

2001

Mervin R. Reid, Ethna R. Reid v. Mutual of Omaha Insurance Company : Brief of Appellant

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

19678

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IN THE SUPREME COURT

OF THE

STATE OF UTAH

MERVIN R. REID and
ETHNA R. REID,

Respondents,

vs.

MUTUAL OF OMAHA INSURANCE
COMPANY, and UNITED BENEFIT
LIFE INSURANCE COMPANY,

Appellants.

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Case No. 19678

BRIEF OF APPELLANTS

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IN THE SUPREME COURT
OF THE
STATE OF UTAH

MERVIN R. REID and	:	
ETHNA R. REID,	:	
	:	
Respondents,	:	Case No. 19678
	:	
vs.	:	
	:	
MUTUAL OF OMAHA INSURANCE	:	
COMPANY, and UNITED BENEFIT	:	
LIFE INSURANCE COMPANY,	:	
	:	
Appellants.	:	

BRIEF OF APPELLANTS

STATEMENT OF KIND OF CASE

This is an action by Plaintiffs, alleging breach of a lease agreement and a Counterclaim by Defendants alleging that Plaintiffs' conduct and the conduct of the adjacent tenant constituted a breach of the lease agreement, and a constructive eviction of Defendants.

DISPOSITION IN LOWER COURT

The matter was tried to the court sitting without a jury and the trial court rendered a judgment in behalf of Plaintiffs and against Defendants for the entire amount of the future rental due under the lease agreement and for damages and the trial court dismissed Defendants' Counterclaim, no cause of action.

RELIEF SOUGHT ON APPEAL

Appellant seeks to have the judgment of the trial court reversed, and a determination made that Defendants are entitled to damages on their counterclaim; or, in the alternative, a new trial with instructions to the trial court regarding the applicable law; and/or, a remittitur or a reduction in the award to the Plaintiffs.

STATEMENT OF FACTS

1. On or about the 15th day of September, 1980, The Plaintiffs, owners and occupants of the basement and second floor (R. 430) of a building located at 2710 East 3300 South in Salt Lake City, Utah entered into a written lease agreement with Defendants for 60% of the main floor for a period of 5 years. (R. 403) The rent was to be paid in the

sum of \$1,100 on the first day of each and every month.
(Exhibit 1-P).

2. When the Defendants signed the written lease agreement (Exhibit 1-P), the entire main floor was vacant.
(R. 403, 512.)

3. On October 3, 1980, two weeks later, the Plaintiffs entered into a written lease agreement with Greco and Associates, hereinafter referred to as Intermountain Marketing, to lease the space adjacent (R. 448, 516) to the Defendants' space with occupancy to commence on the same date as that of Defendants. (Exhibit 29-P, R. 432.)

4. The Defendants' premises were situated in the leasehold property in such a manner as to require them to use a common entryway and hallway with Intermountain Marketing. (Exhibit 42-d) In addition, the employees and clients of Defendants would have to pass by the entrance to Intermountain Marketing to get to the entrance to Defendants' leased premises. (R. 601, 606)

5. The adjacent tenants, Intermountain Marketing brought large groups of sales trainees into their premises

to instruct and motivate them to go out and sell various household wares on a door to door basis. (R. 600)

6. In the process of interviewing, training and motivating the various salespersons, Intermountain Marketing engaged in practices which included the following:

a. The serving and consumption of refreshments in the halls during break times. (R. 543, 590-591, 606, 625-626, 672)

b. Setting up registration tables in the hallway. (R. 522-523, 589-590, 606, 672)

c. Permitting the trainees to engage in practice sessions with one another in the halls during break times. (R. 544, 626, 716)

d. Permitting large numbers of trainees and salespersons to overload the bathrooms, smoke, put lipstick on the wall (R. 675), fill the sinks with paper towels, extinguish cigarettes on the floors and in the toilets, and consume all the paper service making them unsuitable on frequent occasions for the Defendants or their clients to

use. (R. 441, 445-446, 544-546, 548-549, 607, 643-644, 672-673, 675-676, 712, 723-724)

e. Permitting boxes of merchandise to remain in the halls to be sold or delivered to salespersons and/or customers of Intermountain Marketing. (R. 462, 522-523, 592-593, 728, ["The hallways . . . looked like a warehouse."] R. 518)

f. During the sales and training sessions, large numbers of people would be arriving at the Intermountain Marketing offices. (R. 603, 716) As employees or clients of Defendants would attempt to make their way through the hall they would on occasion be stopped and/or directed by Intermountain Marketing people into the sales and training sessions. (R. 447, 521-522, 543, 586-590)

g. During the sales and training sessions, the instructors of Intermountain Marketing would cause the trainees and salespersons to engage in activities which were extremely noisy and

disturbed the Defendants. Those practices included:

(1) Count down drills in which the participants would count-down backwards, shouting out loud, in unison from the number ten to the number one, followed by the shout "I feel great," followed by loud clapping, cheering, and the stamping of feet. (R. 439-440, 447-448, 450, 525, 534, 542, 604-605, 620, 624-625, 632, 670, 712, 715-716, 721, 723, 727)

(2) The trainees and salespersons would engage in loud laughter and clapping on a periodic basis. (R. 465, 525-527, 609, 623, 624) On occasion the instructor would throw a pie in the face on someone present to get the trainees to scream with laughter. (R. 524-525)

(3) Playing loud stereo music, (rock, new wave, etc.) every day to

establish an atmosphere as the young trainees would come to their office.

(R. 528, 615-616, 624, 669-670)

7. The walls which separated the Plaintiffs from the Defendants were semi-portable walls called "Ultra-walls", installed over the carpet. (R. 449)

8. The walls lacked sufficient insulation, to insulate Plaintiffs' premises from the noise emanating from the Defendants' premises. (R. 511, 642-643).

9. The ceilings were suspended ceilings which were not insulated between offices. (R. 526)

10. When the noise and disturbances would emanate from Intermountain Marketing's premises, the Defendants would have to terminate their activities until the disturbance would cease. That would require the Defendants to:

a. Either stop or delay their telephone conversations. (R. 526, 727-728)

b. Either stop or delay their sales presentations to their clients. (R. 526-527, 728)

11. The disturbances continued or increased so substantially just prior to the time that Defendants vacated the premises that the following occurred:

a. The Defendants' secretaries and personnel were becoming upset by the frequent outbursts. (R. 671)

b. Because of the problems and disturbances, the Defendants could no longer safely use the offices to deal with prospective clients and to make sales presentations. Ninety percent of the business Defendants conducted at their offices was interviews with clients. (R. 513) The most important function of the office was sales. (R. 649)

The Defendants' salespersons stopped bringing their clients and prospective clients into the office for fear of loss of sales which would occur as a result of the problems in the halls, and the noise and outbursts. The salespersons began to conduct all their business outside of the office

to avoid the embarrassment and potential loss of sales. (R. 659-660, 664-665, 712-713, 718)

c. Clients of the Defendants who came to Defendants' office would respond with shock at the outbursts of noise and cheering and it was necessary for Defendants to make explanations to pacify the clients and prospective clients. (R. 527, 532, 579, 671-672, 716, 728)

12. The Intermountain Marketing, trainees and salespersons who would attend the meetings which were held three days a week every week (R. 602-603) would completely fill the entire parking lot, overflow to the street, fill all the available nearby street parking and would overflow into the church parking lot down the street. (R. 446, 520-521, 641, 679, 766-767)

13. At least three days a week, during most of the day, there were no parking spaces available in the parking lot or nearby where either the employees of Defendant or their clients could park. (R. 520-521, 608, 669, 674, 724, 729) This factual recitation was supported by the testimony of Hector Diaz R. 520-521, Alice Thompson R. 669, 674,

Verlin Nelsen R. 674, Blaine Stonebraker 729, and John Greco of Intermountain Marketing R. 608. The testimony was substantial and detailed the efforts made on occasion to attempt to direct parking to locations other than the parking lot.

Plaintiffs did not introduce any testimony which would rebut the detailed testimony presented by Defendants regarding the parking except to have the Plaintiff Ethna Reid testify and make the following statement which was essentially repeated by her once or twice:

"Parking had never been a problem and they claimed it had.

I was in the office on a considerable number of days and I never found it impossible to ever park at any time as long as I went to the back parking lot and that those parking spaces were vacant if people wanted to use them . . ." (R. 781)

14. On numerous occasions, ice and snow covered the parking lot and entryway to the building making it hazardous for the Defendants and their clients. (R. 712, 724)

15. The Defendants made numerous complaints to Plaintiffs about the conduct of Intermountain Marketing. (Exhibits 18-d, 19-d, 20-d, 23-d, 24-d, and 25-d, R.

441-453, 458-459, 530-533) During the summer of 1981, the Plaintiffs had meetings with the Defendants and with Intermountain Marketing and Plaintiffs asked Intermountain Marketing to cease their disturbing conduct. (R. 465, 536, 763, 771) Plaintiffs had their attorney write a letter to Intermountain Marketing demanding their cessation of such conduct. (R. 466-468, 774, 778, Exhibits 21-d, 22-P)

16. For a period of time following the meetings between Plaintiffs, Defendants and Intermountain Marketing, and written demands, some of the problems were alleviated. (R. 536-537, 673, 764, 771, 773-774, 778)

17. Although the noise had abated somewhat during the summer and Fall of 1981, (R. 536, 765) in January of 1982, and thereafter, Intermountain Marketing returned to its earlier schedule of noise and count-down drills. (R. 468-469, 536, 607-608, 627-628, 673-674, 716-717, 768, 771, Exhibit 23-d)

18. Defendants complained about the disturbances to Plaintiffs on several occasions and wrote letters to Plaintiffs. (Exhibits 18-d, 19-d, 20-d, 23-d, 24-d, and 25-d, R. 441-453, 458-459, 530-533)

19. In response to the Complaints by Defendants, from and after December 15, 1981, the the Plaintiffs took no action. (R. 471-477, 487, 776, 779-780, 784)

20. Plaintiffs were separated from the noise and confusion created by Intermountain Marketing by Concrete Floors which permitted little or no noise to be transmitted to Plaintiffs' premises. (R. 450, 512, 708.)

21. In addition, after Intermountain Marketing had moved into the premises, the Plaintiffs isolated the second floor and the basement from the main floor tenants by constructing a sound barrier and glass wall at the entry way to the building so that the occupants of the main floor and their clients, entered by a door and hall separate from that of the Plaintiffs. (R. 698-699)

22. During the last several months of 1981, and the first two months of 1982, the conduct of Intermountain Marketing was disturbing Defendants' business to the point that the manager of the local office and personnel at the national office became concerned about the potential loss of business which would occur if the Defendants continued to

occupy the premises under the conditions which existed. (R. 691-693, 658-660)

23. The Defendants sent Plaintiffs a letter dated December 12, 1981, demanding that Plaintiffs take action to alleviate the problems. Plaintiffs took no action, in response thereto. (R. 702-704, 706-707) The Defendants thereafter notified Plaintiffs that they considered the lease agreement to be breached by Plaintiffs and Defendants vacated the premises on or about February 12, 1982. (Exhibit 2-P and R. 542)

During this period of time, the Plaintiffs took the position that no problem existed. (See Exhibits 26-P and 33-P). The Plaintiff Ethna Reid testified as follows:

" . . . [T]here was no problem. . . there just had not been a problem. Intermountain Marketing, I did not feel, was making a noise or a confusion. I did not think that they had created any problem for Mutual of Omaha, not as serious a problem as Mr. Morten was trying to make out." (R. 784)

Concerning the problems other than parking, the foregoing unsubstantiated opinion of the Plaintiff Ethna Reid, was the only testimony offered to rebut the

overwhelming testimony and evidence offered by the Defendants.

24. Within a few days after Defendants vacated the premises, Plaintiffs entered into a lease agreement with Intermountain Marketing (Exhibit 31-P) to lease a substantial portion of the premises previously occupied by Defendants, with occupancy to commence on April 1, 1982. (R. 612-614, 699-701)

25. Within a few weeks after Defendants vacated the premises, Plaintiffs entered into an additional lease agreement to lease virtually the entire main floor of the premises to Intermountain Marketing (Exhibit 30-P, R. 612-614, 699-701)

26. Shortly after Defendants vacated the premises, the Plaintiffs remodelled the premises for occupancy by Intermountain Marketing, and Intermountain Marketing took possession of the newly remodeled portion of the premises on or about July 1, 1982. (Exhibit 30-P)

27. Plaintiffs filed this action against Defendants on April 12, 1982, Defendants Counterclaimed and a trial was held.

28. After Defendants had vacated and had moved to their new location they noted a substantial increase in their business, which they in part attributed to the agents' attitudes toward and utilization of the new offices. (R. 660-661, 666)

The Plaintiffs offered no evidence to rebut any of the foregoing statements of facts except as indicated.

ARGUMENT

POINT NO. I

THE TRIAL COURT FAILED TO MAKE SPECIFIC FINDINGS ON ALL MATERIAL ISSUES OF FACT AND SUCH FAILURE ALONE CONSTITUTES REVERSIBLE ERROR.

A. THE TRIAL COURT FAILED TO MAKE SPECIFIC FINDINGS ON THE PERTINENT ISSUES BEFORE THE COURT.

Rule 52 of the Utah Rules of Civil Procedure requires the trial court to make specific findings of fact and conclusions of law. The rule provides as follows:

"In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon. . ."

The rule has been upheld by the Utah Supreme Court in several cases which have held that failure to make findings

on all material issues constitutes reversible error. (See Romrell v. Zions First National Bank N.A., 611 P.2d 392 (Utah 1980); Boyer Co. v. Lignell, 567 P.2d 1112 (Utah 1977); Gaddis Investment Co. v. Morrison, 3 Utah 2d 43, 278 P.2d 284 (1954).)

A review of the so-called Findings of Fact (R. 353) demonstrates that they are not findings but instead are conclusions. Appellants respectfully call the court's attention to the following paragraphs which Appellants submit are not findings but instead are conclusions:

Paragraphs 6, 7, 8, 9, 10, 13, 17, 23, and 28. (R. 353-358)

A review of the factual recitation contained in this brief demonstrates that substantial factual issues were presented to the trial court, but the trial court failed to make specific findings on any of the factual issues presented.

Defendants respectfully submit that the failure of the trial court to make findings on those issues constitutes reversible error.

B. HAD THE TRIAL COURT MADE SPECIFIC FINDINGS ON THE PERTINENT FACTUAL ISSUES BEFORE THE COURT, THOSE FINDINGS WOULD HAVE SUPPORTED DEFENDANTS' CLAIMS AND WOULD HAVE DEMONSTRATED THAT PLAINTIFFS WERE NOT ENTITLED TO RECOVER ON THEIR COMPLAINT.

A review of the factual recitation in this brief demonstrates substantial, uncontraverted evidence and testimony was presented to the trial court by Defendants. In regard to several issues, the trial court held that further testimony would be cumulative and would not be permitted.

Since no testimony or evidence was introduced to rebut the substantial testimony introduced by Defendants the trial court was obliged to make findings consistent with that testimony and evidence.

Not only did the trial court fail to make specific findings consistent with the facts set forth in the factual recitation of this brief, but also it merely stated that the claims of Defendants "were without merit." (R. 280)

Although the trial was commenced on July 18, 1984, the trial court did not issue its Memorandum Decision until September 29, 1983.

The Defendants respectfully submit that the trial court's failure to make findings on all the relevant and pertinent issues and the trial court's failure to make findings consistent with the uncontraverted testimony and evidence constituted reversible error.

C. THE TRIAL COURT COMMITTED FURTHER
ERROR BY ENTERING CONCLUSIONS OF LAW NOT
SUPPORTED BY THE FINDINGS.

The following Utah cases have held that findings are necessary to support conclusions of law. B.T. Morgan, Inc. v. First Security Corporation, 82 Utah 316, 24 P.2d 384 (1933); and Parrott Bros. Co. v. Ogden City, 50 Utah 512, 167 P. 807 (1917).

There are no findings to support the following conclusions of law:

Paragraphs 1, 2, 3, 4, 5, 6, 7, 8 and 9 and therefore paragraph 10 as well. (R. 359-361)

Absent findings to support the conclusions, the conclusions of law must fail and likewise the judgment rendered in reliance thereon.

POINT NO. II

PLAINTIFFS' CONDUCT AND ITS FAILURE TO TAKE ADEQUATE MEASURES TO ALLEVIATE THE CONDITIONS CAUSED BY INTERMOUNTAIN MARKETING CONSTITUTED A CONSTRUCTIVE EVICTION OF DEFENDANTS FROM THE PREMISES.

A. THE LAW OF CONSTRUCTIVE EVICTION.

The doctrine of Constructive Eviction has long been recognized by the Utah Supreme Court. In Barker v. Utah Oil Refining Co., 111 Utah 308, 178 P.2d 386, 388 (1947), the Utah Supreme Court set forth the Utah law regarding constructive eviction and quoted Black's Law Dictionary as follows:

"Actual eviction is an actual expulsion of the tenant out of all or some part of the demised premises; a physical ouster or dispossession from the very thing granted or some substantial part thereof. * * *

"Constructive eviction. * * * With reference to the relation of landlord and tenant, there is a 'constructive eviction' when the former, without intent to oust the latter, does some act which deprives the tenant of the beneficial enjoyment of the demised premises or materially impairs such enjoyment. * * *"

In Barker the landlord converted a garage on the leased premises to a dance hall without permission of the

tenant. The Court held that such conversion could constitute constructive eviction.

In Thirteenth & Washington STS. Corp. v. Nelsen, 123 Utah 70, 254 P.2d 847 (1953), the Utah Supreme Court recognized the right of a tenant to claim a constructive eviction where the tenant's enjoyment of the premises was substantially disturbed. In this case, the tenants claimed a constructive eviction occurred because the landlord leased portions of the building for use as a shoe shine stand, beauty parlor and barber shop and allowed other conditions to exist. The Utah Supreme Court stated:

"Concerning the general law regarding what interference will constitute a constructive eviction, American Jurisprudence has this to say:

"* * * any disturbance of the tenant's possession by the landlord, or someone acting under his authority, which renders the premises unfit for occupancy for the purposes for which they were demised * * * amounts to a constructive eviction, provided the tenant abandons the premises within a reasonable time."

but properly adds this qualification:

"* * * To constitute a constructive eviction, the interference * * * with the tenant's enjoyment of the demised premises must be of a substantial nature

and so injurious as to deprive him of the beneficial enjoyment of a part or the whole of the demised premises."

. . . The failure to do some act or to adequately perform it, may render a building just as untenable as affirmative interference. The text in American Jurisprudence further reads: "an eviction may be based on the landlord's omission to act where it is his duty to act." [Emphasis added].

Where the landlord authorizes conduct by another it is imputable to him and he must bear the responsibility for it. Plaintiff's agents could well foresee that the shoeshine stand, barber shop and beauty parlor installations would bring about the difficulties that were encountered. The plaintiff is answerable for the natural and probable consequences of the placement and operation of these businesses, as well as for the direct consequences of its own acts or failures to act.

The court went on to review the circumstances of the case, particularly the fact that any one given problem might not have constituted a constructive eviction, but a composite of different elements may together comprise a constructive eviction. The court stated:

"The law is a dignified profession involving the selling of one's services. Professional standards prevent a lawyer from advertising his talents, and as a consequence he is dependent upon other means of attracting and holding a clientele. In connection with the promise of a "first class" building, defendants had a right to expect that the entrance, corridors and offices would present

a businesslike and attractive appearance consonant with the dignity and respectability of their profession and that the building services would also comport therewith. However, even Mr. Kipp, plaintiff's building manager, admitted that certain of the conditions fell below such standard. (Id. at 851-852.)

Utah does not stand alone in its view regarding constructive eviction. In the landmark case of Hannan v. Harper 189 Wis. 588, 208 N.W. 255, 45 A.L.R. 1119 (1926), the Court held that the leasing of an upper apartment of a two-family flat for the use of a college fraternity constituted a breach of the covenant of quiet enjoyment in the lease of a lower flat for residential purposes. In rendering its decision the Court reviewed numerous other decisions and stated:

"An actual expulsion from leased premises is not necessary to constitute an eviction. Any act on the part of the landlord which so interferes with the tenant's possession of the premises as to unfit them for the purpose for which they were leased, and render them uninhabitable for such purposes, and compel the abandonment thereof, constitutes an eviction. . . . Such an eviction furnishes ground for an action for such damages as are the natural and proximate consequences thereof." (208 N.W. at 258.)

The annotations following the case in A.L.R. demonstrate other jurisdictions which also follow the same

rule concerning the landlord's responsibility in leasing the adjacent premises and in the conduct of other tenants in the demised premises.

Several other jurisdictions have ruled that loud noises caused by adjacent tenants constitute grounds for constructive eviction.

In Millbridge Apartments v. Linden, 151 N.J. Super. 168, 376 A.2d 611 (1977), the court properly held that the Reste principle relating to constructive eviction could be applied to a situation similar to that before us. There defendants-tenants frequently complained to their landlord that their neighbors were extremely loud. When the landlord's efforts to correct the problem were unsuccessful, the tenants began withholding their rent. In the landlord's ensuing action for possession based on nonpayment of rent, the tenants contended that the landlord's failure to correct the problem constituted a breach of the covenant of habitability.

Judge Weinberg stated that "repeated loud noise suffered by a residential tenant, which could have been cured by a landlord, can be a defense to a dispossess action

under the rubric of the warranty of habitability." 151 N.J. Super. at 170-171, 376 A.2d 612. He said:

Residential tenants expect to live within reasonable boundaries of quiet. Continual noise of a loud nature infringes upon those expectations and makes one's premises "substantially unsuitable for the purpose for which they are leased," i.e., ordinary residential living. Accordingly, this court holds that noise may constitute a constructive eviction and legally justify a tenant's vacating. . . . (Id. at 613.)

In Gottdiener v. Mailhot, 179 N.J. Super. 286, 431 A.2d 851 (1981), the Superior Court of New Jersey held that the failure of a landlord to prevent adjacent tenants from making excessive amounts of noise constituted constructive eviction. The Superior Court said:

"The primary question on this appeal is whether defendants, former tenants in plaintiffs' apartment complex, may invoke the remedy of constructive eviction by reason of plaintiffs' claimed failure to take sufficient measures to protect defendants from excessively noisy and unruly neighboring tenants." (Id. at 852.)

The Superior Court reviewed the Complaints of the tenant which consisted of the following:

"On several occasions in December 1978 and January 1979 defendants complained of "intolerable noise" coming from the downstairs apartment, such as slamming doors, yelling and screaming children,

and excessive volume from the television and radio after 10 p.m." (Id. at 853.)

The landlord attempted to alleviate the friction between the tenant and the adjacent tenant, but the New Jersey Superior Court held:

"The law of landlord and tenant, including that relating to constructive eviction, has undergone considerable change in recent years. In Reste Realty Corp. v. Cooper, 53 N.J. 444, 456-457, 251 A.2d 268 (1969), the court stated that where there is a covenant of quiet enjoyment, whether expressed or implied, which is breached substantially by the landlord, the doctrine of constructive eviction is available as a remedy for the tenant; and that any act or omission of the landlord or anyone acting under his authority which renders the premises substantially unsuitable for the purpose for which they are leased, or which seriously interferes with the beneficial enjoyment of the premises, is a breach of that covenant and constitutes a constructive eviction of the tenant." (Id. at 853-854.)

Since noise may constitute a constructive eviction, the court determined that excessive noise could also constitute a breach of the covenant of habitability. . . .

We agree with the reasoning of Millbridge Apartments v. Linden. A number of recent cases from other jurisdictions have recognized that a landlord may constructively evict a tenant by failing to prevent other tenants from making excessive amounts of noise. Blackett v. Olanoff, 371 Mass. 714, 358 N.E.2d 817 (Sup. Jud. Ct. 1977); Colonial Court Apartments, Inc. v. Kern, 282 Minn. 533, 163 N.W.2d 770 (Sup. Ct.

1968); Cohen v. Werner, 82 Misc. 2d 295, 368 N.Y.S.2d 1005 (Civ. Ct. 1975), aff'd 85 Misc. 2d 341, 378 N.Y.S.2d 868 (App. Term. 1975). Accord Restatement, Property 2d (Landlord and Tenant), Sec. 6.1, comment d at 226 (1977).

.

We hold that in order to justify early termination of the lease, or for that matter an abatement of rent, the tenant must show that the noise or conduct of a cotenant made the premises substantially unsuitable for ordinary residential living and that it was within the landlord's power to abate the nuisance. The test is objective; the noise or disruptive conduct "must be such as truly to render the premises uninhabitable in the eyes of a reasonable person." (Id. at 854.)

In Bruckner v. Helfaer, 222 N.W. 790 (Wis. 1929) the Court reviewed a claim of a tenant that too much noise from an adjacent tenant caused him to vacate his apartment. The Court held that this disturbance constituted a constructive eviction of the tenant. The Court stated:

" . . . The general rule, as stated in 16 Ruling Case Law, 949, is: "Where a landlord * * * is guilty of such acts as will justify or warrant the tenant in leaving the premises, and he abandons them, then the circumstances which justify such abandonment itself, will support a plea of eviction as against an action for rent." "

In Wade v. Herndl, 127 Wis. 544, 107 N.W. 4 (1906), the Court held that shaking and vibration caused by acts of

an adjacent tenant made the tenant's room unsuitable for the purposes for which it was leased to her because she could not continue to paint on glass (as an artist). The disturbance constituted a constructive eviction for the reason that the room was not suitable for the purposes for which it was leased.

In Lay v. Bennett, 4 Colo. App. 252, 35 P. 748 (Colo. 1894) the Court held that the leasing of premises above those of the complaining tenant to tenants for the purpose of prostitution constituted a constructive eviction of the complaining tenant.

In Maple Terrace Apartment Co. v. Simpson, 22 S.W.2d 698 (Texas 1929), the Court held that the act of a cotenant in keeping a dog in its apartment contrary to the provisions of the lease prohibiting the keeping of animals on the premises and the failure of the landlord to take such action as was required to remove the dog from the premises constituted constructive eviction of the complaining tenant.

Applying the law to the facts of the case at hand, the Defendants respectfully submit that the facts of the case at

hand compel a conclusion that Defendants were constructively evicted from the premises.

The conduct of Intermountain Marketing rendered the premises unsuitable for the purpose for which they were leased, i.e. a dignified office in which the Defendants could conduct their business, service clients, and sell insurance to prospective clients. Defendants required an office which evidenced an atmosphere consistent with dignity, trust, professionalism and substantiality. (R. 514, 681-682, 689)

In the Memorandum Decision rendered by the trial court, the trial court found that the:

" . . . noise made by Intermountain Marketing was distracting to defendants. . . [but] was not of sufficient magnitude to warrant abandonment. . ."
(R. 279)

The trial court was obligated to make findings regarding the noise and the level of distraction to Defendants but it failed to do so.

However, the further statement made by the trial court inferring that actual loss of business had to be demonstrated to warrant abandonment demonstrated that the

trial court applied an incorrect standard in rendering its decision concerning constructive eviction. The trial court in its Memorandum Decision stated:

"Furthermore, no evidence was presented to the Court that as a result of the noise and the other alleged cumulative acts of Plaintiffs caused defendants any loss of business or damages." (R. 279-280)

Defendants presented substantial, uncontraverted evidence that the noise and other conduct of Intermountain Marketing and Plaintiffs caused the premises to be no longer suitable for the purposes for which they were leased.

The requirement imposed by the trial court that Defendants must demonstrate actual business losses and damages is not the appropriate legal test for constructive eviction and is not required under the Utah decisions or the common law on the subject.

The impact of the facts in the case at hand is so similar to the impact of the facts in Thirteenth & Washington STS. Corp. v. Nelsen, 123 Utah 70, 254 P2d 847 (1953), as to make the case practically controlling in the case at hand. In addition, the problems associated with the noise and shouting, the use of the halls and the lack of

parking space appear to accentuate the need for relief in the case at hand.

In a recent case decided by the Utah Supreme Court, Brugger v. Fonoti, 645 P.2d 647 (Utah 1982), the Utah Supreme Court reviewed the memorandum decision of the trial court which stated that the main concern in the case was the disco in the building. As to the disco, the trial court observed:

"I find that the disco was a disturbance, but in relation to the total operation of the cafe, the noise and the kids in the hall would have a very limited effect on the defendants' operation."
(Id. at 648.)

It should also be observed that in Brugger, the restaurant, which claimed constructive eviction, was behind in the rent when it vacated the premises in August, had not paid the utility bills since April, and had remained in possession of the property for approximately 10 months after the disco had taken possession of the space below.

In the case at hand, after the disturbances and parking problems started, Defendants complained to Plaintiffs. Plaintiffs took action from time to time to alleviate the problems. The problems which existed decreased

substantially, in some instances, after Plaintiffs took action. Near the end of the year 1981, and the first part of the year 1982, the problems increased substantially. Defendants again complained but Plaintiffs did nothing to alleviate the problems. Defendants gave Plaintiffs adequate notice and time to resolve the problems and when no resolution occurred Defendants gave final notice and vacated the premises. When Defendants vacated the building, all rental due was paid.

POINT NO. III

PLAINTIFFS BREACHED THE LEASE AGREEMENT BY NOT PROVIDING THE REQUIRED ALLOTTED PARKING AND THEIR PRIOR BREACH EXCUSED DEFENDANTS FROM PERFORMANCE UNDER THE TERMS OF THE LEASE AGREEMENT AND/OR CONSTITUTED A CONSTRUCTIVE EVICTION OF DEFENDANTS.

In the case at hand, the lease agreement provided for a specific number of parking spaces which were to be allocated to Defendants. The applicable provisions of the lease agreement are as follows:

"8. Parking: Landlord shall provide off-street parking for 12 automobiles. In the event that parking is reserved in the covered parking area, tenant will be allotted his proportional share in addition to access to all

non-covered, unreserved parking that is available for all tenants use."

Plaintiffs did not take any action to assure Defendants' use of their allotted parking space. Plaintiffs did not designate parking spaces, did not allot or assign numbers, did not police the parking lot and took the position that no parking problem existed. (R. 446, 453-454, 520-521, 608, 641, 669, 674, 679, 724, 729, 767, and Exhibits 26-P and 33-P).

Plaintiffs' failure to take any action to provide the necessary parking spaces for Defendants was in breach of the lease agreement specifically requiring the allocation of parking spaces for Defendants' use.

At the very least, Plaintiffs' failure to provide the necessary parking spaces adds to Defendants' claims that Plaintiffs' constructively evicted Defendants from the premises.

POINT NO. IV

THE TRIAL COURT ERRED IN REFUSING TO
PERMIT DEFENDANTS TO INTRODUCE TESTIMONY
AS TO THE STANDARDS TO BE MAINTAINED BY
DEFENDANTS IN THEIR LEASED PREMISES.

In Thirteenth & Washington STS. Corp. v. Nelsen, 123
Utah 70, 254 P.2d 847 (1953), the Utah Supreme Court made it
clear that the occupants of the premises are entitled to
have the premises maintained in such a condition as to be
fit for the purpose for which they were leased and so as to
be conducive to the conduct of their business in a
professional manner.

During the trial, the Defendants called Tony Supancic
from Defendants' national headquarters, as a witness to
testify concerning the standards which the Defendants
maintain and require nationwide concerning their leasehold
premises. Tony Supancic handled all leasing agreements for
Defendants and had negotiated and concluded the lease
agreement which is the subject matter of this action. (R.
509, 681, 685)

The trial court refused to permit Tony Supancic to testify as to the standards required locally and nationwide. (R. 691)

The Defendants made a proffer of the testimony which would have been introduced had the trial court permitted the Tony Supancic to testify. (R. 691-693)

It is clear from the testimony which was introduced and permitted at the time of the trial of the above-captioned matter that the Plaintiffs' failed to provide leased premises which met the standards required. (R. 514)

Had the trial court permitted Tony Supancic to testify, his testimony would have demonstrated that Defendants were justified in vacating the premises because of the potential loss of business and damage to the Defendants.

The trial court's decision in this regard constituted reversible error.

POINT NO. V

THE TRIAL COURT FAILED TO REQUIRE THE PLAINTIFFS TO MAKE AN ELECTION OF THE REMEDY WHICH THEY SOUGHT AT TRIAL.

In the event of a default on the part of Defendants, Plaintiffs could have elected to terminate the lease agreement and rely upon their common law remedies outside the terms of the lease agreement, or they could have elected one of the three alternative courses of action or remedies pursuant to the terms of the lease agreement.

At the commencement of trial, the Defendants requested that the trial court require the Plaintiffs to make the election as to which position they were going to take during the course of the trial. Defendants' motion was denied.

In Farmers & Merch. Bank v. Universal C.I.T. Credit Corp., 4 Utah 2d 155, 289 P.2d 1045 (1955), the Utah Supreme Court made the following statement:

"The doctrine of election of remedies applies as a bar only where the two actions are inconsistent, generally based upon incompatible facts; the doctrine does not operate as an estoppel where the two or more remedies are given to redress the same wrong and are consistent. Where the remedies afforded are inconsistent, it is the election of one that bars the other; but where they are consistent, it is the satisfaction that operates as a bar." (Id. at 1049.)

In Cook v. Covey-Ballard Motor Co., 69 Utah 161, 253

P. 196 (1927), the Utah Supreme Court stated:

"It is well settled that one who is induced to make a sale or trade by the deceit of a vendee has the choice of two remedies upon his discovery of the fraud; he may affirm the contract and sue for his damages, or he may rescind it and sue for the property he has sold or what he has paid out on the contract. The former remedy counts upon the affirmance or validity of the transaction, the latter repudiates the transaction and counts upon its invalidity. The two remedies are inconsistent, and the choice of one rejects the other, because the sale cannot be valid and void at the same time. . . .[citation omitted] . . . There thus were open to him at that time two coexisting remedies, which were alternative and inconsistent with each other, and, when the plaintiff elected the one as he did, the other was no longer available. (Id. at 199.)

. . . .

The doctrine of an election rests upon the principle that one may not take contrary positions, and where he has a right to choose one of two modes of redress, and the two are so inconsistent that the assertion of one involves a negation or repudiation of the other, the deliberate and settled choice of one, with knowledge or means of knowledge of such facts as would authorize a resort to each, will preclude him thereafter from going back and electing again. . . ." (Id. at 200.)

In Royal Resources v. Gibraltar Fin. Corp., 603 P.2d

793 (Utah 1979), the Utah Supreme Court stated:

"The doctrine of election of remedies is a technical rule of procedure and its purpose is not to prevent recourse to any remedy, but to prevent double redress for a single wrong. Said doctrine presupposes a choice between inconsistent remedies, a knowledgeable selection of one thereof, free of fraud or imposition, and a resort to the chosen remedy evincing a purpose to forego all others." (Id. at 796.)

In Costello v. Kasteler, 7 Utah 2d 310, 324 P.2d 772 (1958), the Utah Supreme Court recognized the principle that a Party cannot have a judgment against an agent and an undisclosed principal and that the party seeking such judgment must elect to hold one or the other.

In the case at hand, the lease agreement contains a provision governing the Plaintiffs' rights in the event of a default by Defendants. The applicable provision is as follows:

"19. DEFAULT IN RENT, INSOLVENCY OF TENANT: If tenant shall make default in the payment of the rent reserved hereunder, . . . and any such default shall continue for a period of ten (10) days, after written notice to Tenant, or if the lease premises or any part thereof shall be abandoned or vacated . . . , then Landlord, in addition to any other rights or remedies it may have, shall have the immediate right of re-entry and may remove all persons and property from the premises. . . . Landlord may elect to re-enter, as herein provided, or Landlord may take possession pursuant to this Lease and relet said premises or any part thereof for such term or

terms . . . and at such rental or rentals and upon such other terms as Landlord in the exercise of Landlord's sole discretion may deem advisable with the right to make alterations and repairs to said premises. Upon each such reletting, Tenant shall be immediately liable for and shall pay to Landlord, in addition to any indebtedness due hereunder, the costs and expenses of such reletting including advertising costs, brokerage fees, any reasonable attorney's fees incurred and the cost of such alterations and repairs incurred by Landlord, and the amount, if any, by which the rent reserved in this Lease for the period of such reletting . . . exceeds the amount agreed to be paid as rent for the premises for said period by such reletting. . . . No such re-entry or taking possession of the premises by Landlord shall be construed as an election by Landlord to terminate this Lease unless the termination thereof be decreed by a court of competent jurisdiction or stated specifically by the Landlord in writing addressed to Tenant. Notwithstanding any such reletting without termination, Landlord may at any time thereafter elect to terminate this Lease for such previous breach. Should Landlord at any time terminate this Lease for any breach, in addition to any other remedy Landlord may have, Landlord may recover from Tenant all damages Landlord may incur by reason of such breach, including the cost of recovering the premises including attorney's fees, court costs, and storage charges and including the worth at the time of such termination of the excess, if any, of the amount of rent and charges equivalent to rent reserved in this Lease for the remainder of the stated term over the then chargeable rent on the premises for the remainder of the stated term, all of which amounts shall be immediately due and payable from Tenant to Landlord. . . ." [Emphasis added.]

As the foregoing provisions in the lease clearly indicate, the Plaintiff had two (2) alternative remedies which it could have pursued which were mutually exclusive and the choice of one of which precluded the choice of the other as follows:

1. Re-enter the premises, make alterations and repairs and re-let the premises and commence action against Defendants for the costs incurred by Plaintiffs as specified in the default clause of the lease agreement and for the difference between:

The "amount, if any, by which the rent reserved in this Lease for the period of such reletting . . . exceeds the amount agreed to be paid as rent for the premises for said period by such reletting." (Lease Agreement, Para. 19)

2. Terminate the lease agreement, and sue for damages incurred in the breach as specified in the default clause of the lease agreement, and for the difference between:

The "worth at the time of such termination of the excess, if any, of the amount of rent and charges equivalent to rent reserved in this Lease for the then remainder of the stated term over the then chargeable rent on the premises for the remainder of the stated term. . ." (Lease Agreement, Para. 19)

3. According to the terms of the Lease agreement and the common law applicable, the trial court could have determined that Plaintiffs' conduct amounted to a termination of the lease agreement, thus creating a third alternative.

Alternative No. 2 was either not available to Plaintiffs, because Plaintiffs did not introduce any evidence as to the "chargeable rent" or fair market rental value of the premises, or there were no damages available because the the common law presumes:

" . . . the lessor will be able to re-rent the leased premises for the amount of the reserved rent without loss or damage." C.D. Stimson Co. v. Porter, 195 F.2d 410, 413 (10th Cir. 1952)

In the case at hand, prior to the commencement of the trial, the Defendants moved for an order to require the Plaintiffs to elect the remedy which the Plaintiffs would seek at the trial. (R. 398) The request was made in written form supported by a Memorandum and was made orally to the trial court. (R. 339) The trial court did not require such an election to be made. (R. 400)

Later, the trial court stated that it might require the Plaintiffs to make an election of remedy. (R. 788) The Plaintiffs failed to do so and the trial court stated that it would make the election for the Plaintiffs. (R. 790)

In the Memorandum Decision issued by the trial court the following statement is made:

"Defendants' Motion to require plaintiffs to elect remedy is denied. Plaintiffs' remedy for abandonment is set forth in Paragraph 19 of the Lease dated the 15th day of September, 1980. Plaintiffs do not claim in their Amended Complaint that they terminated the lease and no such evidence was presented. Plaintiffs, in effect, elected their remedy by not giving written notice to defendants terminating the lease." (R. 279)

The trial court's ruling that Plaintiffs' conduct constituted an election not to terminate the lease agreement requires the logical conclusion that Plaintiffs therefore elected to proceed under alternative No. 1 of the lease agreement. Plaintiffs' damages would therefore be the difference between the lease agreement rate with Defendants and Plaintiffs' lease agreement rate with the new tenant, Intermountain Marketing.

The trial court's conclusion that Plaintiffs did not terminate the lease because Plaintiffs did not introduce

evidence of a written notice of termination failed to address the issue of whether or not as a matter of law, Plaintiffs' conduct constituted a termination of the lease agreement.

Since the trial court concluded that Plaintiffs elected their remedy under Paragraph 19 of the Lease agreement, the trial court was obliged to restrict its award to Plaintiffs to the remedy elected by Plaintiffs.

Not only did it constitute reversible error for the trial court to refuse to require Plaintiffs to elect their remedy prior to the commencement of trial so Defendants could present a defense to the elected remedy, but also, the award of damages and the relief granted by the Court was not permitted by the default clause of the Lease agreement, i.e. an award of all the future unaccrued rental due under the terms of the lease agreement. The judgment must therefore be reversed.

POINT NO. VI

THE JUDGMENT RENDERED IN BEHALF OF PLAINTIFFS AND AGAINST DEFENDANTS IS VOID AND UNENFORCEABLE AS A MATTER OF LAW.

A. AS A MATTER OF LAW, THE COURT MUST CONCLUDE THAT THE LANDLORD EXERCISED DOMINION OVER THE PREMISES TO THE EXCLUSION OF THE TENANT AND THAT CONDUCT OF THE LANDLORD TERMINATED THE LEASE AGREEMENT.

In Willis v. Kronendonk, 58 Utah 592, 200 P. 1025

(1921), the Utah Supreme Court stated:

"It has so frequently been held by the courts aforesaid that in case a tenant surrenders the premises to his landlord before the end of the term, and before any of the rent is due and payable, the tenant is released or discharged from the payment of all rent, and that the landlord is without a remedy, that the rule has practically become elementary. The doctrine is likewise stated by all the text-writers on Landlord and Tenant." (Id. at 1027-1028)

" . . . the courts are all agreed that, where there is a surrender by a tenant and an acceptance by the landlord, as in the case at bar, no action can be maintained by the landlord after such surrender for any rent not due and payable at or before the surrender went into effect, that in case of surrender the landlord can only maintain an action for the rent that was due and payable at the time of the surrender, and that in case of surrender before the rent is payable there can be no apportionment of the rent. So far as the writer is advised there are no decisions to the

contrary. None have been cited, and the writer, after making diligent search, has not found any." (Id. at 1029.)

"Assuming, however, that there had been merely an abandonment of the premises by the defendant, then the result, in view of the undisputed facts, would still have to be the same. As pointed out in the case cited from California, where a tenant abandons the premises, and the landlord unconditionally goes into possession thereof and treats them as though the tenancy had expired, it amounts to a surrender, and the landlord cannot thereafter recover any rent, nor sue for damages. If he desires to reserve that right, he must recognize the tenant's rights in the premises for the unexpired term, and sue him for damages upon his breach of covenant to pay rent. This, however, is elementary doctrine." (Id. at 1030.)

The Utah Supreme Court followed the same ruling in the later case of Belanger v. Rice, 2 Utah 2d 250, 272 P.2d 173 (1954). In that case, the Court stated:

"A surrender may take place where there is an express agreement of the parties or by operation of law. There is no evidence of an express agreement, and hence we must examine those elements which might give rise to a surrender by operation of law. As stated in 32 Am. Jur., Landlord and Tenant, Sec. 905:

"A surrender of a lease by operation of law results from acts which imply mutual consent independent of the expressed intention of the parties that their acts shall have that effect; it is by way of estoppel. However, the intention of the landlord to accept the

tenant's surrender of the premises is important on the question of surrender by operation of law, and a surrender will not be implied against the intent of the parties, as manifested by their acts; * * * " (Id. at 174.)

"It is fundamental that where a tenant surrenders and the landlord accepts the premises during the term of the lease, the landlord cannot recover rent not due and payable at the time of the surrender." (Id. at 175.)

In John C. Cutler Association v. De Jay Stores, 3 Utah 2d 107, 279 P.2d 700 (1955), the question of whether or not the acts of the parties demonstrated a surrender and acceptance of the surrender by the Landlord was reviewed. The Supreme Court stated:

"It is only when he [the landlord] exercises dominion over the premises beyond those purposes and inconsistent with the rights of a tenant whom he seeks to hold for the rental of the premises, that a finding of surrender is justified." (Id. at 702.)

The Court then indicated that there was a conflict of authorities as to "the rule of law to be applied in determining whether a reletting will terminate the obligations of a lease." After reviewing the three schools of thought on the subject, the Utah Supreme Court adopted the following rule:

"We believe that the third rule referred to by the Connecticut court, suggesting that there is no arbitrary standard to be invariably applied, best lends itself in doing justice in such controversies, and therefore align ourselves with it.

The question of surrender, being generally one of fact as to what was the intention of the parties, is to be determined from all attendant circumstances including the conduct and expressions of the parties." (Id. at 703.)

The Supreme Court then indicated that when the lessor leased the property to another tenant, and such action constituted an exercise of dominion over the property to the exclusion of the tenant, that such act terminated the lease agreement as well as any obligation to pay rent thereafter on the lease agreement.

In Frisco Joes, Inc. v. Peay, 558 P.2d 1327 (Utah 1977), the Utah Supreme Court stated:

"As a general proposition, where a tenant offers to surrender a lease and the landlord agrees to accept the surrender, that extinguishes any liability for rent after such surrender. But it does not extinguish rights which have accrued beforehand." (Id. at 1330.)

In Frisco Jones, the Utah Supreme Court modified the judgment of the trial court and held that any award for rent accruing after the surrender of the lease and acceptance by

the landlord "never did become due. It is therefore necessary to reduce the judgment by that amount." (Id. at 1330.)

Concerning the intention of the landlord to accept the premises, 52 C.J.S. Landlord & Tenant Section 493 (2) at page 433, makes reference to the school of thought that the intention of the landlord will be controlling on the question of surrender of the premises. It states:

" . . . Thus an acceptance will be implied where the landlord takes possession of the premises and uses them for his own purposes, as where he remodels them so as to make them unavailable for the purposes for which they were leased and untenable for the period of remodeling, or where he relets them before the tenant vacates, and ordinarily is implied where he tears down all the buildings on the premises.

It has also been held that an acceptance will be implied where the landlord unqualifiedly takes absolute possession of the premises unless he expresses an intention to hold the lessee for rent or the lease authorizes such action. It has further been adjudicated that if the landlord wishes to prevent an acceptance by operation of law he must either by word or act, convey to the tenant's notice that he is resuming possession for the tenant's benefit and not his own benefit, but, where the landlord's conduct is inconsistent with his notice that he is acting for the tenant, re-entry will be an acceptance."

In the facts of the case at hand, there is no dispute in the evidence nor any evidence offered to disprove the following propositions which were clearly demonstrated by Defendants to show that Plaintiffs, by their acts, accepted the surrender of the subject premises:

1. That Defendants unequivocally surrendered the premises to Plaintiffs.

2. That Plaintiffs exercised immediate and absolute dominion and control over the premises.

3. That Plaintiffs remodeled the premises and leased the entire portion of the premises to another tenant within a few weeks of the time Defendants surrendered the premises to Plaintiffs.

4. That Plaintiffs have never tendered or offered to tender possession of the premises to Defendants from and after the date Defendants surrendered possession to Plaintiffs.

5. That from and after Defendants surrendered possession of the premises to Plaintiffs, the Defendants have never attempted or offered to re-take possession or

dominion or control over the premises surrendered. (R. 480-481)

Plaintiffs did not introduce any evidence to demonstrate a written notice of election of remedy and notification thereof to Defendants, but the evidence demonstrates that Plaintiffs' conduct, as a matter of law constituted an election to terminate the lease agreement.

The trial court was obligated to make findings of fact concerning the surrender of the premises and the retaking of possession by Plaintiffs and the legal effect thereof.

The lease agreement (concerning election to terminate) recognizes that the common law standards will be applied and states:

"No such re-entry or taking possession of the premises by the Landlord shall be construed as an election by Landlord to terminate this Lease unless the termination thereof be decreed by a court of competent jurisdiction or stated specifically by the Landlord in writing addressed to the Tenant. [Emphasis added.]

Since the election to terminate the lease is made either by the Landlord expressly making such termination by written notice, or by a court declaring that the conduct of the Landlord constituted a termination, the trial court was

obliged to make a specific finding on this issue and was compelled by the common law to conclude that the conduct of the Landlord (Plaintiffs) constituted an election to terminate the lease as a matter of law.

The Finding of the trial court that the Plaintiffs elected a remedy by their conduct other than the remedy of termination of the lease agreement is unsubstantiated by any assessment of the facts, even those construed most favorably to the ruling of the trial court.

B. THE JUDGMENT OF THE TRIAL COURT IN SO FAR AS IT ORDERS AND REQUIRES THE DEFENDANTS TO MAKE PAYMENTS IN THE FUTURE FOR RENTS ACCRUING IN THE FUTURE MAY NOT BE SUSTAINED AS A MATTER OF LAW.

1. UNDER THE COMMON LAW, NO CLAIM CAN BE ASSERTED FOR RENTALS WHICH HAVE NOT ACCRUED PRIOR TO THE DATE OF THE FILING OF THE COMPLAINT, OR THE DATE OF THE TRIAL.

Appellant knows of no Utah cases directly on point, but the common law rule of damages on breach of a lease agreement is set forth in C.D. Stimson Co. v. Porter, 195 F.2d 410 (10th Cir. 1952), a case arising in the District of Utah. In the opinion, the Tenth Circuit Court stated:

". . . Like the trial court and the parties, our search has not uncovered any Utah case prescribing a formula for the ascertainment of damages resulting from an anticipatory breach, or premature termination, of a lease or rental contract. We agree, therefore, with the trial court that the general rule is to the effect that the appellant's damage is measured by the difference between present value of reserved rent and the present fair rental value of the remainder, the two of which are presumed to be the same. . . . [Citations Omitted] In other words, it is presumed that in the event of a breach that the lessor will be able to re-rent the leased premises for the amount of the reserved rent without loss or damage. But, this presumption, as all other presumptions in law and fact, may be dissipated or rebutted by competent and relevant facts." (Id. at 413.)

In Jones v. McQuesten, 172 Wash. 480, 20 P.2d 838 (Wash. 1933), the Washington Supreme Court in reviewing the question of damages on breach of a lease agreement stated:

". . . [D]amages are measured, not by the amount of the rent reserved, but by the difference between that amount and the rental value of the premises to the end of the term." (Id. at 840.)

That rule of law, appears to be consistent with the Utah decisions regarding damages for amounts to accrue in the future. Appellant respectfully submits that the Judgment of the trial court is not supported by any evidence as to the fair market rental value of the

premises, the likelihood of reletting the premises and over what period of time, or any other evidence upon which the court could determine the rental value of the premises to the end of the term.

In a suit for rental due, under the common law, the amount recoverable is limited to rental which had accrued either prior to the date Plaintiffs filed the complaint or the date the trial was held.

In 52 C.J.S. Landlord & Tenant Section 52 (b) at page 742, the following is found:

"It has been held that rents accruing after the institution of an action for rent may not be recovered, even where the landlord amends his complaint so as to seek rents accruing during the course of the action."

In the sentence following the above-quoted section, reference is made to cases which have permitted the awarding of rents to accrue in the future. A review of the Oklahoma case cited as authority for that proposition, however, discloses that the award for future rents contemplated that the tenant would remain in possession of the property and the award for future rents was contingent upon the tenant remaining in possession of the premises.

The foregoing proposition that only that rental which has accrued prior to the date of the filing of the complaint or the date of the trial, in part, is based upon the doctrine of equity which requires a mitigation of damages and losses.

In 52 C.J.S. Landlord & Tenant Section 559 at pages 694-695, the following is found:

"An action for rent will not lie until such rent is due and payable. . . .

. . . .

. . . Even where the tenant repudiates the lease, or where the tenant abandons the premises before the expiration of his term and notifies the landlord that he will not abide by the rent contract, the landlord has no right of action for the rent until it falls due under the contract. . . . [See Louisiana case to the contrary]

. . . Where a lease requires the lessee to pay rent in monthly installments and provides that the right to recover each monthly payment would constitute a separate cause of action, the lessor is at liberty to allow the causes of action for monthly deficiencies to accumulate, and to recover on several at the same time, but he may not recover any deficiency until it actually accrues and is ascertained in the manner provided in the lease. Generally there may be no recovery for installments not yet due.

In 52 C.J.S. Landlord & Tenant Section 568 (a), at page 740-741, the following is found:

"In an action for rent, in the absence of circumstances which render it inequitable to award the full stipulated rental, the landlord may recover the entire amount due and unpaid. . . If the landlord relets the premises after the tenant's abandonment thereof, his measure of damages has been held to be the agreed rental less the amount realized from reletting. . . [Emphasis added.]

Appellant respectfully submits that the trial court's Judgment is therefore without any supporting evidence or Findings, is contrary to the common law rule, and the remedy clause of the Lease agreement, and as such is reversible error.

2. A CLAIM FOR DAMAGES FOR FUTURE RENTAL LOSSES CONSTITUTES A CLAIM, NOT FOR RENTAL, BUT INSTEAD FOR DAMAGES FOR FUTURE LOSSES, WHICH DAMAGES MUST BE ESTABLISHED BY COMPETANT EVIDENCE.

In 51C C.J.S. Landlord & Tenant Sec. 250 (2) at pages 661-662, this comment is found:

". . . If the lessee wrongfully abandons or surrenders the leased premises, he is liable for the damages actually sustained by the lessor, although the lease contains no provision as to the amount of damages for the breach. The measure of damages in such a case had been held to be the difference between the agreed rent for the balance of the term and the actual or fair

rental value of the premises, at the time of the breach. . ."

In the case at hand, the only damage for future rental losses which could have been awarded at the time of abandonment would have to have been the difference between the lease agreement rate of Defendants' lease and the lease agreement rate of the Intermountain Marketing lease.

In the case at hand, Plaintiffs were not entitled to an award of the balance of the rental payments which had not yet accrued but which were due under the terms of the lease agreement for future months, and the award of such constituted reversible error.

3. PLAINTIFFS WERE NOT ENTITLED TO
ACCELERATE THE RENTAL DUE UNDER THE
TERMS OF THE LEASE AGREEMENT.

The Lease agreement does not provide for or allow the Plaintiffs to accelerate the balance due under the terms of the Lease agreement. Even if it had, such acceleration clauses are not enforceable unless the tenant retains possession of the premises during the remainder of the period for which the rent is accelerated.

Numerous courts have held that acceleration clauses may not be enforced unless the landlord allows the tenant to remain in possession of the premises during the duration of the lease agreement.

In 52 C.J.S. Landlord & Tenant Section 512 at pages 484-485, the following is found:

" . . . Also the lease may provide for accelerating the time of the payment of rent on certain contingencies, as where there is a default in the payment of rent which is due, on the removal, or attempt at removal, by the tenant of goods from the premises in the case of a levy of execution, or on the tenant's becoming insolvent, bankrupt, or making an assignment for the benefit of creditors. Such provisions are not void as against public policy, but a provision that the rent for the whole term shall become due on failure of the lessee to perform "any" covenant or condition has been held illegal as imposing a penalty. . . . It has been held that the landlord may not collect the entire rent under an acceleration clause and dispossess the lessee before the expiration of the lease, nor may he terminate the lease and collect rent beyond the time the lessee was allowed to remain in possession."

In the case at hand, the Plaintiffs remodelled and relet the premises to Intermountain Marketing after Defendants vacated. When Defendants vacated the premises, they had paid all rental due to the date of abandonment. On

the date Plaintiffs commenced legal action, approximately one-half to one and one-half month's rent had accrued (less the prepayment made by Defendants) and Intermountain Marketing had taken possession of the premises. Under the common law, Plaintiffs were not entitled to damages for any more than one-half to one and one-half month's rent.

The relief granted Plaintiffs by the trial court is not provided for, allowed or permitted under any common law precedent known to Defendants' counsel, or under any provision contained in the Lease agreement.

The judgment awarded Plaintiffs by the trial court constitutes reversible error in and of itself.

4. PLAINTIFFS' JUDGMENT APPEARS TO BE
ONE OF SPECIFIC PERFORMANCE.

The Judgment rendered by the trial court provides as follows:

"10. Plaintiffs should be awarded judgment against Defendants in the amount of \$1,100.00 for each month, due on the first of each month, beginning November 1, 1983, and continuing until the expiration of the Lease term on October 31, 1985 minus any amounts, after subtracting the costs and expenses of reletting, Plaintiffs obtain through reletting the premises." (R. 353, at 361.)

In the case at hand, the Judgment awarded Plaintiffs appears to be one of specific performance in equity, since it requires the Defendants to pay the rental due each and every month as required under the terms of the lease agreement. Defendants know of no common law precedent or any provision in the lease agreement which permits the trial court to make such an award, and the judgment therefore constitutes reversible error in and of itself.

If this is a judgment for specific performance, the trial court committed error by also awarding damages for the cost of remodelling the premises for the benefit another tenant.

If the judgment is one of specific performance of the lease agreement, then and in that event, Plaintiffs should also have been required to specifically perform and tender possession of the leasehold premises to Defendants.

If this judgment is not one of specific performance, it does not require the Plaintiffs to mitigate the loss, it only provides that if they do mitigate the loss, "any amounts" received shall be subtracted from the accruing amount.

If the judgment is not one of specific performance it constitutes a penalty and a forfeiture and is contrary to public policy and is void. The penalty and forfeiture is the forfeiture of the leasehold premises and the total amount due for the remaining term of the lease, with no requirement of mitigation of loss.

POINT NO. VII

THE CASE AT HAND INVOLVES A QUESTION OF EQUITY. THE STANDARDS FOR APPELLATE REVIEW OF QUESTIONS OF EQUITY NOT ONLY PERMIT, BUT ALSO COMPEL THE APPELLATE COURT TO REVIEW THE FACTS AND THE EVIDENCE TO DETERMINE IF THE TRIAL COURT PROPERLY DETERMINED THE FACTS AND APPLIED THEM TO THE CASE AT HAND.

Section 78-2-2 of the Utah Code Annotated and Rule 72 of the Utah Rules of Civil Procedure contemplate that on questions of equity, the appeal may be taken on the facts as well as the law applicable.

The doctrine of Constructive Eviction is an equitable defense. The word itself conveys its origin.

"CONSTRUCTIVE. That which is established by the mind of the law in its act of construing facts, conduct, circumstances or instruments; that which has not the character assigned to it in its own essential nature, but acquires such character in consequence of the way in which it is regarded by a rule or policy of law; hence, inferred,

implied, made out by legal interpretation;--the word "legal" being sometimes used in lieu of "constructive."" (Black's Law Dictionary, Revised Fourth Edition, page 386.)

In the same light, the phrase "constructive trust" also came into being through equity.

"A constructive trust is a creature of equity. . . So, the doctrine of constructive trust is an instrument of equity for the maintenance of justice, good faith, and good conscience resting on a sound public policy . . . In this respect constructive trusts have been said to arise through the application of the doctrine of equitable estoppel, or under the broad doctrine that equity regards and treats as done what in good conscience ought to be done." (89 C.J.S. Trusts Sect. 139 at page 1015.)

As has been previously mentioned in this Memorandum, the overwhelming weight of the evidence demonstrates that the trial court was in error in not finding that Plaintiffs' conduct constituted a breach of the lease agreement and a constructive eviction. Since the appeal is based upon the equitable doctrine of "constructive eviction," the Appellants respectfully submit that the Court may properly look at the unrebutted and overwhelming weight of the evidence and reverse the decision of the trial court on the

grounds that the un rebutted and overwhelming weight of the evidence was contrary to the trial court's decision.

In addition, the judgment is one of specific performance, requiring the Defendants to specifically perform by paying rental to the Plaintiffs on a monthly basis under the terms of the lease agreement.

Because the remedy granted is an equitable remedy, the Utah Supreme Court is entitled to review the facts and make a determination of the propriety of the decision rendered by the trial court.

The argument that the trier of fact was in a better position to observe the witnesses and render a decision on the facts does not have as much merit in the case at hand for the reason that the case was tried by the Court on July 18, 1983. The trial court issued its Memorandum Decision on September 29, 1983, more than two months after the date of the trial.

SUMMARY

The trial court failed to make findings of material facts which are pertinent to the issues of the case.

Had the trial court made findings regarding those pertinent facts, it would have been compelled to make those findings consistent with the overwhelming, un rebutted evidence.

Had the trial court made the findings consistent with the overwhelming, un rebutted evidence, those findings would have supported the claims of Defendants, not the Plaintiffs.

The Conclusions of Law are not supported by Findings as required.

The trial court failed to properly apply the law concerning "constructive eviction" to the facts in the case at hand. The law and the applicable facts demonstrate that Defendants substantiated by overwhelming, un rebutted evidence that they had been constructively evicted from the premises.

The trial court failed to require the Plaintiffs to make an election of remedy and then further compounded the error by concluding the Plaintiffs had elected to proceed under the default clause of the lease agreement but awarded a judgment for a remedy neither specified nor provided for under the terms of the lease agreement.

The judgment rendered by the trial court is contrary to the terms of the lease agreement and the common law and such an award constitutes reversible error in and of itself.

The conduct of the Plaintiffs, constituted an election to terminate the lease agreement and it was reversible error for the trial court to fail to so hold.

The judgment awarded by the trial court constitutes an award of either specific performance, or an award of future damages which are not supported by any evidence as to actual damage or market value.


The case involves questions of equity and the Appellate Court is entitled to review the facts as well as the law and issue an appropriate decision thereon.

The decision of the trial court should be reversed and either:

1. Defendants should be awarded judgment on their counterclaim; or,
2. The case should be remanded with instructions; or,
3. The judgment awarded Plaintiffs should be reduced to the amount of rental accrued and unpaid from the date of

vacation of the premises, to wit: February 15, 1981 to April 1, 1981, together with reasonable attorney's fees.

Respectfully submitted this 16th day of April, 1984.



Jack L. Schoenhals
Attorney for Appellants.

MAILING CERTIFICATE

I certify that I mailed a copy of the foregoing brief to Reid Tateoka, McKay, Burton, Thurman & Condie, Attorneys for Respondents, 500 Kennecott Building, Salt Lake City, Utah 84133 this 16th day of April, 1984.

