1983

Salli Smith Girard v. Charles L. Appleby, Jr., Catherine Appleby, Don Bjarnson, and Grace Bjarnson : Appellants' Petition For Rehearing and Brief For Petition On Rehearing

Utah Supreme Court

IN THE SUPREME COURT

OF THE STATE OF UTAH

SALLI SMITH GIRARD, Plaintiff, Respondent, and Cross Appellant, vs. CHARLES L. APPLEBY, JR., CATHERINE APPLEBY, DON BJARNSON, and GRACE BJARNSON, Defendants, Appellants, and Cross Respondents.	Case No. 17662

APPELLANTS' PETITION FOR REHEARING AND BRIEF FOR PETITION ON REHEARING

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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TABLE OF CONTENTS

CASES CITED

COURT RULES

OTHER AUTHORITIES

IN THE SUPREME COURT OF THE STATE OF UTAH

SALLI SMITH GIRARD, Plaintiff, Respondent, and Cross Appellant, vs. CHARLES L. APPLEBY, JR., CATHERINE APPLEBY, DON BJARNSON, and GRACE BJARNSON, Defendants, Appellants, and Cross Respondents.	APPELLANT'S PETITION FOR REHEARING Case No. 17662

PETITION FOR REHEARING

COME NOW the Defendants, Appellants, and Cross Respondents Charles L. Appleby, Jr., Catherine R, Appleby, Don Bjarnson and Grace Bjarnson, his wife, by and through their attorney, Michael D. Hughes, and petition the Court, pursuant to Rule 76(e)(1), for a rehearing on one point which petitioners believe may not have been addressed or resolved by the Court in its opinion dated March 11, 1983.

The only point upon which petitioners seek a rehearing arises from the first full paragraph of the second page of the Court's opinion, which reads as follows:

> On this appeal, defendants challenge the award of attorney fees, contending that the court erred in reopening the case sua sponte for the purpose of permitting Girard to submit evidence omitted at the time of trial. Girard cross appeals, contending that the court erred in refusing to consider waste and health code violations as further evidence of breach, and that the court erred in denying her motion to amend the complaint at the time of trial, and erred in ruling that plaintiffs had waived forfeiture by the acceptance of rent.

Petitioners believe, by reason of the testimony given at trial and Point VI addressed in their original Brief on Appeal, that this paragraph should have read as follows:

> On this appeal, defendants challenge the award of attorney fees, contending that the court erred in reopening the case sua sponte for the purpose of permitting Girard to submit evidence omitted at the time of trial and in denying Defendants' attorney's fees in sustaining the lease against the remaining plaintiff, as testified to at trial by Defendants' counsel. Girard cross appeals, contending that the court erred in refusing to consider waste and health code violations as further evidence of breach, and that the court erred in denying her motion to amend the complaint at the time of trial, and erred in ruling that plaintiffs had waived forfeiture by the acceptance of rent.

Petitioners are unsure whether the underscored insertion was addressed by the Court. Petitioners' oral argument before the Court did not stress this matter, although it was clearly raised in Petitioners' brief. It may be, however, that the Court impliedly ruled on the above in its final paragraph in the opinion which states as follows:

> The trial court's award of attorney fees is vacated and set aside. In all other respects, the judgment is affirmed. Each party to bear their own costs.

Nonetheless, it is unclear from the text whether the Court did intend to resolve Point VI raised in Appellants' Brief regarding the defendants' attorney's fees by inference in the above summation.

RESPECTFULLY SUBMITTED this 22 day of March, 1983.

Michael D. Hughes

MICHAEL D. HUGHES
Attorney for Petitioners

IN THE SUPREME COURT OF THE STATE OF UTAH

SALLI SMITH GIRARD, Plaintiff, Respondent, and Cross Appellant, vs. CHARLES L. APPLEBY, JR., CATHERINE APPLEBY, DON BJARNSON, and GRACE BJARNSON, Defendants, Appellants, and Cross Respondents.	APPELLANT'S BRIEF FOR PETITION ON REHEARING Case No. 17662

BRIEF FOR PETITION ON REHEARING

Nature of Case

The nature of the case was accurately recited by Chief Justice Hall in his opinion dated March 11, 1983, attached hereto as an appendix, with the exception noted in the Petition for Rehearing, ante.

Disposition in the Trial Court

As it pertains to this petition for rehearing, the trial court denied appellants' attorney's fees as testified to at trial.

Relief Sought by this Petition

In appellants' initial brief on appeal, the issue of appellants' attorney's fees as testified to at trial was covered in Point VI of appellants' brief. The relief sought by this petition for rehearing is to seek the award of those attorney's fees or a clarification of those reasons supporting their denial.

Petitioners fully understand that the Court, in its discretion, may deny their petition.

STATEMENT OF MATERIAL FACTS

Plaintiffs brought this action seeking a forfeiture of a lease on certain heated mineral waters operated by defendants as a recreational and therapeutic spa. As set forth in plaintiff's complaint, plaintiffs' single claim for forfeiture was defendants' failure to maintain liability insurance on the premises. On the morning of trial plaintiff Salli Smith Girard sought to try issues of health code violations not properly plead and which were not tried with the consent of the defendants. Although the trial court reserved its ruling on the propriety of trying these unplead issues, the trial court nonetheless allowed plaintiff to introduce testimony and evidence in support of these claims, over the continuing objection of defendants. Most of the four-day trial time was consumed by these alleged health code violations which were based upon information tendered to appellants and filed with the trial court on the morning of trial. Although the trial court allowed testimony and evidence pertaining to these health code violations, after the trial the court ultimately sustained appellants' objections and excluded from its ruling all matters pertaining to causes not formally raised by the pleadings and not tried by consent.

Paragraph 12 of the lease in question provided for attorney's fees, apparently either in the enforcement of the terms of the lease itself or in the exercise of any rights or remedies contained in the lease or otherwise provided for by law.

As found by the lower court, the trial of issues improperly brought before it consumed most of the trial time, the trial of such issues not being consented to by the defendants. See, Girard v. Appleby, No. 17662, filed March 11, 1983, at 3-4, attached hereto as Exhibit "A". In point of fact the appellants, defendants below, contended throughout the trial that the lessors' acceptance of over $22,000 in rents made the maintenance of such an action for forfeiture superfluous in light of this Court's earlier declarations in Woodland Theaters, Inc., v. ABC Intermountain Theaters, Inc., 560 P.2d 700 (Utah 1977) and Brigham Young Trust Company v. Wagener, 13 Utah 236, 44 P. 1030 (1896). At the end of the trial in which the lease was sustained and after appellants had finished rebuttal of the plaintiff's case, appellants' counsel was sworn and did testify as to an attorney's fee of $2,000 in defending the lease from forfeiture. See partial transcript at 92:18-93:2.

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BASIS FOR PETITION

POINT I

IT IS UNCLEAR WHETHER THE SUPREME COURT ADDRESSED AND RESOLVED THE ISSUE OF APPELLANTS' ATTORNEY'S FEES AS TESTIFIED TO BEFORE THE DISTRICT COURT.

Petitioners fully understand that several points raised in their appeal were resolved in terms of substance by the Court's ruling as set forth in the attached opinion. For example, it is clear once the Supreme Court upheld the trial court's determination that the amendment seeking to implead new issues

was properly disallowed, the fact that those issues might otherwise constitute harmless error was a matter this Court need not decide. In its opinion, however, this Court did not directly address the issue of appellants' attorney's fees which had been testified to at trial. The facts upon which the appellants believe that these fees are justified were set forth in Point VI of appellants' brief, at pp. 36-69. That point is reproduced verbatim herein as follows:

POINT VI

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

The court indicates that the rationale behind the sua sponte motion to reopen and accept affidavits on attorney's fees as being the confusion which resulted from the uncertainty which existed as to the triable issues caused by Respondent's own counsel. During the trial, Respondent Girard made several attempts to amend the complaint and add additional causes of action, most of which had occurred long after the suit was initiated. Although the court noted Appellants' continuing objections to all testimony pertaining to matter outside of the relevant insurance questions, it allowed such testimony to enter into the record and reserved its ruling on those issues until judgment. As a result, the Appellants spent a large part of the trial defending the lease and forfeiture thereof by resisting issues not properly before the court.

Under paragraph 12 of the lease, the Defendants/Appellants are entitled to attorneys fees as a result of trying a case for several days defending their position that the lease should be upheld and not forfeited. To deny Appellants their attorney's fees by finding them in default ignores the testimony of Doug Labrum, called by the Respondents, whose testimony clearly establishes, as preserved in the partial transcript, that Appellants had cured the default within the 30-day grace period allowed by the lease, and prior

to the filing of suit. (P-3, §13; PT Labrum's testimony, seriatum, R-1 showing suit filed May 8, 1978)

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

> [T]he rule now established by nearly all courts is that the ordinary lease of realty, if valid, and executed by a person capable of making such a covenant, raises an implied covenant that the lessee shall have the quiet and peaceable possession and enjoyment of the leased premises . . . unless there is some express covenant of a more limited character inconsistent with a judicial covenant of quiet enjoyment, an express stipulation in the lease that nothing therein contained should be construed to imply a covenant for quiet enjoyment, or a statutory provision which is applicable to leases, abolishing implied covenants.

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

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

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

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

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

While the foregoing argument was addressed as set forth in appellants' brief as heretofore set forth, Chief Justice Hall in the first full paragraph on page 2 of the Court's decision dated March 11, 1983, summarized the issues raised for disposition on appeal as follows:

> On this appeal, defendants challenge the award of attorney fees, contending that the court erred in reopening the case sua sponte for the purpose of permitting Girard to submit evidence omitted at the time of trial. Girard cross appeals, contending that the court erred in refusing to consider waste and health code violations as further evidence of breach, and that the court erred in denying her motion to amend the complaint at the time of trial, and erred in ruling that plaintiffs had waived forfeiture by the acceptance of rent.

Petitioners believe that this paragraph might more accurately have contained the following language, which is underscored for clarification:

> On this appeal, defendants challenge the award of attorney fees, contending that the court erred in reopening the case sua sponte for the purpose of permitting Girard to submit evidence omitted at the time of trial and in denying Defendants' attorney's fees in sustaining the lease against the remaining plaintiff, as testified to at trial by defendants' counsel. Girard cross appeals, contending that the court erred in refusing to consider waste and health code violations as further evidence of breach, and that the court erred in denying her motion to amend the complaint at the time of trial, and erred in ruling that plaintiffs had waived forfeiture by the acceptance of rent.

It may be that Chief Justice Hall intended to resolve the issue of appellants' attorney's fees in his summary of the Court's ruling on page 5 of the opinion as follows:

> The trial court's award of attorney fees is vacated and set aside. In all other respects, the judgment is affirmed. Each party to bear their own costs.

Nonetheless, as there was no discussion of the issue raised in the Court's opinion, it is unclear whether this Court in fact dealt with it. Petitioners believe that this Court, particularly by reason of its issuance of recent seminal rulings, has continually attempted to address and resolve all of the pertinent factual issues presented to it on appeal which are not otherwise resolved by inferences or rendered moot by other rulings. Otherwise, however, this Court's own directive requires that judicial decision-making resolve those matters regarding which there are claimed errors in the lower court's rulings. See, by inference, Romrell v. Zions First National Bank, 611 P.2d 392 at 395 (Utah 1980).

The petitioners understand that this Court may deny their petition. The petitioners understand that this Court may deny their attorney's fees as testified to in the lower court in the event the Court accepts the petition. This petition, however, is made in good faith on the basis that it does not appear that the Court dealt with this issue on appeal.

CONCLUSION

The petitioners seek a clarification of this Court's ruling, adverse or otherwise, on their request in their original brief for their attorney's fees as testified to at trial and

plead for in Point VI of their original brief on appeal. In all other particulars, the Court's original opinion is commendable for its thought and attention regarding the points raised by both counsel.

RESPECTFULLY SUBMITTED this 22nd day of March, 1983.

Michael D. Hughes

MICHAEL D. HUGHES
Attorney for Petitioners

CERTIFICATE OF MAILING

I do hereby certify that on the 28TH day of March, 1983, I mailed two copies of the above and foregoing APPELLANTS' PETITION FOR REHEARING AND BRIEF ON PETITION FOR REHEARING to John L. Miles, attorney for plaintiff/respondent, P. O. Box 339, St. George, Utah 84770, postage prepaid.

SECRETARY

EXHIBIT "A"

IN THE SUPREME COURT OF THE STATE OF UTAH

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Salli Smith Girard,
Plaintiff, Respondent,
and Cross-Appellant,

v.

Charles L. Appleby, Jr., David E. Wood, Don Bjarnson, Catherine R. Appleby, Leone E. Wood, Grace Bjarnson, Steven Alfred, and Beth Alfred,
Defendants, Appellants,
and Cross-Respondents.

No. 17662

F I L E D
March 11, 1983

Geoffrey J. Butler, Clerk

HALL, Chief Justice:

Plaintiffs Genevieve A. Smith, Jesse E. Smith, Beth M. Smith and Salli Smith Girard brought this action to declare forfeiture of a lease on the ground that defendant lessees had failed to furnish liability insurance coverage as required by the terms of the lease. Plaintiffs also sought an injunction restraining defendants from conducting a health spa business on the leased premises until the required insurance coverage was obtained. Defendants stipulated that a temporary injunction might issue, and they also furnished the required insurance coverage. Subsequently, they stipulated that the temporary injunction might be made permanent, and all parties except plaintiff Girard further stipulated to the dismissal of all issues, and that each of the parties should bear their own attorney fees and costs. The trial court accepted the stipulation and entered its order of partial dismissal, and the case proceeded to trial with only Girard as party plaintiff.

On the morning of trial, Girard moved to amend the complaint to include causes of action for waste and for violations of the health and building codes. The court reserved ruling on the motion, but permitted evidence to be presented on those issues.

The complaint contained a demand for an award of attorney fees incurred in enforcing the terms of the lease agreement, but Girard rested her case without presenting any evidence in support thereof, and without reserving the issue.

The case was duly submitted, and in its subsequent written findings, conclusions and judgment, the court ruled, inter alia, as follows: 1) denied the motion to amend the complaint, concluding that it was untimely and that the proposed amendment comprised new and different causes of action;

2) set aside its prior order of partial dismissal and joined the other plaintiffs as involuntary defendants, since all plaintiffs, being co-owners, had not agreed on a common course of action to waive the alleged forfeiture; 3) concluded that defendants had breached the insurance covenant of the lease, but that the breach was not of sufficient substance as would justify forfeiture, and that in any event, all plaintiffs had waived the forfeiture by reason of their acceptance of rental payments following the breach; and 4) determined that plaintiffs were entitled to reimbursement for attorney fees incurred in enforcing the insurance covenant, and ordered proof thereof by way of affidavits. On the basis of the affidavits thereafter submitted, the court awarded Girard the sum of $3,487.50 as and for attorney fees.

On this appeal, defendants challenge the award of attorney fees, contending that the court erred in reopening the case sua sponte for the purpose of permitting Girard to submit evidence omitted at the time of trial. Girard cross-appeals, contending that the court erred in refusing to consider waste and health code violations as further evidence of breach, and that the court erred in denying her motion to amend the complaint at the time of trial, and erred in ruling that plaintiffs had waived forfeiture by the acceptance of rent.

It lies within the sound discretion of the trial court to grant a motion to reopen for the purpose of taking additional testimony after the case has been submitted but prior to entry of judgment.[1] The court should consider such a motion in light of all the circumstances and grant or deny it in the interest of fairness and substantial justice.[2] However, no such discretion is afforded the court to reopen the case sua sponte. Preservation of the integrity of the adversarial system of conducting trials precludes the court from infringing upon counsel's role of advocacy. Counsel is entitled to control the presentation of evidence, and should there be a failure to present evidence on a claim at issue, it is generally viewed as a waiver of the claim.[3]

In the instant case, we are not apprised of the reason Girard saw fit to rest her case without presenting evidence in support of her claim for attorney fees. However, even if it be assumed that it was the result of oversight, the interests of justice are not enhanced when the court exceeds its role as arbiter by reaching out and deciding an issue that would otherwise be dead, it not having been litigated at the time of trial.[4]

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1. Lewis v. Porter, Utah, 556 P.2d 496 (1976).
2. Id., citing 6A Moore's Federal Practice (2d ed.), Sec. 59.04[13] p. 59-37.
3. Interiors Contracting Inc. v. Navalco, Utah, 648 P.2d 1382 (1982).
4. See Dixon v. Stoddard, Utah, 627 P.2d 83 (1981).

Turning now to the merits of the cross-appeal, Girard concedes that the only claim for relief stated in the complaint is the failure to furnish evidence of insurance coverage. Nevertheless, she contends that the "Notice to Cure Defaults" which was attached to the complaint as an exhibit is sufficient to raise the issues of health and business code violations and waste.

Girard relies upon Rule 10(c), Utah Rules of Civil Procedure, which provides, inter alia, that an exhibit to a pleading is a part thereof for all purposes. However, the fact that an exhibit becomes a part of the complaint does not satisfy the requirements of Rule 8(a), Utah Rules of Civil Procedure, that a complaint "shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief; and (2) a demand for judgment for relief he deems himself entitled."

While an exhibit may be considered as a part of a pleading to clarify or explain the same, an exhibit to a pleading cannot serve the purpose of supplying necessary material averments, and the content of the exhibit is not to be taken as part of the allegations of the pleading itself.[5]

Rule 15(a), Utah Rules of Civil Procedure, permits the amendment of pleadings by leave of court, and the rule is to be liberally construed so as to further the interests of justice.[6] However, the rule is to be applied with less liberality when the amendments are proposed during or after trial, rather than before trial.[7] In any event, the granting of leave to amend is a matter which lies within the broad discretion of the court, and its rulings are not to be disturbed in the absence of a showing of an abuse of discretion resulting in prejudice to the complaining party.[8]

In the instant case, the motion to amend was not made until the day of trial, and it proposed to introduce new and different causes of action. Defendants objected to the granting of the motion, contending they would be prejudiced in their defense, not having been apprised of the new claims until the morning of trial. Thereupon, the court concluded as follows:

> [T]hat the matter of the other breaches was a significant change in the cause of action (which consumed most of the trial time), that it was not consented to be

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5. Hoover Equipment Company v. Smith, 198 Kan. 127, 422 P.2d 914 (1967); see also 71 C.J.S. Pleading § 375(2); 41 Am. Jur. Pleading § 56.
6. Gillman v. Hansen, 26 Utah 2d 165, 486 P.2d 1045 (1971).
7. Id.
8. Johnson v. Brinkerhoff, 89 Utah 530, 57 P.2d 1132 (1936).

> tried by defendant [sic], 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.

In light of the facts and circumstances of this case, the court did not abuse its discretion in denying the motion to amend the complaint. Girard's inability to state an adequate reason for the untimeliness of the motion discloses that this is not a case where "justice requires" an amendment. On the other hand, the disadvantage defendants would face if required to meet the new causes of action reveals that the interests of justice will best be served by the court's denial of the motion to amend.[9]

We also find no merit in Girard's remaining contention that the court erred in concluding that the forfeiture had been waived by the acceptance of rent.

The ruling of the trial court follows the rule long recognized by this Court that:

> 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 rent, and at the same time claim a forfeiture of the lease.[10]

Nevertheless, Girard contends that her acceptance of rent did not constitute a waiver because the "Notice to Cure Defaults" heretofore mentioned contained a declaration that: "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." However, her contention is to no avail.

In Woodland Theatres, Inc. v. ABC Intermountain Theatres, Inc.,[11] the Court concluded that such a unilateral reservation avails the lessor nothing.[12]

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9. Id.
10. Brigham Young Trust Company v. Wagener, 13 Utah 236, 44 P. 1030 (1896), cited with approval in Woodland Theatres, Inc. v. ABC Intermountain Theatres, Inc., Utah, 560 P.2d 700 (1977).
11. Supra n.10, at page 701.
12. Id., citing with approval 3A Thompson on Real Property (1959 Replacement), Sec. 1328, p. 576, 1976 Supplement, p. 74, which is now to be found in the 1981 Replacement, Sec. 1328, p. 585-86.

The trial court's award of attorney fees is vacated and set aside. In all other respects, the judgment is affirmed. Each party to bear their own costs.

WE CONCUR:

I. Daniel Stewart, Justice

Dallin H. Oaks, Justice

Richard C. Howe, Justice

Christine M. Durham, Justice