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BRIEF

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IN THE SUPREME COURT OF THE STATE OF UTAH

FASHION PLACE ASSOCIATES, :
:
Plaintiff/Respondent, :
:
vs. : No. 20514
:
GLAD RAGS, INC., :
:
Defendant/Appellant. :

REPLY BRIEF OF APPELLANT

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IN THE SUPREME COURT OF THE STATE OF UTAH

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Plaintiff/Respondent,	:	
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vs.	:	No. 20514
	:	
GLAD RAGS,	:	
	:	
Defendant/Appellant.	:	

REPLY BRIEF OF APPELLANT

POINT NO. 1

FASHION PLACE HAS FAILED TO SHOW THAT GLAD RAGS' DEPARTURE FROM THE DEMISED PREMISES CONSTITUTES ABANDONMENT AS DEFINED UNDER UTAH CODE ANN. §78-36-12.3.

Fashion Place has failed to establish that an abandonment under Utah Code Ann. §78-36-12.3 occurred at any time during the lease between the parties. Utah Code Ann. §78-36-12.3 defines abandonment as follows:

> (3) "Abandonment" is presumed in either of the following of the situations:
>
> (a) The tenant has not notified the owner that he or she will be absent from the premises, and the tenant fails to pay rent within 15 days after the due date, and there is no reasonable

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> evidence other than the presence of the tenant's personal property that the tenant is occupying the premises; or
>
> (b) The tenant has not notified the owner that he or she will be absent from the premises, and the tenant fails to pay rent when due and the tenant's personal property has been removed from the dwelling unit and there is no reasonable evidence that the tenant is occupying the premises.

Fashion Place asserts that the record contains sufficient evidence to find an abandonment under the above quoted statutory definition. However, Fashion Place makes no attempt to analyze the particular requirements of the abandonment definition but asserts that Glad Rags entered into a 15 year lease, which lease was allegedly breached when Glad Rags vacated the premises on December 31, 1981. Fashion Place then asserts that it should be awarded damages as defined in Utah Code Ann. §78-36-12.6, which allows the landlord to retake the premises and rent them at a fair market value, and hold the tenant liable for either the entire rent due for the remainder of the term or for rent which accrued during the period of vacancy plus incidental costs. Fashion Place has overlooked, however, the statutory language stating "in the event of abandonment". Id. The

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damages set forth under §78-36-12.6 are not available to Fashion Place unless the definitional requirements of abandonment under §78-36-12.3 are met. An examination of §78-36-12, 78-36-12.3 and 78-36-12.6 discloses that all of these sections must be interpreted together for the intent of the legislature to come clear. Section 78-36-12 prohibits the landlord from willfully excluding a tenant from the demised premises in any manner except by judicial process with the exception that in the case of abandonment, the landlord may remove tenant's personal property in the event of abandonment under §78-36-12.6(2). Section 78-36-12.3 gives definitions interpreting the provisions of §78-36-12, including "willful exclusion", "owner", and "abandonment". Section 78-36-12.6 begins by stating: "In the event of abandonment the owner may: . . .". The reference to "abandonment" clearly refers to the definition of abandonment set forth in §78-36-12.3. In addition, it must be noted that §78-36-12, 78-36-12.3, and 78-36-12.6 were enacted together in 1981, Law of Utah, Chapter 160, §6, §7, and §8.

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Fashion Place implies that the court should severe these provisions and give it the opportunity to recover under §78-36-12.6, without meeting the definitional requirements of §78-36-12.3. This, however, is not appropriate.

> A statute is regarded as passed as a whole and not in parts. The distribution of the provisions of a statute into articles, titles, chapters, and sections is merely a matter of convenience in reference search and examination.

73 Am. Jur. 2d Statutes §94 (1974). The Utah Supreme Court has stated:

> . . . The meaning of a part of an act should harmonize with the purpose of the whole act. Separate parts of an act should not be construed in isolation from the rest of an act.

Jensen v. Intermountain Health Care, Inc., 679 P.2d 903, 906 (Utah 1984). When a statute is past as a whole, it is inappropriate, as urged by Fashion Place, to severe the parts of the statute for application without satisfying all the statutory requirements. For Fashion Place to collect any damages without satisfying the definitional requirement of abandonment in §78-36-12.3, would, in effect, render §78-36-12.3 meaningless and allow interpretation of statutes out of context.

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> The law-making body's own construction of its language, by means of definitions of the terms employed, should be followed in the interpretation of the act or section to which it relates and is intended to apply. . . . A statutory definition supercedes the common law, colloquial, commonly accepted, dictionary, and judicial definition. Indeed, where a word that already has a definite, fixed, and unambiguous meaning is redefined in a statute, the definition must be taken literally by the courts. Where a statute contains its own definition of a term used therein, the term may not be given the meaning in which it was employed in another statute, although the two may be in pari materia.
>
> In the absence of expressed restriction, it may be assumed that a term is used throughout a statute in the same sense in which it was first defined.

73 Am. Jur. 2d Statutes §225 (1974).

> Words defined in a prior statute are, prima facie, to be regarded as used in the same sense in a subsequent statute, and will be so interpreted unless the contrary appears.

73 Am. Jur. 2d Statutes §227 (1974).

The legislature's use of specific definitions to designate abandonment clearly shows its intent that there be a finding of abandonment before the remedies in §78-36-12.6 become available. It would be inappropriate for the Court to interpret these sections out of context when they were passed together and intended to be interpreted as a whole.

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The section headings are for convenience and have no impact on the interpretation of the statute. Sections 78-36-12, 78-36-12.3, and 78-36-12.6 are designed for a very specific purpose which falls outside the scope of this action. When the tenant is absent from the premises without notifying the landlord, these statutes give the landlord the power to enter the premises, remove the personal property of the tenant, and relet the premises, all without judicial process. These sections resolve the historical conflict faced by landlords whose tenants have vacated the premises without notice. In the past, to be perfectly safe from a claim of forcible entry by the tenant, the landlord would have to file an action and attempt to evict the tenant by judicial process. This was often difficult and time consuming to the landlord when the tenant had departed or disappeared. Without the possibility of serving a summons on the tenant, the landlord would have to approach the court for authorization to publish a summons, the summons would have to be published, and thereafter, the landlord would have to proceed with the normal judicial process, all of which may have caused the leased premises to be vacant for

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long periods of time. These sections give the landlord the opportunity to take possession of leased premises and remove the tenant's personal property without the long delay of judicial proceedings and without the risk of a forcible entry action.

The case at bar is totally different from the situation designed to be resolved by §78-36-12. The record contains no support for a finding of abandonment under the terms of §78-36-12.3, especially in light of the uncontroverted fact that Glad Rags notified Fashion Place of its intent to vacate the premises prior to December 31, 1981 (R. 365, 366, 379, 494, Exhibit 7), and maintained continuous contact with Fashion Place following that date. (R. 318, 386, 387, 452, 526). Not only did Fashion Place know of the intent and whereabouts of Glad Rags, but it also agreed to allow Glad Rags to store personal property on the premises after its departure. (R. 388, 393-94, 451). There was never a period when Glad Rags was absent from the demised premises that Fashion Place did not have notice of the absence.

The facts do not satisfy the statutory definitional requirement of §78-36-12.3, no do the facts fall into the

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class of cases sought to be remedied by §78-36-12. Fashion Place therefore cannot recover under these sections and the ruling to the trial court must be reversed.

POINT NO. 2

UNDER THE TERMS OF THE LEASE AGREEMENT AND COMMON LAW, FASHION PLACE IS NOT ENTITLED TO RECOVER DAMAGES FROM GLAD RAGS.

Fashion Place asserts that Glad Rags ignores the controlling Utah statute providing for damages in the case of abandonment. As mentioned above, however, because the facts of this case do not satisfy the statutory definitional requirements of abandonment found in Utah Code Ann. §78-36-12.3, the provisions for damages set forth in §78-36-12.6 are not applicable.

Fashion Place completely ignores the terms of its own lease agreement which sets forth the measure of damages in the event of a breach. These provisions, found in Article 22 of the lease agreement, state that damages shall be determined as the difference between the reasonable rental value of the demised premises and the reserved rent; or, the difference between the rent reserved in the lease and the

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rental income after the premises have been relet. Because the reasonable rental value of the demised premises exceeds the reserved rent, and because the rental income after the demised premises were relet exceeds the reserved rent under the lease agreement, Fashion Place is not entitled to any damages.

Fashion Place's bear assertion that Glad Rags is attempting to collect rent from a subsequent tenant is contrary to the facts, misrepresents the lease agreement, and misleads the Court. The lease provisions clearly designate that the reasonable market rental of the premises and the amount collected from subsequent tenants be utilized to determine the damages, if any, that Fashion Place has sustained. Lease, Article 22.

The common law likewise sets forth the general rule of damages as the difference between the value of the reserved rent and the present fair rental value of the demised premises, the two of which are presumed to be the same. C.D. Stimson Co. v. Porter, 195 F.2d 410, 413 (10th Cir. 1952). By the same reasoning set forth above, the rental value of the demised premises upon Glad Rags' departure

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exceeded the reserved rent and Fashion Place is not entitled to any recovery.

The lease between the parties and the common law concerning the damages available to the landlord in the event of breach speak in terms of damages for the "term" of the lease. There is no question that Glad Rags vacated the premises with approximately eight years remaining on the lease. During the remainder of that term, Fashion Place would have received $108,800 from Glad Rags. Under the terms of the lease agreements Fashion Place made with Fleet Foot and Life Uniforms in the demised premises, Fashion Place will receive a minimum of $164,400, or at least $55,600 in excess of the sum payable by Glad Rags over the term of the lease. In fact, Fashion Place will probably receive more income from the new tenants because Life Uniforms' rental payments increase over the life its lease term. In light of the great benefit received by Fashion Place as a result of Glad Rags departure, and the provisions of the lease and the common law concerning damages, it is clear that Fashion Place has suffered no damages as a result of Glad Rags' departure, but in fact, has increased its

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return approximately 50%. It would be inequitable and constitute a windfall for Fashion Place to receive additional sums in damages from Glad Rags, when no actual damages were incurred.

The trial court inappropriately based its legal decision on Utah Code Ann. §78-36-12.6, which is not applicable in this case. The trial court made no findings or conclusions concerning the provisions of the lease agreement and the common law as a basis of recovery. The common law and the lease agreement do not substantiate a recovery by Fashion Place and the judgment must be reversed.

POINT NO. 3

FASHION PLACE'S ACCEPTANCE OF THE SURRENDER OF THE GLAD RAGS' PREMISES IS NOT NEGATED BY A FINDING OF ABANDONMENT.

Fashion Place's acceptance of the surrender of the Glad Rags' premises is not negated by a finding of abandonment. Fashion Place implies that a finding of abandonment precludes a finding of surrender. However, despite a finding of abandonment or breach of a lease agreement, a surrender may take place based on the actions of the parties. The Utah Supreme Court has stated:

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. . .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.

Willis v. Kronendonk, 58 Utah 592, 200 P. 1025 (1921). The Utah Supreme Court recognizes that even where a tenant may be found to have abandoned the premises, the landlord, through his actions, may accept the surrender and lose his claim for any rent or damages.

The record is uncontroverted that Fashion Place utilized the demised premises for its own benefit in holding meetings and storing goods, to the exclusion of Glad Rags. (R. 482-83, 447). This use of the premises by Fashion Place is uncontroverted and constitutes the acceptance of Glad Rags' surrender.

Throughout its brief, Fashion Place continually relies on the statutory remedy predicated on a finding of "abandonment". Utah Code Ann. §78-36-12.6 (Supp. 1983). Fashion Place has never established that it meets the definitional requirements of §78-36-12.3 to be eligible for recovery under §78-36-12.6. On the contrary, there is no

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attempt or analysis by Fashion Place to satisfy the requirements of §78-36-12.3. The discussion concerning abandonment on page 15 of Fashion Place's brief speaks simply of common law abandonment, and supplies no justification for the finding of abandonment or the award of damages under §78-36-12.6. Such use of common law definitions of abandonment further emphasize Fashion Place's failure to meet the statutory requirements defining abandonment under §78-36-12.3 and the resulting unavailability of the remedies set forth in §78-36-12.6.

POINT NO. 4

FASHION PLACE FAILED TO ADEQUATELY MITIGATE ITS DAMAGES AND IS THUS INELIGIBLE FOR RECOVERY IN THIS MATTER.

Fashion Place argues that it acted appropriately in mitigating the damages in this matter by attempting to lease the demised premises for almost double the reserved rent in the Glad Rags' lease, plus a $20,000 payment. Fashion Place attempts to justify its actions by relying on Utah Code Ann. §78-36-12.6, which allows the landlord to lease the premises "at fair rental value". The record, however, contains no evidence that a $20,000 lump sum payment, in

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addition to ongoing rental payments is a fair rental value. In addition, as set forth above, because Fashion Place has not met the statutory definitional requirements of abandonment set forth in Utah Code Ann. §78-36-12.3, it is not entitled to the remedies set forth in §78-36-12.6. Fashion Place's entire reliance on this statutory remedy is misplaced and emphasizes Fashion Place's callous attitude towards the mitigation of damages.

The uncontroverted evidence in the record establishes that not only did Fashion Place seek to double the perspective tenants' rent on the demised premises (R. 362, 365, 508), but Fashion Place also requested an additional lump sum payment of $20,000 from perspective tenants. (R. 344, 411). In addition, when a reasonable written offer was submitted to Fashion Place for lease of the demised premises, which over the term of the proposed lease would have exceeded the rent paid by Glad Rags on the demised premises, Fashion Place breached its duty to mitigate by failing to respond to the offer.

If Utah Code Ann. §78-36-12.6 is not available to Fashion Place to establish its damages in this case, the

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mitigation of damages must be measured under the common law. A substantial increase in the rent cannot be considered a good faith effort to mitigate damages. Mar Son, Inc., v. Terwaho Enterprises, Inc., 259 N.W.2d 289, 292 (N.D. 1977). The dramatic increase in rent, the lump sum payment, and the refusal to accept the Chalk Garden's offer clearly establish that Fashion Place failed to adequately mitigate damages and renders Fashion Place ineligible to recover damages for unpaid rent from Glad Rags.

POINT NO. 5

THE TRIAL COURT'S AWARD OF HALF DAMAGES IS NOT SUPPORTED BY THE RECORD AND CONTRADICTS THE FINDINGS OF FACT AND CONCLUSIONS OF LAW AND MUST BE REVERSED.

Both Glad Rags and Fashion Place Mall agree that the lower court's award of exactly 50% of the damages claimed by Fashion Place is inconsistent with the findings of fact and conclusions of law.

The Fashion Place position, however, is curious because of the fact that Fashion Place's attorney prepared the findings of fact and conclusions of law which are inconsistent. The trial court asked Fashion Place's

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attorney, to prepare the findings of fact and conclusions of law, and the court adopted them verbatim as prepared by counsel.

When the court adopts, without change, findings of fact and conclusions of law prepared by the attorney of one of the parties, these findings of fact and conclusions of law must be scrutinized more critically and given less weight than had the judge prepared the findings of fact and conclusions of law himself.

> We do not wish to be understood as approving the practice of uncritical adoption of findings prepared by litigants. But, if, after careful study, the trial judge concludes that the findings prepared by a party correctly state both the law and the facts, then there is no good reason why he may not adopt them as his own. Where the findings of the trial court are verbatim those submitted by the successful litigant, we will, of course, scrutinize them more critically and give them less weight than if they were the work product of the judge himself, or, at least bear evidence that he had given them careful study and revision. [Emphasis in original].

Uptime Corp. v. Colorado Research Corp., 161 Colo. 87, 420 P.2d 232, 235 (1966).

In the case at bar, the findings of fact and conclusions of law prepared by Fashion Place's attorney were

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adopted verbatim and must be critically scrutinized and given less weight than if they had been prepared by the judge.

The findings of fact and conclusions of law are obviously inconsistent concerning the amount of damages awarded by the trial court. These findings of fact and conclusions of law were prepared by Fashion Place's attorney and make no attempt to justify the position of the trial court.

The Utah Supreme Court has stated that the findings of fact must provide a rational basis to justify the award of damages and that proper findings are essential to assure that the evidence supports the findings and the findings support the judgment:

> The findings of fact must provide a basis for determining whether there is a rational basis for the award of damages. Proper findings are essential to enable this Court to perform its function of assuring that the findings support the judgment and that the evidence supports the findings. See Romrell v. Zions Bank, Utah, 611 P.2d 392 (1980); Chandler v. West, Utah, 610 P.2d 1299 (1980); Rooker v. Dalton, Utah, 598 P.2d 1336 (1979).

Bastian v. King, 661 P.2d 953, 957 (Utah 1983).

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The Utah Supreme Court has also stated:

> The importance of complete, accurate and consistent findings of fact in a case tried by a judge is essential to the resolution of dispute under the proper rule of law. To that end the finding should be sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached. Woods Construction Co. v. Pool Construction Co., 314 F.2d 405 (10th Cir. 1963); Salisbury v. Hanover Insurance Company, Wyo., 443 P.2d 135 (1968). The rule as stated in Prows v. Hawley, 72 Utah 444, 271 P.31, 33 (1928) is:
>
> > That until the court has found on all the material issues raised by the pleadings, the findings are insufficient to support a judgment; and that findings should be sufficiently distinct and certain as not to require an investigational review to determine what issues are decided.
>
> Unless findings of fact meet such standards, application of the proper rule of law is difficult, if not impossible, and the reviewing function of this Court is seriously undermined.

Rooker v. Dalton, 598 P.2d 1336, 1338-1339 (Utah 1979).

The Findings of Fact and Conclusions of Law of the trial court are not complete, accurate, or consistent and, as a result, the trial court utilized improper rules of law in the resolution of this matter. The award of damages is clearly a material issue raised by the pleadings, but the

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findings are insufficient to support the award of such damages. The judgment and award by the trial court must therefore be reversed.

Fashion Place also urges this court to remand the case with instructions to the trial court to enter a judgment consistent with the findings of fact and conclusions of law. Such a result, however, would be inappropriate, since the basis of the trial court's decision, the award of damages in reliance on Utah Code Ann. §78-36-12.6, is not available. Until the statutory definitional requirements of abandonment found in Utah Code Ann. §78-36-12.3 are satisfied, there can be no statutory damages under §78-36-12.6. In addition, under the lease and common law, Fashion Place is not entitled to receive any damages from Glad Rags. Therefore, this court should reverse the lower court's ruling and order no recovery.

POINT NO. 6

FASHION PLACE BREACHED ITS DUTY AS BAILEE FOR THE ITEMS IT HELD ON GLAD RAGS' BEHALF AND THE COURT MADE NO FINDING CONCERNING BAILMENT AND INAPPROPRIATELY APPLIED THE LAW.

The undisputed facts in the record establish that Glad

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Rags delivered its personal property to Fashion Place with Fashion Place's promise that said items could be stored on the demised premises. (R. 388, 393-394, 451). Fashion Place conditioned this bailment agreement with the provision that the personal property must be removed upon 48 hours' notice to Glad Rags. Glad Rags claims to have never received notice that it should remove the bailed personal property. (R. 540). Nevertheless, assuming that Glad Rags did receive the notification from Fashion Place that the personal property should be removed, the bailment was not terminated and Fashion Place had a duty to restore possession of the stored items to Glad Rags in fulfillment of its bailment obligation and responsibility. See 8 C.J.S. Bailments §41(c). Because Fashion Place failed to restore possession of the personal property to Glad Rags, the bailment must be considered to be ongoing. Id.

The trial court failed to make any finding or conclusion concerning the issue of bailment argued at trial. This constitutes a failure by the trial court to make findings of facts upon all material issues submitted for

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decision. Romrell v. Zions First National Bank, NA, 611 P.2d 392 (Utah 1980); Boyer Co. v. Lignell, 567 P.2d 1112 (Utah 1977). It is essential to the resolution of a dispute under the proper rule of law that findings be complete, accurate, and consistent with the evidence. Rooker v. Dalton, 598 P.2d 1336 (Utah 1979). Findings are insufficient to support a judgment until the court has found on all material issues raised at trial. Id. The failure to make sufficient findings is reversible error.

Assuming, for the sake of argument, that the trial court relied on Fashion Place's testimony that it called Glad Rags to have the personal property removed from the demised premises, but no action was taken, this nevertheless does not relieve Fashion Place of its obligation to restore the personal property to Glad Rags. Fashion Place was in constant contact with Glad Rags and knew how to reach it and where its other store was located. (R. 318, 386, 387, 452, 526). Because of this failure to meet its duty and obligation under the bailment agreement, Fashion Place is liable to Glad Rags for the value of said personal property. The trial court misapplied the law when failing to require

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Fashion Place to meet its legal requirement to restore the personal property to Glad Rags, and the decision of the lower court must be reversed.

POINT NO. 7

THE TRIAL COURT FAILED TO MAKE FINDINGS OF FACT AND CONCLUSIONS OF LAW CONCERNING GLAD RAGS' COUNTERCLAIM ON THE SECURITY DEPOSIT.

Fashion Place agrees to return Glad Rags' deposit upon satisfaction of the judgment of the lower court. This concession by Fashion Place, however, does not meet the objection raised by Glad Rags. The trial court failed to make any findings of fact or conclusions of law concerning Glad Rags' Counterclaim for the return of said deposit. This failure to make findings of fact and conclusions of law on all material issues presented in the case is reversible error, Romrell v. Zions First National Bank, NA, 611 P.2d 392 (Utah 1980); Boyer Co. v. Lignell, 567 P.2d 1112 (Utah 1977), and hinders the Supreme Court in performing its function of assuring that the evidence supports the findings and that the findings support the judgment. Bastian v.

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King, 661 P.2d 953 (Utah 1983); Rucker v. Dalton, 598 P.2d 1336 (Utah 1979).

Because the trial court failed to make the appropriate findings of fact and conclusions of law on all material issues, it is necessary to reverse the trial court's judgment.

POINT NO. 8

GLAD RAGS IS ENTITLED TO RECOVER ATTORNEY'S FEES.

Fashion Place has not objected or questioned Glad Rags' right to recover attorney's fees under the terms of the Lease Agreement. If the conditions set forth in Article 25 of the Lease Agreement are satisfied, then Glad Rags is entitled to recover these fees.

CONCLUSION

Fashion Place is not entitled to recover damages from Glad Rags under any theory presented in this matter. The Utah statutory definition of abandonment has not been met, and the damages awarded by the trial court in this matter, under the statutory abandonment theory, are not available. Fashion Place utilized the demised premises for its own

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benefit to the exclusion of Glad Rags, which actions constitute an acceptance of the surrender of the premises and terminates Glad Rags' obligation to pay rent. Fashion Place failed to mitigate its damages by virtually doubling the rent, asking $20,000 from perspective tenants, and refusing to accept a written offer by the Chalk Garden to lease the demised premises. The terms of the lease and the common law deny Fashion Place any recovery from Glad Rags because the market value and rent received exceeds the reserved rent under the lease. In fact, Fashion Place has increased its return from the demised premises as a result of Glad Rags' departure by a minimum of 50%, or at least $55,600. The Court's award of 1/2 of the damages claimed by Fashion Place is unsubstantiated by the record and appears to be the Court's attempt to remedy the manifest in justice which would result by awarding the entire claimed damages to Fashion Place. Fashion Place acted as bailee for the personal property of Glad Rags left in the demised premises by permission and Fashion Place breached its bailment agreement and duty by failing to return the personal property to Glad Rags and by losing control and possession

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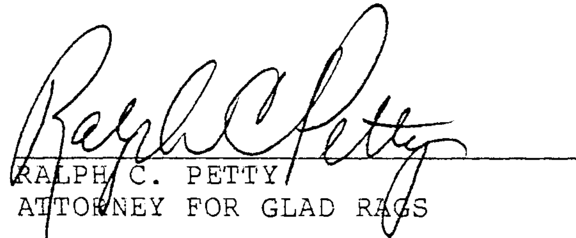
and control of said property. The judgment of the trial court must be reversed because no findings or conclusions were made concerning the bailment, the measure of damages, and Glad Rags' Counterclaim concerning the security deposit. Glad Rags requests that this Court reverse the ruling of the trial court, find no basis for recovery, and award attorney's fees to Glad Rags under the terms of the Lease Agreement.

RESPECTFULLY submitted this 20th day of September, 1985.



RALPH C. PETTY
ATTORNEY FOR GLAD RAGS

MAILING CERTIFICATE

I hereby certify that I mailed four true and accurate copies of the foregoing Reply Brief to Raymond Scott Berry, Green, Higgins & Berry, 900 Newhouse Bldg., 10 Exchange Place, Salt Lake City, Utah 84111, this 20th day of September, 1985.

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APPENDIX I

LEASE PROVISIONS CONCERNING DEFAULTS BY TENANT

Article 22.

DEFAULT BY TENANT.

Should the Tenant at any time be in default hereunder with respect to any rental payments or other charges payable by the Tenant hereunder . . . or should the tenant vacate or abandon the premises, then the Landlord may treat the occurrence of any one or more of the foregoing events as a breach of this Lease, and in addition to any or all other rights or remedies of the Landlord hereunder and by the law provided, it shall be, at the option of the Landlord, without further notice or demand of any kind to Tenant or any other person:

(a) The right of the Landlord to declare the term ended and to re-enter the premises and take possession thereof and remove all persons therefrom, and the Tenant shall have no further claim thereon or thereunder; or

(b) The right of the Landlord without declaring this Lease ended to re-enter the premises and occupy or lease the whole or any part thereof for and on account of the Tenant and upon such terms and conditions and for such rent as the Landlord may deem proper and to collect said rent and any other rent that may thereafter become payable and apply the same toward the amount due or thereafter to become due from the Tenant and on account of such expenses of such subletting and any other damages sustained by the Landlord; and should such rental be less than that herein agreed to be paid by the Tenant, the Tenant agrees to pay such deficiency to the Landlord in advance on the payment of minimum annual rental and to pay to the Landlord forthwith upon any such reletting the costs and expenses the Landlord may incur by reason thereof; or

(c) The right of the Landlord even though it may have relet the premises, to thereafter elect to terminate this Lease and all of the rights of the Tenant in or to the premises.

Should the Landlord have relet the premises under the provisions of subparagraph (b) above, it may execute any such lease either in its own name

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or in the name of the Tenant as it shall see fit but the tenant therein named shall be under no obligation whatsoever to see to the application by Landlord of any rent collected by the Landlord from such tenant, nor shall the Tenant hereunder have any right or authority whatever to collect any rent from such tenant. The Landlord shall not be deemed to have terminated this Lease, or the liability of the Tenant to pay rent thereafter to accrue, or its liability for damages under any of the provisions hereof, by any such re-entry or by any action in unlawful detainer, or otherwise, to obtain possession of the premises, unless the Landlord shall have notified the tenant in writing that it has so elected to terminate this Lease, and the Tenant further covenants that the service by the Landlord of any notice pursuant to the unlawful detainer statutes of the State of Utah and the surrender of possession pursuant to such notice shall not (unless the Landlord elects to the contrary at the time of or at any time subsequent to the serving of such notices and such election be evidenced by a written notice to the Tenant) be deemed to be a termination of this Lease. Nothing herein contained shall be construed as obligating the Landlord to relet the whole or any part of the premises. In the event of any entry or taking possession of the premises as aforesaid, the Landlord shall have the right, but not the obligation, to remove therefrom all or any part of the personal property located therein and may place the same in storage at a public warehouse at the expense and risk of the owner thereof

. . .

Should the Landlord elect to terminate this Lease under the provisions of subparagraphs (a) or (c) above, the Landlord shall thereupon, without waiting for the end of the term hereof, be entitled to recover from the Tenant as damages the difference, if any, between the then reasonable rental value of the premises for the period of the term reserved in the Lease and the amount of rental and other charges payable by the Tenant for the balance of the term of this Lease, together with the rent then unpaid if any.

. . .

The remedies given to the Landlord in this Article shall be in addition and supplemental to

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all other rights or remedies which the Landlord may have under the laws then in force.

The waiver by Landlord of any breach of any term, covenant or condition herein contained shall not be deemed to be a waiver of such term covenant or condition or any subsequent breach of the same or any other term, covenant or condition herein contained. The subsequent acceptance of rent hereunder by Landlord shall not be deemed to be a waiver of any preceding breach by tenant of any term covenant or condition of this Lease, other than the failure of Tenant to pay the particular rental so accepted, regardless of Landlord's knowledge of such preceding breach at the time of acceptance of such rent. No covenant, term or condition of this Lease shall be deemed to have been waived by Landlord unless such waiver be in writing by Landlord.

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tion" in the third sentence; substituted "be issued immediately" in the third sentence for "not be issued until the expiration of five days"; deleted "within which time the tenant or any subtenant, or any mortgagee of the term, or other party interested in its continuance, may pay into court for the landlord the amount of the judgment and costs, and thereupon the judgment shall be satisfied, and the tenant shall be restored to his estate; but if payment as herein provided is not made within the five days, the judgment may be enforced for its full amount and for the possession of the premises" at the end of the third sentence; deleted "other" before "cases" in the last sentence; and made minor changes in phraseology and punctuation.

Treble damages.

Plaintiff's failure to comply with the provisions of 78-36-8 converted his action for unlawful detainer into one at common law for ejectment and defeated his right under this section to treble damages. Pingree v. Continental Group of Utah, Inc. (1976) 558 P 2d 1317.

Law Reviews.

Forfeiture Under Installment Land Contracts in Utah, 1981 Utah L. Rev. 803, 807.

78-36-11. Time for appeal.

Section applicable.

A party has ten days, as provided by this section, and not one month, as provided by Rule 73(a), U.R.C.P., in which to appeal from a judgment for unlawful detainer. Ute-Cal Land Development v. Intermountain Stock Exchange (1981) 628 P 2d 1278.

78-36-12. Exclusion of tenant without judicial process prohibited — Abandoned premises excepted. It is unlawful for an owner to willfully exclude a tenant from the tenant's premises in any manner except by judicial process, provided, an owner or his agent shall not be prevented from removing the contents of the leased premises under section 78-36-12.6 (b) [78-36-12.6(2)] and retaking the premises and attempting to rent them at a fair rental value when the tenant has abandoned the premises.

History: C. 1953, 78-36-12, enacted by L. 1981, ch. 160, § 6.

78-36-12.3. Definitions. (1) "Willful exclusion" means preventing the tenant from entering into the premises with intent to deprive the tenant of such entry.

(2) "Owner" means the actual owner of the premises and shall also have the same meaning as landlord under common law and the statutes of this state.

(3) "Abandonment" is presumed in either of the following situations:

(a) The tenant has not notified the owner that he or she will be absent from the premises, and the tenant fails to pay rent within 15 days after the due date, and there is no reasonable evidence other than the presence of the tenant's personal property that the tenant is occupying the premises; or

(b) The tenant has not notified the owner that he or she will be absent from the premises, and the tenant fails to pay rent when due and the tenant's personal property has been removed from the dwelling unit and there is no reasonable evidence that the tenant is occupying the premises.

History: C. 1953, 78-36-12.3, enacted by L. 1981, ch. 160, § 7.

78-36-12.6. Abandoned premises — Retaking and rerenting by owner — Liability of tenant — Personal property of tenant left on premises. In the event of abandonment the owner may:

(1) Retake the premises and attempt to rent them at a fair rental value and the tenant who abandoned the premises shall be liable:

(a) For the entire rent due for the remainder of the term;

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(b) For rent accr
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(2) If the tenant
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sell the property anc
money left over fron
tion 78-44-11. Nothi
owner's rights under

History: C. 1953, 78
1981, ch. 160, § 8.

78-37-1. Form of

Multiple parcels offer
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A valid foreclosure s
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sale proceeds attributa
property; where multi
are offered at a single
proceeds from each par
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& Associates v. Smith (

Nature of action.

Proceeding to foreclo
an action in rem or
National Credit Corp. v
FSupp 634.

Necessity of exhausti

Mortgagee is require
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78-37-6. Right of r

Extension of time to r

A court sitting in eq
extend the time pe

(b) For rent accrued during the period necessary to re-rent the premises at a fair rental value, plus the difference between the fair rental value and the rent agreed to in the prior rental agreement, plus a reasonable commission for the renting of the premises and the costs, if any, necessary to restore the rental unit to its condition when rented by the tenant less normal wear and tear. This subsection shall apply, if less than subsection (a) notwithstanding that the owner did not re-rent the premises.

(2) If the tenant has abandoned the premises and has left personal property on the premises, the owner is entitled to remove the property from the dwelling, store it for the tenant, and recover actual moving and storage costs from the tenant. The owner shall make reasonable efforts to notify the tenant of the location of the personal property; however, if the property has been in storage for over 30 days and the tenant has made no reasonable effort to recover it, the owner may sell the property and apply the proceeds toward any amount the tenant owes. Any money left over from the sale of the property shall be handled as specified in section 78-44-11. Nothing contained in this act shall be in derogation of or alter the owner's rights under Chapter 3 of Title 38.

History: C. 1953, 78-36-12.6, enacted by L. 1981, ch. 160, § 8.

CHAPTER 37

MORTGAGE FORECLOSURE

78-37-1. Form of action — Judgment — Special execution.

Multiple parcels offered at single foreclosure sale.

A valid foreclosure sale results in the satisfaction of a specific mortgage debt from the sale proceeds attributable to the encumbered property; where multiple parcels of realty are offered at a single foreclosure sale, the proceeds from each parcel are applied to satisfy only the related mortgage debt. Bawden & Associates v. Smith (1982) 646 P 2d 711.

Nature of action.

Proceeding to foreclose upon a mortgage is an action in rem or quasi in rem. 1ST National Credit Corp. v. Von Hake (1981) 511 FSupp 634.

Necessity of exhausting security.

Mortgagee is required to exhaust its security by foreclosure and sale of the mortgaged property before it can reach the general assets of the debtor by writ of attachment. Bank of Ephraim v. Davis (1978) 581 P 2d 1001.

Pledge of personal property.

The rights of a creditor secured by a pledge of personal property are governed by the Uniform Commercial Code, not this section. Kennedy v. Bank of Ephraim (1979) 594 P 2d 881.

Law Reviews.

Equitable Considerations of Mortgage Foreclosure and Redemption in Utah: A Need for Remedial Legislation, 1976 Utah L. Rev. 327.

78-37-6. Right of redemption, etc.

Extension of time to redeem.

A court sitting in equity has discretion to extend the time period of redemption. Mollerup v. Storage Systems International (1977) 569 P 2d 1122.

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