

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 : Reply Brief

Utah Court of Appeals

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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 I through 10,

Defendants/Appellant.

Case No. 970591-CA

Priority No. 15

**UTAH COURT OF APPEALS
BRIEF**

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[CAPTION CONTINUED ON INSIDE FRONT COVER]

REPLY BRIEF

APPEAL FROM THE FOURTH JUDICIAL DISTRICT COURT, AMERICAN FORK
DEPARTMENT, UTAH COUNTY, ON SUMMARY JUDGMENT GRANTING
PLAINTIFF'S DECLARATORY JUDGMENT AND DISMISSING DEFENDANTS'
COUNTERCLAIMS, BEFORE THE HONORABLE JOHN C. BACKLUND

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FILED
Utah Court of Appeals

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Julia D'Alesandro
Clerk of the Court

MICHAEL KELSCH, Personal
Representative to the Estate of
LaRue Griffin, Deceased; RUTH
WILLIAMSON; and JOHN DOES
I 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 1 through X,

CounterDefendant and
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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
ARGUMENT	1
I. The Park Did Not Meet Its Burden, As the Moving Party, Sufficient to Shift the Burden to the Estate to Produce Evidence.	1
II. The Estate is Entitled to the Benefits of the Griffin Lease	4
III. The MHPRA Does Not Expressly Grant the Park the Authority to Arbitrarily Create Its Own Minimum Size Specifications	5
A. It Is For This Court Alone to Interpret the MHPRA	6
B. Section 57-16-4(7) is Ambiguous	8
C. It is Appropriate to Look to the Legislative History Behind the MHPRA's Enactment in 1981 and to Construe the Statutes <i>In Pari Materia</i>	10
D. It is Necessary to Harmonize the MHPRA's Provisions with Each Other and with the Act's Purposes	16
E. The Unconscionability of the Park's Rule Change Should Not Be Adjudicated Summarily	18
IV. The Park's Unjustified Refusal to Approve Any Subtenant Breaches the Covenant of Good Faith and Fair Dealing.	20
V. The Estate's Other Issues Have Been Adequately Presented	23
CONCLUSION AND PRECISE RELIEF SOUGHT	24

TABLE OF AUTHORITIES

CASES CITED

<u>Badger v. Brooklyn Canal Co.</u> , 922 P.2d 745 (Utah 1996)	3
<u>Barker v. Utah Oil Refining Co.</u> , 178 P.2d 386 (Utah 1947)	22
<u>Broadbent v. Board of Educ.</u> , 910 P.2d 1274 (Utah App. 1996)	12
<u>Brugger v. Fonoti</u> , 645 P.2d 647 (Utah 1982)	22
<u>Celotex Corp. v. Catrett</u> , 477 U.S. 317 (1986)	3
<u>Clover v. Snowbird Ski Resort</u> , 808 P.2d 1037 (Utah 1991)	9, 16
<u>D&L Enters., Inc. v. Davenport</u> , 507 P.2d 373 (Utah 1973)	4
<u>Drake v. Industrial Comm'n</u> , 939 P.2d 177 (Utah 1997)	7
<u>Draper City v. Estate of Bernardo</u> , 888 P.2d 1097 (Utah 1995)	19
<u>Durham v. Duchesne County</u> , 893 P.2d 581 (Utah 1995)	6
<u>Employers' Reinsurance Fund v. Industrial Comm'n</u> , 856 P.2d 648 (Utah App. 1993) . . .	7
<u>Equitable Life & Casualty Ins. Co. v. Ross</u> , 849 P.2d 1187 (Utah App. 1993)	9
<u>Harline v. Barker</u> , 912 P.2d 433 (Utah 1996)	2
<u>Hector, Inc. v. United Sav. & Loan Assoc.</u> , 741 P.2d 542 (Utah 1987)	11
<u>Howe v. Professional Maninvest, Inc.</u> , 829 P.2d 160 (Utah App. 1992)	21
<u>In re Estate of Conklin</u> , 451 N.E.2d 1382 (Ill. App. 1983)	4, 23
<u>Jensen v. IHC Hosps., Inc.</u> , 944 P.2d 327 (Utah 1997)	2
<u>K & T, Inc. v. Koroulis</u> , 888 P.2d 623 (Utah 1994)	1
<u>Kearns-Tribune Corp. v. Hornak</u> , 917 P.2d 79 (Utah App. 1996)	10

<u>McNair v. Farris</u> , 944 P.2d 392 (Utah App. 1997)	1
<u>Murphy v. Crosland</u> , 886 P.2d 74 (Utah App. 1994), <u>aff'd</u> , 915 P.2d 491 (Utah 1996)	13, 16
<u>Murray City v. Hall</u> , 663 P.2d 1314 (Utah 1983)	11
<u>Ogden City v. Boreman</u> , 57 P. 843 (Utah 1899)	14
<u>Olympus Hills Center v. Smith's Food & Drug Centers</u> , 889 P.2d 445 (Utah App. 1994)	21
<u>Patterson v. Utah County Bd. of Adjustment</u> , 893 P.2d 602 (Utah App. 1995)	9
<u>PDQ Lube Center, Inc. v. Huber</u> , 949 P.2d 792 (Utah App. 1997)	21, 22
<u>Resource Management Co. v. Weston Ranch</u> , 706 P.2d 1028 (Utah 1985)	19
<u>Retherford v. AT&T Communications</u> , 844 P.2d 949 (Utah 1992)	18
<u>Richard Barton Enters. v. Tsern</u> , 928 P.2d 368 (Utah 1996)	22
<u>State ex rel. H.R.V.</u> , 906 P.2d 913 (Utah App. 1995)	7
<u>State Farm Mut. Auto. Ins. Co. v. Clyde</u> , 920 P.2d 1183 (Utah 1996)	7, 8
<u>State v. Hunt</u> , 906 P.2d 311 (Utah 1995)	15
<u>State v. Pena</u> , 869 P.2d 932 (Utah 1994)	6, 7
<u>Timm v. Dewsnup</u> , 851 P.2d 1178 (Utah 1993)	2
<u>TS 1 Partnership v. Allred</u> , 877 P.2d 156 (Utah App. 1994)	2
<u>Tygesen v. Magna Water Co.</u> , 226 P.2d 127 (Utah 1950)	6
<u>Utah County v. Orem City</u> , 699 P.2d 707 (Utah 1985)	11
<u>V-1 Oil Co. v. Utah State Tax Comm'n</u> , 942 P.2d 906 (Utah 1997)	15
<u>Winegar v. Froerer Corp.</u> , 813 P.2d 104 (Utah 1991)	7

<u>World Peace Movement of America v. Newspaper Agency Corp.</u> , 879 P.2d 253 (Utah 1994)	10
<u>Zoll & Branch, P.C. v. Asay</u> , 932 P.2d 592 (Utah 1997)	14

STATUTORY AUTHORITIES

1981 Laws of Utah, Ch. 177	11, 12
42 United States Code § 5401 (1980)	12
42 United States Code § 5402(6) (1980)	13
Utah Code Ann. § 13-11-5(1) (1997)	19
Utah Code Ann. § 13-11-5(2) (1997)	19
Utah Code Ann. § 41-20-1 (1981)	11
Utah Code Ann. § 41-20-1 (1997)	13-15
Utah Code Ann. § 41-20-1(2) (1981)	12
Utah Code Ann. § 57-16-4(4) (1996).	6, 16, 17
Utah Code Ann. § 57-16-4(7) (1996)	6, 8, 9, 16, 17
Utah Code Ann. § 57-16-4(7)(a) (1996)	9, 10, 14, 15
Utah Code Ann. § 57-16-7(1) (1996).	6, 16-18

COURT RULES

Utah R. of Civil P. 12	3
Utah R. of Civil P. 56	3

OTHER AUTHORITIES

42 A.L.R. 4th 963 (1985)	4
49 Am.Jur. 2d, Landlord & Tenant § 287 (1995)	5
Audio Tape Recordings of Utah Senate, March 5, 1981 (discussing S.B. No. 209 and S.B. No. 237)	12
Friedenthal et al., Civil Procedure 444 (2d. ed. 1993)	3
Sands, Sutherland Statutory Construction § 23.17 (5 th ed. 1992)	12
Sands, Sutherland Statutory Construction § 24.02 (5 th ed. 1992)	17
Sands, Sutherland Statutory Construction § 38.06 (5 th ed. 1992)	10
Sands, Sutherland Statutory Construction § 49.01 (5 th ed. 1992)	13
Sands, Sutherland Statutory Construction § 51.01 (5 th ed. 1992)	11
Sands, Sutherland Statutory Construction § 51.04 (5 th ed.1992)	14

ARGUMENT

This appeal arises from the trial court's grant of summary judgment in favor of Imperial Mobile Home Park ("the Park") and against the Estate of LaRue Griffin ("the Estate"); accordingly, this Court should "determine only whether the trial court erred in applying the governing law and whether the trial court correctly held that there were no disputed issues of material fact." K & T, Inc. v. Koroulis, 888 P.2d 623, 627 (Utah 1994). Indeed, "[s]ummary judgments present for review conclusions of law only, because, by definition, summary judgments do not resolve factual issues." McNair v. Farris, 944 P.2d 392, 394 (Utah App. 1997).¹

I. The Park Did Not Meet Its Burden, As the Moving Party, Sufficient to Shift the Burden to the Estate to Produce Evidence.

At the outset of this brief, it should be noted that the Park repeatedly asserts that the Estate does not marshal the evidence for the appellate court, and that the Estate did not present sufficient evidence to support its claims before the trial court. Moreover, the Park objects that the Estate "is requesting that the Park bear the burden of proving its case first The standards for summary judgment do not impose that great of burden on the moving party." (Appellee's brief, p. 31).

The Park mistakenly believes that by simply moving for summary judgment and by attaching some affidavits and deposition excerpts, the Estate must then come forward

¹ The Park unexplainedly intimates that "the trial court's ruling is nevertheless based upon the evidence presented at trial and the findings therefrom," and suggests that this Court should indulge considerable deference to the lower court's findings. (See Appellee's brief, p. 2). No trial of the merits has occurred in this case.

with evidence to support each and every element of each and every claim. This is not what the law requires.

"The moving party determines the scope of a motion for summary judgment. That party decides what issues to present to the court for adjudication." Timm v. Dewsnup, 851 P.2d 1178, 1181 (Utah 1993). "Thus, the moving party has an initial burden of informing the trial court of the basis for the motion and identifying the portions of the pleadings or supporting documents which it believes demonstrates an absence of genuine issue of material fact." TS 1 Partnership v. Allred, 877 P.2d 156, 158 (Utah App. 1994); see also Jensen v. IHC Hosps., Inc., 944 P.2d 327, 339 (Utah 1997) ("On a motion for summary judgment, the moving party bears the burden of proof for its motion, namely, the burden of proving that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.").

The Park erroneously asserts that the moving party is not required to produce evidence in order to shift that burden to the responding party. (Appellee's brief, p. 31). "Unless the moving party meets its initial burden to present evidence establishing that no genuine issue of material fact exists, 'the party opposing the motion is under no obligation to demonstrate that there is a genuine issue for trial.'" Harline v. Barker, 912 P.2d 433, 445 (Utah 1996). Indeed, "[f]ailure on the part of the moving party to meet this initial burden may render summary judgment inappropriate." Allred, 877 P.2d at 158.

Contrary to the Park's claim in its brief, the Park did not set forth facts sufficient to demonstrate that each of the Estate's claims were without factual support. The Park did

present some evidence, but only evidence applicable to the Estate's breach of contract claim, to the alleged lack of mitigation by the Estate, and to the Park's reasons for not uniformly enforcing its own mandatory rules.

As previously demonstrated by the Estate in its initial brief, the Park's motion for summary judgment, with respect to those claims being preserved on appeal, did not present a challenge to the evidentiary support for the Estate's claims, but only argued that the asserted legal theories were not cognizable as a matter of law. As such, the Park's motion with respect to these claims more closely resembled a Rule 12 motion to dismiss for failure to state a claim than a Rule 56 motion for summary judgment.

In any event, the Park did not meet its initial burden such that the Estate was obligated to respond with its entire evidentiary arsenal to support each element of each cause of action asserted.² The Estate's burden to "'set forth specific facts showing that there is a genuine issue for trial' . . . is triggered only when 'a motion for summary judgment is made and supported as provided in'" Rule 56. Badger v. Brooklyn Canal Co., 922 P.2d 745, 752 (Utah 1996); see also Friedenthal et al., Civil Procedure 444 (2d. ed. 1993) ("If, but only if, the moving party produces information that appears to establish that no factual dispute exists, then the responding party normally must come forward with materials to show that there indeed is a genuine issue of fact.").

² It should be noted that a mere "conclusory assertion that the plaintiff has no evidence to prove his case" would not likely be sufficient to meet this initial burden. Celotex Corp. v. Catrett, 477 U.S. 317, 328 (1986) (White, J., concurring).

Accordingly, this Court should disregard the Park's references to lack of marshaling or lack of evidence and focus on the legal theories presented. In any event, the Estate believes it has presented sufficient evidence on the record to support each of the claims preserved on appeal.

II. The Estate is Entitled to the Benefits of the Griffin Lease.

The Park contends that the Estate did not raise before the trial court the issue of whether the Estate enjoys any rights under the Griffin lease or whether it has any lease with the Park at all. (See Appellee's brief, pp. 7, 10-12). This assertion is simply not correct. The arguments concerning the Estate's leasehold interest were argued in the Estate's memorandum and again at the hearing on the motion for summary judgment. (See R. at 498-97; 818, Tr. at 29-31).

Furthermore, the evidence and law undisputedly support the fact that Mrs. Griffin's lease became part of her Estate upon her death. The general rule of law is that "a lease is not terminated by the death of the lessor or the lessee unless the rule is altered by statute or by the terms of the lease." In re Estate of Conklin, 451 N.E.2d 1382, 1383 (Ill. App. 1983); see also 42 A.L.R. 4th 963, 967 (1985) (stating "general rule" that "the death of the lessee does not of itself constitute an event which will terminate the contract").

This appears to be the law in Utah as well. See D&L Enters., Inc. v. Davenport, 507 P.2d 373, 374 (Utah 1973) (agreeing with a wife's contention that her husband's death did not terminate the lease). Accordingly, "[u]pon the death of the tenant the unexpired

leasehold interest of the decedent becomes personal property of the estate, and does not automatically revert to the lessor." 49 Am.Jur. 2d, Landlord & Tenant § 287 (1995).

Moreover, even were this not the law, the Park has essentially consented to the Estate continuing in possession of the premises under the Griffin lease by not sending notice of termination of the lease or initiating the proper procedures for evicting the Griffin mobile home; instead, the Park allowed the mobile home to remain in the Park and sent the June 10, 1996, letter expressly indicating that if the Estate paid the rent due for lot space #119, the Park would not "take any further action." (See Exhibit "A" in the addenda to Appellant's brief).³

In any event, the Park belatedly concedes that "[t]he existence of some sort of a 'lease' is undisputed." (Appellee's brief, p. 12).⁴

III. The MHPRA Does Not Expressly Grant the Park the Authority to Arbitrarily Create Its Own Minimum Size Specifications.

The Park continues to argue that the only question this Court need resolve is whether mobile home parks have been granted express authority and discretion, under the Mobile Home Park Residency Act (the "MHPRA"), to set and enforce minimum size requirements. While resolution of this issue is certainly critical to the proper determination of the appeal, this issue, even if answered in the affirmative, does

³ The Griffin mobile home has not been devised or transferred to the Church of Jesus Christ of Latter-day Saints as the Park suggests, but remains in the Estate. The Park has no support in the record for making such an assertion.

⁴ At the very least, a lease should be implied at law as the Estate has asserted in its initial brief and the Park has disingenuously attempted to discredit.

automatically dispose of the appeal. The issues are somewhat more varied and complex than the Park would like to believe. Indeed, the interpretation and construction of other provisions of the MHPRA are also necessary inasmuch as several of the Estate's claims are based on violations of those other statutory provisions. See Utah Code Ann. §§ 57-16-4(4) & -7(1) (1996).

The Park asserts that it has the authority and discretion to set and enforce size requirements in accordance with the plain language of section 57-16-4(7); that the MHPRA should not be considered as a whole, with all of its provisions harmonized with the Act's goals and purposes; that the legislative history cited in the Estate's initial brief cannot be considered because it was not first called to the attention of the trial court; and that the Estate cannot now assert a statutory interpretation different from that asserted before the trial court.

A. It Is For This Court Alone to Interpret the MHPRA.

First and foremost, a question of statutory interpretation and construction present questions of law for the appellate court alone to decide. Durham v. Duchesne County, 893 P.2d 581, 584 (Utah 1995). No deference is given to the trial court, or to the arguments of the parties, in resolving a question of pure law such as this. See State v. Pena, 869 P.2d 932, 937 (Utah 1994).

"It is the duty of courts to interpret and construe statutes," and to do so correctly. Tygesen v. Magna Water Co., 226 P.2d 127, 131 (Utah 1950). The arguments urged by the parties may be persuasive, but they do not somehow relieve the court of the obligation

to properly interpret the statute. Particularly, "the appellate court 'has the power and duty to say what the law is and to ensure that it is uniform throughout the jurisdiction.'" Drake v. Industrial Comm'n, 939 P.2d 177, 181 (Utah 1997) (quoting Pena, 869 P.2d at 936) (emphasis added). It would make little sense to accord private parties their own personal interpretations of public statutes when those statutes should have uniform application throughout the State of Utah.

Accordingly, this Court has previously interpreted statutes differently from the interpretations urged by either party to the case. See, e.g., State ex rel. H.R.V., 906 P.2d 913, 915-16 (Utah App. 1995); Employers' Reinsurance Fund v. Industrial Comm'n, 856 P.2d 648, 652 & 654 (Utah App. 1993) (concluding that "[w]hile each interpretation [proposed by the parties] has some plausibility, neither interpretation is the correct interpretation" and then finding "the one permissible interpretation of the statute in question"). Such a result would also seem logical because the court's primary objective in construing a statute is to give effect to "the legislature's intent," rather than to give effect to the intent of the parties, as would be the case in interpreting a contract. Compare State Farm Mut. Auto. Ins. Co. v. Clyde, 920 P.2d 1183, 1186 (Utah 1996) ("Our primary objective is to give effect to the legislature's intent."), with Winegar v. Froerer Corp., 813 P.2d 104, 108 (Utah 1991) ("In interpreting a contract, the intentions of the parties are controlling.")

Admittedly, the Estate did not discover prior to this appeal that the Utah legislature had passed, contemporaneously with the MHPRA, another statute that dealt specifically

with mobile homes at that time. Nevertheless, the interpretation of section 57-16-4(7) was properly at issue in this case, and the trial court had the obligation to correctly interpret that statute, regardless of the interpretations proposed by the parties at the time.

The Park argued below that mobile home parks have the express authority to set size specifications and that by doing so, no other provision of the MHPRA could be violated. The Estate never conceded that the Park's interpretation and construction of the statute were correct; instead, the Estate argued that, at most, the statute in question granted some implied authority to mobile home parks, which authority could not be exercised in contravention of express prohibitions contained elsewhere in the MHPRA.⁵

Therefore, this Court should decide for itself how the relevant provisions of the MHPRA should be interpreted, construed, and applied. Only the correct interpretation should be adopted. The parties' arguments should merely assist the Court in reaching the proper interpretation.

B. Section 57-16-4(7) is Ambiguous.

Moreover, it is proper to evaluate the legislative history in this case and to construe the related statutes together. Appellate courts will "generally look first to the plain language of the statute to discern the legislative intent." Clyde, 920 P.2d at 1186.

However, section 57-16-4(7) is not clear and unambiguous as the Park suggests. That

⁵ The Estate has never challenged the validity or constitutionality of section 57-16-4(7), but merely the interpretation, construction, and application of the statute. The Estate is not asking the Court to rule on the "reasonableness" of the legislative enactment as the Park suggests; accordingly, the Park's separation of powers argument is simply irrelevant to this appeal.

section ambiguously refers to "minimum size specifications." See Utah Code Ann. § 57-16-4(7)(a) (1996). As previously asserted, nowhere in the MHPRA does the legislature define what these minimum size specifications are, or how and by whom they are to be adopted. The Park merely assumes that the legislature intended to grant this authority to the mobile home parks, but nowhere in the Act is such a grant of authority explicitly spelled out. The only authority allowed the parks themselves is to require that a mobile home be removed from the park if it fails to meet these undefined minimum size specifications.

Thus, section 57-16-4(7) is ambiguous, and the meaning of "minimum size specifications" is unclear and uncertain. Indeed, "[a] statute is ambiguous if it can be understood by reasonably well-informed persons to have different meanings." Patterson v. Utah County Bd. of Adjustment, 893 P.2d 602, 606 (Utah App. 1995); cf. Equitable Life & Casualty Ins. Co. v. Ross, 849 P.2d 1187, 1192 (Utah App. 1993) (indicating that "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").

As the Park admits, "[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." Clover v. Snowbird Ski Resort, 808 P.2d 1037, 1045 (Utah 1991). In addition, "when the statute's language is ambiguous[, the appellate court will] seek guidance from

the legislative history and policy considerations' to 'discover [legislative] intent.'" Kearns-Tribune Corp. v. Hornak, 917 P.2d 79, 83 (Utah App. 1996); see also World Peace Movement of America v. Newspaper Agency Corp., 879 P.2d 253, 259 (Utah 1994).

C. It is Appropriate to Look to the Legislative History Behind the MHPRA's Enactment in 1981 and to Construe the Statutes *In Pari Materia*.

The Park objects because the legislative history referred to in the Estate's initial brief was not presented to the trial court below. However, contrary to the Park's objections, the Estate is not improperly "supplementing the record" with references to recorded legislative proceedings. These are not evidentiary matters that must be submitted by a party to a court before that court can consider them. As other courts and commentators have recognized, a statute's "legislative history, passage, date of approval and the time and manner of its operation will be given judicial notice." Sands, Sutherland Statutory Construction § 38.06 (5th ed. 1992) (hereinafter "Sutherland"). Accordingly, this Court has previously researched and considered recorded legislative history on its own volition, even when neither party attempted to address that history. See, e.g., Kearns-Tribune Corp., 917 P.2d at 83-86.

In any event, it is appropriate for this Court to consider the legislative background of the MHPRA in attempting to accurately discern the legislature's intent in referring to "minimum size specifications" in section 57-16-4(7)(a). A review of the relevant legislative history reveals that during the same session of the legislature in which the MHPRA was enacted, a statute entitled "Manufactured Housing and Recreational Vehicles

Standards" was also substantively amended. See 1981 Laws of Utah, Ch. 177 (originally codified at Utah Code Ann. §§ 41-20-1 et seq.).

That statute also dealt specifically with mobile homes, establishing definitions and adopting various standards to be applied to mobile homes, manufactured homes, and recreational vehicles. See id. As commentators and courts have repeatedly recognized, "[o]ther statutes dealing with the same subject as the one being construed--commonly referred to as statutes *in pari materia*--comprise [a] form of extrinsic aid useful in deciding questions of interpretation." Sutherland at § 51.01.

More specifically, the Utah Supreme Court has established that

[s]tatutes are considered to be *in pari materia* and thus must be construed together when they relate to the same person or thing, to the same class of persons or things, or have the same purpose or object. If it is natural or reasonable to think that the understanding of the legislature or of persons affected by the statute would be influenced by another statute, then those statutes should be construed to be *in pari materia*, construed with reference to one another and harmonized if possible.

Utah County v. Orem City, 699 P.2d 707, 709 (Utah 1985) (footnotes omitted).

Clearly, both the Mobile Home Park Residency Act and the Manufactured Housing and Recreational Vehicles Standards statute both related to mobile homes at the time. The two statutes are interrelated and, thus, should be construed together even though they dealt generally with different aspects of mobile homes and the mobile home industry. Indeed, construing similar statutes as being *in pari materia* is a relatively common practice in the judicial interpretation of statutes. See, e.g., Hector, Inc. v. United Sav. & Loan Assoc., 741 P.2d 542, 545 (Utah 1987); Utah County, 699 P.2d at 708-09; Murray City v. Hall,

663 P.2d 1314, 1318 (Utah 1983); Broadbent v. Board of Educ., 910 P.2d 1274, 1280 n.6 (Utah App. 1996).⁶

The fact that the two statutes were debated and voted upon in the Utah Senate on the same day, March 5, 1981, and passed by the same legislature should give even more credence to the need to construe the statutes together. See Audio Tape Recordings of Utah Senate, March 5, 1981 (discussing S.B. No. 209 and S.B. No. 237).

If the same legislative session enacts two or more acts on the same subject they are presumed to have been actuated by the same policy and intended to have effect together. The rules of construction and interpretation of acts *in pari materia* apply with singular force to enactments promulgated by the same legislative body

Sutherland at § 23.17 (footnotes omitted, but see also cases cited therein).

Specifically, the 1981 Legislature defined a "mobile home," in part, as "a structure built prior to June 15, 1976, transportable in one or more sections, which is eight body feet or more in width and 32 body feet or more in length." 1981 Laws of Utah, Ch. 177, § 1 (originally codified at Utah Code Ann. § 41-20-1(2)) (emphasis added). In addition, the 1981 Legislature specifically adopted the standards of the National Manufactured Housing Construction and Safety Standards Act of 1974, 42 U.S.C. §§ 5401 et seq., to apply to mobile homes built after June 16, 1976. 1981 Laws of Utah, Ch. 177, § 1 (originally codified at Utah Code Ann. § 41-20-1(1)). The federal act's relevant provisions defined a

⁶ The principle that statutes *in pari materia* should be construed together is a variation of the principle that all parts of a statute should also be construed together
Sutherland at § 51.01.

mobile home built after June 16, 1976 (referred to as a "manufactured home"), in part, as "a structure, transportable in one or more sections, which, in the traveling mode, is eight body feet or more in width or forty body feet or more in length, or, when erected on site, is three hundred twenty or more square feet." 42 U.S.C. § 5402(6) (emphasis added).

Therefore, when the 1981 Legislature enacted a statute that referred to "minimum size specifications" for mobile homes, without attempting to define those specifications, then the minimum sizes for mobile homes adopted by the same Legislature in another statute would seem the likely "specifications" to which the Legislature was referring.

The Park considers such a conclusion to be "untenable" because the 1990 amendments to Title 41, Chapter 20, deleted all references to mobile homes and manufactured homes. Thus, the statute now deals only with "recreational vehicles." See Utah Code Ann. §§ 41-20-1 et seq. (1997).

Nevertheless, the "[u]se of legislative intent as the governing criterion for interpretation focuses attention on circumstances and events at the time when a bill was enacted." Sutherland at § 49.01 (emphasis added); see, e.g., Murphy v. Crosland, 886 P.2d 74, 80-81 (Utah App. 1994), aff'd, 915 P.2d 491 (Utah 1996) (refusing to recognize official comments to the Model Business Corporation Act as indicative of the Utah Legislature's intent inasmuch as the official comments were drafted eight years after the Utah statute was enacted). Even if amendments to section 41-20-1 eliminated that statute's applicability to mobile or manufactured homes, those amendments came nine years after the relevant provisions were first adopted. The relevant provisions were enacted

contemporaneously with the MHPRA and are more likely indicative of the 1981 Legislature's intent and understanding than any amendments in 1990.

Moreover, "[a]n act relating to the same subject matter need not be a valid and existing statute to be construed with an ambiguous act in order to help determine its meaning. . . . Many courts have declared that repealed . . . statutes relating to the same subject matter are likewise eligible to be considered *in pari materia*." Sutherland at § 51.04. At least one Utah court has recognized that

[a] general rule for the construction of statutes is that, where a part of an act has been repealed, it must, although of no operative force, still be taken in construing the rest. The propriety of comparing repealed statutes with those remaining in force, or subsequently enacted, for the purpose of construing the latter, is not to be questioned in the absence of any reference to them in the statute under consideration.

Ogden City v. Boreman, 57 P. 843, 844 (Utah 1899).

Thus, the most plausible interpretation of what the 1981 Legislature meant by the "minimum size specifications" referred to in section 57-16-4(7)(a) is gleaned by reference to section 41-20-1, as that statute was amended by the same Legislature. Indeed, such an interpretation is supported by the legislature's use of the term "specifications" (which implies some sort of industry standard) rather than "requirements" or some other term which might suggest that minimum size requirements can be established by individual mobile home parks. Appellate courts "presume that the legislature used each word advisedly and give effect to each term according to its ordinary and accepted meaning." Zoll & Branch, P.C. v. Asay, 932 P.2d 592, 594 (Utah 1997) (emphasis added); see also

V-1 Oil Co. v. Utah State Tax Comm'n, 942 P.2d 906, 917 (Utah 1997) (indicating that court "must attempt to give each part of the provision a relevant and independent meaning so as to give effect to all of its terms"); State v. Hunt, 906 P.2d 311, 312 (Utah 1995) (indicating that court will avoid interpretation which renders portions of, or words in, a statute superfluous or inoperative).

Finally, inasmuch as it is reasonable to construe the 1981 statutes together and to infer that the 1981 legislature was referring, in the MHPRA, to the sizes established for mobile or manufactured homes referenced in a companion statute, it is also reasonable to infer that the 1981 legislature did not intend to grant any authority to mobile home parks to establish size specifications. Furthermore, by later eliminating section 41-20-1's applicability to mobile homes, the 1990 Legislature certainly did not intend to suddenly transfer to the mobile home parks some implied authority that did not exist before the amendments. If that had been the case, the 1990 legislature could have made that clear by also amending the MHPRA. In fact, the national standards published by the American National Standards Institute and National Fire Protection Association, as well as those adopted in the National Manufactured Housing Construction and Safety Standards Act of 1974, have existed independent of any reference to them in the Utah Code. At most, the 1990 amendments can only be read as repealing any minimum size specifications for mobile homes, thus preventing mobile home parks from being able to rely on section 57-16-4(7)(a) as a basis for requiring the removal of any mobile home upon sale.

D. It is Necessary to Harmonize the MHPRA's Provisions with Each Other and with the Act's Purposes.

The Estate's causes of action for violations of the MHPRA are expressly based on violations of other provisions of the Act, specifically sections 57-16-4(4) and 57-16-7(1). The Park relies heavily on the flawed reasoning that because section 57-16-4(7) clearly and unambiguously gives mobile home parks the authority to establish minimum sizes for the homes and to then require the "undersized" homes be removed from the park upon sale, that the Park cannot, as a matter of law, violate other provisions of the MHPRA by so doing.

As already established, section 57-16-4(7) is not clear and unambiguous. The proper interpretation of that statutory provision demonstrates that the legislature did not intend to give such authority and discretion to the parks. Nevertheless, even if the mobile home parks do have some implied discretion under the statute, that grant of authority is not expressly written into the plain language of the act. Because of this inherent ambiguity or uncertainty, contrary to the Park's assertions, 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." Clover, 808 P.2d at 1045; see also Murphy, 886 P.2d at 80.

Accordingly, it is entirely appropriate, if not absolutely necessary, to harmonize the MHPRA's provisions and to balance the corresponding rights and obligations that apply to park owners and mobile home owners. The Estate has already discussed these issues in comprehensive detail in its initial brief.

Indeed, if any conflict exists between sections 57-16-4(4) and -7(1) and section 57-16-4(7), the express prohibitions in the former sections should prevail over any implied discretion granted in the latter section. Indeed, "a limitation on power, declared in negative terms, is more apt to be given a mandatory construction and applied as an absolute with no exceptions or deviations tolerated than is the case with directives written in affirmative terms." Sutherland at § 24.02.

Accordingly, if the practical effect of a park rule requiring the removal of mobile homes smaller than 12 feet by 65 feet upon sale is to prevent or unreasonably limit the sale, then the prohibition against such a rule or condition established in section 57-16-4(4) must be given force and effect. The Park disingenuously argues that section 57-16-4(7) does not take effect until a sale has occurred and that the other provisions of the Act thus have no bearing on that section because they apply before a sale occurs. This argument must fail. In fact, the Park admits that the rule requiring removal of undersized homes is enforced only once a sale is consummated "and the sale is made with the knowledge of the removal rule." (Appellee's brief, p. 17).⁷ It is precisely the knowledge that the home must be removed if it is purchased, combined with the Park's reliance on its rule to refuse to approve potential purchasers for park residency, that has the practical effect of preventing or unreasonably limiting the sale of the mobile home in this case.

⁷ The Park also confuses enforcement of "the subject Code sections" with enforcement of the Park's own rules. (Appellee's brief, p. 17).

E. The Unconscionability of the Park's Rule Change Should Not Be Adjudicated Summarily.

The Estate further contends that the Park's rule change in 1994 was unconscionable, thereby rendering the rule change invalid. See Utah Code Ann. § 57-16-7(1) (1996) ("No change in rule that is unconscionable is valid."). The Park assails this claim by asserting, once more, that the Estate has not marshalled any evidence to support findings of oppression or unfair surprise in this case. The Estate simply reiterates that "summary judgment resolves only questions of law;" Retherford v. AT&T Communications, 844 P.2d 949, 958 (Utah 1992); hence, the Estate has no duty to "marshall" evidence. More importantly, as has been already addressed in this brief, the Estate was not required to present evidence to support each and every element of its claim that the Park's rule change was unconscionable and invalid. The Estate has articulated a valid and recognizable legal theory upon which equitable relief can be granted, declaring the Park's rule change establishing minimum size requirements to be an invalid rule change.

Moreover, the Estate is arguing that the oppression and unfair surprise to Park residents occurred in 1994, at the time of the unilateral rule change. The fact that the Estate, or Mr. Kelsch, was not a Park resident at the time is irrelevant. Mr. Kelsch does not claim any unfair surprise to the Estate; although the Estate continues to be financially oppressed by the unilateral rule change. The Estate merely asserts that an unconscionable rule change is invalid. See Utah Code Ann. § 57-16-7(1) (1996). No legal authority supports the proposition that an invalid rule change somehow automatically becomes valid

later during the course of the lease. In any event, if the Estate is somehow barred from attacking the unconscionable rule change under the MHPRA, then the Estate should be able to attack the rule change under the UCSPA.. See id. §§ 13-11-1 et seq. Pursuant to that act, "[a]n unconscionable act or practice by a supplier in connection with a consumer transaction violates this act whether it occurs before, during, or after the transaction." Id. § 13-11-5(1) (1997) (emphasis added). Thus, the Estate could challenge an unconscionable rule change occurring before it acquired the Griffin lease.⁸

Finally, unconscionability may be a question of law,⁹ but the legal determination of the rule change's unconscionability still depends heavily on the factual circumstances surrounding the change. "'Unconscionable' is a term that defies precise definition. Rather, a court must assess the circumstances of each particular case in light of the twofold purpose of the doctrine, prevention of oppression and of unfair surprise." Resource Management Co. v. Weston Ranch, 706 P.2d 1028, 1041 (Utah 1985) (emphasis added). Accordingly, "[f]act sensitive cases such as this do not lend themselves to a determination on summary judgment." Draper City v. Estate of Bernardo, 888 P.2d 1097, 1101 (Utah

⁸ The Park repeatedly attempts to shift the focus from the Park's statutory and common-law obligations to mobile home owners by inaccurately describing and attacking Mr. Kelsch's authority and responsibilities as personal representative of the Griffin Estate. (See Appellee's brief, p. 20). No legal or factual basis supports these assertions. In fact, the Griffin mobile home has not been transferred to the Church of Jesus Christ of Latter-day Saints, but still remains part of the Griffin Estate and the responsibility of Mr. Kelsch. The Park's representations otherwise are unsupported by the record and untrue.

⁹ Certainly under the UCSPA, "[t]he unconscionability of an act or practice is a question of law for the court." Utah Code Ann. § 13-11-5(2) (1997).

1995). The trial court should be required to review all the facts and evidence surrounding the rule change before determining that the rule change was not unconscionable as a matter of law.

IV. The Park's Unjustified Refusal to Approve Any Subtenant Breaches the Covenant of Good Faith and Fair Dealing.

The Estate has asserted repeatedly that a breach of good faith and fair dealing has occurred, and continues to occur, as a result of the Park's absolute refusal to allow any sublessee or caretaker to reside in the Griffin mobile home while the home remains in the Park. (See R. at 495; 489; 818, Tr. at 35-36, 39-40, and 42-43). Nevertheless, the Park has virtually ignored this issue at every step of the way, including in its appellate brief. Never has the Park even attempted to offer any justification or explanation for its absolute and unconditional refusal to allow a sublessee.

Instead, the Park argues that the Estate's argument that the Park is attempting to constructively evict the Griffin mobile home is being asserted for the first time on appeal. Again, this contention is simply inaccurate. Indeed, at oral arguments before the trial court, counsel for the Estate plainly declared, "Now, what's going on in this case really, your Honor, is that this is an attempt to cause a constructive eviction, because they're trying to prevent anyone from living in the home and requiring [it] to be moved upon sale." (R. 818, Tr. at 40). Even if the references to "attempted constructive eviction" are few, the actual conduct complained of (the refusal to allow anybody to reside in the Griffin mobile home while in the Park) has been asserted from the beginning of this case.

(See record cites in first paragraph of this section.) It is simply a fact that the practical effect of the Park's refusal is a denial of the full leasehold interest to the Estate and the imposition of financial hardship in an obvious attempt to constructively evict the Griffin home from the Park.

The Park's argument that it is simply exercising express contractual rights does not justify the Park's conduct as a matter of law. Utah courts have unequivocally "determined that a party must exercise express rights awarded under a contract reasonably and in good faith." Olympus Hills Center v. Smith's Food & Drug Centers, 889 P.2d 445, 450 (Utah App. 1994) (emphasis added); PDQ Lube Center, Inc. v. Huber, 949 P.2d 792, 798 (Utah App. 1997).

The express provision of the Griffin lease agreement establishes the "Resident shall not assign, transfer or sublet the site or any part thereof, or this Rental Agreement, without Landlord's prior written consent." (See Exhibit "C" in addenda to Appellant's brief). Nevertheless, the Park has indicated that it will not allow anyone to reside in the mobile home and, thus, will not under any circumstance give its prior written consent. It is simply not clear what contractual "right" is being exercised by the Park.

The case of Howe v. Professional Maninvest, Inc., relied on by the Park, is distinguishable from our case and therefore inapposite. See 829 P.2d 160 (Utah App. 1992). In Howe, the lessee sought the landlord's approval after the lease was already assigned, when the lease required prior consent of the landlord. Id. at 163-64. In essence,

the mere act of assignment constituted a breach of the lease by the lessee, who could not then assert breach of good faith and fair dealing on the part of the landlord. Id.

The Park further objects that the Estate has "no reasonable expectations involved in the lease." (Appellee's brief, p. 23). Nevertheless, every party to a contract has the "right to receive the fruits of the contract." Huber, 949 P.2d at 797. Certainly, at a minimum, the use and enjoyment of the leased premises are "fruits" of any residential lease. Indeed, "all leases" are subject to an "implied covenant of quiet enjoyment." Richard Barton Enters. v. Tsern, 928 P.2d 368, 374 (Utah 1996). Accordingly, "constructive eviction occurs where a tenant's right of possession and enjoyment of the leased premises is interfered with by the landlord." Brugger v. Fonoti, 645 P.2d 647, 648 (Utah 1982); see also Barker v. Utah Oil Refining Co., 178 P.2d 386, 388 (Utah 1947). The Estate is not being allowed full use and possession of the premises by not being allowed to have someone occupy the mobile home.

Contrary to the Park's assertions, the Estate's justified expectations are relevant. "To comply with his obligation to perform a contract in good faith, a party's actions must be consistent with the agreed common purpose and the justified expectations of the other party." Huber, 949 P.2d at 797-98 (emphasis added). The Estate certainly expected to receive the basic "fruits" of a residential lease.¹⁰

¹⁰ Based on the June 10, 1996 letter which indicated that if rent was paid, the Park would take no "further action," the Estate also has the justifiable expectation that the Park would not attempt to constructively evict the Griffin mobile home.

It is worth noting that some jurisdictions have specifically imposed upon a landlord "a duty to accept a suitable subtenant when offered." Conklin, 451 N.E.2d at 1382. In Conklin, that duty was imposed upon the landlord when the deceased tenant's estate had ceased paying the rent for the premises. Id. Similarly, Utah courts have held "that a landlord who seeks to hold a breaching tenant liable for unpaid rents has an obligation to take commercially reasonable steps to . . . ordinarily . . . relet the premises." Reid v. Mutual of Omaha Ins. Co., 776 P.2d 896, 906 (Utah 1989). It stands to reason that if the Estate were to stop paying rent, in which situation the Park would then have a duty to accept a suitable subtenant offered by the Estate or else to take affirmative steps to relet, that the Park should also be obligated to accept a suitable subtenant offered by the Estate when the rent is being paid and the Estate is not in breach of the lease.

In any event, the Park was not entitled to judgment as a matter of law on the Estate's claim for breach of the covenant of good faith and fair dealing.

V. The Estate's Other Issues Have Been Adequately Presented.

With respect to the Estate's claim for violation of the UCSPA, the Estate believes the issues were adequately addressed in its initial brief. The Estate would simply call the Court's attention to the fact that claims of unconscionability are highly fact-dependent and ill-suited for disposition on summary judgment, as has already been addressed. Moreover, an unconscionable act or practice violates the Act if it occurs "before, during, or after the transaction;" in other words, before, during or after the Park's leasing of lot space #119 to the Estate. See Utah Code Ann. § 13-11-5(1) (1997).

Moreover, the Estate's arguments respecting intentional interference with economic relations and the issue of mitigation of damages have been adequately addressed in the Estate's initial brief.

CONCLUSION AND PRECISE RELIEF SOUGHT

Appellant respectfully requests that the Court of Appeals set aside the summary judgment of the trial court which granted Appellee's request for a declaratory relief and dismissed Appellant's counterclaims for violations of the MHPRA, and the UCSPA, for breach of the duty of good faith and fair dealing, and for intentional interference with economic relations. Appellant further requests that the case be remanded for trial or other proceedings in the district court, with express guidance on the interpretation, construction, and application of the relevant statutes and case law.

Dated this 23rd day of April, 1998.

GREENWOOD & BLACK

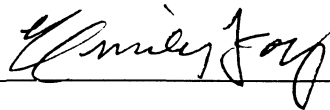


CHRIS D. GREENWOOD
JAMES K. HASLAM

CERTIFICATE OF SERVICE

I certify that on the 23rd day of April, 1998, I caused to be mailed, by first class, postage pre-paid, two (2) true and correct copies of the foregoing, REPLY BRIEF to James R. Boud, the counsel for the appellee in this matter, at the following address:

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