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IHC Health Services, Inc v. D&K Management, Inc : Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE

STATE OF UTAH

IHC HEALTH SERVICES, INC., a Utah non-profit corporation, Plaintiff/Appellee, vs. D&K MANAGEMENT, INC., a Utah corporation, Defendant/Appellant.	Priority No. 15 Case No. 20010508 SC

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I. IHC's Statement of the Standard of Review Is Incorrect But Highlights the Trial Court's Error In Ignoring Woodland Theatres

One of IHC's principal arguments on appeal is that the trial court did not treat IHC's Motion for Judgment on the Pleadings as a Motion for Summary Judgment. IHC would have this Court review the trial court's ruling in IHC's favor for correctness but look at no facts beyond the pleadings. IHC also argues, however, that the trial court's determination that IHC did not waive its right to a forfeiture of D&K's Lease requires a different standard of review. With regard to that conclusion, IHC argues without citation to authority, that this Court should "defer" to the trial court's determination of no waiver unless the trial court "abused its powers of review." (Opposition at 12.)[1] Legally and procedurally, IHC's positions lack merit.

The trial court appropriately treated Plaintiff's Motion on the Pleadings as a Motion for Summary Judgment.[2] D&K raised the affirmative defenses of waiver and estoppel in its Answer, in its Motion for Summary Judgment and in its Opposition to IHC's Motion on the Pleadings. This precluded a favorable ruling for IHC on a Motion on the Pleadings.

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[1] For purposes of citation herein, D&K will refer to Appellee IHC's Brief on Appeal as the "Opposition."

[2] The trial court refers to IHC's papers as "Motions for Judgment on the Pleadings and Summary Judgment," explains the applicable standard is Rule 56, and grants "Plaintiff's motions for judgment on the pleadings and summary judgment." (R. at 630-32, 636.)

See, e.g., Mountain America Credit Union v. McClellan, 854 P.2d 590, 591 (Utah Ct. App. 1993) ("[w]e affirm a judgment on the pleadings only if, as a matter of law, the nonmoving party . . . could not prevail under the facts alleged").[3] Moreover, D&K supported these affirmative defenses with affidavits and deposition testimony. Rule 12(c) of the Utah Rules of Civil Procedure states in part: "[i]f, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56."

IHC's argument that this Court should "defer" to the trail court's determination of no waiver is equally flawed but serves to highlight the trial court's fundamental error in granting judgment for IHC. D&K based its Motion for Summary Judgment on certain undisputed facts and the law of waiver and estoppel. The applicable law regarding waiver in the landlord-acceptance-of-rent context, D&K argued, is Woodland Theatres, Inc. v. ABC Intermountain Theatres, Inc., 560 P.2d 700 (Utah 1977), which focuses on the actions of the landlord (e.g., acceptance of rent or other benefits under the lease) and not

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[3] It is well settled that in considering a motion on the pleadings "all of the well pleaded factual allegations in the adversary's pleadings are assumed to be true and all contravening assertions in the movant's pleadings are taken to be false." See Wright & Miller, Federal Practice and Procedure § 1368 at p. 520 (2d ed. 1990) and cases cited therein. Furthermore, a "plaintiff may not secure a judgment on the pleadings when the answer raises issues of fact that, if proved, would defeat recovery." Id. at p. 527. Such material issues of fact "may result from defendant pleading new matter and affirmative defenses in his answer." Id. at p. 529. D&K pled two affirmative defenses here.

the landlord's subjective intent. As presented by D&K, the only issues before the trial court were ones of law. Since it was undisputed that IHC accepted April rent after notice that D&K had missed the deadline to pay March rent, as a matter of law IHC waived its forfeiture remedy for the missed March payment. In its Decision, the trial court resolved the waiver issue but based its ruling on Olympus Hills Shopping Center, Ltd. v. Smith's Food & Drug Centers, Inc., 889 P.2d 445 (Utah Ct. App. 1994), not Woodland Theatres. D&K asserts that the trial court's rejection of Woodland Theatres and its reliance on Olympus Hills in the landlord-acceptance-of-rent context is erroneous and should be reviewed for correctness "giv[ing] no deference to the trial court's view of the law." Tallman v. City of Hurricane, 1999 UT 55, ¶1, 985 P.2d 892.

Furthermore, under Olympus Hills and the Utah Supreme Court authorities it relies on, waiver is "generally a factual question," is "foremost a question of intent," and must be determined by the "fact finder" under a "totality of the circumstances" analysis. Olympus Hills, 889 P.2d at 461; Soter's Inc. v. Desert Federal Savings & Loan Assoc., 857 P.2d 935, 942 (Utah 1993); State v. Pena, 869 P.2d 932, 938 (Utah 1994). Accordingly, if Woodland Theatres is to be overturned by this Court in favor of a subjective test then a material issue of fact exits which precludes summary judgment under Rule 56. While D&K believes the trial court's application of Olympus Hills to these objective facts is erroneous, if Olympus Hills is the applicable law, D&K was entitled to have a trier of fact determine whether IHC intended to waive its right to forfeiture.

Soter's, 857 P.2d at 942. The trial court's judgment in favor of IHC without a trial was erroneous. Only after a trial would this Court review the trial court's determination with deference.

II. IHC Mis-Reads Woodland Theatres and Living Scriptures

In its Opposition, IHC argues that Woodland Theatres stands only for the proposition that acceptance of rent after a declaration of default or after filing a legal action is a waiver of the forfeiture remedy. IHC states, "[i]n Woodland, the Utah Supreme Court made clear that it was the acceptance of rent 'after the action was filed' that precluded the landlord's right to terminate." (Opposition at 18.) Based on this reading of Woodland Theatres, IHC asserts that because it "never accepted rent after it declared a default," even under Woodland Theatres it did not waive its right of forfeiture. (Opposition at 3, 4, 15, 16-18, emphasis in original.) But IHC drastically mis-characterizes the holding in Woodland Theatres.[4]

In Woodland Theatres, as a matter of fact, the landlord did accept rent "after the action was filed." Based on that fact, the court determined that the landlord had waived its right to enforce the remedy of forfeiture only. IHC makes much of the specific timing of

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[4] In a somewhat contrary assertion, IHC also argues that Woodland Theatres makes essentially no statement regarding the importance of when a landlord accepts rent: "They [the Utah waiver cases including Woodland Theatres] all further recognize that it is not the acceptance of rent that determines if or when a waiver of the breach has occurred, but whether the landlord has intended to treat the lease as a subsisting contract notwithstanding the breach." (Opposition at 4, emphasis added.)

when the landlord accepted rent and tries to use that fact to blur the legal rule re-affirmed in the case. But Woodland Theatres' statement of waiver law does not incorporate or depend on the landlord's acceptance of rent after filing an action. On the timing issue, the Court was clear:

> Any act done by a landlord knowing of a cause for forfeiture by his tenant, affirming the existence of the lease and recognizing the lessee as his tenant, is a waiver of such forfeiture.
>
> If the lessor receives rent from the lessee after full notice or knowledge of the broken covenant or condition, he cannot thereafter assert his rights of forfeiture given by the lease, notwithstanding express denial of the waiver upon acceptance of the rent.

560 P.2d at 701-02 (emphasis added, citations omitted). Contrary to what IHC asserts, the rule is not only that acceptance of rent after filing an action (or acceptance of rent after issuing a Notice of Default) constitutes a waiver. Any act affirming the existence of the lease after knowledge of a tenant's breach waives the remedy of forfeiture. Here, IHC's acts affirming the Lease are overwhelming. With knowledge that D&K had missed the March payment, IHC accepted April rent, accepted and later returned the March rent, demanded and accepted increased rent payments and proof of insurance pursuant to the terms of Lease, and continued throughout to address D&K as its "Dear Tenant." If Woodland Theatres applies at all, it precludes IHC's action to enforce a forfeiture. In any event, IHC's characterization of Woodland Theatres' statement of the law of waiver is substantially incorrect.

One other misrepresentation of law also merits mention. In its Opposition, IHC argues that it did not "accept" April rent but, even if it did, that "single" acceptance of rent after notice of a breach does not constitute a waiver of the right to enforce a forfeiture. (Opposition at 18-19.) In support, it cites Living Scriptures, Inc. v. Kudlik, 890 P.2d 7, 9-10 (Utah Ct. App. 1995), as follows: "holding that landlord's acceptance of late payments four times did not constitute waiver because it was not routine." (Opposition at 19.) In Living Scriptures, the court determined that a landlord's prior acceptance of late rental payments did not constitute a waiver of the landlord's right to insist thereafter on strict compliance with payment deadlines. The case does not address waiver of the right of forfeiture by accepting benefits under a lease after notice of a breach. And it does not conclude that the acceptance of four late rental payments, routine or otherwise, did not constitute a waiver of the forfeiture remedy.

III. The "Undisputed Facts" Do Not Support the Trial Court's Determination of No Waiver

As set out above, if Olympus Hills rather than Woodland Theatres is the controlling law as the trial court held, then whether IHC intended to waive its right of forfeiture is necessarily an issue of fact for a jury to decide under the "totality of circumstances." Nevertheless, IHC argues that the undisputed facts alone are sufficient to support the trial court's conclusion that IHC did not intend to waive its forfeiture right.[5] The undisputed

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[5] D&K introduced many of the undisputed facts in connection with its Motion for Summary Judgment as sufficient to support that Motion. These are not all the facts that D&K would introduce if a "totality of the circumstances" rule applies.

facts, however, do not support the trial court's ruling. Moreover, many of what IHC characterizes as "undisputed facts" are either not facts at all or are improper findings of the trial court which it had no authority to make at the summary judgment stage.[6]

A. IHC's Claim that It "Unknowingly" Accepted April Rent Is Misleading and False

Many times in its Opposition, IHC claims that the trial court "found that IHCHS never intentionally or knowingly accepted April 1998 rent." (Opposition at 11.) Since this misleading assertion pervades the Opposition, several points require mention in response.

First, the trial court made no such finding.[7] IHC's citations reveal that the trial court simply stated that "the April rental payment was timely, but the method of tender was incorrect." (R. at 631.) This casual mention of the method of tender was of no apparent significance to the trial court, but IHC nonetheless equates this statement to a finding of "unknowing" acceptance which is binding on this Court. That stretch defies logic. Moreover, D&K never stipulated or agreed that its method of tender was somehow

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[6] Notably, IHC's Opposition is replete with concessions that the trial court improperly made findings of fact. IHC defends the trial court's findings on the ground that the court was "well positioned to determine any factual issues as they related to D&K's claims of waiver or estoppel." (Opposition at 12, n.5.)

[7] The trial court not only never found that IHC did not "knowingly" accept the April rent, but it would have made no sense for it to address the issue in its Decision. The trial court mistakenly thought that upon receipt of the April check IHC promptly returned the check to D&K. (R. at 631, 632 and 633.) In other words, the trial court thought that IHC was well aware of the April payment and that it knowingly returned the April check to D&K. The trial court expressly relied on this factual mistake to conclude that IHC did not intend to waive its forfeiture remedy. (R. at 633.)

"incorrect." The facts which IHC apparently wants to obscure by raising this "knowingly" issue are that D&K timely tendered April rent to an IHC agent, that the agent accepted the rent and cashed D&K's check, and that IHC retained the benefit of D&K's payment with no objection. These facts are undisputed.

Second, it would have been error for the trial court to make any such "finding." "Knowingly" is an issue of fact for the fact finder to decide after weighing all the evidence, not an issue that can be decided on summary judgment. If the trial court made any such factual finding as IHC suggests, it invaded the province of the jury. This is precisely the court's error in determining that IHC did not intend to waive its forfeiture remedy even though it accepted and demanded numerous benefits under the Lease after knowledge of the missed March rent payment. (R. at 635.) Again, if Olympus Hills is the controlling law as the trial court held, whether IHC intended to waive any right was an issue for the trier of fact to determine after reviewing all the evidence, and the trial court erred in granting judgment without a trial.

Third, IHC mis-applies the term "knowingly." IHC's characterization of its acceptance of the April rent as "unknowing" is essential to its legal argument that inadvertent acceptance of rent cannot constitute a "knowing waiver." (Opposition at 16 and 18.) It argues that the IHC agent that accepted and cashed D&K's April rent check did not deliberately intend to waive IHC's right of forfeiture so no waiver occurred. The argument mis-construes the applicable law.

IHC cites numerous cases for the vague proposition that "inadvertent action cannot constitute a waiver." (Opposition at 18.) But these cases do not stand for a rule that a corporate landlord's agent charged with collecting rent must know and intend that his or her acceptance of rent on the landlord's behalf will constitute a waiver of the landlord's right of forfeiture or no waiver occurs upon his or her receipt of the rent. They simply stand for the well-settled requirement that the landlord must know that it is accepting rent and know that its tenant is in breach. Jefpaul Garage Corp. v. Presbyterian Hosp. In New York, 462 N.E.2d 1176 (N.Y. 1984), for example, is an excellent statement of the general rule. In Jefpaul, the court set out the "settled principle" that:

> acceptance of rent by a landlord from a tenant with knowledge of the tenant's violation of the terms of the lease normally results in a waiver of the violation. The logic underlying this rule is plain enough: the option rests with the landlord to recognize the violation and terminate the tenancy. If he chooses to ignore it and accepts rent with knowledge of the tenant's violation then the acceptance evidences his waiver and election to continue the relationship.

Id. at 1179. The "knowledge" at issue was clearly the landlord's awareness of "the tenant's violation," not its understanding that by accepting rent it waived the particular remedy of forfeiture. Likewise, in Werner v. Baker, 693 P.2d 385, 387 (Colo. Ct. App. 1984), the court applied the general rule that "any act by a lessor which recognizes the existence of the lease, after the lessor has learned of a breach of the lease creating the right to terminate, constitutes a waiver of the lessor's right to terminate" to conclude that the lessor's "knowing acceptance of rent accruing after the alleged breaches . . . waived any

right . . . to terminate the leases." Id. Again, the knowledge at issue relates to the landlord accepting rent after he "ha[s] learned of a breach," not its agent's intent to waive the right to terminate the lease. Moreover, Werner makes clear that it is the landlord's conduct ("any act") that constitutes the waiver, not the landlord's subjective intent. Accord Woodland Theatres, 560 P.2d at 701 ("[a]ny act done by landlord knowing of a cause for forfeiture . . . is a waiver").

Here, it cannot reasonably be disputed that the IHC agent involved knew that it had received a rent check from D&K, knew that it was depositing the check and knew that the corporation benefitted from its conduct. There is no evidence of inadvertence.[8] Nor can it be disputed that IHC agents (the Rideouts and perhaps others) also knew that D&K had missed the March rent payment. This knowledge is imputed to IHC as a matter of law.[9]

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[8] As part of its inadvertence argument, and eager to assign some improper motive to D&K's actions, IHC asserts that D&K intentionally "side-stepp[ed] the property managers [the Rideouts]" by paying rent directly to IHC's corporate offices. This notion is baseless. D&K paid the April rent on April 8, 1998, at least six days before IHC's Notice of Default and before D&K realized that it had missed the March payment. D&K had no reason to go around the Rideouts. Moreover, nothing in the Lease or IHC's January 26, 1998, introductory letter prohibited D&K from tendering rent directly to IHC's local office. IHC's letter merely stated that "[r]ent checks should be made out to IHC Health Services, Inc. and will be collected by the Rideout's [sic] . . . ."

[9] It is fundamental that IHC, like any corporation, is bound by the knowledge of its agents. See 18B Am. Jur. 2d Corporations § 1671 at p. 522 (2d ed. 1985) ("a corporation is bound by the knowledge acquired by, or notice given to, its officers or agents within the actual or apparent scope of their authority or employment and in reference to a matter to which their authority or employment extends"); see also Microbiological Research Corp. v. Muna, 625 P.2d 690, 695 (Utah 1981) (applying rule to hold that corporation is bound by knowledge of former directors of corporation).

Through its agents, IHC "knowingly" accepted D&K's April rent check. As a matter of law under Woodland Theatres, this acceptance constitutes a waiver of the right of forfeiture. Under Olympus Hills, this acceptance and all the attendant circumstances are factors which the fact finder must consider. Summary adjudication in IHC's favor was improper.

B. Through Its Agent Mrs. Rideout, IHC Accepted D&K's Tender of March Rent

In its Opposition, IHC attempts to turn D&K's point that the trial court erred by not concluding that Mrs. Rideout accepted D&K's March rent payment into a concession that "the trial court found [that] IHCHS never accepted March's rent." (Opposition at 19.) IHC's assertion is demonstrably false. In fact, the trial court never addressed the issue. The undisputed facts are that on April 16, 1998, D&K tendered March rent to Mrs. Rideout who received and issued D&K a receipt for the payment. (R. at 100, 120, 127, and 255-56.) Mrs. Rideout was at the time an employee of Steve and Daniel Rideout, the undisputed property managers for IHC, and she was charged with accepting and depositing rent payments from IHC's tenants. (R. at 385.) Upon learning that Mrs. Rideout had accepted the March rent payment, someone at IHC's corporate offices returned the March check to D&K uncashed. From these undisputed facts, the trial court should have concluded that IHC accepted the March rent and, as matter of law under Woodland Theatres, that it waived its right of forfeiture for the missed March payment. In not doing so, it erred.

IHC's effort to defeat the consequences of these undisputed facts is two fold. First, it claims as an additional "undisputed fact" that Mrs. Rideout was not authorized to accept the March check so her conduct is not binding on IHC. And second, it claims that she was "an elderly woman in her late 80s at the time, did not know that IHCHS had terminated the Lease and did not knowingly accept the payment with the intent to waive IHCHS' right to terminate the lease," so no waiver occurred as a matter of law. (Opposition at 20.) Neither argument has merit. First, Mrs. Rideout was, in fact, authorized to accept rental payments from IHC's tenants. (R. at 385.) IHC's purported challenge to this fact would at best make it a factual issue for the fact finder to decide. Second, whether Mrs. Rideout specifically intended to waive IHC's forfeiture right by accepting the March rent check is a false issue. Mrs. Rideout undisputably knew she was accepting rent plus late fees because she issued a receipt for the tendered amount and designated it as monthly rent. (R. at 127, Exhibit E of Addendum to Appellant's Brief.) This is all she was required to know. As set out above (n.9), her knowledge is imputed to IHC.[10]

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[10] This fact also defeats IHC's assertion that Mrs. Rideout's receipt of the March rent check and IHC's subsequent return of it do not constitute "acceptance" as matter of law. IHC cites several cases and Black's Law Dictionary for the notion that "acceptance" means receipt with the intent to retain. But there are no facts that Mrs. Rideout did not receive the check with the intent to retain it. To the contrary, the undisputed facts are that she accepted D&K's check for rent and late fees and issued D&K a receipt which she filled out on the Rideouts' bank deposit slip. IHC corporate simply does not want to be bound by its agent's conduct within the scope of her authority because someone on the corporate level had decided to exploit the missed March payment but apparently did not make that decision clear to its agents.

C. With Notice of the Missed March Payment, IHC Undisputably Took Many Other Actions Affirming the Existence of the Lease

In addition to accepting the April and March rental payments, IHC undisputably took numerous other actions in its capacity as landlord, such as: (1) demanding increased rent pursuant to the consumer-price-index provision of the Lease and retaining the increased payments D&K tendered; (2) demanding insurance coverage at D&K's expense with IHC being added as a loss payee as required by Article 14 of the Lease; (3) retaining and not returning all rental payment checks after initially returning the March payment on April 17, 1998; and (4) continuing to communicate with D&K as its "Dear Tenant." Under Woodland Theatres, each of these acts constitute a waiver of the forfeiture remedy as a matter of law. Under Olympus Hills, they raise a material issue of fact regarding IHC's intent. But in light of these facts, IHC's strident refrain that it "has done nothing to confirm D&K's tenancy since it learned of the D&K's breach" rings hollow. (Opposition at 19, n.8.)

IHC's primary argument that these actions do not constitute waiver centers on two assertions. First, none of these actions shows an intent to waive rights because IHC kept telling D&K (after the Notice of Default) that the Lease was terminated. Second, IHC re-asserts the trial court's reasoning that demanding and keeping increased rental payments and demanding proof of insurance are permissible protective measures which it was "forced to take" to protect its property rights.

The first argument again highlight's the trial court's error. The trial court weighed the facts tending to show that IHC intended to waive its forfeiture right under the Lease against those facts tending to show that IHC did not intend to waive any rights. For example, the court stated: "[t]he Court . . . must weigh all of IHC's subsequent actions in balance with the applicable law to see if there was a subsequent waiver;" "IHC's actions must be carefully scrutinized to determine whether it intended to relinquish any right;" "[t]here is no convincing evidence of any such intent." (R. at 632, 633 and 635.) Specifically, the trial court weighed IHC's "acceptance" of the April rent, its request for increased rent and its demand for insurance coverage against the Notice of Default and the trial court's misunderstanding that IHC returned both the April and March rental payments. (R. at 632-33.) Such weighing of the evidence is reversible error. See, e.g., Francisconi v. Union Pacific Railroad, 2001 UT App 350, ¶¶16-17, 434 Utah Adv. Rep. 23 (concluding that similar comments of a trial court revealed "evidence-weighing and fact-finding that is beyond the proper purview of summary judgment").

The second argument squarely conflicts with the holding and rationale of Woodland Theatres. In Woodland Theatres, the Court held that the landlord can either (1) assert its right of forfeiture and recover damages if the tenant remains in possession or (2) it can accept benefits under the lease thereby treating the lease as subsisting. 560 P.2d at 701-02. But the landlord cannot have it both ways. Here, IHC has done precisely what Woodland Theatres prohibits. In addition to accepting the March and April payments, IHC demanded

and accepted increased rent and demanded and accepted the benefit of insurance coverage. These were not permissible protective measures which IHC was forced to take, they were the benefit of the landlord's bargain in the Lease. Indeed, there is no principled distinction between the acceptance of insurance coverage and the acceptance of rent. Moreover, to the extent IHC argues that it never wavered in its intent to enforce its right of forfeiture because it took these actions after its Notice of Default, Woodland Theatres again defeats IHC's claim. Woodland Theatres made clear that such a "unilateral reservation of rights avails the lessor nothing." Id. at 701.

IV. The Trial Ignored D&K's Estoppel Argument

In its Opposition, IHC asserts that D&K's estoppel defense is identical to its waiver defense, so, the argument goes, by resolving the waiver issue, the trial court properly addressed and resolved D&K's estoppel defense as well. Again, IHC's assertion is incorrect.

D&K made two primary arguments in its Motion for Summary Judgment. The first was that IHC had waived its right to enforce a forfeiture of the Lease for the missed March rent payment because it accepted numerous benefits under the Lease, including the March and April rent, after it had notice of D&K's breach. In simple terms, this is D&K's waiver argument. The second was that the historical course of dealing between D&K and the Rideouts (IHC's predecessor) caused D&K to believe reasonably that strict compliance with the Lease payment deadlines would not be enforced by forfeiture without some

advance warning and, accordingly, that such course of dealing should estop IHC from strictly enforcing the Lease payment deadlines without clearly notifying D&K of its intent to do so.[11] This was D&K's estoppel argument. Because this course of dealing and D&K's reliance thereon were undisputed facts, D&K sought summary judgment on the estoppel issue. The trial court never addressed D&K's estoppel argument.

The sole basis for IHC's claim that the trial court did resolve D&K's estoppel defense is that in a footnote in the estoppel section of D&K's Memorandum Supporting Its Motion for Summary Judgment D&K noted that the doctrines of estoppel and waiver are very closely-related and that some courts have on occasion used them interchangeably. Specifically, D&K pointed out that numerous courts reviewing similar facts have ruled that the landlord is estopped from enforcing strict compliance with lease deadlines without giving appropriate notice but that in Living Scriptures the Utah Court of Appeals chose to analyze this particular fact pattern in terms of waiver.[12] This footnote, which IHC takes

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[11] The Rideouts, the landlords from whom IHC purchased the property, had for years accepted late rental payments from D&K and clearly manifested their intent that they would not strictly enforce the rent payment deadlines in the Lease by way of forfeiture without first providing D&K the opportunity to cure any missed rental payment. (R. at 118-19, 370-71 and 387-89.) D&K relied on this course of dealing. (R. at 119-20.) IHC had specific notice of this late-payment history and the Rideouts' course of dealing with D&K when it purchased the property. (R. at 389-90.) Upon its purchase of the property, IHC retained the Rideouts to continue to manage the property, and, true to the parties' established course of dealing, the Rideouts accepted without objection D&K's late tender of the February 1998 rent. (R. at 24, 99, 119-20, 258 and 370.)

[12] D&K raised the same point in footnote 14 of its appeal brief. (Brief of Appellant at p. 39.)

out of context, explains that whether the doctrine applied to the parties' course of dealing is termed estoppel or waiver, the result should be the same -- IHC should not be permitted to require, without notice, strict adherence to the Lease payment deadlines when IHC's predecessor (and later IHC) induced D&K to believe that strict adherence would not be required. The trial court's failure to address D&K's estoppel defense is reversible error.

CONCLUSION AND REQUESTED RELIEF

For the reasons set forth above, D&K respectfully requests that this Court reverse the trial court's Memorandum Decision granting summary judgment in favor of IHC. D&K also requests that this Court enter summary judgment in its favor based on the undisputed facts and a proper application of the doctrine of waiver. D&K further requests that this Court address the estoppel issue, which the trial court did not address, and determine that IHC should be estopped as a matter of law from forfeiting the Lease based on strict enforcement of the rental payment deadlines in the Lease. In the alternative, D&K requests that this Court reverse the trial court's Decision and remand this case to the trial court with instructions to conduct a trial on the issues of whether IHC intended to waive its right of forfeiture and whether IHC should be estopped from strictly enforcing the Lease payment deadlines.

DATED this 7th day of January, 2002.

PRINCE, YEATES & GELDZAHLER
A Professional Corporation

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PROOF OF SERVICE

I hereby certify that on January 7, 2002, two (2) true and correct copies of the foregoing **REPLY BRIEF OF APPELLANT** were served by mail, postage pre-paid to:

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