.

The only "expectation" of the Appellant by reason of the June 10, 1996, letter is that he be permitted to sell the substandard home. It was Mr. Kelsch's obligation to inform any potential buyer that the home needed to be removed from the Park. There must be a logical and reasonable method of setting reasonable guidelines and Rules, which authority must remain with the Park. At the time the subject leases were executed, there was no apparent conflict with the Park's rules. If there were, the lease would not have been signed. The lease specifically alerted the lessees to the fact that Rule modifications could be made in the future. This demonstrated, early on, that the lessees impliedly and actually consented to abide by any such rule change. This issue was notable to the lower court as evidenced by the Findings of Fact. [R.671(¶8-9)]. The lower court also found, based upon the undisputed evidence that:

*"...there is absolutely no inference whatsoever in the June 10, 1996, letter, which would give Mr. Michael Kelsch any expectation whatsoever that he has the right to resell the mobile home of LaRue Griffin to a buyer who would keep it in the Imperial Mobile Home Park. To the contrary, the court finds that the June 10, 1996, letter is perfectly clear that the mobile home must be removed from the Park upon sale and Mr. Michael Kelsch could have no reasonable expectation to the contrary."*

[R.669, ¶ 11 (Findings of Fact)].

Appellant has further admitted below that the June 10, 1996, letter from the Park's manager is unambiguous. See [R.502].<sup>5</sup> The Appellant never challenged the fact that the June 10, 1996, letter directed and instructed him that upon sale of the Griffin mobile home, it would have to be removed from the Park, since the subject mobile home did not satisfy the minimum size requirements as established by the Park.

Because the Appellant failed to refute, and even admitted, that the June 10, 1996, letter was his "lease" with the Park, then the unambiguous terms of the letter are not subject to his interpretation by intrinsic evidence. In Utah, *"it is axiomatic that a contract should be interpreted so as to harmonize all of its provisions and all of its terms, which terms should be given effect if it is possible to do so."* LDS Hospital v. Capitol Life Ins. Co., 765 P.2d 857, 858 (Utah 1988)(emphasis added). Courts may not view a subparagraph of a contract in isolation to determine if it is ambiguous, but all provisions must be interpreted together as one contract. Village Inn Apartments v. State Farm Fire & Casualty Co., 790 P.2d 581, 583 (Utah App.1990) (citing 2 G. Couch, Cyclopedia of Insurance Law §15.29 (rev. ed. 1984)).

Contract language may be ambiguous if it is unclear, omits terms, or if the terms used to express the intention of the parties may be understood to have two or more plausible meanings. A term is not ambiguous, however, **merely because one party assigns a different meaning to it in accordance with his or her own interests.** Village Inn Apartments, 790 P.2d at 583 (citations omitted).

---

<sup>5</sup> Appellant did claim below that a minor ambiguity existed in the June 10, 1996, letter, which concerned only an interpretation of the method used in measuring a mobile home and that a square footage calculation was a plausible means of measuring and satisfying the minimum size requirements. See [R.496].

The Appellant's charge that the Utah Mobile Home Residency Act, § 57-16-4(7)(a) must be held invalid because of the various claims advanced is spurious. The question has been determined at two levels preceding the prerogative of this Court to make such a determination. The first is the legislature, and the second was the trial court. Legislative enactments should be accorded great deference. This Court follows the settled rule that *"legislative enactments are endowed with a strong presumption of validity and will not be declared unconstitutional unless there is no reasonable basis upon which they can be construed as conforming to constitutional requirements."* Blue Cross & Blue Shield v. State, 779 P.2d 634, 637 (Utah 1989); City of West Jordan v. Utah State Retirement Bd., 767 P.2d 530, 532 (Utah 1988).

Because the June 10, 1996, letter contains all of the terms constituting an agreement or "lease" between the parties hereto, Mr. Kelsch's responsibilities were two-fold: (1) assure payment of the rent; and (2) upon sale of the mobile home, have the buyer remove it from the Park. Because no other obligations existed or can be implied under his agreement with the Park, this Court may summarily rule that the issues raised by the Appellant on this appeal are baseless, since each present cursory arguments of error that the express authority to establish minimum size specifications under the Utah Mobile Home Residency Act, § 57-16-4(7)(a), Utah Code Annotated, as amended, is unauthorized by law.

This is not a question of reasonable or justified expectations. Appellant's argument is unilateral in effect. The reasonable expectations of the Park is to simply have its tenants abide by the Park's Rules. Because the Park is granted discretionary authority to set Rules, the Park may likewise apply them with discretion. The Appellant objected to the Park's

inconsistent application of the Rules to other mobile homes and spaces, but the Park must, at times, make logical concessions.<sup>6</sup> This is not an abuse or arbitrary application, and frankly, Appellant has no standing to challenge the Park's discretion since the application of the Rules to other owners/lessees is independent of the Appellant here.

Appellant further challenged the Park's discretion in permitting certain other undersized mobile homes to remain in the Park. The Park had reconfigured and modified several lots, which after doing so could not accommodate a larger home because of the irregular lot shape. There was simply no way for a larger home to fit on the lot. [R.243-241]. In that regard, the available land and Provo City Ordinances [R.200] dictated the proper usage of the available land.

The Appellant has offered nothing, factually or legally, in support of his claim that the adoption and enforcement of the Park Rules is unreasonable and in bad faith. There are certainly no damages flowing from the Appellant's unwillingness to abide by the Rules. The "Estate" is not being forced to pay the rent any more so than it would force Mrs. Griffin to pay the rent if she were still alive. Rent is paid in accordance with the agreement between the parties. If the Appellant refuses to pay the rent under his agreement, the Park could force eviction proceeding. To this date no eviction issue has come up.

Utah law clearly supports the trial court's ruling in this matter with respect to the issues of good faith and fair dealing. The Park has done nothing to violate those principles.

---

<sup>6</sup> The Park concededly was mistaken on one occasion where the manager failed to measure a mobile home that was being sold, and was later found to be undersized. The error occurred during the Christmas holidays and was merely an oversight. The lessee was not forced from the Park because of the mistake. [See R.239].

**IV. There have been no violations of the Utah Consumer Sales Practices Act, assuming it applies to this setting.**

Section 13-11-5(2) of the Utah Consumer Sales Practices Act provides that the Court shall determine whether any alleged act or practice is unconscionable. The parties are afforded a reasonable opportunity to present evidence as to the alleged wrongful act or practice. The matter is not one reserved for a jury, but is purely a matter for the Court to determine as a matter of law. [See Section 13-11-5(2), U.C.A.]. This Act simply has no relevance to these proceedings.

Appellant's strained reasoning that the UCSPA is applicable to this setting is beyond reason. Even reviewing the undisputed facts of this case, Mr. Kelsch does not own the subject mobile home; the LDS Church does. The Church is not a party to assert rights under the lease. Mr. Kelsch was once agreeable to the terms and conditions of the matters set forth in the June 10, 1996, letter. Mr. Kelsch's claims are limited to the park rules as they existed at the time of the June 10, 1996, letter, and he has no standing to challenge the implementation of the revised rules in 1994 as being unconscionable. Appellant's argument attempts to place him in the shoes of a resident with a lease to challenge rules adopted in 1994. This claim simply has no application to the facts of this case.

With respect to the record, the trial court discussed the issue with Appellant's counsel at some length. The trial court opined that unless there is some evidence of the size rule being unreasonable, it logically follows that there can be no unconscionability. [R.772-770]. Appellant proffered no evidence or factual issue that the rule was unreasonable. To determine whether the rule was unreasonable, the Appellant needed to come forward, beyond the pleadings, with evidence that the Park had control over the market conditions

for sales of mobile homes, and also had control over other Parks that would accept a smaller mobile home or had no imposed any size restrictions. The analytical approach taken by the Appellant fails to provide a sound foundation from which to find and argue unconscionability. Arguments of counsel do not constitute admissible evidence.

In the context of this case, the Appellee was not a "supplier" as defined in the UCSPA. The Appellant is a "supplier" since he is the "person" selling the mobile home. The Appellee is simply waiting for the Appellant to sell the mobile home, and has no control over the selling price or the buyer's offering price. If any transaction has occurred, it has nothing to do with the Park, and the Act does not apply in this case on that basis as well.

**V. The Park has not intentionally interfered with the Estate's economic relations.**

The economic hardship as argued by Appellant, as limiting the sale of a mobile home, is a *red herring*. The Court should recall that Mr. Kelsch did have a buyer for the Griffin mobile home who was willing to remove it from the Park and would have paid the Estate in an amount to satisfy the debts of the estate. [R.223-221]. Mr. Kelsch did not pursue the offer, since he believed he could get more for the home if it were left in the Park. [R.223].

Approaching this matter from an economic hardship analysis as being an unreasonable practice would open the floodgate for every individual who could not obtain his asking price for a particular piece of personal property. The park does not set the economic tides for mobile homes. The park established Rules governing size requirements.



No objection was raised by Mrs. Griffin during her residency under the revised Rules. She did not request of her personal representative to fight the Park to obtain the highest price. She requested that the home be sold and the assets be distributed. Mrs. Griffin had no heirs. The most credible evidence that Mr. Kelsch does not enjoy the rights of a lease under the Estate theory is that Mrs. Griffin specifically left her personal property to the "Church of Jesus Christ of Latter Day Saints." [R.190]. As the Park pointed out to the lower court, Mr. Kelsch did not pay the rent on the Griffin home, but the subject Church. If the lease belonged to any person, it was the Church, but the Church is not a party to this action. [R.572].

Mr. Kelsch has no rightful claim on the subject mobile home, but simply a duty to distribute the assets under no compulsion to get the highest price. The LDS Church, on the other hand, as owner of the mobile home could seek to demand and set the price limit. That issue was never raised by the Appellant, and we will never know. There has been no interference with Mr. Kelsch's right and obligation to sell the mobile home.

**VI. Appellant was required, as a matter of Utah law, to demonstrate the existence of material fact.**

Appellee is uncertain what Appellant is claiming with respect to the issue that the lower court "required the Estate to produce sufficient actual evidence." [Aplt.Br.45]. The Park was the moving party for summary judgment. The Park set forth numerous facts that were claimed to be undisputed. The Park's claim for declaratory relief that the MHPRA authorizes setting of minimum size requirements is a question of law for the court to determine. The Park also set forth facts to demonstrate that each of the eight counterclaims

asserted by the Appellant were without factual or legal basis and subject to summary judgment.

Rule 56 of the Utah Rules of Civil Procedure does not require the moving party to "produce actual evidence," but imposes an affirmative duty to respond with affidavits or other evidentiary materials. See D&L Supply v. Saurini, 775 P.2d 420 (Utah 1989). While the Appellant may claim there remain hotly contested issues between the parties, the real question is whether the facts at issue are (1) material, and (2) genuine.

A "material fact" is one which affects the rights or liabilities of the parties. There is a "genuine issue as to any material fact" unless all facts which affect the rights or liabilities of the parties are so conclusively shown that there is not the slightest doubt thereon, and in order to sustain such a judgment such facts must show that the moving party is entitled to a judgment as a matter of law. Holland v. Columbia Iron Mining Co., 4 Utah 2d 303, 293 P.2d 700 (1956).

The essential or actual "evidence" in this case is the June 10, 1996, letter from the Park to Mr. Kelsch. Mr. Kelsch's claim that the Park has discriminated have been abandoned, but the underlying vengeance remains. Appellant is requesting that the Park bear the burden of proving its case first, and moreover, with absolute certainty. The standards for summary judgment do not impose that great of burden on the moving party as set forth above. Where there is no evidence or rebuttal to undisputed facts, the burden would appear to be heavier. Thus is the purpose of summary judgment.

## **VII. Mitigation of damages.**

Appellee submits that this issue has no real bearing upon the outcome of this appeal, and would only become an issue in the event this matter is remanded for a trial on the merits. There has been no determination as to any damages to which this issue would turn, since the Appellant's Counterclaims are, at this stage, dismissed. Appellee reserves the right to raise this defense should this Court find for Appellant and reverse.

The lower Court's findings on this issue were obviously made to bolster his ruling that Mr. Kelsch could have prevented this entire matter from becoming a litigation nightmare by selling the mobile home when he had the opportunity. The sale, according to him [R.223-221], would have provided \$8,000 to the estate, which was more than enough to satisfy the debts and repay the LDS Church, although there was no obligation to do so.

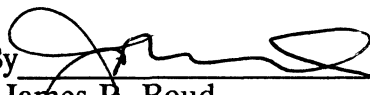
## **CONCLUSION**

Appellant's causes of action raised below all stem from the enforcement of the minimum size requirements of the Park Rules. The Park's actions in this setting were in accord with the authority granted by the legislature, as was found by the lower court. The numerous claims asserted on this Appeal demonstrates the contentious nature of the litigation. The lower court considered this matter with great understanding and diligence. The facts were laid out and backed with credible evidence. The Appellant produced hearsay affidavits, which had really nothing to do with the central issue. The same is true here.

The lower Court's granting of summary judgment in this matter is amply supported by the record and undisputed evidence. Affirmance is requested.

DATED this 3 day of March, 1998.

**ASHTON, BRAUNBERGER, BOUD, P.C.**

By   
James R. Boud  
Attorney for Appellees

**CERTIFICATE OF SERVICE**

This is to certify that the undersigned served a true and correct copy of the foregoing was delivered by mailing the same to the following on this 3 day of March, 1998, to the following:

Chris Greenwood  
GREENWOOD & BLACK  
1840 North State St., Suite 200  
Provo, Utah 84604

