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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 : Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT

STATE OF UTAH

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

Involuntary Defendants,)
Plaintiff, Respondent,)
and Cross Appellant,)

vs.)

Case No. 17662

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

Defendants, Appellants)
and Cross Respondents.)

REPLY BRIEF

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

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KEY TO ABBREVIATIONS

PT	-	Partial Transcript
R	-	Record
RB	-	Respondent's Brief

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CHARLES L. APPLEBY, JR., CATHERINE R.)
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Defendants, Appellants,
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REPLY BRIEF

POINT I

THE TRIAL COURT'S FINDING THAT THE LESSORS
WAIVED THEIR RIGHT TO FORFEITURE BY ACCEPT-
ANCE OF RENT IS IN HARMONY WITH UTAH LAW AND
SHOULD BE UPHELD BY THIS COURT.

The Respondent admits that in the 32 months between
filing the complaint and trial, the Lessors received monthly
payments in excess of \$22,000 from the Lessees. (RB at 23).
Nevertheless, the Respondent asks this Court, on cross appeal,
to rule that the trial court erred in ruling that the Respon-
dent waived forfeiture of the lease by acceptance of rent. (RB
at 22) The Appellants believe that the trial court's finding
of waiver is correct and must be sustained by this Court.

The finding challenged by the Respondent reads as
follows:

The next two issues are whether this breach was substantial enough to justify forfeiting the lease, and whether the forfeiture was waived by acceptance of rent. The Court finds for the defendants on both of these issues.

. . .

In finding that the acceptance of rent by all of the lessors waived the breach of insurance covenant, the following factors were considered:

(A) There was no stipulation that payments would be accepted not as rent, but as future damages for withholding possession. 49 Am.Jur. 2d 1032.

(B) The majority of the lessors appear to have accepted rent, as rent. Although Mrs. Clinger intended to accept it as damages, this was apparently not communicated to lessees.

Finding No. 7 at R 304-305.

The trial court's finding that the lessors' acceptance of rent waived their claim of forfeiture represents a well established general rule in the State of Utah. For example, in Woodland Theatres, Inc., v. ABC Intermountain Theatres, Inc., 560 P.2d 700 (Utah 1977), the Utah Supreme Court held that acceptance of rent waived the lessor's forfeiture of the leasehold, citing favorably an 1896 case as follows:

This contested principle was resolved long ago in Brigham Young Trust Company v. Wagener, [13 Utah 236, 44 P. 1030 (1896)]. This court there explained a party cannot be allowed to avoid the contract, and then treat it as subsisting, or treat it as subsisting and afterwards be permitted to avoid it to the other party's injury. This court held:

. . . Where by reason of a breach of a condition, a lease becomes forfeited, the lessor is entitled to recover possession. He waives that right by the acceptance of rent. He cannot accept the rent, and at the same time claim a forfeiture of the lease. 560 P.2d at 701.

Similarly, in Jensen v. O.K. Investment Corporation, 19 Utah 2d 231, 507 P.2d 713 (1973), plaintiffs, owners of a parcel of real property, executed a lease agreement. The lease provided that lessees could not assign the lease without written approval of the lessors. Several years later lessors attempted to forfeit the lease for breach of this covenant. In response to the attempted forfeiture, this Court said:

The conduct of plaintiffs over the period of years in which . . . [the assignee] remained in possession, particularly after they received written notification that the option to renew was being exercised and they accepted the increased rental payment, constituted a waiver of their right to demand a forfeiture for breach of the condition against assignment without written consent. 507 P.2d at 717 (emphasis added).

See also, Minshaw v. Chevron Oil Company, 575 P.2d 192 (Utah 1978).

In spite of the trial court's finding of fact that the lessors accepted rent, and the general rule that the right of forfeiture is waived by acceptance of rent, Respondent asks this Court to find error in the lower court's ruling because, "[I]t cannot be doubted that the parties, through their attorneys, treated the rent either as compensation for withholding possession or as compensation on a quantum meruit basis." (RE at 24) Succinctly stated, Respondent urges that the trial court erred because she alleges the lessors intended that lessees' rental payments would not be accepted as rent and she desires this Court to reverse a finding of fact pertaining to the lessors' acceptance of rent entered by the trial court. As evidence of her alleged intent Respondent cites a paragraph

in the March 1978 "Notice to Cure Defaults" by which the lessors unilaterally stated the following:

No waiver of this notice or the required thirty (30) days to cure the above-mentioned defaults will be granted unless in writing and signed by all parties concerned. (RE at 22)

The Appellants urge this Court to reject the Respondent's position for the reasons explained in the following analysis:

A. Where No Transcript of the Trial Proceedings is Furnished, the Trial Court's Findings of Fact Must Be Presumed To Be Correct.

In Howard v. Howard, 601 P.2d 931 (Utah 1979), this Court held that where no transcript of trial proceedings is furnished, the trial court's ruling on the evidence must be presumed correct. See also, Bagnall v. Suburbia Land Company, 579 P.2d 917 (Utah 1978); Sawyers v. Sawyers, 558 P.2d 607 (Utah 1976); K & P Plumbing & Heating, Inc., v. Winterton, 543 P.2d 1352 (Utah 1975).

In the instant case the Respondent consciously chose to proceed without the benefit of a transcript as to the points raised on cross appeal. (R 358) As a result, and as a matter of factual accuracy, Respondent's brief is indeed "loaded with unreferenced self-serving statements of facts and contentions" with the apparent invitation that this Court reverse the lower court's findings of fact that the lessors accepted rent as rent. See, Bagnall v. Suburbia Land Company, 542 P.2d 183, 184 (Utah 1975). The Respondent's unsupportable statement that rental monies were received as either "compensation for withholding possession or as compensation on a quantum meruit basis" is totally unreferenced to the record and contradicts

the lower court's finding that the payments were accepted as rents. (RE at 24, cf. Finding No. 7 at R 304-305)

The Appellants requested a partial transcript of the proceedings. The existence of this partial transcript in the record does not, however, defeat the presumption of correctness of the trial court's findings, even if the partial transcript tended to support Respondent's arguments, which it definitely does not. This Court, in Bagnall v. Suburbia Land Company, 542 P.2d 183 (Utah 1975), decided a case in which defendants relied on a partial record, much of which appeared to be controverted according to the trial court's findings. This resulted in many unreferenced statements of so-called facts in briefs. This Court said that where there was only a partial record, it would presume the findings of fact "to have been supported by admissible, competent and substantial evidence" and would "turn a deafened ear" to any criticism of the same. Id. at 184.

It is instructive to note in the instant case that Respondent's self-serving statements concerning payments received from the lessees are not even referenced to nor supported by the partial transcript. The partial transcript does, however, contain the following testimony given by the Respondent which clearly supports the trial court's finding.

CROSS EXAMINATION BY MR. HUGHES:

Question: All right. Now, are you presently getting the rent on time?

Answer: For the last two months, since I requested cashier's checks, yes, we have gotten it on time.

Question: And it is current, isn't it?

Answer: It is current, yes.

Question: And in fact, subsequent to the filing of the suit and up until the present time, you've been receiving your rent, haven't you, Mrs. Clinger?

Answer: Not always on time. Sometimes it's as much as a month late, Mr. Hughes.

Question: But at any rate, you've been accepting the rent?

Answer: You bet. (PT at 63)

The Appellants conclude that the lower court's finding that the lessors, including the Respondent, accepted rent and thereby waived their right of forfeiture must be presumed correct on appeal without a transcript of the proceedings.

B. The Respondent's Unilateral Reservation that Acceptance of Rent Would Not Constitute a Waiver of Forfeiture Aailed Respondent Nothing.

The Respondent asserts that she did not intend that acceptance of rent should constitute a waiver of forfeiture and she invites this Court to find that this unilateral intent should bar waiver. This request comes in spite of the fact that the trial court found as a matter of fact that all lessors waived forfeiture by acceptance of rent. While the trial court agreed that the Respondent may have had the intent of accepting the rent as damages, it found that this intent was never communicated to the lessees. (Finding No. 7, P 304-305)

In Woodland Theatres, Inc., v. ABC Intermountain Theatres, Inc., supra, this Court rejected a lessor's attempt to escape the rule that acceptance of rent waives forfeiture,

by a "unilateral reservation" that its acceptance of rent did not constitute a waiver of forfeiture. In that case this Court quoted with approval the following admonition expressed in 3A Thompson on Real Property (1959 Replacement), Sec. 1328, p.

576:

If the lessor receives rent from the lessee after full notice and knowledge of a broken covenant or condition, he cannot thereafter assert his rights of forfeiture given by the lease, notwithstanding express denial of the waiver upon acceptance of rent. 560 P.2d 702 (emphasis added).

In spite of the Respondent's unilateral attempt to expressly deny that monies accepted were rent, the Woodland Theatres Court held that "the acceptance of rental payments, by lessor after the action was filed, precludes its right to enforce forfeiture." Id.

In the present controversy, Respondent unilaterally declares that she intended to accept the money from the lessees as damages. The trial court held that she, as well as the other lessors, accepted rent as rent and did not communicate a contrary intent to the Appellants. (Finding No. 7, R 304-305) Once again, the Appellants are constrained to state that this finding of fact may not be challenged on appeal without the benefit of a complete transcript. Howard v. Howard, supra. This Court should follow its precedent in Woodland Theatres and hold that the Respondent's unilateral declarations and uncommunicated oral intentions may not overcome the trial court's finding that all the lessors continued to accept rent after filing the law suit and thus waived their right of forfeiture.

The Respondent attempts to buttress her "intent" argument by stating that the March 1978 "Notice to Cure Defaults" states and gives notice "that acceptance of rent after the breach of a covenant will not be construed as consent to the breach or a waiver of the right to assert a forfeiture." (RB at 24) In short, she asserts that unilateral notice of her intent will bar waiver.

The clause (hereinafter anti-waiver clause), which assertedly gives this express notice, previously referenced supra at 3, reads as follows:

No waiver of this notice or the required thirty (30) days to cure the above-mentioned defaults will be granted unless in writing and signed by all the parties concerned. (Emphasis added)

The foregoing clause is not a blanket prohibition of waiver. It expressly denies only waiver of the notice of cure or the requirement that cure be made in thirty days after notice is given. The notice and period of cure are only prerequisites to exercise of the right to forfeiture. Simply stated, the effect of this clause is that in the absence of a written agreement to the contrary, the right to forfeiture would arise in thirty days. The anti-waiver clause cannot reasonably be understood to pertain to waiver of the right of forfeiture, which arises only after the thirty-day period has run without written agreement to waive. This clause does not mention waiver of the right of forfeiture or waiver by acceptance of rent.

It is a generally accepted principle of law that forfeitures of leases are looked upon with disfavor and that

forfeiture clauses will be strictly construed. Beck v. Giordano, 356 P.2d 264 (Colo. 1960); Woodall v. Pharr, 168 S.E.2d 645 (Ga. 1969). The anti-waiver clause as construed by the Respondent is a forfeiture clause. As explained above, this clause is at best ambiguous. Therefore, the Appellants assert that it should be strictly construed and all ambiguities resolved in favor of the lessees and against the harshness of forfeiture.

The Respondent cites Karbelnig v. Brothwell, 244 Cal.App.2d 333, 53 Cal.Pptr. 335 (1966) for the proposition that "notice" that acceptance of rent will not be construed as a waiver is enough to bar waiver. (PB at 24) The Karbelnig case does not stand for this broad proposition. In that case an intermediate California court held that a lessor's acceptance of rent did not waive the lessor's seeking forfeiture where the lessees had voluntarily and expressly signed an agreement in the original lease against waiver of the lessor's right to forfeiture by acceptance of rent in the event of breach. The Karbelnig Court found this agreement signed by the lessees bound them and their assigns and was "tantamount to a relinquishment of the right of lessees and their assignees to assert a waiver . . .". 53 Cal.Pptr. at 341 (emphasis added).

As make-weight facts, the Karbelnig court referred to the lessor's notice that the acceptance of rent would not be construed as a waiver and had acted promptly in filing its cause of action wherein it sought forfeiture of the lease. 53 Cal.Pptr. at 341. However, the primary fact upon which the

holding was based was the existence of an express agreement in the lease that acceptance of rent would not be a waiver. Therefore, this case does not stand for the proposition that a unilateral notice given to the lessees, that acceptance of rent would not waive the right of forfeiture, is enough to frustrate or bar the waiver doctrine.

In the instant case the anti-waiver clause in the "Notice to Cure Defaults" is the unilateral expression of the lessors, to which the lessees did not agree. Even if this Court construes this clause to give notice that acceptance of rent will not waive the right of forfeiture, contrary to the plain language of the clause, that unilateral notice by itself will not bar waiver according to this Court's opinion in Woodland Theatres, Inc., v. ABC Intermountain Theatres, Inc., supra, wherein this Court said that "such a unilateral reservation avails lessor nothing." 560 P.2d at 701.

POINT II

THE TRIAL COURT'S RULING THAT ALLEGED HEALTH AND BUILDING CODE VIOLATIONS AS WELL AS WASTE WERE NOT PROPERLY RAISED OR PLED IS CORRECT AND SHOULD BE SUSTAINED BY THIS COURT.

The Respondent argues that the trial court erred in finding that alleged breaches consisting of health and building code violations, as well as waste, were not pled or raised. (RE at 17) Close examination of the record reveals that the trial court's ruling is correct and should be sustained by this Court.

Respondent's Verified Complaint was filed May 8, 1978, almost three years before trial. The first cause of action alleges Appellants' failure to maintain adequate liability insurance on the premises. The entire Verified Complaint will be attached hereto so that the Court may review its thrust in totality. Paragraphs 14 through 23, omitted in Respondent's Brief, are important as they individually and collectively focus on Appellants' alleged breach in "having failed to act in good faith to provide liability insurance coverage on the leased premises or to provide lessor-plaintiff with any policy of insurance as provided in paragraphs 9 and 15 of the lease agreement." (R 4, ¶21) The only other matter complained of was the Appellants' continuing possession despite this alleged breach. Id at ¶¶27-28. This is the entire breach spoken of in the first cause of action.

The second cause of action alleges that the nature of the premises is basically recreational and that the risk-creating activity of the same poses risks to both persons and personal property. (See attachment to this brief) But again, the Respondent's only request for relief in the second cause of action was a temporary and permanent enjoinder of activities on the premises unless liability insurance was first obtained as called for by the lease. Nevertheless, the Respondent, on appeal, characterizes her Verified Complaint as clearly asserting issues other than insurance. (RB at 3)

Respondent seeks to cure this obvious lack of any pleading of health or building code violations in the Verified

Complaint by asserting that the "Notice to Cure Defaults," which was attached as an exhibit to the complaint, is sufficient to raise these issues. This argument is ill-conceived. Respondent quotes Rule 10(c) of the Utah Rules of Civil Procedure wherein that rule states that exhibits are included as part of the pleadings "for all purposes," and proposes that this exhibit of the Verified Complaint should be allowed to allege entire causes of action not set forth in the complaint. (RB at 16)

The Respondent's interpretation of Rule 10(c) has been rejected in other jurisdictions and ought to be rejected by this Court. In Hoover Equipment Company v. Smith, 198 Kan. 127, 422 P.2d 914 (1967), the Supreme Court of Kansas held that K.S.A. 60-210(c) which, similar to 10(c) U.R.C.P., provided that exhibits attached to a complaint are part of the same "for all purposes," nonetheless, does not permit a substitution of such exhibit "for any allegation lacking in the pleading but necessary to declare a legal claim of relief against the defendant." Id., at 919, citing Caterpillar Tractor Company v. International Harvester Company, 106 F.2d 769 (9th Cir. 1939); 1-A Barron & Holtzoff, Federal Practice & Procedure, §325 at page 260; 71 C.J.S. "Pleading", §375(2); 41 Am.Jur. "Pleading", §56. Similarly, other courts have continually ruled that while an exhibit may be considered as a part of a pleading to clarify and explain the same, an exhibit to a pleading cannot serve the purpose of supplying necessary material averments, and the information recited in the exhibit to the pleading is not to be

taken as alleged by the pleading itself. See, Burgess v. Downing, 354 P.2d 293, 223 Or. 235 (1960); Employers Casualty Company v. Transport Insurance Company, 440 S.W.2d 606 (Texas 1969); Anderson v. Chambliss, 262 P.2d 298, 199 Or. 400 (1953); Andersen v. Turpin, 142 P.2d 999, 172 Or. 420 (1943); Wright v. White, 110 P.2d 948, 166 Or. 136 (1941).

As succinctly stated in 71 C.J.S. "Pleading" §375(a)(2):

Generally an exhibit can be used only to clarify and remove uncertainty in pleadings, or to furnish particulars, and not to supply allegations essential or material to a cause of action or defense.

See also, Chesney v. Chesney, 33 Utah 503, 94 Pac. 989 (1908), an older but unquestionably well reasoned Utah case.

In light of the foregoing, Finding of Fact No. 4 entered by the trial court which follows is correct and should be sustained:

4. The notice of forfeiture sets forth various grounds for forfeiting the lessees' interest and although it was attached to the complaint, a claim for relief was stated only with respect to the matter of insurance. The motion to amend the complaint during the trial to include the non-insurance matters was objected to, along with the proffered evidence. This evidence was admitted provisionally, subject to the ruling of the motion to amend. The Court finds that the matter of other breaches was a significant change in the cause of action (which consumed most of the trial), that it was not consented to be tried by the defendants and that no reason was adduced for not timely moving to amend prior to trial. Accordingly, the Court exercises its discretion under Rule 15 to deny the motion to amend. The objections to testimony and exhibits pertaining to breaches of the lease other than insurance are sustained.

The Respondent further asserts that the Appellants were made aware of the health code and building code defaults

claimed, by answers to interrogatories filed on November 13, 1980, and supplemental answers filed January 28, 1981. (FB at 12) On August 21, 1978, Appellants filed interrogatories in order to clarify Respondent's position as to certain violations of the Utah Code mentioned in the "Notice to Cure Defaults," but which were not pleaded in the Verified Complaint. (R 53) Answers to these interrogatories were not timely filed. Responding to the Appellants' motion to compel answers to interrogatories (R 120), Respondent purported to answer these interrogatories on November 13, 1980. (R 128) These answers were insufficient. Appellants invite this Court to examine Respondent's answers given on November 13, 1980, to Interrogatory No. 29 regarding inspection of the leased premises requested by the Plaintiff. (R 134, 144) Respondent answered as follows:

Inspections were made and areas found to be objectionable are listed in detail and will be given later. (R 135)

The detailed list was not to be found. Furthermore, in answering Interrogatory No. 32, wherein Appellants asked Respondent to state wherein the Appellants were in violation of the Utah Division of Health, Code of Camp, Trailer, Court, Motel, Hotel, Resort Sanitation Regulations, the Respondent blithely answered that the Appellants should "see attached copy of report." (R 135) The only problem is that there was no copy of any report attached to the interrogatories!

To further elucidate Respondent's unwillingness to clarify her position, Appellants need do no more than ask the

Court to examine her Answers to Interrogatories No. 33, 37, 42, 43, 44, 45, 46 and 48. These requests all pertain to improving the leased premises for the benefit of the public. All Respondent's answers refer to the replies to either Interrogatory No. 29 or 32 recited above, which responses we have already seen were really not responsive at all. (R 135-138)

Upon review of these answers, Appellants were constrained to renew their motion to compel and for sanctions. On the 9th day of December, 1980, the Honorable J. Harlan Burns, sitting on the Law and Motion Calendar, gave Respondent's counsel seven days in which to complete discovery and answer Interrogatory No. 29. (R 163) The actual answers were not filed until the very morning of trial, January 29, 1981, some two and one half years after Appellants requested that the Respondent clarify her position!

It is abundantly clear from the record that the reason Respondent did not respond to the interrogatories was because the Respondent was not aware of any specific defaults other than the alleged lack of liability insurance. The following testimony given by Respondent at trial, more than two and one half years after filing of the the "Notice to Cure Defaults" is illuminating:

CROSS EXAMINATION BY MR. HUGHES:

Question: All right. Now, as of December 12, 1980, did you know what the nature of the health code violations were on the premise?

Answer: As of that date?

Question: Yes.

Answer: It seems to me that I did not receive a copy of the report until January.

Question: 1981?

Answer: 81.

Question: And prior to that time did you know what the nature of violations were?

Answer: I did not know the exact codes, no, but I certainly felt as though it needed some help.

Question: You had a feeling that there were obviously violations that needed fixing?

Answer: Yes. I didn't know the exact code numbers.

Question: O.K. But at that time when you executed Plaintiffs' Exhibit 4, it was just basically the same general feeling that there were some violations out on the property?

Answer: Well, Mr. Boutwell filed this and he told us that there was no doubts codes were being broken, but we were not told what specific codes. (PT 68-69)

Subparagraph 4 of Respondent's answer to interrogatory No. 29 tendered on the morning of trial is especially revealing:

Inspections made by Bob Simpson and David Fairhurst, county building inspector, have just recently become available, and are attached hereto as Exhibits "A", "B", "C" and "D" and incorporated herein by this reference. (R 176, emphasis added)

Perusal of the reports of the inspectors reveals that inspections weren't even conducted until March of 1980 and some were as late as January 6, 1981, years after the filing of the complaint and notice of default. The Respondent alleges that the substance of these reports was communicated to the Appellants "shortly after the time of inspection" (RB at 10), but there is no support for this contention, which once again is unreferenced to the record.

In light of the late dates of the inspections and the ignorance of the lessors themselves concerning the nature of the supposed defaults, it seems incredible that the Respondent would seriously assert that the "Notice to Cure Defaults" put Appellants on notice of the defaults claimed or that had Appellants spent "a few minutes making telephone calls to building inspectors instead of drafting interrogatories they would have quickly learned what defaults existed." (RB at 13)

It should be noted that while Respondent puts much stress on the finding of the inspectors that the premises were "found unsafe and dangerous to human life" in 1980, two years after filing the complaint, she failed to indicate the premises were not closed by those same state and local health and building inspectors who made inspections on the premises. (RB at 4) Instead, once the inspection reports were made available to the Appellants on the morning of trial, steps to cure and actual cure of said violations were initiated to the satisfaction of such officers during the very period allowed for trial.

Respondent also argues that the Appellants were not unfairly surprised and prejudiced by the issues regarding building and health code violations, since those issues were included in Appellants' own proposed pretrial order. (RB at 14-17) This unsigned pretrial order of November 19, 1979, does indeed show that Appellants were aware Respondent might claim something dealing with violations of regulations promulgated by the Utah State Division of Health. This possibility was communicated in the "Notice to Cure Defaults." However, it should

be carefully noted that as of the date of this unsigned pretrial order Appellants were still trying to clarify whether Respondent intended that additional claims were to be litigated, and if so, the Appellants were trying to compel Respondent to reveal the nature of her claims by answering the Appellants' interrogatories. The paragraph entitled "Discovery" in the proposed yet unsigned pretrial order reveals the ambiguity and confusion surrounding the Respondent's lawsuit.

Discovery will be completed at least ten (10) days prior to trial. Interrogatories which are outstanding shall be discussed between the parties so that those material to the lawsuit or which may become material might be answered in due course. It is not clear at this time whether the Plaintiffs intend to go forward pertaining to issues based on alleged violations of health code provisions. (R 91)

The Respondent's unwillingness to clarify her claims raised questions as to whether she intended to pursue the same at trial. The validity and reasonableness of the Appellants' doubts as to whether Respondent intended to pursue health code violations as a cause of action in the litigation is underscored by the testimony of Mr. Boutwell, counsel for lessors at the time the "Notice to Cure Defaults" was filed, wherein Mr. Boutwell testified that three of the lessors did not intend to pursue the alleged health and building code violations. (PT 12:9-20) Certainly if three of the lessors did not intend to pursue these alleged violations, the Appellants' uncertainty as to what was being litigated is reasonable.

In summary, the Appellants ask this Court to uphold the trial court's finding that the breaches other than insurance were significant changes in the cause of action which were

not timely raised, pled or tried with consent. The Respondent's attempts to overturn this finding once again have a hollow ring in view Respondent's unwillingness to clarify her claims prior to the day of trial and her subsequent failure to rely on a transcript when challenging the trial court's findings on appeal.

POINT III

THE TRIAL COURT PROPERLY EXERCISED ITS
DISCRETION IN DENYING RESPONDENT'S MOTION
TO AMEND.

The trial court found that "no reason was adduced for not timely moving to amend prior to trial," and accordingly exercised its discretion under Rule 15 to deny the Respondent's motion to amend. (Finding No. 7, R 303-304)

Respondent argues that the trial court abused its discretion in denying Plaintiff's motion to amend. Respondent's first point is that it was unreasonable for the trial court to deny the motion because Appellants were not unfairly surprised or prejudiced by the Respondent's claims. In this the Respondent overlooks the fact that the Appellants only became aware of the Respondent's claims on the morning of trial when Respondent finally submitted answers to interrogatories. (See Point II, supra)

In spite of this obvious prejudice, Respondent asserts that Appellants were not surprised because "continuances of the trial gave Defendants almost a full month to prepare to meet these issues." (RB at 18) Trial began on January 29, 1981, and continued uninterrupted for two days. (R

186,195) Much of that time was consumed hearing evidence, which was provisionally admitted over Appellants' objection, concerning Respondent's recently revealed claims. (R 303) Certainly it cannot be gainsaid that Appellants were surprised and prejudiced by this late proffer of evidence. The trial court then continued the trial until February 20, 1981. (R 195) During the interim the Appellants initiated cure of the alleged defaults. Not until February 20, 1981, did Respondent file her motion to amend. By this time, after three years of preparation for trial and two days of actual trial, the damage and prejudice to the Appellants had been done. The Appellants were prejudiced in their defense on the merits, having only learned the particulars of the Respondent's claims on the morning of trial. (See U.R.C.P. Rule 15(b))

It is evident from the very efforts of discovery recited heretofore in Point II that even were Respondent's amendments otherwise allowable as nonprejudicial to the Appellants, the Respondent's dilatory tactics in responding to discovery and failure to comply with not one but two discovery motions to compel would easily provide the trial court alternative grounds under Rule 37(b)(2)(B) or (C) to have refused to entertain Respondent's motion to amend her complaint after the inception of trial. (See R 120-28; 158-60)

Respondent correctly cites Gillman v. Hansen, 26 U.2d 165, 486 P.2d 1045 (1971) for the proposition that the trial court's discretion in denying leave to amend "is to be exercised in furtherance of justice." Id at 1046. This Court, in

First Security Bank of Utah, N.A., v. Colonial Ford, Inc., 597 p.2d 859 (Utah 1979), states that in determining whether a denial of a motion to amend will promote justice, that judgment should be granted, "in accordance with the law and the evidence." Id. at 861, emphasis added. In short, the trial court's discretionary ruling, which is not to be overruled unless there is an abuse of discretion (Benson v. Oregon Short Line R. Co., 35 U. 241, 99 P. 1072 (1909)), is based in part on its evaluation of evidence. The trial court found that the evidence did not merit amendment. The Respondent disagrees. Again, Respondent finds herself in the unenviable position of challenging the factual foundation for the trial court's discretionary decision without providing a transcript to properly enable this Court to review this factual determination. Thus, Respondent's allegation of an abuse of discretion should go unheeded according to the reasoning of this Court in Howard v. Howard, supra.

POINT IV

ASSUMING, ARGUENDO, THAT THE TRIAL COURT ERRED IN FINDING THAT RESPONDENT HAD NOT ADEQUATELY RAISED HEALTH AND BUILDING CODE VIOLATIONS, OR IN DENYING RESPONDENT'S MOTION TO AMEND, THESE ERRORS WERE NEVERTHELESS HARMLESS ACCORDING TO RULE 61, U.R.C.P.

Rule 61 of the Utah Rules of Civil Procedure states that:

No error in either the admission or the exclusion of evidence, and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The

court at every stage of the proceedings must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

This Court has continually held that the judiciary must disregard any error which does not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect. This Court has further held that the burden is upon the party claiming error to show both error and prejudice before he may prevail. This burden includes a showing that there is at least a reasonable likelihood that the result would have been different in the absence of the alleged error. See, State v. Salmon, 612 P.2d 366 (Utah 1980); Bowden v. Denver & Rio Grande Western Railroad Company, 3 U.2d 444, 286 P.2d 240 (1955); Burton v. Zions Cooperative Mercantile Institution, 249 P.2d 514 (Utah 1952); Startin v. Madsen, 237 P.2d 834 (Utah 1951).

The only relief Respondent seeks on her cross appeal is forfeiture of the lease. (RB at 20) Assuming, arguendo, that the Respondent were to otherwise bear her burden of establishing error in the trial court's finding that additional defaults were not adequately raised, or in that court's denial of her motion to amend, the Respondent, nonetheless, may not prevail because she cannot show substantial prejudice in the denial of her efforts to obtain a forfeiture, or a reasonable likelihood of a different judgment on the issue of forfeiture had the trial court otherwise entertained her allegations. Appellants respectfully submit that this follows because the judgment of the trial court denying forfeiture partly on the

basis of Respondent's waiver of that equitable right is both persuasive and pervasive as to any claimed breach. The trial court found that the majority of the lessors accepted "rent as rent" and waived any right to forfeiture. The trial court further found as a matter of fact that the Respondent, even though she may not have intended to "accept rent as rent," did not communicate this unilateral reservation to the lessees and waived the right of forfeiture. This finding cannot now be challenged on appeal without a transcript.

There is no reasonable likelihood that the finding of waiver of the right to forfeiture would have been different had the trial court allowed the Respondent to amend. This Court held in Woodland Theatres, Inc., v. ABC Intermountain Theatres, supra, that acceptance of rent with knowledge of a breach after the action was filed precluded the right to enforce forfeiture. This Court's rationale was that acceptance of rent with full knowledge of a default is a reaffirmation of the lease and the continuation of the landlord-tenant relationship in spite of the default. The only limitation on this doctrine of waiver is that the breaches must be known before they can be waived. In the instant case, Respondent necessarily claims that the alleged defaults relating to violations of the health and building codes were known to the lessors when they filed their "Notice to Cure Defaults." In other words, these defaults were supposedly known to the lessors when they accepted rents from the lessees. Since these defaults were supposedly known to the lessors when they accepted rent and affirmed the tenancy, there

is no justification in reason or in law to distinguish the unlitigated defaults from the litigated defaults or speculate that had the trial court litigated these additional defaults it would have come to a different conclusion as to the lessor's acceptance of rent being a waiver of the alleged breaches and a reinstatement of the lease. Simply stated, regardless of the nature of the defaults litigated between the parties, the lessors still accepted rent, and the trial court would still have been bound to follow the rule of Woodland Theatres and declare that the lessors' right to forfeiture had been waived.

It should also be observed that the trial court provisionally heard all of the Respondent's evidence regarding the alleged defaults. In fact, hearing of the evidence on these defaults consumed most of the trial. (Finding No. 4, R 303) Nevertheless, the court ruled that the lessors accepted rent and waived forfeiture. In the Appellants' estimation, this is a strong indication that the trial court would not have come to a different conclusion on the issue of forfeiture had it allowed the Respondent to amend. Apparently there was nothing in this provisionally accepted evidence to convince the court that the lessors had not accepted rent or that the rule expressed in Woodland Theatres should not apply.

Respondent has failed to shoulder her burden to show that there is a reasonable likelihood that Finding of Fact No. 7, in which the court found waiver of the right to forfeiture, would have been different had she been allowed to amend. (R 304-305) The Appellants submit that the Respondent still would

not have been granted the relief of forfeiture, which is the only relief she seeks. Therefore, no substantial rights are affected, even if this Court finds error in the lower court's denial of Respondent's motion to amend, or otherwise rule on her allegations of health code violations. Clearly, any error in this case was harmless.

POINT V

RESPONDENT AS A CO-TENANT CANNOT MAINTAIN
AN ACTION FOR THE FORFEITURE OF A LEASE
WHEN SHE IS NOT JOINED IN THE ACTION BY
OTHER CO-TENANTS.

Near the end of March, 1978, Genevieve A. Smith, Jesse E. Smith, Beth M. Smith, and Salli Smith Girard (the Respondent, aka Salli Smith Clinger) as co-tenants signed a "Notice to Cure Defaults" and caused it to be served on the Appellants. The notice sets forth an alleged default in maintaining liability insurance on the premises, as well as other grievances, and notified the Appellants that legal action would be instituted to forfeit possession of the premises if the defaults were not cured in thirty days.

On May 8, 1978, the above-named co-tenants jointly filed a Verified Complaint seeking to establish lessees' prior default and forfeiture of the lease. Over the next 32 months the lessors, as co-tenants, received monthly rental payments from the lessees which amounted to \$22,400. (RB at 23) The trial court found as a matter of fact that lessors had accepted rent as rent, and that any possible intent to the contrary on the part of the Respondent had not been communicated to the lessees. (R 305)

By a stipulation dated in December of 1980, the trial court signed an order dismissing with prejudice three of the co-tenants, Genevieve A. Smith, Jesse E. Smith, and Beth M. Smith. (R 164) In spite of the fact that Plaintiffs normally have the right to dismiss (U.R.C.P. 41(a)(2)), the trial court set aside the order dismissing three of the co-tenants and joined them as involuntary parties defendant because the stipulation to dismiss the three co-tenants had not been submitted to the remaining co-tenant, the Respondent. (Finding No. 2, R 302) In short, three co-tenants were forced to participate involuntarily as defendants, even though they had expressed no desire to pursue the forfeiture.

The general rule regarding forfeitures by co-tenants is stated in 50 A.L.R.2d 1366:

It is established that where property subject to a lease is owned by co-tenants, forfeiture of the lease on the ground of breach of covenants on the part of the lessee cannot be enforced by less than all of such co-tenants.

In Calvert v. Bradley, 57 U.S. 580 (16 How.) (1853), one of several co-tenant-lessors had entered into a lease of property called the National Hotel in Washington. The lessee covenanted to keep the premises in good repair and surrender them in like repair. The Supreme Court held that this covenant ran to all lessors and that one of the lessors acting alone could not maintain an action for the breach of it by the lessee. Dismissing the complaint, the Supreme Court stated that if the covenantees can sue jointly, "they are bound to do so."

In Fredeking v. Grimmett, 86 S.E.2d 554 (W.Va. 1955), a husband and wife owned some property under lease as tenants in common. The husband thereafter died, leaving two minor children, who at the time of trial each held an undivided one-eighth interest in common, subject to the dower of the widow, who owned an undivided three-fourths interest. The widow continued to receive rents and had disqualified herself from seeking enforcement of the forfeiture clause. Such disqualification of one of the co-tenants prevented a claim by her to forfeit the lease alleging standing as guardian of the two minor children. The court said:

All the heirs of J. G. Fredeking, must concur and unite in the enforcement of the forfeiture provision for its breach of the lease; and there can be no forfeiture of the lease by less than all the tenants in common who own undivided interests in the property. Howard v. Manning, 79 Okl. 165, 192 P. 358, 12 A.L.R. 819 (1920).

The court reasoned that less than all co-tenants could not pursue forfeiture because "if the lease could be forfeited by less than all the owners of the undivided interest, the lessee would be bound by the lease as to some of such owners and discharged as to other such owners." 86 S.E.2d at 564. See also, Eurengy v. Equitable Realty Corporation, 341 Mo. 341, 107 S.W.2d 68 (1937).

There is limited case law which suggests that one co-tenant may initiate a notice of foreclosure without other co-tenants, if such action would inure to the benefit of all lessors. For example, in Webb v. Graf, 289 Ky. 644, 159 S.W.2d 433 (1942), the court upheld a notice of development filed by

only one co-tenant-lessor. In maintaining the suit, however, the Webb Court noted that all the lessors in common had joined in the action and affirmed and ratified the action of the single co-tenant who had filed. The court reaffirmed the language of Union Gas & Oil Co. v. Gilliam, 212 Ky. 293, 279 S.W. 629 (1925), wherein it was stated that all the co-tenants in common must concur and unite in an action to enforce a forfeiture. Thus, the limited holding in the Webb case is that a single co-tenant may initiate an action if such action inures to the benefit of all lessors and if all lessors later join and unite in the pursuance of the suit, pursuant to the standards set forth in the Gilliam case.

The instant case is readily distinguishable. All lessors temporarily joined together to initiate the forfeiture action. See, Axis Petroleum Co. v. Taylor, 108 P.2d 978 (Cal.App. 1941); B. & B. Sulphur Co. v. Kelley, 141 P.2d 908 (Cal.App. 1943). Later all lessors, according to the trial court's finding, accepted rent from the lessees, but never again acted harmoniously. After it became obvious that the lessees had cured the insurance default (prior to the filing of the complaint) and the lessors had accepted over \$22,000 in rent, three of the four lessors decided that their best interests were to withdraw from the law suit. Clearly the majority of the lessors did not join in or unite in prosecuting this suit after the initial filing. Neither can it be said that Respondent's pursuing forfeiture would somehow inure to the benefit of her co-lessors, as they had already determined

that it would be to their benefit to reinstate and continue the lease. In addition, it is difficult to conceive how pursuing forfeiture could inure to the lessors' benefit when they had already waived and precluded any possibility of forfeiture by acceptance of rent. For these reasons the Appellants believe that this Court should follow the general rule and hold that because the lessors were not united in their desires to pursue forfeiture, as evidenced by their acceptance of rent and attempted dismissal of the suit, the Respondent, acting alone, may not maintain this claim.

POINT VI

THE RESPONDENT FAILED TO MEET HER BURDEN
OF PROOF ON THE ISSUE OF ATTORNEY'S FEES
WHEN SHE CHOSE TO RELY ON CONTROVERTED
AND INADEQUATE AFFIDAVITS.

In response to the arguments made in the Appellants' Brief that the trial court erred as a matter of law in awarding the Respondent attorney's fees, the Respondent makes several points which should be addressed in this reply. There is no dispute in this case that an award of attorney's fees must be based on findings of fact, which in turn must be based on the evidence. The primary dispute in this case concerns the kinds of evidence that may provide an evidentiary basis for the award when both the amount and the availability of the award is controverted, as distinguished from an uncontroverted award. The Appellants have urged that the trial court erred in awarding a controverted attorney's fees to the Respondent on the basis of rebutted affidavits alone, without sworn testimony. Respondent asserts that the trial court's award of attorney's fees on

controverted affidavits instead of upon sworn testimony is proper because the Appellants were given an opportunity for a hearing on the matter, but that opportunity was "waived" by the Appellants. (RB at 6)

The general rule is that attorney's fees are required to be proved by sworn testimony. Aiken v. Burroughs, 30 U.2d 116, 514 P.2d 533 (1973). However, this Court noted in F.M.A. Financial Corporation v. Build, Inc., 17 U.2d 80, 404 P.2d 670 (1965), that fees are "not always required to be proved by sworn testimony." Attorney's fees may be proved other than by sworn testimony when they are "submitted upon stipulation," in other words, when an award is not controverted. Id. Similarly, this Court, in Freed Finance Company v. Stoker Motor Company, 537 P.2d 1039 (Utah 1975), stated that when there was no issue of fact (which would mean the award was uncontroverted), a party may supply the necessary evidence to award an attorney fee by an "unrebutted affidavit." Appellants submit, however, that an award of attorney fees based upon the lower court's unsolicited yet solicitous invitation to the Respondent, weeks after trial, to prepare affidavits, and the resulting controverted nature of those affidavits cannot provide an evidentiary basis for an award.

In her brief, Respondent did not directly deny Appellants' assertion that rebutted affidavits alone are insufficient to support an award of attorney's fees. Rather, Respondent seeks to avoid this issue by asserting that the Appellants had an opportunity for a hearing in which they could have

gotten sworn testimony but "waived the opportunity." Appellants supposedly "waived" this opportunity for hearing by assertedly electing to submit controverting affidavits instead of requesting a hearing. (RB at 6-7)

Respondent's waiver theory is unique and innovative, but it arises from Respondent's confusion as to which party had the burden of proof on this issue. In F.M.A. Financial Corporation v. Build, Inc., supra, this Court said that the party asking for an award of attorney's fees had the burden of proving the fees as a part of her case. Failing to offer sufficient proof on this issue "had the same effect as would failure to offer proof as to any other controverted issue." 404 P.2d at 674.

It was the Respondent's burden and responsibility in the present case to see that the proper evidentiary foundation was laid to support her award of attorney fees. The Appellants had no responsibility to assure that the kind of evidence the Respondent chose to lay an evidentiary foundation was either proper or otherwise sufficient. As Appellants had no burden in this matter, they were under no obligation to request a hearing, or to advise Respondent that her controverted affidavits submitted to a lower court already disposed to give her the award were otherwise insufficient to bear her burden. Appellants' silence upon Respondent's own decision to present affidavits which Appellants subsequently controverted can hardly constitute a waiver of the burden of proof required by Utah

law. Indeed, as advocates, Appellants sought the denial of Respondent's belated claim. On appeal, Appellants have unfortunately been constrained to categorize the lower court's reopening of the case on Respondent's behalf as both arbitrary and improper. Certainly Appellants' counsel has no greater obligation to assist the Respondent in meeting her burden by pointing out prior to appeal that the method she chose was faulty.

Simply stated, the obligation to see that the proper evidence was offered was entirely upon Respondent. This burden could not be shifted to the Appellants by the lower court's ruling that it would decide the issue of attorney's fees upon affidavits "unless either party requested a hearing." (R 305) The Respondent's "waiver theory" is contrary to Utah law, inasmuch as its ultimate effect would be to shift the burden of assuring a proper evidentiary foundation for a controverted award of attorney's fees to the party opposing the award.

Next the Respondent argues that the lower court's award of attorney's fees is justified because it was in harmony with the objective of Rule 54(c)(1), URCP. (RB at 8) The Respondent cites Palombi v. D & C Builders, 22 U.2d 297, 452 P.2d 325 (1969) for the proposition that Rule 54(c)(1) is interpreted to allow the trial court to award attorney's fees even though plaintiff did not ask for attorney fees in her complaint. The Appellants agree that this would indeed be the effect of Rule 54(c)(1) in a case where the prerequisites set forth in Palombi had been met. In Palombi the Court said:

The fact that there was no specific pleading in that regard does not preclude such an award. It is indeed important that the issue be raised and that the parties have full opportunity to meet it. But when that is done our rules indicate that there should be liberality of procedure to reach the result which justice requires. 452 P.2d at 328 (emphasis added).

In the instant case the Respondent chose to meet her burden of proof on the issue of attorney's fees by submitting affidavits at the lower court's invitation offered weeks after trial. The Appellants had no burden in this regard. Thereafter, the lower court, obviously disposed to award Respondent her attorneys fees, did so erroneously, on the basis of controverted affidavits and without the aid of sworn testimony or cross examination. Facing a court which had already indicated its inclination to award Respondent her fees, Appellants can hardly be faulted in allowing Respondent to abandon an opportunity for a hearing or by failing to come to the Respondent's rescue by requesting a hearing on their own.

In addition, it is extremely difficult to understand how justice could require an award of attorney's fees to the Respondent-lessor in this case. The lessors brought suit seeking forfeiture of a lease. This relief was denied because the trial court found that the lessors had ratified the continuing existence of the lease by acceptance over nearly three years of \$22,400 in rent. During this three-year pendency of the proceedings, the Appellants tried in vain to discover the nature of Respondent's claims so that they might be cured, but were continually frustrated by the Respondent's unwillingness to answer interrogatories. (R 53, 120, 159, 186) Finally,

three of the lessors stipulated that the complaint should be dismissed as to them, and that they would bear their own attorney's fees. (R 162) Under these circumstances, it is a mockery to assert that justice demands an award to the remaining Respondent of all attorney's fees expended by all the lessors. The Appellants can only conclude that the instant case is not an appropriate case for the operation of Rule 54(c)(1) because the Palombi prerequisites are not met. Indeed, Rule 54(c)(1) states that litigants should be granted the relief to which they are "entitled." Respondent's failure to present any evidence on attorneys fees at trial entitled the Appellants to a favorable ruling on this issue! Respondent's failure to present adequate or sufficient evidence after trial does not cure this frailty.

In their brief the Appellants urged that Mr. Boutwell's affidavit is an improper basis for an award of attorney's fees because the affidavit nowhere states that the Respondent owes Mr. Boutwell these fees also incurred by three other lessors in addition to the Respondent, all of whom agreed to bear their costs and expenses. (R 337-39; 162) The Respondent speculates that the attorneys' fees awarded to her in this case are justified since, "in this case the amount of attorneys' time would be the same whether there was one lessor or one hundred lessors." (RB at 7) This argument misses the point. The Appellants assert that the purpose of an award of attorney fees to reimburse the successful litigant for her personal liability for attorney fees. To award the Respondent

attorneys' fees which where the personal liabilities of other parties is to unjustly enrich the Respondent and penalize the Appellants.

CONCLUSION

The Respondent's claim that the trial court erred in factually finding that the lessors accepted rent as rent without communicating a contrary intent to the lessees is not meritorious. Without a transcript, the trial court findings of fact must be presumed correct. Respondent has chosen to bring her appeal in this context.


Having found as a matter of fact that the lessors accepted rent, the trial court correctly determined that the lessors waived their right to pursue forfeiture. Indeed, waiver would be the result of acceptance of rent regardless of the nature of the breaches litigated. Therefore, any possible error in denying the Respondent an opportunity to litigate her belated claims was harmless error.

In contrast, the Appellents assert that the trial court erred as a matter of law in awarding to Respondent attorney fees when Respondent sought to meet her burden of proof by relying on controverted affidavits produced after trial on the trial court's own sua sponte invitation. Clearly, the trial court itself found as a matter of fact that "no evidence was given at trial" on the issue of Respondent's attorneys' fees. (Finding No. 8, R 305) Favoring this finding, again, with a presumption of truth, it becomes clear that there is not sufficient evidence given weeks after trial to belatedly cure

Respondent's omission. Respondent now offers only controverted affidavits to support her claim; she has failed to meet her burden. For these reasons, the Appellants respectfully submit that this Court should uphold the trial court's refusal to forfeit the lease, but reverse the lower court's belated award of attorney fees to Respondent. Appellants' attorneys' fees, testified to at trial and expended in upholding the lease, should respectfully be granted.

RESPECTFULLY SUBMITTED this 23rd day of March, 1982.

ALLEN, THOMPSON & HUGHES


MICHAEL D. HUGHES
Attorney for Defendants,
Appellants and Cross Respondents

CERTIFICATE OF MAILING

I do hereby certify that on the 23rd day of March, 1982, I mailed two true and correct copies of the above and foregoing REPLY BRIEF to John L. Miles and J. MacArthur Wright of Atkin, Wright & Miles, attorneys for respondent and cross appellant, P. O. Box 339, St. George, Utah 84770, postage prepaid.



RECEIVED

MAY - 8 1975

RONALD BRENT BOUTWELL
ATTORNEY FOR PLAINTIFFS
COUNTY COURTHOUSE
PRICE, UTAH 84501
TELEPHONE: 637-4047

From _____
By R. H. Hume

IN THE FIFTH JUDICIAL DISTRICT COURT OF WASHINGTON COUNTY
STATE OF UTAH

GENEVIEVE A. SMITH; JESSEE E. SMITH; BETH M. SMITH, and SALLI SMITH GIRARD,	:	
	:	
Plaintiffs,	:	VERIFIED COMPLAINT
VS.	:	
CHARLES L. APPLEBY JR.; DAVID E. WOOD; DON BJARNSON; CATHERINE R. APPLEBY; LEONE E. WOOD; GRACE BJARNSON; STEVEN ALFRED, and BETH ALFRED,	:	
Defendants.	:	

CIVIL NO. 6727

R# 39916

Plaintiffs allege:

FIRST CAUSE OF ACTION

1. Defendants CHARLES L. APPLEBY JR., DAVID E. WOOD, and DON BJARNSON entered into a real estate lease agreement with E. PENN SMITH and GENEVIEVE A. SMITH, above named plaintiff, on June 14, 1975, at Washington County, Utah.
2. An amendment to said lease agreement was executed on July 23, 1975.
3. Exhibit "A", which is attached to this complaint and incorporated herein as if fully set forth, is a true and correct copy of said lease agreement and amendment above-mentioned in paragraphs 1 and 2.
4. Defendants CATHERINE R. APPLEBY, LEONE E. WOOD, and GRACE BJARNSON did affix their names to said lease agreement and amendment at the time said instruments were executed.
5. CATHERINE R. APPLEBY is the wife of CHARLES E. APPLEBY JR.; LEONE E. WOOD is the wife of DAVID E. WOOD, and GRACE BJARNSON is the wife of DON BJARNSON.
6. STEVEN ALFRED and BETH ALFRED are employee agents of defendants CHARLES L. APPLEBY JR., DAVID E. WOOD, and DON BJARNSON,

and as such employee agents, said STEVEN ALFRED and BETH ALFRED manage the leased premises at the instance and direction of said defendants. Said leased premises are in Washington County.

7. Defendants are now in possession of the leased premises and the defendants claim an interest in the leased premises based upon said lease agreement.

8. Under the terms of the lease agreement, paragraph 2 requires that lessee indemnify and save harmless the lessor against any and all claims arising from the conduct or management of or from any work or thing whatsoever done in or about the demised premises or any building or structure thereon or the equipment thereof during said term or arising during said term from any condition or any street or sidewalk adjoining the premises or of any passageways, or spaces therein or appurtenant thereto, or arising from any act of negligence of the tenant or any of its agents, contractors, or employees, or arising from any accident, injury or damage whatsoever, however caused to any person or persons, or to the property of any person, persons, corporation or corporations, occurring during said term on, in, or about the leased premises or on or under the sidewalk in front thereof, and from and against all costs, counsel fees, expenses, and liabilities incurred in or about any such claim or any action or proceeding brought thereon, and lessee further agreed to insure said premises for liability in the amount of at least Three Hundred Thousand Dollars (\$300,000.00).

9. Plaintiffs are informed and believe and therefore act on information and belief that defendants have never insured said premises for \$300,000.00 as required under the lease agreement.

10. Plaintiffs have wilfully failed to insure the leased premises for the required amount of liability insurance, and for several months since taking possession of the premises under the lease, the defendants have failed to insure the premises with any kind of liability insurance.

11. At all times mentioned herein, plaintiffs have demanded that lessor insure the premises for the required

of liability insurance, and defendants have wilfully failed to secure such liability insurance.

12. Plaintiffs are successors in interest of the original lessor's interest under the lease agreement and amendment to said lease agreement above-mentioned in paragraphs 1,2,and 3..

13. On or about the 21st day of March, 1978, Defendants were served a NOTICE TO CURE DEFAULTS. A true copy of said notice is attached to this complaint as Exhibit "B" and incorporated by reference as if fully set forth.

14. Receipt of said notice by lessees on or about March 21, 1978, was acknowledged by defendant lessees on April 20, 1978, in a letter sent to lessor GENEVIEVE A. SMITH by attorney Michael D. Hughes. Said letter was also signed by lessee defendants.

15. Said notice to cure defaults demanded that lessee insure the leased premises with liability insurance of \$300,000.00 as required in paragraph 9 of the lease agreement within thirty days as required under the lease agreement.

16. Following receipt of the notice to cure defaults by lessee defendants, defendants sent Plaintiffs a copy of an alleged insurance binder. One of said insurance binder copies is attached to this complaint as Exhibit "C" and is incorporated herein as if fully set forth.

17. Plaintiffs have not received , as yet, any insurance policy or copy of any insurance policy showing that there is the required amount of liability insurance on the leased premises.

18. Exhibit "C", the insurance binder, does not show that there is any liability insurance for injury or damage to the property of any person as required under paragraph 9 of the lease agreement.

19. Exhibit "C" also shows that there is bodily injury liability insurance only in the amount of \$100,000.00 for each occurrence. This is only one third of the required amount of insurance under the lease agreement.

20. Exhibit "C" by its own terms expired 30 days after

March 29, 1978.

21. Defendants have failed to act in good faith to bring liability insurance coverage on the leased premises or to provide lessor plaintiffs with any policy of insurance as provided in paragraphs 9 and 15 of the lease agreement.

22. There is no sublessee of the leased premises.

23. Said lease agreement provides that lessee shall have thirty days in which to cure defaults, and at the end of said thirty day period, if the default complained of has not been cured, then and in that event the lessor shall have the right to demand full process of law against the lessee and all of the improvements, repairs and additions on said leased premises shall become the property of lessor as liquidated damages. Said lease agreement also provides that lessor shall also have the right to re-enter and take possession of said premises on default by the lessee.

24. Lessee defendants are in default under the lease and have failed to cure said default within 30 days after receiving notice of said default.

25. Because of lessee defendants continuing default plaintiffs are entitled to re-enter the premises and take possession.

26. Defendants now possess said leased property and refuse to allow plaintiff, or any of them, to re-enter and take possession.

27. Said lease agreement constitutes a cloud on plaintiffs title; unless this court enforces said agreement and places plaintiffs in possession of said property, plaintiff will be prevented from using and enjoying the rightful ownership and possession of said property.

28. As a result of defendants default and refusal to allow plaintiffs to re-enter and take possession of the leased premises, plaintiffs have had to retain the services of an attorney to enforce the terms of the lease agreement and to exercise the rights and remedies thereunder as well as other rights and remedies provided by law. Plaintiffs are therefore entitled to recover reasonable attorney fees.

SECOND CAUSE OF ACTION

29. Plaintiffs incorporate herein paragraphs 1 through 28 in plaintiff's First Cause of Action as if fully set forth.

30. The lease agreement provides that the leased premises shall be operated in the main as a recreational and therapeutic spa.

31. Such operation allows many customers to come onto the premises for the purpose of bathing in a pool area and a grotto area.

32. In the pool area, there are no life guards or anyone else to prevent accidents or prevent small children from swimming unattended in the large swimming pool.

33. The grotto area is located under steep cliffs of rocks and boulders. Occasionally a rock or boulder will fall onto the grotto area where bathers are bathing.

34. Plaintiff are informed and believe and therefore allege on information and belief that during the last few months during periods of rain, large rocks and boulders fell from the steep cliffs around the grotto area and pool area, and that some of these large rocks and boulders fell across a pathway used by customers and smashed through a wooden fence.

35. Operation of the leased premises poses risks of injury to body and property. It is because of such risks that plaintiffs have continually tried to make lessee secure liability insurance on the premises as provided for in the lease agreement.

36. Plaintiffs are informed and believe and therefore allege on information and belief that the lessee defendants cannot indemnify plaintiffs adequately against any and all claims arising from the conduct, management, or acts of negligence unless liability insurance coverage in the sum of \$300,000.00 is provided by the lessee defendants as required in the lease agreement.

37. Lessor plaintiffs have no adequate remedy at law to protect themselves and their property if liability insurance

is not carried on the leased premises as provided in the lease agreement. Without adequate liability insurance, plaintiffs will suffer immediate and irreparable injury in the form of financial liability should plaintiffs not enforce the terms of the lease agreement as to liability insurance. Plaintiffs fear that a cause of action could arise in the immediate future from acting on the leased premises that would involve the plaintiffs in such a way that adequate liability insurance is not obtained by defendant for the benefit of the plaintiffs as required in the lease agreement. Such liability exposure because of the lack of adequate liability insurance could cause immediate and irreparable financial losses to the plaintiffs.

38. Unless the court immediately restrains the defendant from operating the leased premises as a business and allowing people to come onto the premises without \$300,000.00 of liability insurance for bodily injury and property damage, plaintiffs and their property will be subject to immediate and irreparable liability for which plaintiffs have no adequate remedy at law.

39. The lease agreement does not provide that lessor may pay insurance premiums and look to lessee for reimbursement. Therefore, if lessor did pay insurance premiums, lessor would have to bring a multiplicity of lawsuits in an attempt to get back such premiums from lessee. Plaintiffs, therefore, have no adequate remedy at law.

40. Unless the court temporarily enjoins lessee defendant during the pendency of this action from operating the leased premises without \$300,000.00 of liability insurance for bodily injury as well as property damage, plaintiffs will have no adequate remedy at law.

40. Unless the court permanently enjoins lessee defendant from operating the leased premises without \$300,000.00 of liability insurance for bodily injury as well as property damage, plaintiffs will have no adequate remedy at law unless the court restrains

possession of the premises to plaintiffs as prayed for in plaintiff's First Cause of Action.

41. Defendants should be ordered to show cause why the court should not enjoin defendants from operating said leased premises without first procuring \$300,000.00 of liability insurance as provided in paragraph 9 of the lease agreement.

WHEREFORE; plaintiffs pray for judgment against defendants as follows:

1. Declaring defendants have breached the terms of the lease agreement.
2. Quieting plaintiff's title to the real property described in the lease agreement.
3. Placing plaintiffs in possession of the leased property.
4. Declaring that defendants and all persons claiming under them have no estate, right, title or interest in or to said real property described in the lease agreement.
5. For a restraining order prohibiting the defendants from operating the leased premises without first obtaining \$300,000.00 of liability insurance against bodily injury and property damage for each occurrence.
6. For a temporary injunction during the pendency of this action enjoining the defendants from operating the leased premises without first obtaining \$300,000.00 of liability insurance against loss for bodily injury and property damage.
7. For a permanent injunction permanently enjoining the defendants from operating the leased property as a business during the term of the lease without having \$300,000.00 of liability insurance as required in paragraph 9 of the lease agreement.
8. For temporary attorney fees that are reasonable as determined by the court at the order to show cause hearing.
9. For reasonable attorney fees as determined at time of trial.
10. For such other relief as the court may deem just and proper in the premises.

Dated this 8th day of May, 1978.

Donald Brent Southwell
DONALD BRENT SOUTHWELL
ATTORNEY FOR PLAINTIFFS

Plaintiff, GENEVIEVE A. SMITH, being first sworn, says she has read the foregoing complaint, understands it, and believes it to be true.

Genevieve A. Smith
GENEVIEVE A. SMITH, Plaintiff

SUBSCRIBED AND SWORN to before me on this MAY 8 1978 day of May, 1978.

Edith J. Smith
NOTARY PUBLIC - Residing at
St George, Utah

My commission expires:

MY COMMISSION EXPIRES
SEPTEMBER 16, 1980

Plaintiff, JESSEE E. SMITH, being first sworn, says he has read the foregoing complaint, understands it, and believes it to be true.

Jesse E. Smith
JESSEE E. SMITH, Plaintiff

SUBSCRIBED AND SWORN to before me on this MAY 8 1978 day of May, 1978.

Edith J. Smith
NOTARY PUBLIC - Residing at
St George, Utah

My commission expires:

MY COMMISSION EXPIRES
SEPTEMBER 16, 1980

Plaintiff, BETH M. SMITH, being first sworn, says she has read the foregoing complaint, understands it, and believes it to be true.

Beth M. Smith
BETH M. SMITH, Plaintiff

SUBSCRIBED AND SWORN to before me on this MAY 8 1978 day of May, 1978.

Arthur J. Smith
NOTARY PUBLIC - Residing at
St. George, Utah

My commission expires:
MY COMMISSION EXPIRES
SEPTEMBER 16, 1980

Plaintiff, SALLI SMITH GIPARD, being first sworn, says she has read the foregoing complaint, understands it, and believes it to be true.

Salli Smith Gipard
SALLI SMITH GIPARD, Plaintiff

SUBSCRIBED AND SWORN to before me on this MAY 8 1978 day of May, 1978.

Arthur J. Smith
NOTARY PUBLIC - Residing at
St. George, Utah

My commission expires:
MY COMMISSION EXPIRES
SEPTEMBER 16, 1980

THIS AGREEMENT is made and executed by and between
 E. PERRY SMITH AND GENEVIEVE SMITH, his wife, of Pintura,
 LESSORS, and CHARLES L. APPEBY JR and DAVID E. WOOD of
 California and DON BJARNSON of Hurricane, Utah, LESSEE.

W I T N E S S E T E :

1. LEASED PREMISES AND TERM OF LEASE: Lessors
 this day leased to Lessee for a term of twenty (20) years
 following described tract of land in Washington County, Mo.

Beginning at a point in middle of the channel of Virgin
 river located directly South from a point 15.4 chains
 East of Northwest corner of the Northeast $\frac{1}{4}$ Southeast
 Section 26, Township 41 South, Range 13 West, Salt
 Lake Meridian and running thence North 9.4 chains,
 more or less to a point 30 feet South of a line separating
 the Southeast $\frac{1}{4}$ and the Northeast $\frac{1}{4}$ of said Section
 thence South 87° East 9.7 chains, more or less; thence
 South $23^{\circ}45'$ West 5.4 chains; thence South 68° East
 24.50 chains, more or less, to the middle of Virgin
 to a point, which is $\frac{1}{4}$ chains West and 15 chains South
 from the Northeast corner of the Southwest $\frac{1}{4}$ Section
 25; thence follow downstream the middle of the River
 the point of beginning. ALSO: Beginning at a point
 chains South of the Northwest corner of the Southwest
 Southwest $\frac{1}{4}$ Section 25, Township 41 South, Range 13
 West, Salt Lake Meridian and running thence East 30.4
 thence Northerly 30 chains, more or less to the point
 intersection of the middle of the channel of the Virgin
 River with the line separating the Southwest $\frac{1}{4}$ and the
 West $\frac{1}{4}$ of Section 25; then follow downstream the middle
 of the River to a point where said river intersects the
 Easterly boundary line of Highway U-17; thence South
 04° West 15 chains, more or less to the South boundary
 of Northeast $\frac{1}{4}$ Southeast $\frac{1}{4}$ Section 26; thence East
 19 chains, more or less to the Southeast corner of the
 Northeast $\frac{1}{4}$ Southeast $\frac{1}{4}$; thence South 10 chains to
 beginning. Containing 110.24 acres.

Together with all improvements thereon and appurtenances
 thereto, including any and all minerals, oil, gas and
 water rights running with this real property and
 including the inventory sheet marked Exhibit "A",
 attached hereto.

It is further agreed that at the end of the first
 year of this lease and at yearly intervals thereafter the
 LESSEES may by giving sixty (60) days notice in writing to
 LESSORS their heirs, assigns or legal representatives, end
 this lease. Any improvements placed on or made to the leased
 premises shall not be removed but shall become the property
 the lessors.

E.P.S.
G.S.
C.L.A.
D.E.W.
D.B.

This Lease shall be perpetually renewable on its own terms for additional twenty (20) year periods on the same terms and conditions as herein contained and the option to renew will be revoked only on affirmative action by Lessee, his heirs and or assigns, who may revoke said Lease by written notice to Lessor at the end of any one(1) year period.

For \$1.00 Lessor hereby gives exclusive option to purchase herein above described property to Lessee. This option is to remain in effect as long as the property is under lease. The selling price shall be the appraised value at the time of sale.

2. PAYMENT OF RENT: In consideration of the Lease of said premises herein described Lessee does agree to pay Lessor rentals as follows:

A. Eight Thousand four hundred (\$8,400) on the 15th day of July, 1975 which shall be the lease payment for the first year of said lease and shall run to the 15th day of July, 1976.

B. On the 15th day of July, 1976, the Lessor shall pay seven hundred dollars (\$700) and the lease payment shall be seven hundred dollars (\$700) per month for each month thereafter.

C. During the second year of this lease Lessor shall be entitled to Four Percent (4%) of the gross sales of all business activities carried on on the leased premises in excess of \$3,000 per month. During the third year of this lease, Lessor shall be entitled to Four Percent (4%) of the gross sales of all business activities carried on on the leased premises in excess of \$3,000 per month. During the fourth year of this lease and each year thereafter as long as said lease remains in full force and effect, Lessor shall be entitled to Five Percent (5%) of the gross sales of all business activities carried on on the leased premises in excess of \$3,000 per month.

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SAC [Signature]

Lessee and Lessor shall share equally (50% to each) any revenues derived from drilling for geothermal heat energy by a third party sublease as referred in paragraph #18.

3. LESSEES TO OPERATE SAID PREMISES AS A RECREATIONAL AND THERAPUTIC SPA: The premises and facilities subject to this Lease shall be operated in the main as recreational and theraputic spa; Lessees may perform all functions necessary to carry on said operations together with those functions and operations necessary to carry on business related to the development of the Spa; including but not limited to restaurant, housing facilities, hotels motels, trailer parks, caves, and the mining, manufacturing and sale of cosmetics or any other function economically feasible. The meaning and purpose of this section is to insure that the spa or hot springs will be the center of the business activity on said premises; all other activities being related or incident thereto.

4. LESSOR RESERVES REAL PROPERTY AND APPURTENANTS:
~~Lessor shall during the time this lease is in effect have access to, and the use of, for any and all purposes, including the use of mineral water on said premises, rent free, the rock building on the north side of the Virgin River directly north of the present grotto and the real property on which said building is located and the real property extending 100 feet north and south of said building and 300 feet east and west of said building.~~

5. SUB-LEASING: Lessee shall have right to assign or sub-lease the premises herein described with the written consent of Lessor but subject to all the terms and conditions herein set forth.

6. WATER SALES:

It is of mutual interest for the Lessor and Lessee to have the mineral water bottled and sold.

It is therefore herein agreed that in case the Lessee cannot put in a bottling plant within two years, from the letting of this lease; A third party may be sought by either the Lessor or Lessee to bottle and market the water, with the profits from this venture to be divided and shared half to the Lessee and half to the Lessor.

7. SPRING WATERS TO BE KEPT ON PREMISES: SPRING WATERS from the hot mineral springs shall be used on the leased premises and shall not be piped therefrom.

8. TAXES AND ASSESSMENTS: TAXES for the year 1975 shall be prorated as of the date of this lease and thereafter, Lessee covenants and agrees to pay promptly when due all taxes, including real estate taxes and assessments, and governmental charges, general and special of every nature and kind whatsoever, which may be (a) levied, imposed or assessed on the real estate hereby demised, or on any improvements thereon, at any time after the date of this lease and prior to its expiration, or (b) levied, imposed, or assessed on any interest of the Lessor in or under this lease; or (c) which the Lessor shall be required to pay reason of or on account of his interest in the real estate hereby demised and the improvements on said real estate. Every such tax, assessment, and charge shall in any event be paid in time to prevent the additions of any interest penalty thereto.

9. INDEMNITY OF LESSOR BY LESSEE AGAINST LOSS: THE Lessee covenants to indemnify and save harmless the Lessor against any and all claims arising from the conduct or management of or from any work or thing whatsoever done in or about the demised premises or any building or structure thereon or the equipment thereof during said term or arising during said term from any condition of any street or sidewalk adjoining the

premises or of any passageways, or spaces therein or appurtenances thereto, of arising from any act of negligence of the tenant or any of its agents, contractors, or employees, or arising from any accident, injury or damage whatsoever, however caused to any person or persons, or to the property of any person, persons, corporation or corporations, occurring during said term in, or about the leased premises or on or under the sidewalk in front thereof, and from and against all costs, counsel fees, expenses, and liabilities incurred in or about any such claim or any action or proceeding brought thereon, and further agree to insure said premises for liability in the amount of at least Three Hundred Thousand Dollars (\$300,000.00).

10. WASTE OR DAMAGES: Lessee acknowledges that it has examined the demised premises prior to the making of the Lease, and knows the condition thereof, and covenants that it will care for said premises in a reasonable and prudent manner and make no waste or injury thereon.

11. UNLAWFUL USE PROHIBITED: It is understood and agreed between the parties hereto that said premises will not be used for any purpose in violation of any law, county ordinance or regulation, of the County of Washington, State of Utah.

12. ATTORNEY'S FEES: In the event of a default in performance on the part of either Lessor or Lessee, the party determined to be guilty of such default or breach of the Lease shall be liable and responsible to the non-defaulting party for reasonable attorney's fees incurred by the non-defaulting party in enforcing the terms of this agreement or exercising any rights or remedies hereunder or any rights or remedies otherwise provided by law.

13. REMEDY FOR DEFAULT: On the breach of any of the conditions herein contained by the Lessee, the Lessee shall have thirty (30) days in which to cure said default and at the end of said thirty (30) day period, if the default complained of is not cured, the Lessor may, at its option, terminate this Lease.

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not been cured, the Lessor shall give notice to any and all sublessees of these defined premises, who shall have the right and privilege to cure said default and if after twenty (20) days from notice, said sublessees have not cured the default hereunder, then and in that event the Lessor shall have the right to demand full process of law against both the Lessee and sublessees, and all of the improvements, repairs and additions on said leased premises shall become the property of Lessor as liquidated damages. Lessor shall also have the right to re-enter and take possession of said premises on default by the Lessee.

14. LIENS: Lessee shall be responsible for and hold Lessor harmless from any and all liens, including mechanics liens which shall be placed on said property through the actions of Lessee, from and after the effective date of this agreement.

15. INSURANCE: THE Lessee will be responsible for the improvements now kept on said premises and improvements placed thereon after the inception of this lease and said Lessee shall be liable for damages as set forth in paragraph 9, and said Lessee shall carry fire insurance and liability insurance in amounts adequate to protect both Lessee and Lessor and the said Lessor shall be furnished with copies of fire and liability insurance policies as they are obtained by Lessee.

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16. FUTURE DEVELOPMENTS BY CONSENT: ALL future development of the hot mineral waters as it emerges from the thermals shall be approved in writing by Lessor and Lessee.

17. FUTURE GEOTHERMAL DEVELOPMENT: Any future development of geothermal heat shall be approved by both Lessor and Lessee in writing. Any such agreement shall provide for adequate compensation to Lessees for such damages as they may sustain to the overall operation of the leased premises including but not limited to the operation of a health spa, production of cosmetics, etec.

18. IMPROVEMENTS: In the event of default by Lessee, the improvements situated on said property at the time of the default shall remain on the leased premises and become the property of Lessor at the time of default.

19. ENTIRE AGREEMENT: THIS written instrument constitutes the entire agreement between the parties.

20. MANUFACTURE AND SALE OF COSMETICS:

~~It is understood and agreed that until the Lessee has built a recovery plant for the recovery of minerals from the hot mineral waters located on these premises, and a cosmetics factory to formulate, bottle and package cosmetics, The Lessor shall ~~thereafter~~ approve all cosmetic formulations ~~to~~ to the Lessees. *See also 1925 Jan & Feb*
Until the Lessees have their cosmetic plant ready for operation; The Lessor may furnish cosmetics items in quantities sufficient for sales at the springs at the rate of 10% of the retail price.~~

See also 1925 Jan & Feb
See also 1925 Jan & Feb

21. TERMS OF SUCCESSION AGREEMENT: This Lease Agreement shall be binding on the heirs, assigns, successors in interest, purchasers, or anyone taking any interest in or to said leased premises, from the parties to this lease.

DATED this 10 day of June, 1975.

LESSORS:

E. Penn Smith
E. PENN SMITH

Genshieve Smith
GENSHIEVE SMITH

LESSEES:

Catherine R. Appleby
CATHERINE R. APPLEBY
Leo E. Wood
LEO E. WOOD
Grace Starnes
GRACE STARNES

Catherine R. Appleby
CATHERINE R. APPLEBY
Leo E. Wood
LEO E. WOOD
Grace Starnes
GRACE STARNES

WITNESSES:

STATE OF WASH } ss.
COUNTY OF Washington

On the 10 day of June, 1975, personally appeared before me E. Penn Smith and Genshieve Smith, his wife, the signors of the within instrument, who duly acknowledged to me they executed the same.

My Commission expires: 6/14/76

Catherine R. Appleby
Catherine R. Appleby
Notary Public
Residing at Long Beach, CA

STATE OF CALIFORNIA } ss.
COUNTY OF San Diego before me,
On June 18, 1975
the undersigned, a Notary Public in and for said County and State,
personally appeared Catherine R. Appleby

known to me
to be the person whose name subscribed to the
within instrument and acknowledged that she executed the
same.

Catherine A. Vanderbaeck

Catherine A. Vanderbaeck
Name (Typed or Printed)
Notary Public in and for said County and State

FOR NOTARY SEAL OR STAMP



Amendment to Lease Agreement

The parties to the lease heretofore executed on 1975, leasing the premises generally known as Pan Tenna hot mineral springs hereby agree to amend paragraphs 4, 6 and 10 of said lease to read as follows;

4. Lessor and Lessees Reserves Real Property and Appurtenants:

Lessor and Lessees agree to permit E. Penn Smith access and use of the rock building on the north side of the Virgin river, directly north of the present grotto and the real property on which said building is located and the real property extending 100 feet north and south of said building 300 feet east and west of said building, for personal, residential and experimental use, including the use of mineral water, rent free.

The Lessees and E. Penn Smith shall both have use of well located on said property.

All parties agree to limit use or diversion of the mineral waters on this property so as not to appreciably diminish the current and usual flow from the thermals and/or springs situated on the leased premises.

At such time as E. Penn Smith does not have personal use for said rock building and real property described in this paragraph it shall be returned to the lessees for their use.

For the consideration of one dollar the Lessees shall have 1st option to purchase equipment in the rock building.

6. Watersales

It is of mutual interest for the lessor and lessees have mineral water bottled and sold.

It is therefore herein agreed that in case lessees cannot establish processing and marketing of bottled water within 2 years from the effective date of this lease a third party may be sought by either the lessor or lessees. The third party shall be approved by both lessor and lessees.

The profits from such venture to be equally divided by lessor and lessees.

20. Manufacture and sale of Cosmetics.

The lessor agrees to provide the lessees the complete cosmetic formulation processes.

Until the lessees have their cosmetic plant ready for operation the lessor agrees to furnish cosmetic items in quantities sufficient for sales at the rate of 60% of retail when bottling is provided by lessor or 40% of retail when bottling is provided by lessees.

If after 2 years from dated of said lease the sales of cosmetics fail to reach a mutually agreed volume a third party may be sought by either lessor or lessees. The third party shall be approved by both lessor and lessees.

Profits from such venture to be equally divided by lessor and lessees.

Dated this 23 day of July, 1975

Lessors;

E. Penn Smith

Lessees;

Charles L. Appleby, Jr.

David L. Wood

Genevieve Smith

Catherine R. Appleby

Leone L. Wood

N O T I C E T O
C U R E D E F A U L T S

TO: CHARLES L. APPLEBY JR.
DAVID E. WOOD
DON BJARNSON

FROM: GENEVIEVE A. SMITH
JESSE E. SMITH
BETH M. SMITH
SALLI SMITH GIRARD

Notice to cure defaults within thirty (30) days is hereby given to CHARLES L. APPLEBY JR., DAVID E. WOOD, and DON BJARNSON, lessees of that certain "Lease Agreement" between themselves and E. PENN SMITH and GENEVIEVE SMITH, lessors, and which was executed on June 14, 1975, and amended on July 23, 1975. This notice is given as provided in paragraph 13 of said lease agreement.

Specific defaults under the lease agreement which must be cured with thirty (30) days are as follows:

1. Lessees must insure the leased premises for liability in the amount of at least Three Hundred Thousand Dollars (\$300,000.00) to cover the agreement of indemnification as provided in paragraph 9 of said lease agreement, and lessees must furnish lessors a copy of said liability insurance policy as provided in paragraph 15 of said lease agreement.

2. Lessees must insure all improvements on the leased premises against loss by fire in amounts adequate to protect lessors interest, and lessees must furnish lessors a copy of said fire insurance policy showing that lessors interest is protected as provided in paragraph 15 of said lease agreement.

3. Lessees must not continue to operate the leased premises in violation of Utah State Division of Health, Code of Camp, Trailer Court, Hotel, Motel and Resort Sanitation Regulations, adopted by the Utah State Board of Health on February 21, 1968, under authority of 26-15-4, U.C.A., 1953, as amended.

4. Lessees must eliminate waste on the leased premises and restore said leased premises to that condition which the leased premises would now be in if said leased premises had been cared for in a reasonable and prudent manner as provided in paragraph 10 of said lease agreement. Particular areas where lack of care or waste has allowed the leased premises to become dilapidated are as follows:

(a). The grotto area on the leased premises has become, and continues to be, unclean, unkept and dangerous to users.

(b). The swimming pool area is falling into disrepair and is a health hazard. The pool area is in violation of the Utah State Division of Health, Regulations Relating to Operation and Maintenance of Public Swimming and Wading Pools.

(c). The cabin motel units are falling in disrepair and are not in clean, sanitary and operable condition. There is no adequate or approved screening to control insects and the windows, shades, curtains, furniture and fixtures are not clean and in good repair. The units are in violation of State law as referred to in paragraph 3 above, as well as county health laws.

(d). The roads on the leased premises are in disrepair with chuck holes and inadequate graveling.

(e). Electrical and plumbing on the leased premises is unsafe and does not comply with any standard of safety.

Genevieve A. Smith, Jesse E. Smith, Beth Smith, and Salli Smith Girard are successors in interest to the leased premises. See Quit Claim Deed recorded August 23, 1977, with the Washington County Recorder, Book 224, Page 240, Reference 186462. Attachment "A" is a copy of Quit Claim Deed.

Service of this notice on any lessee party is notice to all lessees as partners and agents of each other.

No waiver of this notice or the required thirty (30) days to cure the above-mentioned defaults will be granted unless in writing and signed by all parties concerned.

In the event that the above mentioned defaults, or any of them, are not cured within thirty (30) days following service of this notice upon lessees, or any of them, then lessors will institute legal action to recover possession of the leased premises and will re-enter and take possession of the leased premises, and lessors will take all legal steps necessary to insure that lessors recover possession of said leased premises.

Should legal action be necessary to recover possession of the leased premises, lessors will ask the court for an award of attorney's fees against lessees, and each of them, for all reasonable attorney's fees incurred by lessors in enforcing the terms of the lease agreement or any other rights or remedies available thereunder as provided in paragraph 12 of the lease agreement.

This NOTICE TO CURE DEFAULTS was signed on this ____ day of March, 1978.

GENEVIEVE A. SMITH

JESSE E. SMITH

BETH M. SMITH

SALLI SMITH GIRARD

Recorded at Request of Jesse Smith 1981 AUG 31 1981
at 12:00 P. M. Fee Paid \$ 8.00 County Recorder
by _____ Dep Book 224 Page 240 Ref: 186462
Mail tax notice to _____ Address _____

QUIT-CLAIM DEED

Genevieve A. Smith, Jesse E. Smith, and Beth M. Smith, his wife, Salli Smith Girard, Penn Harris Smith, and Mary A. Smith, his wife, grantors of _____, County of Washington, State of Utah, hereby
QUIT-CLAIM to Genevieve A. Smith, thirty three and one-third percent (33 1/3%); Jesse E. Smith, and Beth M. Smith, his wife, as joint tenants with full right of survivorship, thirty three and one-third percent (33 1/3%); and Salli Smith Girard, thirty three and one-third percent (33 1/3%);
of _____ Washington County, Utah
Ten Dollars and NO/100----- for the sum of _____ DOLLARS

the following described tract of land in _____ Washington County,
State of Utah:

Beginning at a point in middle of the channel of Virgin River located directly South from a point 15.4 chains East of Northwest Corner of the Northeast & Southeast 1/4 Section 26, Township 41 South, Range 13 West, Salt Lake Meridian and running thence North 9.4 chains, more or less to a point 30 feet South of a line separating the Southeast 1/4 and the Northeast 1/4 of said Section 26; thence South 37° East 9.7 chains, more or less; thence South 23°45' West 5.4 chains; thence South 68° East 24.50 chains, more or less, to the middle of Virgin River, to a point, which is 14 chains West and 15 chains South from the Northeast Corner of the Southwest 1/4 Section 25; thence follow downstream the middle of the River to the point of beginning. ALSO Beginning at a point 10 Chains South of the Northwest corner of the Southwest 1/4 Southwest quarter Section 25, Township 41 South, Range 13 West, Salt Lake Base and Meridian and running thence East 30 chains thence Northerly 30 Chains, more or less to the point of intersection of the middle of the channel of the Virgin River with the line separating the Southwest 1/4 and Northwest 1/4 of Section 25, then follow downstream the middle of the River to a point where said river intersects the Easterly boundary line of Highway U-17; thence South 21° 04' West 15 Chains, more or less to the South boundary line of Northeast 1/4 Southeast 1/4 Section 26; thence East 19 chains, more or less to the Southeast corner of the Northeast 1/4 Southeast 1/4; thence South 10 chains to beginning.

Witness the hand of said grantor, this _____ 5th day of _____
March, A. D. one thousand nine hundred and seventy seven

Signed in the presence of _____

STATE OF UTAH,
County of IRON

} ss.

On the _____ 5th day of _____ A. D. one thousand nine hundred and seventy seven
Genevieve A. Smith, Jesse Smith, Beth Smith, Salli Smith Girard,
Penn H. Smith and Mary A. Smith

the signer of the foregoing instrument, who duly acknowledge to me that same.

My commission expires 1-12-81

Address: Cedar City, Utah

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

FILED

DEC 7 1982

CLERK OF DISTRICT COURT

IN THE SUPREME COURT

STATE OF UTAH


GENEVIEVE A. SMITH, JESSE E. SMITH,)	
BETH M. SMITH, and SALLI SMITH GIRARD,)	
<u>Involuntary Defendants,</u>)	NEWLY
<u>Plaintiff, Respondent,</u>)	DISCOVERED
and Cross Appellant,)	CASE
)	
vs.)	Case No. 17662
)	
CHARLES L. APPLEBY, JR., CATHERINE R.)	
APPLEBY, DON BJARNSON, and GRACE)	
BJARNSON,)	
)	
Defendants, Appellants,)	
and Cross Respondents.)	

PURSUANT to Rule 75(p) (3) of the Utah Rules of Civil Procedure, Appellants by and through their counsel augment Point 3 of their Brief on Appeal by citing Interiors Contracting Incorporated, et al v. Navalco, No 17105, Filed June 10, 1982, approximately eighty days after the filing of Appellant's Reply Brief. Appellants cite Navalco for the proposition that "(o)rderly procedure requires that a party present all his evidence on the issues once he embarks upon the proof of his case" and that "(f)ailure to adduce

evidence on a claim at issue constitutes a waiver of the claim." Thus, Navalco supports Appellants' position that the Respondent, once having rested at trial without presenting evidence on attorney's fees and having failed to move to reopen the trial even after Appellants rested had voluntarily forgone her right to introduce fresh evidence, and had waived recovery on that issue. See Appellant's Brief at Page 30. The Navalco case further points out that the lower Court's sua sponte reopening of the case three weeks after trial without motion was both capricious and arbitrary, and certainly thwarts the basic system of Utah justice, in which adversaries must take the responsibility for their own trial strategies.

That the lower Court awarded attorney's fees which Respondent waived for her proving a breach which Respondent also waived by accepting rent compounds the absurdity of this case.

RESPECTFULLY SUBMITTED this 6th day of October, 1982.


MICHAEL D. HUGHES
Attorney for Defendants,
Appellants and Cross Respondents

CERTIFICATE OF MAILING

I do hereby certify that on the 5th day of October, 1982, I mailed two true and correct copies of the above and foregoing NEWLY DISCOVERED CASE to John L. Miles

and J. MacArthur Wright of Atkin, Wright & Miles, attorneys
for respondent and cross appellant, P. O. Box 339, St.
George, Utah 84770, postage prepaid.

Shelley L. Nelson