

1981

Genevieve A. Smith, Jesse E. Smith, Beth M. Smith,  
and Salli Smith Girard v. Charles L. Appleby, Jr.,  
Catherine R. Appleby, Don Bjarnson, and Grace  
Bjarnson : Brief of Appellants

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc2](https://digitalcommons.law.byu.edu/uofu_sc2)



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors John L. Miles; Attorney for Respondent Salli Smith Girard Michael D. Hughes; Attorney for Appellants

---

#### Recommended Citation

Brief of Appellant, *Girard v. Appleby*, No. 17662 (Utah Supreme Court, 1981).  
[https://digitalcommons.law.byu.edu/uofu\\_sc2/2616](https://digitalcommons.law.byu.edu/uofu_sc2/2616)

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

---

IN THE SUPREME COURT

STATE OF UTAH

---

GENEVIEVE A. SMITH, JESSE E. SMITH, )  
BETH M. SMITH, and SALLI SMITH GIRARD, )

Involuntary Defendants,  
Plaintiff, Respondent, )

Case No. 17662

vs. )

CHARLES L. APPLEBY, JR., CATHERINE R. )  
APPLEBY, DON BJARNSON, and GRACE )  
BJARNSON, )

Defendants, Appellants. )

---

BRIEF OF APPELLANTS

Appeal from Judgment of Fifth Judicial  
District Court of Washington County, State  
of Utah, the Honorable Robert F. Owens,  
District Judge, pro tem.

---

ALLEN, THOMPSON & HUGHES  
Michael D. Hughes  
Attorney at Law  
148 East Tabernacle  
St. George, UT 84770  
Attorney for Appellants

ATKIN, WRIGHT & MILES  
John L. Miles  
J. MacArthur Wright  
Attorneys at Law  
60 North 300 East  
St. George, UT 84770  
Attorneys for Respondent  
Salli Smith Girard

FILED

AUG 24 1981

---

Clerk, Supreme Court, Utah

# TABLE OF CONTENTS

	<u>Pg.</u>
NATURE OF THE CASE . . . . .	1
DISPOSITION IN THE LOWER COURT . . . . .	2
RELIEF SOUGHT ON APPEAL . . . . .	4
STATEMENT OF FACTS . . . . .	5
APPELLANTS' POINTS ON APPEAL . . . . .	20
I. THERE IS NO TESTIMONY PROPERLY REGARDED AS SUCH UPON WHICH THE PLAINTIFF/ <del>APPEL-</del> <i>RESPONDENT</i> <del>LANT</del> GIRARD MAY BE AWARDED ANY ATTOR- NEY'S FEES . . . . .	20
II. THE ATTORNEY'S FEES AWARDED BY THE JUDGE ARE CONTRARY TO THE STIPULATION ENTERED INTO BETWEEN APPELLANTS' COUN- SEL AND COUNSEL FOR THE INVOLUNTARY DEFENDANTS, RONALD BOUTWELL, UPON WHOSE AFFIDAVIT THE LARGEST PORTION OF THE ATTORNEY'S FEES WAS BASED . . . . .	23
III. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN SUA SPONTE REOPENING THE CASE ON THE ISSUE OF ATTORNEY'S FEES BASED UPON A FINDING OF FACT, WHICH FINDING WAS NEITHER RAISED, PLEAD OR ARGUED BY PLAINTIFF'S COUNSEL AND WHICH FINDING IS NOT SUFFICIENT UNDER RULE 61 OF THE UTAH RULES OF CIVIL PROCEDURE TO OTHERWISE OPEN CASES TO PRESENT NEW EVIDENCE . . . . .	28
IV. THE RELIEF AFFORDED THE REMAINING PLAINTIFF AT TRIAL IS NO GREATER THAN THAT TO WHICH THE DEFENDANT STIPULATED WELL IN ADVANCE OF TRIAL . . . . .	32
V. THE AWARD OF ATTORNEY'S FEES TO THE PLAINTIFF BASED UPON AFFIDAVITS TO WHICH THERE WERE CONTRARY AFFIDAVITS IN THE FILE AS TO BOTH THE ISSUES OF AMOUNT AND REASONABLENESS IS IMPROPER UNDER BASIC PRINCIPLES OF JURISPRU- DENCE APPLICABLE TO ADVERSARY PRO- CEEDINGS AND AMOUNTS TO TRYING ISSUES BY AFFIDAVIT . . . . .	34

VI. THE COURT'S DENIAL OF DEFENDANTS/ APPELLANTS' ATTORNEY'S FEE IN TRYING IN LARGE PART ISSUES NOT PROPERLY BEFORE THE COURT AND IN SUCCESSFULLY RESISTING FORFEITURE OF THE LEASE WAS IMPROPER, SUCH FEES HAVING BEEN TESTIFIED TO AND BEING ALLOWABLE PURSUANT TO UTAH LAW . . . . .	36
CONCLUSION . . . . .	39

CONSTITUTIONS, STATUTES AND COURT RULES

	<u>Pg.</u>
Utah Rules of Civil Procedure, Rule 15 . . . . .	16
Utah Rules of Civil Procedure, Rule 56 . . . . .	35
Utah Rules of Civil Procedure, Rule 61 . . . . .	28,29,32

CASES CITED

	<u>Pg.</u>
<u>Aiken v. Burrows</u> , 30 Utah 2d 116, 514 P.2d 533 (1973) . . . . .	21
<u>Audit Services, Inc. v. Kraus Construction, Inc.</u> , 615 P.2d 183 (Mont. 1980) . . . . .	35
<u>Carter v. Cummings-Neilson Co.</u> , 34 Utah 315, 97 Pac. 335 (1908) . . . . .	21,22
<u>Chesney v. Chesney</u> , 33 Utah 503, 94 Pac. 989 (1908) .	14
<u>Comish v. Smith</u> , 97 Idaho 89, 540 P.2d 274 (1975) . .	22
<u>Costango v. Nyman</u> , No. 16905 (Utah, filed Sept. 24, 1980) . . . . .	14
<u>Crooks v. Harmon</u> , 29 Utah 304, 81 Pac. 95 (1905) . .	21
<u>Davis v. Riley</u> , 20 Utah 2d 325, 437 P.2d 453 (1968) . . . . .	29,30,31
<u>Dixon v. Stoddard</u> , 622 P.2d 83 (Utah 1981) . . . . .	30
<u>Freed Finance Compnay v. Stoker Motor Company</u> , 537 P.2d 1039 (Utah 1975) . . . . .	34

<u>Ficke v. Alaska Airlines, Inc.</u> , 524 P.2d 271 (Alaska 1974) . . . . .	26
<u>Gardner v. Christensen</u> , 622 P.2d 782 (Utah 1980) . .	30,31
<u>Hall v. Hickey</u> , 319 P.2d 33 (Cal. 1957) . . . . .	30
<u>Heywood v. Ogden Motor Car Co.</u> , 266 P.1040 (Utah 1928) . . . . .	38,39
<u>Laundry, Dry Cleaning, Dye House Workers Union v. Laundry Workers International Union</u> , 4 Wis.2d 542, 91 NW 2d 320, (1958) . . . . .	33
<u>Lee Wayne Co. v. Pruitt</u> , 550 P.2d 1374 (Okla. 1976) .	35
<u>Lewis v. Porter</u> , 556 P.2d 496 (Utah 1976) . . . . .	28
<u>Lohman v. Lohman</u> , 29 Cal.2d 144, 173 P.2d 657 (1946).	35
<u>Maas v. Patterson</u> , 204 P.2d 1040 (Mont. 1949) . . . .	31
<u>O'Malley v. United Producers &amp; Consumers Coop, Inc.</u> , 95 Ariz. 134, 387 P.2d 1016, (1963) . . . . .	30
<u>Parmenter v. Ransom</u> , 169 P.2d 883 (Ore. 1946) . . . .	30
<u>Sandall v. Hoskins</u> , 137 P.2d 819 (Utah 1943) . . . .	39
<u>School Board of Consol. Dist. No. 36 v. Edwards</u> , 87 P.2d 962 (Okla. 1939) . . . . .	33
<u>Smith v. Miller</u> , 213 Kan. 1, 514 P.2d 377 (1973) . .	35
<u>Stenfonick v. Stenfonick</u> , 167 P.2d 867 (Mont. 1946) .	35
<u>United Producers &amp; Consumers Coop, Inc. v. O'Malley</u> , 103 Ariz. 26, 436 P.2d 575 (1968) . . . . .	31
<u>U.S. v. Lotempio</u> , 58 F.2d 358 (D.N.Y. W.D. 1931) . .	32

#### OTHER AUTHORITIES

	<u>Pg.</u>
49 Am Jur. 2d, "Landlord & Tenant", §330 (1970) . . .	37,38
Blacks Law Dictionary, 96 (5th Ed. 1979) . . . . .	32
32A C.J.S. "Evidence", §1052 (1964) . . . . .	35

83 C.J.S., "Stipulations", §6 (1953) . . . . .	26
Jones, "Evidence", §809 (3rd Ed.) . . . . .	30
6. J. Moore Federal Practice, ¶59.04[13], (2nd Ed. 1976) . . . . .	28

---

IN THE SUPREME COURT  
STATE OF UTAH

---

GENEVIEVE A. SMITH, JESSE E. SMITH,       )  
BETH M. SMITH, and SALLI SMITH GIRARD,       )  
                    Involuntary Defendants,  
                    Plaintiff and Respondent,)       Case No. 17661  
  
                    vs.                                )  
  
CHARLES L. APPLEBY, JR., CATHERINE R.       )  
APPLEBY, DON BJARNSON, and GRACE               )  
BJARNSON,                                        )  
  
                    Defendants, Appellants.       )

---

BRIEF OF APPELLANTS

NATURE OF THE CASE

The Plaintiffs initially filed a Verified Complaint seeking the forfeiture of a lease by reason of the Defendants' alleged failure to maintain insurance on the premises as required therein. Plaintiffs also sought a temporary restraining order affirmatively requiring the Defendants to maintain insurance during the pendency of the action. The Defendants/Appellants [hereinafter "Appellants"] responded claiming that they had timely cured the deficiency regarding insurance pursuant to the terms and periods allowed by the lease and that forfeiture should not be declared. Appellants also alleged that the Plaintiffs were aware and had consented

to the lack of insurance and had waived and were estopped from seeking a forfeiture by Plaintiffs' actions inconsistent therewith. Lastly, the Appellants counterclaimed alleging that the Plaintiffs had violated several covenants of the lease, and were in material breach thereof, Appellants further seeking to establish their rights to quiet enjoyment of the leasehold pursuant to its terms.

Prior to trial, three of the four Plaintiffs initially filing suit entered into a stipulation with the Appellants to dismiss the lawsuit with prejudice as to all issues pertaining to them with the exception that the injunctive relief pertaining to the issuance of insurance would continue. These same parties also stipulated that each party would bear his or her own attorney's fees and costs. The case was continued through trial by the remaining Plaintiff and the Respondent herein, Salli Smith Girard, also known as Salli Smith Girard Clinger.<sup>1</sup>

#### DISPOSITION IN THE LOWER COURT

In an initial series of findings, together with an order dated March 6, 1981, the court declined to declare a forfeiture of the lease finding that the alleged breaches, if any, were not so substantial as to require the penalty of

---

<sup>1</sup>At trial, Mrs. Girard had remarried and testimony was given under the name of Clinger.



forfeiture insofar as the Plaintiff had now been placed in a position as if no such breach had ever occurred. The court further found that the continuing acceptance of rents by the lessors constituted a waiver of their claim to the penalty of forfeiture. (R304) With regard to the three named Plaintiffs who had earlier stipulated to the dismissal of the suit, the court declined to honor that dismissal and, instead, joined them as involuntary parties Defendant. (See Finding of Fact #2, R302-03; R162, R164) Thereafter, without motion, the lower court assumed the task of Respondent's trial strategy and reopened the case, sua sponte, to take testimony on Respondent Girard's attorneys' fees, upon which issue no evidence had been given by Respondent at trial.

Respondent Girard then submitted two affidavits, one by Mr. John L. Miles, counsel for Mrs. Girard, and one by Ronald B. Boutwell, counsel for the other Plaintiffs, who had been joined by the court as involuntary parties Defendant. (R322, 337) Counsel for Appellant filed an opposing Affidavit. (R332-33) Mr. Miles affidavit requested \$350.00 and Mr. Boutwell's affidavit indicated that his attorney's fees were \$3,137.50. (R338). Thereafter, in a series of an additional findings of fact dated the March 18, 1981, the court disregarded the affidavit filed by Appellants and awarded to the Respondent Mrs. Girard the attorneys fees as set forth in the affidavits of Mr. Miles, as well as Mr. Boutwell. (Finding of Fact No. 16, R341)

## RELIEF SOUGHT ON APPEAL

Appellants seek modification of the judgment below on the grounds that the attorneys' fees awarded to the Respondent Clinger are not supported by any testimony properly before the court. Appellants seek reversal on the grounds that there was no just cause to reopen the case without motion and the court's judicial paternalism to the Respondent Girard vicariously undertook her trial strategy, which was best left to either of her two counsel at trial. Appellants further seek reversal of the attorney's fees on the further ground that an award of an attorneys' fee, when the Appellants had previously stipulated to the continuing issuance of the injunction, which was the sole relief awarded at trial, is inappropriate. Furthermore, Appellants seek reversal of the attorney's fees awarded to Respondent Girard on the grounds that that award to her for costs set forth by the Affidavit of Mr. Boutwell, counsel for the involuntary parties defendant, is without natural logic as there is no evidence before the court as to any obligation of the Respondent Girard to pay counsel for these involuntary parties who were again joined without motion.

Lastly, Appellants seek reversal of that portion of the court's judgment denying them their attorneys fees as testified to at trial, such attorney's fees being expended to sustain the leasehold and prevent the forfeiture of the lease when a timely cure had been made.

## STATEMENT OF FACTS

This case arose out of a lease initially executed on the 23rd day of July, 1975, for a parcel of property near Hurricane, Utah, commonly known as "Pah Tempe" or "The Hot Springs". The property under lease is part of a canyon within which there is a natural phenomenon of heated mineral waters. The initial Lessors were E. Penn Smith and Genevieve A. Smith with the initial Lessees being Charles L. Appleby, Jr., David E. Wood and Don Bjarnson and their wives. Mr. and Mrs. Wood later sold out to the Appleby's and Bjarnson's and Mr. Smith later passed away so at the time of trial, the Lessors interest were held in three equal shares as tenants in common by Genevieve A. Smith, Jesse E. Smith and Salli Smith Girard, also known at the time of trial as Salli Smith Girard Clinger. (Partial Transcript, hereinafter PT30:1-5,15)

Initially drafted by the Lessors, the lease encouraged the Lessee to improve the property thereon and provided for a rental which combined both a flat rate and, under certain circumstances, a percentage of the gross receipts. The parties also agreed that the premises and facilities should be operated as a "recreational and therapeutic spa". (See P-3 at p.3) As relevant to Respondent's cause of action filed below, paragraph 9 of the lease required the Lessees to maintain liability insurance in the sum of \$300,000 on the premises and paragraph 12 of the

lease required either party to be responsible to the non-defaulting party for reasonable attorney's fees incurred "in enforcing the terms of this agreement or exercising any rights or remedies hereunder or any rights or remedies otherwise provided by law". Paragraph 13 of the lease also provided that the Lessees had "thirty (30) days in which to cure" any default in the terms of the lease. (See P-3)

While the Respondent Girard has chosen to cross-appeal without the benefit of a transcript, nonetheless, the following facts can be gathered from the court's findings and her testimony, which was prepared as part of a partial transcript requested by the Appellants. (R358, see also, Clerks Certificate filed June 1, 1981) Appellants first came on the leased premises and, as Respondent recalls, built a living room, fireplace and bunk room. (T78:25-28) Respondent also recalls the Lessees constructing two new bedrooms together with closets as an annex to the initial office space on the premises. (T79:26-29) Other improvements constructed by the Lessees consisted, in the Respondent's own words, of an entirely new and modern cabin on the premises, picnic tables, a wishing well and sprinklers substantially doubling the earlier living space. (T79:26-29; T83:5-9, 26-30; T87:1-5) Additionally, Respondent Girard testified that the Lessees had put cinders in the parking lot, placed a lighted sign on the highway to the premises, repaired a gaping hole in the

grottos in the theraputic hot water areas, and repaired crumbling plaster, replacing the same with a hand painted mural around the pool area. (T81:28-82:1; T81:8-11; T84; T86)

In early 1978, the cost of insuring the premises with the previous insurer suddenly trebled and the Lessees failed to renew their policy advising the Lessors of their concern and requesting the Lessors' help to obtain an alternative source of insurance. (T71:13-15; T40:3; T39:12-13; T72 at 30) Finally, on or about March 20, 1978, both Lessors and Lessees were very actively concerned about getting insurance. (T39:5-7) As a result, sometime in late March of 1978, the Lessors sent Lessees an undated "Notice to Cure Defaults". (P-4) Shortly thereafter, on May 8, 1978, the Lessors' attorney, Ronald Boutwell, filed a Verified Complaint on behalf of Genevieve A. Smith, Jesse E. Smith, Beth M. Smith, his wife, and Salli Smith Girard.

In their first cause of action, Lessors alleged that the Appellants were in default on their lease because insurance, as required thereby, had not otherwise been obtained. As a result of this allegation, the Respondent claimed a forfeiture of the leasehold and an entitlement to re-enter and take possession of the premises. The second cause of action, plead in equity, sought an immediate injunction of any activities on the leased premises unless \$300,000 of liability insurance was first obtained by Appellants. (R1-7) While an unsigned copy of the "Notice to

Cure Defaults" attached to the Complaint as Exhibit B referred to matters other than insurance, such matters were not alluded to whatsoever within the pleadings in the complaint. (R1-8, 19-21) And while the Appellants sought to correct all of those matters mentioned in the "Notice to Cure Defaults", they discovered that outside of those insurance matters plead in the complaint, the Lessors also had no information whatsoever upon which the other matters set forth in the "Notice to Cure Defaults" were framed. In the Respondent Girard's own words at trial, she admitted not knowing what violations other than those of insurance, in fact, existed until January of 1981. (T68-69) Mrs. Girard later explained the Lessors' lack of knowledge as follows:

Well, Mr. Boutwell filed this and he told us that there were no doubts codes were being broken, but we were not told what specific codes. (T69:25-27)

On August 17th of 1978, Defendants filed their answer and counterclaim pertaining to the insurance issues raised in the complaint, pleading estoppel and waiver among their affirmative defenses and further denying those allegations pertaining to their alleged bad faith refusal to get insurance. Defendants further alleged that they had properly cured the default within the time allowed pursuant to the lease and counterclaimed alleging some material breaches of the lease by Lessors. (R44) Respondent's reply to the counterclaim was not filed until 15 months later and the

counterclaim itself was not actively pursued at trial. (R72, Findings of Fact 11 and 12, R305)

While the Lessors, pending trial, continually alluded to alleged health code violations, they never clarified what these were until the day of trial. And, while Lessors' counsel had ample opportunity over a period of over three years to amend their complaint, no motion was ever made prior to trial, and thus, matters outside of those allegations pertaining to insurance were not properly before the court.

With regard to insurance, the partial transcript ordered by the Appellants contains the testimony of Mr. Douglas Labrum<sup>2</sup> who was retained by Appellants to obtain insurance on the premises. Mr. Labrum's testimony reveals the following: First, that after delivery of the Notice to Cure Defaults, Mr. Donald Bjarnson, one of the Lessees, approached Mr. Labrum very anxious to obtain insurance in March of 1978. (T20:19) Labrum described Bjarnson's attitude as "eager", indicating that Bjarnson literally barraged the insurance agency with phone calls in order to obtain insurance. (PT16; 19; 20-23) Labrum thereafter indicated that the first coverage on the Hot Springs was obtained by reason of a binder issued March 19, 1978 (PT14:26-28) and

---

<sup>2</sup>Labrum was called by Respondent Girard as her witness.

that this binder was good for thirty days. (PT35:14-18) Labrum also testified that it is often conceivable that binders do not result in the ultimate issuance of a policy and that the insurance company often sends engineers to check the risk and to give the property owners a list of things which need to be corrected prior to the policy being issued (PT15:6-8; 19:20-29; 28:13-24) While Mr. Bjarnson's instructions were to do everything possible to maintain insurance on the premises, it was clear that at times binders were rejected and checks made out to Mr. Labrum from the Lessees were returned. (PT21:1-5, 12-15) The nature of the resort made it difficult for the agent to place the coverage. (PT20:28-30)

Regardless of the difficulty in placing insurance, Labrum later testified that between March and the date of trial, there were only two periods in which no coverage existed; one being a twelve day period beginning April 27, 1978 and the other being a thirty day period between June 20 and July 20 subsequent to the filing of the cause of action in May of 1978. (PT15:20-25; 17:25-30; 18:4-8) Upon cross examination, however, Labrum recanted his earlier testimony and indicated that coverage was extended through June 20 and that the only lapse of coverage after March 19, 1978 occurred between June 20 and July 20, 1978, that period being clearly subsequent to the filing of the complaint. (See R1; PT18:14-30; 19:1-3, 19-30; PT22:13-20; PT22:26-23:1) The basis for Labrum



recanting his earlier testimony was a memo in his own file from the insurance company's agent and underwriter, which extended coverage on the basis of an engineer's view of the premises through June 20. (Id; PT22:26-23:1; PT20:1-9) After July 20, there was continuous coverage up through the date of trial. (PT17:30-18:3) Ultimately, the policy was actually issued on September 28, 1978 with Mr. Bjarnson instructing Mr. Labrum to make his files open and available at all times to any of the Lessors. (PT23:29-30; 27:26-30)

In early 1980, Mr. Boutwell withdrew his counsel for Salli Smith Girard Clinger. Ultimately, John L. Miles filed a formal notice of appearance on her behalf on September 2, 1980. (R117)

In November of 1980, Boutwell met with all of the Plaintiffs, including Mrs. Girard, and his clients made it clear that they were satisfied that the Lessees had complied with their demands for insurance and wanted the suit dismissed. (PT48:11-20) Thereafter, Boutwell called the Appellants' attorney advising him that he believed all of the Plaintiffs were going to dismiss the suit. On December 8, 1980, the Plaintiffs Genevieve A. Smith, Jesse E. Smith and Beth M. Smith, through their attorney Ronald Boutwell, and the Defendants, Appellants herein, by and through their attorney, Michael D. Hughes, stipulated as follows:

1. That the complaint as to the stipulating parties be dismissed with prejudice as to those issues raised on behalf of the three stipulating Plaintiffs.

2. That the injunction requiring Defendants [Appellants] to maintain insurance coverage remain in full force and effect, not being dismissed with the dismissal of the complaint.

3. That each party bear his or her own costs and expenses incurred in the action.  
(R161)

This stipulation arose as a direct result of the earlier meeting at which the remaining Plaintiff [Respondent] Salli Smith Girard was present, and, though the stipulation was referred to on two different occasions on the law and motion calendar, a copy of the same was inadvertantly not mailed to Mr. Miles, counsel for the remaining Plaintiff, Salli Smith Girard. A partial dismissal with prejudice reflecting the stipulation appears in the record at 164 and indicates that the complaint be dismissed with prejudice as for Plaintiffs Genevieve A. Smith, Jesse E. Smith and Beth M. Smith, but that the preliminary injunction remain in full force and effect and that no costs and attorney's fees be assessed against any of the parties to the stipulation. (R164)

During the pendency of these proceedings, all of the Plaintiffs, including Mrs. Girard, continued to accept rents from the Appellants herein for the leasehold premises. (PT63:23-24; Finding of Fact No. 7, R304-05) At the time of trial, the three named Plaintiffs, Genevieve A. Smith, Jesse E. Smith and Beth M. Smith, did not appear as parties, but merely as witnesses. They all represented to the court that they did not desire to be parties to the law suit. The court upon hearing that evidence, found that such was the

case. (Finding of Fact No. 2, 302-03) While Mr. Boutwell testified as a witness at trial, he also did not participate as counsel. Thus, in the partial transcript there is no reflection of any direct or cross examination conducted by Mr. Boutwell, despite the Appellants' request that the partial transcript contain "[a]ll direct and cross examination conducted by Ronald B. Boutwell." (See clerk's certificate filed June 1, 1981, together with attachments.)

During the trial, the Respondent, Mrs. Girard, who was represented by both Mr. Miles and Mr. Wright, moved to amend the complaint and proceed on another theory involving health code violations based upon information tendered to the Appellants on the morning of the trial and filed that same date with the court. (R172-183) This information was tendered only after the Appellant had strenuously urged a clarification of Mrs. Girard's position through several earlier discovery motions. (See PT1-8) Mrs. Girard explained the difficulty as to obtaining this information, stating that she did not know the exact nature of the cause of action she chose to plead even until the month of trial. (T68:28-69:10; PT69:25-27) As a result of Plaintiff Girard's failure to clarify her position and to formally amend her cause of action, and, further, as a result of the late tender of any discovery thereon, the Appellants objected strenuously throughout trial to the amendment of any pleadings to raise causes of actions not properly framed and before

the court. While the court allowed such testimony to enter into the record, it noted the Appellants' counsel's continuing objection to all testimony pertaining to matters outside of the relevant insurance questions. (PT32:28; 33:7-14) Plaintiff Girard, on the other hand, asserted that her cause of action as recently discovered by her was fairly plead by reference to the Notice to Cure Default attached as an exhibit to the original complaint. Ultimately, the court in accordance with Chesney v. Chesney, 33 Utah 503, 94 Pac. 989 (1908), sustained Appellants' objection and excluded from its ruling all matters pertaining to causes not formally raised by the pleadings and not tried by consent.

During the trial, Respondent Girard also sought to introduce testimony pertaining to matters which had occurred on the leased premises only two or three months prior to trial. At best, the major thrust of her lawsuit pertained to the lapse in insurance from June 20 through July 20, 1978 despite the fact that the verified complaint again was filed on May 8, 1978, some six weeks before the alleged material breach occurred. Appellants again objected to the court taking evidence on facts occurring after the filing of a complaint since Respondent's cause of action must exist either at the time of filing of the complaint or not at all. This position, framed in reference to the Costagno v. Nyman case, No. 16905 (Utah, filed in September 24, 1980) was rejected by the court, though the Appellants firmly believed that they had cured the

default in securing insurance as was reflected by the testimony of Doug Labrum at trial.

At the end of Respondent Girard's case, both of her attorney's rested having presented no evidence on attorney's fees. (Finding of Fact number 8, R305) The Appellants finished their rebuttal of the Plaintiff's case and their counsel was then sworn to testify as to his attorney's fees in defending the lease from forfeiture. His testimony established that a reasonable fee in the instant case on Appellants behalf would be \$2,000. (PT92:18-93:2)

On cross-examination of Appellants' counsel, Respondent Girard's counsel attempted to establish her attorney's fees in the following manner:

Q: You consider that, then, [\$2,000] a reasonable amount, is that right, Mr. Hughes?

A: For my services, yes.

Q: And that would be a reasonable sum, then, for attorneys on the opposing side?

A: I couldn't testify to your case in direct, Mr. Wright.

Q: My question is, that figure would be a reasonable figure, don't you think?

A: I have no way of knowing what your billing system is at your office.

Q: That would be a reasonable fee for an attorney, would it not?

A: For my services, yes.  
(R93:5-19)

It was clear from the above cross examination that both of Respondent Girard's counsel realized they had failed

to present any testimony on Respondent's attorneys' fees at trial and were trying to inferentially put sufficient testimony into evidence by the cross-examination of Appellants' counsel. Nonetheless, Respondent's counsel did not move to reopen the case and present evidence on their attorney's fees, apparently declining to do so as part of their trial strategy. Whatever the reason, this is a decision uniquely left to counsel as part of the adversary process.

After the trial, the district court set aside its own order of dismissal based upon the prior stipulation and rejoined Genevieve A. Smith, Jesse E. Smith and Beth M. Smith to the action as involuntary parties defendant. (R162, 164, Finding of Fact number 2, R302-3) Thereafter, the court disallowed those amendments to the cause of action proposed by Respondent Girard during trial, holding that the evidence presented thereon throughout trial had been subject to the continuing objection of Appellants' counsel and that there was no reason produced for the Respondents not having formally moved to amend prior to trial. (Finding of Fact No. 4, R303-04) In failing to allow the amendment, the court noted that its action was well within its discretion under Rule 15 U.R.C.P. (Id.) All testimony received pertaining to those causes of action, and all objections relating to the testimony and exhibits pertaining to those causes of action were thereafter sustained. (Id.)

Despite Appellants cure within the time allotted within the lease pursuant to the testimony of Doug Labrum, the court found, nonetheless, that there had been a breach of the lease, but that the same was not sufficient to justify a forfeiture of the leasehold. (Findings of Fact 6 and 7, R304-305) These findings were based on the court's judgment that a penalty of the nature sought after by Respondent Girard was disproportionate to her claimed losses and that the Lessors as a whole had been placed in a equivalent position as if the breach "relatively short in duration" had not occurred. (Id.) The court further found that all of the Lessors had accepted rent consistent with their desire to continue their status under the terms of the leasehold. (Id.)

Appellant's attorney's fees previously testified to at trial in sustaining the lease and avoiding forfeiture were anomalously denied. Nonetheless, without further motion, the court, in an act of judicial paternalism, re-opened the case to receive evidence as to the Respondent's attorney's fees, finding that her omission of any evidence thereon may have been caused, in part, by Respondent's own pursuit of causes of action not properly before the court. This reopening of the case weeks after trial was directly contrary to the Appellants' interest and directly favorable to the interests of Respondent. Again, the case was reopened without motion and, despite the court's finding that the

omission was somewhat inadvertant, or perhaps caused by Respondent's own attorneys' efforts to amend during trial, it is clear that the court was in error in actively assuming the position of Respondent Girard's trial strategist. Her attorney's cross-examination of Appellants counsel, ante pp. 15-16, clearly revealed that they were well aware of this omission.

While the court invited Respondent's counsel to optionally present further testimony on attorney's fees, Respondent's attorneys chose to bear their burden of proof by submitting two affidavits, one by Mr. Miles testifying to \$350.00 attorney's fees and the other by Mr. Boutwell, who, similar to his clients had not appeared at trial other than as a witness. (R322, 337) Again, it cannot be gainsaid that Boutwell conducted no direct or cross examination at trial. (See clerk's certificate filed June 1, 1981, together with attachments, and PT) Mr. Boutwell's affidavit stated that he had incurred attorney's fees of \$3,137.50. (R338) Appellants' counsel filed an opposing affidavit indicating that in light of the Appellants' cooperation in obtaining insurance, a reasonable attorney's fee on Respondent's behalf could be no more than \$250.00. (R332-33)

In a series of additional findings filed on March 18, 1981, the court awarded the remaining Plaintiff, Salli Smith Girard, the sum of \$3,487.50 in attorneys fees simply adding those figures submitted by John L. Miles and Ronald B.



Boutwell. (R340-41, No. 16) This finding came despite the fact that Mr. Boutwell did not represent Mrs. Girard and had earlier stipulated on behalf of all of his clients that each party represented by him would bear their own costs and expenses incurred in the action. (R162) Again this stipulation was reflected by an order executed by the court. (R164)

The court further found that the attorney's fees were awardable to the Respondent Girard because trial of the matter had resulted in the finding that a "breach of the insurance covenant had occurred, and that a permanent injunction could issue, without bond." (R341) Again, however, Appellants had already stipulated that the injunction continue, and the bond required by an earlier order of the court on September 12, 1978, was only \$500.00, or approximately one-seventh of the attorney's fees awarded. (R162, 164; R67-68) Ultimately, the award of attorney's fees was a conclusion perhaps foreshadowed by the court's own assumption of Respondent's trial strategy. Having personally reopened the case on Respondent Girard's behalf, it perhaps begs the question to ask why the opposing affidavit of Appellant's counsel pertaining to an appropriate attorney's fees on Respondent's behalf was given no evidentiary weight and the two affidavits of Mr. Miles and Mr. Boutwell, which were not subject to cross examination, were accorded full evidentiary value.

As a result of the foregoing rulings, this appeal

was taken on behalf of Appellants to reverse the award of attorney's fees on Respondent Girard's behalf and again reverse that denial of attorney's fees requested by Appellants and testified to at trial by their counsel. This appeal contends that the system of justice in Utah is basically adversarial and that counsel must ultimately take the responsibility for trial strategy, it being inappropriate for the court to reach out and assume the task of deciding an issue contrary to one party's interest when no evidence has been presented during trial upon that issue.

### APPELLANTS' POINTS ON APPEAL

#### POINT I

THERE IS NO TESTIMONY PROPERLY REGARDED AS  
SUCH UPON WHICH THE PLAINTIFF/APPELLANT *Respondent*  
GIRARD MAY BE AWARDED ANY ATTORNEY'S FEES.

At the close of trial, Respondent Girard rested her case without giving any testimony on attorney's fees and without requesting to reopen her case to present testimony to pursue that matter. (Findings of Fact No. 8, R305) Despite the fact that the Respondent Girard bore the burden of proof at all stages of the trial to present testimony on this matter and failed to do so, the lower court, sua sponte, reopened the case after a series of findings dispositive of the material issues in the suit. (R302-06) This case was reopened solely to provide Mrs. Girard the opportunity to bear the burden of proof on the issue of her attorney's

fees, upon which no evidence had been presented at trial. Her attorneys chose to bear this burden by the presentation of affidavits which were contraverted by an opposing affidavit in the record. (R322-24, 337-39, & 332-34) Thereafter, the court simply chose to disregard the contradictory affidavit of Appellant's counsel and awarded attorney's fees based upon the affidavits of John L. Miles, counsel for Mrs. Girard, and Ronald B. Boutwell, who filed an affidavit regarding his attorney's fees but did not articulate whether Mrs. Girard was indebted to him or whether, in fact, he had been paid, either by her, or his other clients who had continuously requested dismissal from the suit.

As there was no stipulation on an appropriate attorney's fee, the award of attorney's fees to Mrs. Girard in the instant case should be reversed since, simply stated, it was not "based on sworn testimony" properly subject to cross examination at trial. See Aiken v. Burrows, 30 Utah 2d 116, 514 P.2d 533 (1973).

In the early case of Crooks v. Harmon, 29 Utah 304, 81 Pac. 95 (1905), Chief Justice Bartch speaking for the Supreme Court said:

The word 'testimony' is a restricted, limited term, consisting only of the statements of witnesses, while the word 'evidence' is a comprehensive term, embracing not only testimony, or the statements of witnesses, but also documents, written instruments, admissions of parties, and whatever may be submitted to a court or jury to elucidate an issue or prove a case. 81 Pac. at 96

Similarly, three years later, Chief Justice McCarthy in Carter v. Cummings-Neilson Co., 34 Utah 315, 97 Pac. 335 (1908), stated the following in defining the word "testimony":

The word 'testimony', when used as it is in the foregoing certificate, is not synonymous with evidence. The former refers to and includes one species of evidence, namely, the oral statements made by witnesses while testifying; whereas, the latter is a generic term, and includes any species of evidence or proof submitted to a court or jury in the trial of a case. 97 Pac at 335.

That the word testimony continues to be a restrictive term is clear in the recent Idaho case of Comish v. Smith, 97 Idaho 89, 540 P.2d 274 (1975), wherein the Idaho Supreme Court confirms that "testimony" is "merely a species of evidence which is produced by oral statements of the witness." 540 P.2d at 278

In the instant case, there was no testimony presented on attorney's fees during trial. Respondent Girard's counsel failed to open the case before closing argument or even before the initial findings of fact were entered to put on testimony subject to cross examination, thus waiving her claim to the same. The court's award, therefore, is based on contested affidavits filed subsequent to trial, such affidavits being invited by the court's own solicitous ruling. As the burden of proof to sustain an appropriate award of attorney's fees is Respondent's, this Court should reverse and reject the judgment for attorney's fees as there is no stipulation or "testimony" as such upon which the

appropriate award may be based. It is clear from the partial transcript of trial that the Respondent Girard's counsel knew they had failed to present evidence thereon, strenuously attempting to establish their attorney's fees through the testimony of opposing counsel. (PT at 93:6-21) Failing to do that, they also neglected to appropriately reopen the case. The lower court's subsequent indulgence of the Respondent in reopening the case for her, harmed the Appellants, and is much too close to overt advocacy favorable to one party. Further, the contested affidavits presented therein are simply not sufficient upon which to base an award of attorney's fees, not being otherwise subject to cross examination.

## POINT II

THE ATTORNEY'S FEES AWARDED BY THE JUDGE ARE CONTRARY TO THE STIPULATION ENTERED INTO BETWEEN APPELLANTS' COUNSEL AND COUNSEL FOR THE INVOLUNTARY DEFENDANTS, RONALD BOUTWELL, UPON WHOSE AFFIDAVIT THE LARGEST PORTION OF THE ATTORNEY'S FEES WAS BASED.

Initially this suit was pursued by four Plaintiffs, three of which have a present interest in the Hot Springs. (R1, PT at 30:1-15) Attorney Ronald B. Boutwell represented all of the Plaintiffs in the action at its inception.

On September 12, 1978, a preliminary injunction as to the operation of the resort was issued. (R 67, 68) The insurance problem, which had been raised in both the notice to cure and the complaint was already in the process of being

resolved among the parties at that time, first, with the issuance of binders and ultimately by the issuance of a policy on September 28, 1978. (PT at 23:29-30)

By November of 1980, Mr. Jesse Smith, his wife Beth Smith and Mrs. Genevieve Smith informed their attorney, Mr. Boutwell, that they intended to pursue the case no further. (PT48:11-20) Thereafter, Mr. Boutwell, acting at his clients' request, secured a stipulation from Appellants' attorney in which all of the parties to that stipulation agreed as follows: (1) that the Complaint on file be dismissed with prejudice as it relates to issues raised on behalf of the three Plaintiffs previously named; (2) that the injunction requiring Defendants [Appellants herein] to maintain insurance coverage on the leased premises remain in full force and effect; and (3) that each party bear his or her own costs and expenses incurred in this action. Executed on December 8, 1980, this stipulation appears in the record at page 162. Prior to executing the same, Boutwell had already informed Mrs. Girard that it would be in her best interest to find a new attorney since it would be difficult for him to continue to represent her as a result of the anticipated settlement by the other plaintiffs. At trial, the stipulating Plaintiffs stated to the court that they did not want to be parties to the law suit, but the court joined them as involuntary defendants, again without motion. (Finding of Fact No.2, R302-03)

At trial, Mr. Miles and Mr. Wright represented the

Respondent herein; Mr. Boutwell, not only did not represent Mrs. Girard, but did not even appear in the case as counsel. In its initial series of findings and order when the court reopened the case, it invited Mr. Wright and Mr. Miles to present evidence pertaining to their attorney's fees. Their firm then prepared an affidavit for Mr. Boutwell's signature which states that he was at one time the attorney for all the Plaintiffs and that the sum of \$3,137.50 would be a reasonable attorney's fees for him in the above entitled matter. (R 337-39) While Plaintiff Girard's counsel had successfully moved to set aside the stipulation executed by the other co-plaintiffs, neither they nor their attorney, Mr. Boutwell, joined in that motion. (Finding of Fact No. 2, R302-03; R210) Furthermore, the affidavit of Boutwell at no point indicates that Mrs. Girard is indebted to him for that amount or that that sum has been paid by her. In fact, logic and equity would indicate that his attorney's fees at best, would have to be divided equally between his clients. Nonetheless, the court in awarding attorney's fees awarded the remaining Plaintiff, Mrs. Girard, all of those attorney's fees set forth in Ronald B. Boutwell's affidavit despite the fact that three of his four clients stipulated that they would be responsible for their own costs and expenses. (See Finding of Fact No. 16, R341; R162, 164)

While Respondent Girard's attorneys moved to set aside the order of the court based upon the stipulation at

R164, their motion was framed on the premise that the stipulating Plaintiffs needed to be rejoined in the lawsuit. While the court did rejoin those parties, it is evident that they did not desire to be part of the trial by the Findings of Fact entered thereon. (Finding of Fact No. 2, R302-03) Nonetheless, the court's refusal to honor that portion of the stipulation relating to those parties bearing their own costs and expenses is reversible error. Simply stated, once a stipulation is signed, it becomes part of the record of the case, having the same effect and potency as an order of the Court agreed to by the parties thereto. 83 C.J.S. Stipulations §6 (1953)

While apparently the court did not choose to be bound by the stipulation in the instant case, the court should, nonetheless, have disregarded that portion of Boutwell's affidavit relating to attorney's fees charged to all four clients which at one time were represented by him. As stated in Ficke v. Alaska Airlines, Inc., 524 P.2d 271 (Alaska 1974):

An attorney retained in negotiating the terms of an agreement binds his client to promises made within the scope of that authority. Id. at 275.

Again, there is no indication in Mr. Boutwell's affidavit what portion of those fees sought in this affidavit are properly assessable on behalf of the remaining Plaintiff, Mrs. Girard. (R337-39)



In the stipulation bearing Mr. Boutwell's signatures, is the statement "each party hereto shall bear his or her own costs and expenses incurred in this action." (R162) This statement implies that each party to the stipulation will equally absorb the expense of the action. The logical assumption in the instant case is that Boutwell's clients would equally divide the initial costs of securing their rights. Nonetheless, the court's ruling has awarded to the remaining Plaintiff, Mrs. Girard, all of those attorney's fees incurred by Mr. Boutwell in representing all four plaintiffs. As the result, Boutwell's affidavit, which neither divides the attorney's fees between his clients or indicates that Mrs. Girard is obligated to him for that amount or, in fact, any amount or whether she is indebted to him at all should be disregarded. (R 337-39) Boutwell's earlier acquiescence to the stipulation that each party should bear his or her own costs would seemingly disqualify the larger portion of his fees testified to as being assessable at this time against the Appellants. (R162) The court's holding the Appellants responsible for all of Boutwell's fees, including those generated for clients who did not participate in the trial as parties and who chose to settle the case with Appellants is patently in error.

### POINT III

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN  
SUA SPONTE REOPENING THE CASE ON THE ISSUE OF  
ATTORNEY'S FEES BASED UPON A FINDING OF FACT,

WHICH FINDING WAS NEITHER RAISED, PLEAD OR ARGUED BY PLAINTIFF'S COUNSEL AND WHICH FINDING IS NOT SUFFICIENT UNDER RULE 61 OF THE UTAH RULES OF CIVIL PROCEDURE TO OTHERWISE OPEN CASES TO PRESENT NEW EVIDENCE.

The lower court has no justification in the case at bar for sua sponte reopening the case for the presentation of evidence on the issue of attorney's fees. While the reopening of cases to preserve the furtherance of justice is allowable, in this instance the court has abused its discretion for lack of good reason.

Ordinarily a case is only reopened, subject to the court's discretion, on a motion by counsel. While the Court may indulge a variety of considerations on a motion to reopen, it should grant or deny the motion in light of all the circumstances pertaining to fairness and substantial justice. 6 J. Moore's Federal Practice, ¶59.04[13] (2nd Ed. 1976) quoted in Lewis v. Porter, 556 P.2d 496 (Utah 1976) Rule 61 U.R.C.P. indicates those standards to be considered in reviewing whether the exclusion of evidence is sufficient error to consider disturbing a judgment. Thus, only where the refusal of the Court to take action would appear to be inconsistent with "substantial justice" will judgment be disturbed. (Id.) Otherwise, the Rule instructs: "The Court at every stage of the proceeding must disregard error or defect in the proceeding which does not affect the substantial rights of the parties." Rule 61, U.R.C.P.

In the present case the resultant denial of Re-

spondent's counsel's attorney's fees bottomed on their failure to put on testimony of the nature and value of such services can hardly be considered a denial of substantial justice to the Respondent or her attorneys. Simply stated, a judgment denying Respondent her attorneys' fees is the natural and logical consequence of her counsels' failure to testify thereon. Further, their absent testimony is totally irrelevant to the material relief afforded by the judgment. Nonetheless, the lower court below disregarded the appropriate parameters of Rule 61, and assumed a position much akin to Respondent's advocate in personally reopening the case to thereafter assess against the Appellants over \$3,000 in attorney's fees. And, as the court reopened the case, sua sponte, the Appellants did not even have an opportunity to resist the ruling.

As previously alluded to, while the consideration as to whether or not to reopen is discretionary, thereby granting considerable latitude of judgment to the court,

this does not mean unrestrained power to act in a capricious or arbitrary manner which may produce an inequitable or unjust result. The word "discretion" itself imports the action should be taken with reason and in good conscience, and with an understanding of and consideration for the rights of the parties, for the purpose of serving the always desired objective of doing justice between them. Davis v. Riley, 20 Utah 2d 325, 437 P.2d 453, 455 (1968). See also Gardner v. Christensen, 622 P.2d 782 (Utah 1980).

Such discretion does not justify in this instance the assumption by the lower court of the role of advocate when

error has been made by counsel in the establishing of evidence on attorney's fees.

In a recent Utah case, Judge Stewart, in his concurring opinion, indicated that courts should not reach "out and . . . [assume] the task of deciding an issue contrary to one party's interest when the issue has not been litigated." Continuing, he stated:

I have no doubt that the administration of justice is likely to be greatly enhanced when trial judges act not solely as passive arbiters but, when occasion demands, become involved to assure the just outcome of a cause. But in the end, our system of justice is basically adversarial, and counsel must ultimately take the responsibility for the trial strategy. Dixon v. Stoddard, 627 P.2d 83, 84 (Utah 1981).

Here the court gratuitously provided a mechanism whereby counsel, at his convenience, could rectify his error. It is a general rule in most jurisdictions to permit a plaintiff or any party to a suit, after resting his case, to add to his proof, is a practice not to be encouraged. Jones, Evidence, §809 (3rd ed.) See also Parmenter v. Ranson, 169 P.2d 883 (Oregon 1946); Hall v. Hickey, 319 P.2d 33 (Cal. 1957); O'Mally v. United Producers & Consumers Coop., Inc., 95 Ariz. 134, 387 P.2d 1016 (1964). The justification for this proposition is posted on the seasoned reasoning that each party after having a full and complete opportunity to develop his case, once resting, has voluntarily foregone his right to introduce fresh evidence. United Producers & Consumers Coop. v. O'Mally, 103 Ariz. 26, 436

P.2d 575 (1968); Maass v. Peterson, 204 P.2d 1040 (Mont. 1949).

While this reasoning may be considered unacceptable in response to a timely motion from counsel, herein no such motion to reopen was made. Cf. Gardner v. Christensen, 622 P.2d 782 at 784 (Utah 1980).

The lower court in reopening solicitously speculated that there may have been some confusion by Respondent's counsel as to what issues actually were before the court. This speculation is not well taken. Such confusion, if any, was self-inflicted by these same counsel in their desire to pursue issues not properly framed before the court. Nevertheless, the burden of proof remained with counsel to establish attorney's fees.

As stated in Davis v. Riley, 20 Utah 2d 325, 437 P.2d 453 (1968), any discretion exercised in a capricious and arbitrary manner, producing an inequitable or unjust result, would be an appropriate candidate for review. There can be no question that the result as to the issue of attorney's fees in this case was unjust. There was no evidentiary basis upon which the court could award attorney's fees prior to the submission of affidavits which were not allowed as a result of any motion by opposing counsel, but as a result of an unsolicited finding of the court as to the opposing counsel's confusion. Such unilateral advocacy as herein

exercised by the trial court exemplifies Black's<sup>3</sup> definition of "arbitrary" as being "without fair, solid and substantial cause; that is without cause based upon the law." U.S. v. Lotempio, 58 F.2d 358, 359. (D.N.Y.; W.D. 1931)

The trial court committed reversible error in re-opening the case on the basis of a finding the Plaintiff's counsel was confused, which argument was never raised, plead or argued by Plaintiff, nor is considered a valid rationale for the amending of a judgment under Rule 61, U.R.C.P.

#### POINT IV

THE RELIEF AFFORDED THE REMAINING PLAINTIFF AT TRIAL IS NO GREATER THAN THAT TO WHICH THE DEFENDANT STIPULATED WELL IN ADVANCE OF TRIAL.

On December 8, 1980, three Plaintiffs stipulated to a dismissal with prejudice of the case at bar. (R162, 164) That stipulation granted these Plaintiffs an extension of the original preliminary injunction, which had been issued on September 12, 1978. (Id.) The stipulation stated "[t]hat the Injunction requiring Defendant to maintain insurance coverage on the leased premises, which are the subject of this action, shall remain in full force and effect and shall not be dismissed with the dismissal of the Complaint." (R162)

The December 8, 1980 stipulation indicated that there had been a previous "injunction" to the one which was

---

<sup>3</sup> Blacks Law Dictionary 96 (5th Ed. 1979)

entered into by the stipulation. That injunction was a preliminary injunction ordered on September 12, 1978, supported by Plaintiffs' nominal bond of \$500 "for the payment of such costs and damages as may be incurred or suffered by any party who is found to be wrongfully enjoined or restrained." (R68, emphasis added.)

At the time of the December 8, 1980 stipulation, Appellants stipulated to extend this injunction indefinitely, no mention of any bond being made. And, as is the general rule, when an injunction is made permanent, the requirement of a bond is not applicable, the parties having stipulated that the relief is appropriate and not wrongful. School Board of Consol. Dist. No. 36 v. Edwards, 87 P.2d 962, 968 (Okla. 1939). Moreover, it is a requirement that can be "waived or dispensed with by stipulation of the party enjoined, or his counsel". Laundry Dry Cleaning, Dye House Workers Union v. Laundry International Union, 4 Wis.2d 542, 91 N.W.2d 320, 328 (1958).

Thus, Finding of Fact No. 9 entered by the Court on March 6, 1981, which makes the September 28, 1978 preliminary injunction "permanent" grants no greater relief than that to which the Appellants had earlier stipulated. (R305; cf. R162)

The court's explanation that he found no indication in the file that the Appellants had stipulated to a "permanent" injunction is lexically correct, but legally meaningless.

(R34, ¶16 ) The stipulation executed in December that the injunction "remain in full force and effect and . . . not be dismissed with the dismissal of the Complaint" clearly reflects the intent and understanding that the injunction be permanent. Thus, while the Judge may see the judgment awarded as technically different from the stipulation, in result they are the same. Those attorneys' fees expended by Respondent Girard in obtaining by trial a remedy no greater than that to which the Appellants had already stipulated should be denied. Rather, the Respondent's efforts to forfeit the lease resulted in a lengthy trial which the Appellants successfully defended, only to be assessed attorney's fees after the trial.

#### POINT V

THE AWARD OF ATTORNEY'S FEES TO THE PLAINTIFF  
BASED UPON AFFIDAVITS TO WHICH THERE WERE  
CONTRARY AFFIDAVITS IN THE FILE AS TO BOTH  
THE ISSUES OF AMOUNT AND REASONABLENESS IS  
IMPROPER UNDER BASIC PRINCIPLES OF JURIS-  
PRUDENCE APPLICABLE TO ADVERSARY PROCEEDINGS  
AND AMOUNTS TO TRYING ISSUES BY AFFIDAVIT.

The Supreme Court of Utah in discussing the foundation upon which attorney's fees could be awarded concluded in Freed Finance Co. v. Stoker Motor Co., 537 P.2d 1039 (Utah 1975) that attorney's fees cannot be awarded without either a "stipulation as to the amount, an unrebutted affidavit or evidence given as to the value thereof." 537 P.2d at 1040 (emphasis added). This case substantially delineates



the line which must be drawn in considering an affidavit as sufficient evidence of attorney's fees.

Even when not contradicted by opposing affidavits, affidavits are "commonly regarded as weak evidence, to be received with caution" 32A C.J.S., Evidence, § 1052 at 706 (1964) See also Lohman v. Lohman, 29 Cal. 2d 144, 173 P.2d 657, 660, (1946); Audit Services, Inc. v. Kraus Construction, Inc. 615 P.2d 183 (Mont. 1980). Thus, where an objection has been made "to an affidavit as evidence and where there is a contest involved and where the effect of an adverse order was tantamount to a judgment for money, proof of facts may not be made by ex parte affidavits without the right of cross-examination." Stenfonick v. Stenfonick, 167 P.2d 867, 869 (Mont. 1946). In actuality such treatment of affidavits is only a mechanism to see such documents in their true light as self-serving statements drawn up by representative counsel. Thus, an affidavit should be used only when testimony is cumulative or of minor importance, not as in this instance where the outcome of the issue is directly dependent on the document. Lee Wayne Co. v. Pruitt, 550 P.2d 1374, 1375 (Okla. 1976). See also Smith v. Miller, 213 Kan. 1, 514 P.2d 377 (1973).

Such a situation presented here is analogous to a Rule 56 Motion for Summary Judgment. There, where contradicting affidavits are presented to the court, the selecting

of one affidavit over another affidavit filed by an opponent is, in short, grossly inappropriate.

The award of attorney's fees to the Plaintiff on the basis of rebutted affidavits is a violation of the level of proof required to sustain such an award. The fact that the affidavits themselves are inapposite precludes judicial selection of one over another as the sole foundation to a finding of fact. (See R322, 332, and 337) Simply stated, the affidavits of Mr. Miles and Mr. Boutwell were not unrebutted. A third affidavit contested not only the viability of the award, but the appropriate amount thereof, raising a factual issue which precludes a choice of one affidavit over another on the basis of the cold record.

#### POINT VI

THE COURT'S DENIAL OF DEFENDANTS/APPELLANTS' ATTORNEY'S FEE IN TRYING IN LARGE PART ISSUES NOT PROPERLY BEFORE THE COURT AND IN SUCCESSFULLY RESISTING FORFEITURE OF THE LEASE WAS IMPROPER, SUCH FEES HAVING BEEN TESTIFIED TO AND BEING ALLOWABLE PURSUANT TO UTAH LAW.

The court indicates that the rationale behind the sua sponte motion to reopen and accept affidavits on attorney's fees as being the confusion which resulted from the uncertainty which existed as to the triable issues caused by Respondent's own counsel. During the trial, Respondent Girard made several attempts to ~~amend~~ the complaint and add additional causes of action, most of which had occurred long after the suit was initiated. Although the court noted Appellants' continuing objections to all testimony pertaining

to matter outside of the relevant insurance questions, it allowed such testimony to enter into the record and reserved its ruling on those issues until judgment. As a result, the Appellants spent a large part of the trial defending the lease and forfeiture thereof by resisting issues not properly before the court.

Under paragraph 12 of the lease, the Defendants/Appellants are entitled to attorneys fees as a result of trying a case for several days defending their position that the lease should be upheld and not forfeited. To deny Appellants their attorney's fees by finding them in default ignores the testimony of Doug Labrum, called by the Respondents, which testimony clearly establishes, as preserved in the partial transcript, that Appellants had cured the default within the 30 day grace period allowed by the lease, and prior to the filing of suit. (P-3, ¶13; PT Labrum's testimony, seriatum, R-1 showing suit filed May 8, 1978)

Yet another reason for denying Appellants' attorney's fees is equally fallacious, that is, that they were not expended in establishing a breach of one of their leasehold rights by Respondent. One such right is stated in 49 Am. Jur. 2d, Landlord & Tenant, §330, p.344 as follows:

[T]he rule now established by nearly all courts is that the ordinary lease of realty, if valid, and executed by a person capable of making such a covenant, raises an implied covenant that the lessee shall have the quite and peaceable possession and enjoyment of the leased premises . . . unless there is some express covenant of a more limited character

inconsistent with a judicial covenant of quiet enjoyment, an express stipulation in the lease that nothing therein contained should be construed to imply a covenant for quiet enjoyment, or a statutory provision, which is applicable to leases, abolishing implied covenants.

None of these exceptions to the established rule of an implied covenant of quiet enjoyment apply in the instant case. No evidence was presented at trial to show that that lease was invalid or that it was not executed by a person capable of making a covenant of quiet enjoyment, nor is there any provision in the lease itself restricting lessees' right to quiet enjoyment, and no Utah statute applicable to leases abolishes implied covenants in leases for real property.

There is, therefore, in the lease before the court an implied covenant of quiet enjoyment of the leasehold premises, and in defending against Respondent Girard's attempt to forfeit their leasehold interest, Appellants were clearly enforcing their rights pursuant to the terms of the lease as implied by law. As stated by the Utah Supreme Court in Heywood v. Odgen Motor Car Co., 266 P. 1040 (Utah 1928):

The written lease does not contain an express covenant of quiet enjoyment. It is, however, quite generally held that a covenant of quiet enjoyment by the lessors is implied in every lease for a term of years. Id. at 1042.

The Heywood case was cited for this same proposition in Sandall v. Hoskins, 137 P.2d 819 (Utah 1943), and this holding has never been reversed.

As Appellants successfully defended their rights of quiet enjoyment during trial, they are entitled to a reasonable attorney's fees incurred in upholding their rights under the lease, and the sum of \$2,000 as a reasonable sum for such attorney's fees was testified to at the trial and was not objected to by counsel for Plaintiffs. Clearly, this amount should be awarded to Appellants, and assessed against the Respondent Girard.

### CONCLUSION

Four Plaintiffs initially filed suit in the instant case claiming a breach of a lease by the alleged failure of lessees to maintain insurance on the premises as called for therein. Lessees received notice of this problem in mid-March of 1978 though all the parties to the lease were previously aware of it. The testimony of an insurance agent called on the Lessors' behalf at trial established, however, that the Lessees had obtained insurance by reason of a binder being issued on March 20, 1978 and thus had timely cured this default within the parameters of the lease.

Despite this, on May 8, 1978, when there was complete insurance coverage on the premises, the Lessors filed a verified complaint seeking a forfeiture of the lease as well as a temporary injunction mandating that no operation of the leased premises occur without the existence of valid insurance coverage.

In September of 1978, the court issued a preliminary injunction on the nominal bond of \$500 ordering the Lessees to maintain insurance throughout their operation of the leased premises. A final policy of insurance was issued approximately at that time. By November of 1980, three of the four named plaintiffs in the suit were desirous of dismissing the action and instructed their attorney, Mr. Ronald Boutwell, to do so. Mr. Boutwell, together with Appellants' attorney, Mr. Hughes, executed a stipulation reflecting this intent on December 8, 1980.

The remaining plaintiff, Salli Smith Girard, proceeded to trial seeking therein to amend her cause of action and proceed on theories not properly before the court. The Appellants below successfully defended their right to quiet enjoyment of the leasehold and the court in its discretion sustained Appellants' objections to evidence and exhibits pertaining to issues not formally framed in the pleadings.

At the end of the Appellants' defense, their attorney, under oath, testified to a reasonable attorney's fee of \$2,000. The Respondent Girard's attorneys cross-examined in an attempt to belatedly establish a reasonable attorney's fee on their client's behalf. In its initial findings and order, the lower court reflected that the Respondent Girard's attorneys had presented no evidence whatsoever on the issue of attorney's fees. Nonetheless,

the court sua sponte reopened the matter to allow the Respondent Girard yet one more day in court to present this evidence.

This appeal sets forth those reasons in law and in equity upon which the Appellants feel Mrs. Girard's rights, if any, should be deemed waived or denied. In the instant case, the true nature of the adversary system was thwarted by the independent arbiter's assuming the position of Respondent's advocate and then subsequently awarding her attorney's fees.

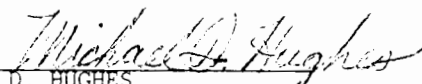
The Respondent Girard chose to bear her burden of proof once the court had unjustifiably reopened the case on her behalf by the filing of controverted affidavits. These affidavits are at best weak evidence of an appropriate attorney's fee. Furthermore, one of the affidavits is filed by Mr. Boutwell, who at the time of trial, neither represented Mrs. Girard nor appeared as an attorney in the matter. In short, his affidavit states what a reasonable attorney's fee for his services would be, but does not allude to whether Mrs. Girard is obligated to him for that amount or whether that amount has in fact ever been paid.

Beyond seeking reversal of the court's award of attorney's fees to the Respondent Girard, Appellants strenuously urge that the attorney's fees expended by them in sustaining the lease and in upholding their rights of quiet enjoyment, which are implied under the laws of the State of

Utah, should be granted. These fees, contrary to those of the Respondent Girard, are based upon sworn testimony which was properly subject to cross-examination. It is the position of the lessees that as a result of a lengthy trial in which they were successful at defending their rights to the leasehold, the lessees are equitably entitled to an award for attorney's fees.


RESPECTFULLY SUBMITTED this 24th day of August,  
1981.

ALLEN, THOMPSON & HUGHES

  
MICHAEL D. HUGHES  
Attorney for Defendants/Appellants

MAILING CERTIFICATE

I hereby certify that on the 24<sup>th</sup> day of August, 1981, I mailed a true and correct copy of the foregoing BRIEF OF APPELLANTS to Mr. John L. Miles and Mr. J. MacArthur Wright at 60 North 300 East, St. George, UT 84770, postage prepaid.

  
SHARON COOK