

2006

# IHC Health Services Inc. v. D&K Management Inc. : Brief of Appellee

Utah Supreme Court

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**IN THE SUPREME COURT OF THE  
STATE OF UTAH**

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Utah non-profit corporation,	)	
	)	
Plaintiff/Appellee,	)	Case No. 20061017-SC
	)	
v.	)	
	)	
D&K MANAGEMENT, INC., a Utah	)	
corporation.	)	
	)	
	)	
Defendant/Appellant.	)	

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**BRIEF OF APPELLEE**

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## **INDEX TO ADDENDUM**

Hearing Transcript of May 26, 2004

Exhibit A

Escrow Agreement

Exhibit B

Hearing Transcript of March 2, 2004

Exhibit C

<i>McKeon v. Williams</i> , 799 P.2d 198 (Or. Ct. App. 1991).....	23
<i>Mower v. Jorgensen</i> , 2006 UT App 329 .....	34, 41
<i>Nance v. L.J. Dolloff Assoc., Inc.</i> , 126 P.3d 1215, 1221 (N.M. Ct. App. 2005) .....	31
<i>NationsBank of Georgia v. Conifer Asset Mgmt, Ltd.</i> , 928 P.2d 760, 763 (Colo. Ct. App. 1996)15	
<i>Ogunwo v. Amer. Nat’l Insur. Co.</i> , 936 P.2d 606, 611 (Colo. Ct. App. 1997).....	31
<i>Olympus Hills Shopping Ctr., Ltd. v. Smith’s Food &amp; Drug Ctrs., Inc.</i> , 889 P.2d 445, 461 (Utah Ct. App. 1994), <i>cert. denied</i> , 899 P.2d 1231 (Utah 1995).....	15, 16, 20, 38, 43
<i>Pantry, Inc. v. Stop-N-Go Foods, Inc.</i> , 796 F.Supp. 1164, 1167 (S.D. Ind. 1992) .....	28
<i>Plateau Mining Co. v. Div. of State Lands &amp; Forestry</i> , 802 P.2d 720, 730 (Utah 1990).....	20
<i>Prince v. Bear River Mut. Ins. Co.</i> , 2002 UT 68, ¶ 30, 56 P.3d 524.....	24
<i>R.T. Nielson Co. v. Cook</i> , 2002 UT 11, ¶ 20, 40 P.3d 1119 .....	9, 46
<i>Rocafort v. IBM Corp.</i> , 334 F.3d 115, 122 (1st Cir. 2003).....	27
<i>Slattery v. Covey &amp; Co., Inc.</i> , 909 P.2d 925, 928 (Utah Ct. App. 1995).....	43
<i>Smith v. Osguthorpe</i> decision, 2005 UT App 11. (App.’s Brief at 25.) .....	32, 36
<i>Soter’s, Inc. v. Deseret Fed. Sav. &amp; Loan</i> , 857 P.2d 935, 942 (Utah 1993).....	14, 18, 19, 20, 38
<i>State Bank of S. Utah v. Troy Hygro Sys., Inc.</i> , 894 P.2d 1270, 1277 (Utah Ct. App. 1995).....	27
<i>State Bank of S. Utah</i> , 894 P.2d at 1277 .....	28
<i>State v. Pena</i> , 869 P.2d 932, 938-39 (Utah 1994).....	14
<i>Thurston v. Box Elder County</i> , 892 P.2d 1034, 1037 (Utah 1995).....	32, 33, 34, 35
<i>Timm v. Dewsnup</i> , 921 P.2d 1381, 1386 (Utah 1996).....	9, 37
<i>Trembly v. Mrs. Fields Cookies</i> , 884 P.2d 1306, 1310 n.2 (Utah Ct. App. 1994) .....	32, 37, 39, 40
<i>U.P.C., Inc. v. R.O.A. Gen., Inc.</i> , 1999 UT App 303, ¶ 57, 990 P.2d 945.....	37
<i>Valley Bank &amp; Trust Co. v. Wilken</i> , 668 P.2d 493 (Utah 1983). .....	24, 25
<i>Virgin Atl. Airways, Ltd. v. Nat’l Mediation Bd.</i> , 952 F.2d 1245, 1255 (2d Cir. 1992) .....	32
<i>Waddoups v. Amalgamated Sugar Co.</i> , 2002 UT 69, ¶¶ 31, 36, 54 P.3d 1054.....	28
<i>Wisden v. Bangerter</i> , 893 P.2d 1057, 1058 (Utah 1995).....	33

## **Other Authorities**

10 <i>Moore's Federal Practice</i> § 54.25[4] (3d ed. 2006) .....	33
Rule 1.5 of the Utah Code of Professional Responsibility .....	48

## **Rules**

Rule 15(a) of the Utah Rules of Civil Procedure.....	26
Rule 56(e) .....	28, 30
Utah R. Civ. P. 12(b), 12(h) .....	23
Utah R. Civ. P. 56(c) .....	16
Utah R. Civ. P. 56(e) .....	27, 39
Utah R. Civ. P. 8(c) .....	24, 25
Utah R. Civ. P. 8(e)(1).....	23

## **I. STATEMENT OF JURISDICTION**

This Court has jurisdiction pursuant to Utah Code Ann. § 78-2-2(j).

## **II. DETERMINATIVE STATUTES**

None.

## **III. STATEMENT OF CASE**

The following colloquy between the trial court and counsel for Appellant D&K Management (“D&K”) summarizes the true posture of this case:

THE COURT: There are no facts left unless you identify some for me, and that is one of my questions for you.

COUNSEL FOR D&K: Okay.

THE COURT: No facts left that determine possession, are there? Only the damages that result from forfeiture of staying in possession?

COUNSEL FOR D&K: I would agree with your Honor that, given the Court’s ruling, there are no facts left – no facts left that have to be decided. *There were no facts initially with this motion for summary judgment.* (Emphasis added.)

THE COURT: Uh-huh, (affirmative).

COUNSEL FOR D&K: But given this ruling, *there are no facts that have to be decided for possession.* However there are a number of facts and there are certainly issues that remain with regard to their damages. (Emphasis added).

THE COURT: Oh, I agree with that.

(H’rg Tr., 4:24-5:11, May 26, 2004; R. 999; attached hereto as Exhibit A.)

This exchange took place following remand from this Court in *IHC Health Services, Inc. v. D&K Management*, 2003 UT 5 (“*D&K I*”). It demonstrates D&K’s concession to the trial court: there are no material disputed facts in this case. The

exchange took place during a hearing on finality of judgment for Rule 54(b) certification. The trial court had been pressing D&K to explain exactly what facts, if any, remained undetermined. Unable to avoid the trial court's direct exploration of D&K's claims, counsel was forced to concede that there really are no facts which are undisputed. Accordingly, the trial court affirmed its decision to grant summary judgment in favor of IHC Health Services ("IHC") on the issue of whether D&K forfeited its lease with IHC (hereafter the "Lease"). (Order, Jan. 23. 2006; R. 1370-74.)

In this appeal, though, D&K abandons the candor with which it addressed the trial court. It now insists that a trial was warranted, even though it conceded to the trial court there were no disputed material facts. (Appellant's Br. at 20.) In sum, D&K's current appeal is nothing more than an attempt to create issues and arguments where none existed before the trial court.

This Court previously decided the controlling legal issues in this case in *D&K I*. In *D&K I*, this Court agreed with the trial court and with D&K's more candid arguments and found that "the material facts in this case appear to be undisputed." 2003 UT 5, ¶ 9. The Court went on to note that "there are disputes [such as, historically,] whether rent was timely paid, . . . but these factual disputes are not material." *Id.* at n.2. This Court determined that, in initially granting IHC summary judgment, the trial court "misapprehended one material fact" and remanded to the trial court to review D&K's



“waiver” defense “under the totality of the circumstances.” *Id.* at ¶ 9.<sup>1</sup>

Even though the instructions on remand were limited to review of the waiver issue, and even though D&K limited its arguments to the trial court to the waiver issue on remand, D&K now attempts to reverse the trial court’s renewed ruling in favor of IHC based on new legal theories that it never argued to the trial court. Chiefly, D&K claims that it should now be entitled to a trial on the theory of “substantial compliance.” (Appellant’s Br. at 20.) This theory was never mentioned to the trial court until the trial court’s second summary judgment ruling (after remand) was being certified for appeal. (*Id.* at 9.) It was never briefed until after the Court of Appeals determined the case was not yet ripe for appeal, in a motion to reconsider. (*Id.* at 11.) Oddly, D&K claims that it preserved the defense of substantial compliance by pleading “unconscionability” in its answer. (*Id.* at 23-24.) It argues that unconscionability and substantial compliance are synonymous and therefore, because it “substantially complied” with the Lease, it would be “unconscionable” to allow IHC to forfeit its leasehold. (*Id.*) This argument is odd for the reason that it has already been disposed of by this Court. In *D&K I*, this Court expressly held that “[p]ermitting IHC to enforce the forfeiture provision of the written lease agreement after D&K’s failure to pay rent following a one-month acquiescence in late payment is not unconscionable . . .” 2003 UT 5 at ¶ 11.

In sum, having found that (1) there were no disputed facts regarding the waiver issue that would preclude summary judgment, (and D&K having conceded as much to the

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<sup>1</sup> In addition to the waiver defense, D&K also raised an estoppel defense at the trial court and on appeal in *D&K I*. This Court held that IHC could not be estopped from

trial court), and (2) it is not unconscionable to allow IHC to enforce the forfeiture provision based upon one month's missed rent, this Court has already disposed of all of the arguments D&K now makes.

#### IV. RESPONSE TO APPELLANT'S STATEMENT OF FACTS

As in *D&K I*, Appellant's Statement of Facts is set forth in general prosaic form, without numbered paragraphs, making direct challenges to the claims difficult. However, this Court should note that the facts set forth by D&K in an attempt to demonstrate a dispute are the same facts that this Court already found to be irrelevant in *D&K I*. *Id.* at n.2.

April Rent. The sole "new" fact that this Court asked the trial court to consider on remand was the fact that IHC retained D&K's April 1998 rent check. *Id.* at ¶ 9. However, this fact is immaterial in light of the fact that IHC cashed D&K's April rent check *before* it elected to terminate the Lease by issuing a Notice of Default. Importantly, D&K paid the April rent on April 8, 1998. (Appellant's Br. at 5.) IHC sent D&K a Notice of Default and Forfeiture of Lease Agreement on April 14, 1998 because, at that time, March 1998 rent still had not been paid. (*Id.*) In other words, at the time IHC issued a Notice of Default, D&K was undisputedly in default, and IHC had the right to exercise any of its contractually-reserved options under the Lease. Indeed, D&K did not even attempt to tender the March rent until April 16, 1998. (*Id.*) It is undisputed that IHC never accepted the March rent. (*Id.*)

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forfeiting D&K's leasehold as a matter of law. *D&K I*, 2003 UT 5, ¶ 12.

**A. Relevant Facts for This Court to Consider**

Because IHC was awarded summary judgment, the only facts this Court need consider are those the trial court found undisputed to see if they give rise to judgment as a matter of law. Those facts are:

1. In January 1998, IHC purchased a strip mall at 52nd South State Street, Murray, Utah from Medical Plaza 9400. (Answer ¶ 7; R. 39.)
2. Before that purchase, D&K leased space in the mall (specifically, 5142 South State Street) from Medical Plaza 9400, under a written lease agreement dated July 18, 1994. (Answer ¶ 5; R. 39.)
3. When IHC purchased the mall, it accepted an assignment of Medical Plaza 9400's interest in the Lease. (Answer ¶ 7; R. 40.)
4. With the assignment of the Lease, D&K became IHC's tenant. Pursuant to section 3 of the Lease, D&K was obligated to pay IHC \$3,280 per month in rent. (Answer ¶¶ 7, 8; R. 39-40.)
5. According to Section 3 of the Lease, this rent was due "in advance of the first day of each calendar month . . . ." (Answer ¶ 8; R. 40.)
6. Section 17.1 of the Lease provides, in pertinent part:  
Default by Tenant. Upon the occurrence of any of the following events, Landlord shall have the remedies set forth in Section 17.2:  
  
[a] Tenant fails to pay any other sum due hereunder within (10) days after the same / shall be due.  
  
(Answer ¶ 14; R. 41.)
7. Section 17.2, in turn, provides, in pertinent part:

Remedies. Upon the occurrence of the events set forth in Section 17.1, Landlord shall have the option to take any or all of the following actions, without further notice or demand of any kind to Tenant or any other person:

- [c] Termination of this lease by written notice to Tenant. In the event of such termination, Tenant agrees to immediately surrender possession of the Demised Premises.

(Compl. Ex. A; R. 18; Answer ¶ 15; R. 41.)

8. After IHC took ownership of the property leased to D&K, D&K paid rent for February 1998. (Answer ¶ 9; R. 40.)

9. D&K did not make any rent payment for March 1998, during March 1998. (Answer ¶ 10; R. 40.)

10. On or about April 8, 1998, D&K delivered a rent check to IHC's corporate headquarters for April rent (hereafter "April Rent"). This check was cashed by IHC shortly thereafter. (Answer ¶ 11; R. 41.)

11. On April 14, 1998, after IHC cashed the April Rent check, IHC gave D&K written notice that it was exercising its option to terminate the Lease by sending D&K a Notice of Default and Forfeiture of Lease Agreement (hereafter the "Termination Notice").<sup>2</sup> (Answer ¶ 16; R. 42.)

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<sup>2</sup> The Termination Notice was written as though no April rent had been paid. (R. 29.) This was due to the fact that, at the time the Termination Notice was sent, IHC's property managers did not know that D&K had paid April's rent. (See Aff. of Thomas Uriona, Feb. 2, 2001, ¶ 6; R. 278-79.) IHC property managers subsequently discovered that D&K had delivered a check to IHC's corporate offices (rather than to the property managers) and had designated the check as "April rent." (*Id.*) However, it is an undisputed fact that as of April 14, 1998, D&K still had failed to pay March 1998 rent. (Appellant's Br. at 5.) Additionally, when D&K ultimately tendered March 1998 rent on April 16, 1998, that check, like all subsequent rental payments, was rejected. (*Id.*) Since that time, IHC has placed all of D&K's tendered rents in escrow, according to an

12. On or about April 16, 1998, D&K attempted to tender its March 1998 rent. (Aff. of Kent Bangerter, May 19, 2002, ¶ 14; R. 120.) However, IHC rejected that payment and returned the check to D&K. (*Id.* ¶ 15.)

13. On or about March 1, 1999, D&K and IHC entered into a Consent, Reservation of Rights and Escrow Deposit Agreement (“Escrow Agreement”) whereby D&K could tender what it claimed to be additional accruing rents, and IHC could reject such payments without waiving any of its rights under the Lease. (R. 157-162.) The Escrow Agreement was designed to preserve the status quo of the landlord/tenant relationship, without either party being accused of having waived their arguments in this litigation.

14. Paragraph 4 of the Escrow Agreement provides that:

[T]he parties agree that, by the execution and delivery of this Escrow Agreement, *IHCHS does not waive its claims of default and/or forfeiture of the Lease Agreement against D&K Management by allowing D&K Management to continue to occupy the Leased Premises or to make any one or all of the Escrow Deposits, and all of IHCHS’ claims and assertions against D&K Management, including without limitation those set forth in the Default Letter, and against any defenses of D&K Management, whether articulated before or after the date of this Escrow Agreement, are expressly reserved and not waived by reason of this Escrow Agreement and shall not in any way be lessened or diminished by reason of or in connection with the execution and delivery of this Escrow Agreement.* (Emphasis added) (R. 157-58. Attached hereto as Exhibit B.)

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agreement that IHC “does not waive its claim of default and/or forfeiture of the Lease Agreement by allowing D&K Management to continue to occupy the Leased Premises . . . .” (Answer ¶ 20; R. 42-43.) In short, *it is an undisputed fact that no rent payments were accepted by IHC after it delivered the Termination Notice to D&K.*

15. Since sending the Termination Notice, IHC has never accepted any payment from D&K except pursuant to the Escrow Agreement. (Answer ¶ 20; R. 43-43.)

IHC submits that these undisputed facts (hereafter “Facts”) entitled it to judgment against D&K as a matter of law for forfeiture of the Lease; IHC’s post-Termination Notice conduct cannot now be claimed a waiver of its rights to terminate D&K’s leasehold.

**V. RESPONSE TO STATEMENT OF ISSUES AND STANDARD OF REVIEW**

D&K raises four issues on this appeal. It claims that all four issues involve pure questions of law which allow no deference to the trial court and which should be reviewed for correctness. (Appellant’s Br. at 1-3). This is only partially correct.

**Issue 1.** D&K’s first issue involves an appeal from the trial court’s grant of summary judgment to IHC on the issue of forfeiture of the Lease. Although the decision of whether to grant summary judgment is normally reviewed for correctness, trial courts have broad discretion in determining whether a waiver has occurred. *See Living Scriptures, Inc. v. Kudlik*, 890 P.2d 7, 10-11 (Utah Ct. App. 1995) (reviewing trial court’s decision to reject defendant-tenant’s waiver defense as a matter of law under an abuse of discretion standard). Indeed, as this Court recognized in *D&K I*, “unlike most cases, the legal conclusions underlying a trial court’s grant of summary judgment on a waiver issue are reviewed with some measure of deference.” 2003 UT 5 at ¶ 6. Accordingly, on this appeal, this Court should again determine whether the trial court’s decision on the application of the law of waiver to the facts of this case “falls within the bounds of [the trial court’s] discretion.” *Id.*

**Issue 2.** D&K's second issue, whether the trial court erred by denying it a trial on substantial compliance, was raised by D&K for the first time in a motion to reconsider. Necessarily then, D&K must argue that the trial court improperly denied its motion to reconsider. Indeed, D&K's own papers indicate it appeals from the trial court's order denying its motion to reconsider. (Appellant's Br. at 2.)

Whether to grant or deny a motion for reconsideration is a matter on which deference is given to the trial court, and such a ruling will be disturbed only for an abuse of discretion. *Timm v. Dewsnup*, 921 P.2d 1381, 1386 (Utah 1996). Therefore, any argument that D&K makes pertaining to the trial court's alleged error in failing to grant it a trial on the issue of substantial compliance must be reviewed for an abuse of discretion, not for correctness.

**Issues 3 & 4.** Whether to grant an award of attorney's fees is a legal conclusion; however, the *calculation* of any particular award is "in the sound discretion of the trial court, and will not be overturned in the absence of a showing of a clear abuse of discretion." *Dixie State Bank v. Bracken*, 764 P.2d 985, 988 (Utah 1988) (internal cites omitted). Further, determining which party was the "prevailing party" on a particular motion or appeal for purposes of awarding attorney's fees "depends, to a large measure, on the context of each case," and, therefore is left to the sound discretion of the trial court. *R.T. Nielson Co. v. Cook*, 2002 UT 11, ¶ 25, 40 P.3d 1119. In other words, the trial court's decision as to who was the "prevailing party" on each matter in this case is reviewed for an abuse of discretion. Accordingly, this Court should review the trial

court's decision as to the amount of attorney's fees that it awarded to IHC under an abuse of discretion standard.

## **VI. SUMMARY**

In summary, the issues D&K has raised should be disposed of as follows:

**Issue 1:** Did the trial court fail to view the facts in the light most favorable to D&K and improperly draw inferences that were the province of the jury in granting IHC summary judgment on the issue of waiver?

**Answer:** No. There are no disputed facts in this case; therefore, a jury trial is unwarranted. The trial court properly exercised its discretion to conclude that the undisputed facts could not give rise to a clear expression of intent on the part of IHC to waive its right to terminate the Lease. Because IHC's retention of the April Rent was not an affirmative act undertaken by IHC after it declared that D&K forfeited the Lease, it does not demonstrate a clear intent to waive forfeiture once forfeiture was declared. Moreover, the trial court properly concluded that IHC's actions were necessary to protect its interests after a stay was imposed pending the outcome of this litigation and were undertaken pursuant to the Escrow Agreement by which D&K agreed that IHC's conduct would not constitute a waiver.

**Issue 2:** In refusing to allow D&K a jury trial on substantial compliance, did the trial court err in:

- a. declaring forfeiture without a pleading of materiality of breach?

**Answer:** No. D&K never moved to dismiss IHC's complaint on this basis, so this argument has not been preserved for appeal. Nor do the notice pleading



rules require IHC to specifically plead “materiality.” It was sufficient for IHC to plead that D&K breached the Lease. Moreover, D&K’s failure to pay rent was a material breach of the Lease.

- b.** ruling that D&K had not raised substantial compliance in its pleadings?

**Answer:** No. D&K failed to plead “substantial compliance” in its Answer. Nor did it seek leave to amend its Answer to assert this defense. D&K’s assertion of an “unconscionability” defense did not adequately place IHC on notice that D&K intended to rely on a “substantial compliance” defense. To the extent that D&K argues that “substantial compliance” is the same defense as “unconscionability,” this Court has already ruled that termination of the Lease is not unconscionable.

- c.** ruling that the law of the case precluded consideration of substantial compliance?

**Answer:** No. The trial court properly refused to revisit its grant of summary judgment in favor of IHC under the law of the case doctrine because no “exceptional circumstances” were present sufficient to warrant reopening the decision on the forfeiture matter. Exceptional circumstances were lacking due to the fact that D&K itself was responsible for its own failure to argue substantial compliance during the summary judgment phase of this litigation.

- d.** failing to consider D&K’s Motion for Reconsideration under the standards applicable to Rule 54(b)?

**Answer:** No. Under Rule 56(e) D&K is wholly responsible for its failure to raise substantial compliance during the summary judgment phase of this litigation. D&K opted to rely solely on waiver and estoppel defenses when faced with summary judgment on the issue of forfeiture. D&K must now face the consequences of that decision. Rule 54(b) does not provide a basis for D&K to get a second chance to relitigate its case after it lost on waiver and estoppel. Accordingly, the trial court properly exercised its discretion in refusing to grant D&K's Motion to Reconsider.

- e. ruling that D&K had not presented facts that would support substantial compliance?

**Answer:** No. D&K's "facts" regarding substantial compliance are the same facts that it relied upon for its estoppel defense. This Court ruled against D&K on that defense. Therefore, D&K has not raised any new facts that would lead to a different outcome under the theory of "substantial compliance."

**Issue 3:** Did the trial court err in deciding that IHC was entitled to attorneys' fees under a provision in the Lease that allowed recovery of fees for an action filed "during the term" of the Lease?

**Answer:** No. IHC is entitled to attorneys' fees because IHC brought this action to enforce its rights under the Lease. The Lease explicitly provides IHC with a right to attorneys' fees incurred in enforcing the Lease. Specifically, IHC brought this action to enforce section 17.2[c] of the Lease, whereby D&K agreed to vacate the premises upon receiving IHC's Termination Notice.

**Issue 4:** Did the trial court err in awarding fees on the basis of the record below where:

- a. IHC failed to provide evidence upon which the trial court could determine that IHC's were necessary and reasonable?

**Answer:** No. IHC provided ample evidence in support of the reasonableness of its fees. This is evidenced by the fact that it took D&K over a month and a half to respond to IHC's Affidavit of Attorneys' Fees. Moreover, over 300 pages of the trial court record are devoted solely to the reasonableness of IHC's fees.

- b. IHC failed to apportion its fees to matters on which it was successful and the court effectively shifted to D&K the burden of apportioning IHC's fees between successful and unsuccessful matters?

**Answer:** No. The trial court *did* require IHC to resubmit a second Affidavit of Fees removing fees for matters on which IHC did not prevail. The trial court properly exercised its discretion in apportioning and determining the reasonableness of the fees.

- c. the court awarded IHC fees for matters on which it was not successful, contrary to applicable precedent?

**Answer:** No. The trial court had broad discretion in determining whether IHC "prevailed" on any given matter. The trial court further instructed IHC to remove fees on certain matters for which IHC was not the prevailing party. What is more, the trial court disallowed IHC to recover over \$40,000 of fees for

matters for which the trial court did not find IHC to be the prevailing party. In sum, D&K has not demonstrated that the trial court committed patent error in allocating fees.

- d. the court failed to make findings of fact necessary to permit appellate review of the reasonableness, necessity and apportionment of issues?

**Answer:** No. The trial court satisfied its obligation to make explicit findings under each *Bracken* factor and under the Rules of Professional Conduct. Further, appellate review of the reasonableness of the fees is limited to an abuse of discretion. Accordingly, the trial court's findings demonstrate that the trial court clearly did not abuse its discretion in awarding fees.

## **VI. ARGUMENT**

### **1. The Trial Court Properly Granted IHC Summary Judgment as a Matter of Law, Despite D&K's Waiver Claim.**

Waiver is the intentional relinquishment of a known right. *D&K I*, 2003 UT 5, ¶ 11; *Soter's, Inc. v. Deseret Fed. Sav. & Loan*, 857 P.2d 935, 942 (Utah 1993). Waiver requires three elements: (1) an existing right; (2) knowledge of its existence; and (3) an intention to relinquish the right. *Id.* at 940. "Intent to relinquish a right must be distinct" in order for waiver to occur. *Id.* A trial court is granted "very broad discretion" in determining whether a waiver has occurred in a particular case. *Living Scriptures, Inc. v. Kudlik*, 890 P.2d 7, 10 (Utah Ct. App. 1995) (citing *State v. Pena*, 869 P.2d 932, 938-39 (Utah 1994)). Accordingly, the trial court in this case had broad latitude in concluding that IHC's conduct did not amount to waiver as a matter of law.

A. Waiver May Be Decided as a Matter of Law.

D&K correctly notes that intent, an essential element of waiver, is generally a question of fact. Nevertheless, courts have not hesitated to rule as a matter of law on the issue of waiver when the evidence is conclusive or the facts undisputed. *E.g., American Sav. & Loan Ass'n v. Blomquist*, 445 P.2d 1, 3-4 (Utah 1968) (holding that waiver may be determined as a matter of law if evidence of intent is conclusive); *Davidsohn v. Doyle*, 825 P.2d 1227, 1229-30 (Nev. 1992) (holding that summary judgment may be granted on a waiver issue); *NationsBank of Georgia v. Conifer Asset Mgmt, Ltd.*, 928 P.2d 760, 763 (Colo. Ct. App. 1996) (holding that deciding waiver as a matter of law is warranted if material facts are not in dispute); *Jones v. Maestas*, 696 P.2d 920, 922 (Idaho Ct. App. 1992) (deciding waiver as a matter of law). To be sure, in *Olympus Hills*, the court ruled as a matter of law against the tenant-defendant on its waiver defense. *Olympus Hills Shopping Ctr., Ltd. v. Smith's Food & Drug Ctrs., Inc.*, 889 P.2d 445, 461 (Utah Ct. App. 1994), *cert. denied*, 899 P.2d 1231 (Utah 1995).

If each waiver defense necessarily demanded a trial, as D&K's argument implies, not only would *Olympus Hills* and the other above-mentioned authorities need to be reversed, but this Court's ruling in *D&K I* would also need to be overturned. In *D&K I*, this Court did *not* remand for a jury trial. Instead, it remanded "to the trial court for reconsideration of *its* prior ruling in light of the correct facts regarding the April payment." *Id.* at ¶ 9 (emphasis added). Had this Court been persuaded by D&K's arguments, which it merely repeats again on this appeal, this Court could have and simply would have remanded for a trial. *See J. Pochynok Co., Inc. v. Smedsrud*, 2007 UT App

88, ¶ 14 (“if the supreme court determined that a . . . trial was the only way to determine [an issue], it would have so directed the trial court in its remand.”). This Court correctly gave deference to the trial court to decide whether a trial was necessary in light of the April Rent. This ruling necessarily encompassed the understanding that the trial court may well conclude that the one additional fact regarding the April Rent did not warrant a trial. D&K’s argument that the question of intent is always subject to a fact-finder’s inquiry contradicts *D&K I*, *Olympus Hills*, and all other cases deciding waiver on summary judgment.

B. Summary Judgment Was Warranted Because There Are No Disputed Material Facts.

Summary judgment should be granted when there is “no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law.” Utah R. Civ. P. 56(c). In reviewing a trial court’s grant of summary judgment, an appellate court need only decide “whether the trial court erred in applying the law and whether a material fact was in dispute.” *E.g., Ford v. Amer. Express Fin. Advisors, Inc.*, 2004 UT 70, ¶ 9, 98 P.3d 15.

It is the law of the case, from a ruling of this Court, that there are no disputed facts that would necessarily preclude a ruling on summary judgment on the issue of waiver in this case. In *D&K I*, this Court held that the material facts in this case regarding waiver are undisputed, specifically noting that any factual disputes were “irrelevant” or “immaterial.” *D&K I*, 2003 UT 5, ¶ 9, n.2. Indeed, after receiving this Court’s opinion, D&K conceded to the trial court that there were no disputed facts regarding any legal

issues surrounding IHC's right to obtain possession of the property. During a May 26, 2004 hearing before the trial court, following remand from this Court, the following colloquy took place:

THE COURT: No facts left that determine possession, are there? Only the damages that result from forfeiture of staying in possession?

COUNSEL FOR D&K: I would agree with your Honor that, given the Court's ruling, there are no facts left – no facts left that have to be decided. *There were no facts initially with this motion for summary judgment.* (Emphasis added.)

THE COURT: Uh-huh, (affirmative).

COUNSEL FOR D&K: But given this ruling, *there are no facts that have to be decided for possession.* However there are a number of facts and there are certainly issues that remain with regard to their damages. (Emphasis added).

(H'rg Tr., 4:24-5:11, May 26, 2004; R. 999. Ex. A.)<sup>3</sup>

Thus, not only has this Court previously ruled that there are no disputed material facts to defeat summary judgment on the issue of waiver, but D&K itself conceded to the trial court that there were no disputed facts on the issue of possession.<sup>4</sup> Having instructed the trial court that there were no material disputed facts, D&K cannot now complain to this Court that the trial court accepted its own concession.

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<sup>3</sup> Significantly, IHC'S claims for damages were dismissed voluntarily, so no such claims, and no such fact disputes, exist today.

<sup>4</sup> It is significant that the trial court asked D&K if there were any fact disputes that would preclude a legal ruling on "possession" rather than merely limiting its inquiry to the waiver defense. D&K was specifically asked if there was *any* factual inquiry that remained for *any* legal theory regarding IHC's right to take possession of its property. D&K candidly instructed the court that there were not. Certainly, if it was going to raise substantial compliance, or any of the alleged disputes D&K now claims exist, it was under an obligation to do so when asked by the trial court.

To be sure, the parties do not dispute that IHC sent D&K the Termination Notice on April 14, 1999. (Fact 11.) Similarly, they do not dispute that, at the time of the Termination Notice, D&K was in default because it had not paid rent for March 1998. (Facts 9, 12.) The parties do not dispute that IHC never accepted or cashed any rent check after April 1998, except under the Escrow Agreement, pursuant to which D&K agreed that IHC did “not waive its claims of default and/or forfeiture of the Lease.” (Facts 14, 15.)

IHC does not dispute that it inadvertently cashed the April Rent check before sending D&K the Termination Notice, and that the payment was never returned to D&K. (Fact 10.) However, the single *undisputed* fact that IHC retained the April Rent payment does not preclude summary judgment, as suggested by D&K. To the contrary, because there is no dispute as to *any* material fact, a trial is unwarranted on the waiver issue. *See, e.g., Gary Porter Constr. v. Fox Constr., Inc.*, 2004 UT App 354, ¶ 48, 101 P.3d 371 (“Because [defendant] did not set forth facts sufficient to create a disputed issue of material fact, . . . the trial court did not err by concluding that [plaintiff] was entitled to judgment as a matter of law.”) Because the retention of the April Rent is undisputed, there was no reason for a jury to consider the “totality of the circumstances” on remand from *D&K I*. There are no facts for a jury to decipher.

Because each fact that D&K alleges supports a finding of waiver is undisputed, the trial court was free to rule on the waiver issue *as a matter of law*. *See Soter’s*, 857 P.2d at 940 (describing the issue of whether “intentional relinquishment was or was not



shown” as a “legal question”). Consequently, the trial court did not err in refusing to grant D&K a jury trial on the waiver defense.

C. Viewing the Facts in the Light Most Favorable to D&K, a Waiver Did Not Occur.

Even after this Court ruled that the trial court initially misapprehended one fact regarding the April Rent, IHC was entitled to judgment as a matter of law. One additional fact—that IHC retained the April Rent after inadvertently cashing D&K’s check—does not alter the conclusion that IHC did not waive its right to terminate the Lease.

In order to survive summary judgment on a waiver defense, a defendant must show facts that could support an inference that the plaintiff “clearly intended” to waive a known right. *See Soter’s*, 857 P.2d at 940 (stating that waiver should not “be found from any particular set of facts unless it was clearly intended”). In rejecting the stilted, single-fact-specific waiver analysis proposed by D&K in *D&K I*, this Court clearly stated that, to find a waiver, a fact-finder must determine whether the totality of the circumstances supports an inference that waiver was “distinctly made.” *D&K I*, 2003 UT 5 at ¶ 4 (quoting *Soter’s*, 857 P.2d at 942). D&K argues that IHC’s retention of the April Rent, “Dear Tenant” letters, receipt of rent checks under the Escrow Agreement, and demands for insurance create a triable dispute as to whether an implied waiver occurred. (Appellant’s Br. at 18-20.) D&K is wrong.

First, regarding the April Rent, it is undisputed that D&K paid the April Rent *before* IHC issued the Termination Notice and that IHC has never accepted any payments

after it declared forfeiture (except under the Escrow Agreement). (Facts 11, 15.) Simply put, the mere fact that IHC retained rent that it received *before* it declared forfeiture does not suggest that IHC waived its right to declare the forfeiture. Indeed, IHC had no obligation under the Lease to return any rent payments that it received before its declaration of forfeiture. Therefore, by simply retaining the April Rent, IHC did not affirmatively or “distinctly ” engage in conduct from which a fact-finder could infer an intent to relinquish any forfeiture rights under the Lease. *Cf. Soter’s*, 857 P.2d at 940 (“mere silence is not a waiver unless there is a duty or obligation to speak.”) (quoting *Plateau Mining Co. v. Div. of State Lands & Forestry*, 802 P.2d 720, 730 (Utah 1990)). IHC’s retention of D&K’s April Rent was no more a “distinctly made” waiver than its retention of D&K’s February 1998 rent, because D&K paid both rents *before* IHC declared forfeiture. Consequently, the April Rent is irrelevant to either the question of default by D&K or waiver by IHC. In fact, the trial court’s ruling found D&K in default under the Lease based *solely* on the missed March 1998 rent payment. (Order, July 29, 2004, 3; R. 1100.)

Even assuming, for the sake of argument, that IHC had received and retained the April Rent *after* it declared forfeiture, a fact-finder *still* could not infer an intent to waive based on that fact alone. *See, e.g., Living Scriptures, Inc.*, 890 P.2d at 10 (recognizing that the mere acceptance of a rental payment from a tenant in breach, while enforcing other rights under a lease, is not alone enough to constitute waiver of the right to terminate a lease for default); *Olympus Hills Shopping Ctr., Ltd.*, 889 P.2d at 461 (same);

*see also Davidsohn*, 825 P.2d at 1229-30. Regardless, that is not what occurred here, no matter how favorably the facts are viewed to D&K.

The remainder of IHC's actions (the "Dear Tenant" letters, demands for proof of insurance, etc.) do not give rise to an inference that IHC intended to affirm the Lease for two main reasons. First, the trial court issued a stay in this matter, thereby allowing D&K to remain in the premises owned by IHC pending the final outcome of this litigation. (R. 685-89.) Because this stay effectively obligated IHC to act as D&K's "landlord," IHC was required to undertake certain actions to protect itself, such as requiring that the building be insured. Therefore, contrary to D&K's argument that IHC's conduct should have been viewed most favorably to D&K so as to suggest that IHC intended to *affirm* the Lease, IHC's conduct could only be viewed as consistent with IHC's desire to preserve its right to *terminate* the Lease. At most, IHC's conduct demonstrated only its reasonable efforts to protect its rights and interests while the dispute over the forfeit of the Lease continued.

Second, the parties entered into an Escrow Agreement, which expressly states that "*IHC* does not waive its claims of default and/or forfeiture of the Lease Agreement against D&K" by allowing D&K to remain in possession of the property during this litigation. (Fact 14 (emphasis added).) The trial court was required to consider the Escrow Agreement under the "totality of the circumstances." *See Living Scriptures, Inc.*, 890 P.2d at 10 n.5 (holding that an anti-waiver provision is a factor to consider in determining whether a waiver has occurred). Thus, D&K's argument that IHC engaged in "dozens of acts . . . that recognized the Lease as in force" (Appellant's Br. at 20), is

directly contrary to D&K's contractual agreement and should be disregarded by this Court.

In sum, given the trial court's discretion to decide whether the "totality of circumstances" could give rise to an inference that IHC "distinctly made" a waiver, the trial court clearly did not err. The trial court properly exercised its discretion in applying the law of waiver to the facts of this case, and its grant of summary judgment in favor of IHC was not an abuse of discretion.

## **2. D&K Cannot Belatedly Seek a Trial on Substantial Compliance.**

### **C. D&K Impermissibly Argues That IHC Failed to Plead Materiality of Breach for the First Time on Appeal.**

As an initial matter, D&K argues that IHC failed to state a claim upon which relief can be granted because "IHC did not plead materiality" of the breach of the Lease. (Appellant's Br. 22.) The Court cannot consider this untimely argument because D&K has raised it for the first time on appeal. *See, e.g., Brookside Mobile Home Park, Ltd. v. Peebles*, 2002 UT 48, ¶ 14, 48 P.3d 968 ("in order to preserve an issue for appeal, the issue must be presented to the trial court in such a way that the trial court has an opportunity to rule on that issue.") As D&K itself notes, an issue is not preserved for appeal unless: (1) it was timely raised; (2) it was specifically raised; and (3) a party introduced supporting evidence and relevant legal authority to the trial court. *Id.* (Appellant's Br. 28 (quoting *Albores v. Bracamontes*, 2006 UT App 204, ¶ 4).)

Here, D&K *never* raised this argument to the trial court before or after *D&K I*. Therefore, it is not surprising that D&K fails to point to a single instance where it argued to the trial court that IHC's Complaint should be dismissed for failure to plead materiality

of breach. To be sure, the argument that IHC failed to state a claim upon which relief can be granted could *only* have been raised in a pleading or by motion to the trial court. *See* Utah R. Civ. P. 12(b), 12(h). Instead, D&K raises this argument on its second appeal to this Court, a full *eight years* after it filed its Answer. Without a doubt, D&K's assertion is untimely and cannot be considered by this Court.<sup>5</sup> *See also* Utah R. App. P. 24(a)(5)(A) (stating that appellate briefs must contain a "citation to the record showing that an issue was preserved in the trial court").

**B. D&K Waived Its Substantial Compliance Defense When It Failed to Plead This Affirmative Defense in its Answer.**

Despite the fact that the affirmative defense of "substantial compliance" was nowhere mentioned by D&K until 2004, five years *after* it filed its original answer and *after* summary judgment was already entered in favor of IHC twice, and *after* summary judgment was reviewed by this Court once, D&K now asks this Court to accept that it raised substantial compliance in its original answer. (Appellant's Br. at 23-24.) In fact, D&K raised the defense of "substantial compliance" for the first time in a Motion to Reconsider, following the renewed motion for summary judgment after *D&K I*. (*Id.* at 9; *see also* R. 1108.) D&K argues that it preserved the right to assert "substantial

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<sup>5</sup> Even if this Court *were* to consider the merits of D&K's argument, it should be rejected outright. First, D&K's failure to pay rent *is* a material breach. *See, e.g., McKeon v. Williams*, 799 P.2d 198 (Or. Ct. App. 1991) ("failure to pay rent could be nothing other than a material breach."). Second, D&K offers no authority for the proposition that IHC must actually plead materiality of the breach in its complaint. (*See* Appellant's Br. 22 (stating that the case law merely "suggests" that materiality is an essential element of a forfeiture claim).) Moreover, D&K's argument is at odds with Utah's notice pleading rules. *See* Utah R. Civ. P. 8(e)(1) ("Each averment of a pleading

compliance” by pleading the defense of “unconscionability” in its answer, because substantial compliance “constitutes a major part of the defense of unconscionability.” (Appellant’s Br. 23-24.). This matter may be summarily disposed of by the Court.

Under Rule 8 of the Utah Rules of Civil Procedure, a party seeking to avoid a claim must, in plain and simple terms, plead any “matter constituting an avoidance or affirmative defense.” Utah R. Civ. P. 8(c); *see also Valley Bank & Trust Co. v. Wilken*, 668 P.2d 493 (Utah 1983). The primary purpose of requiring a defendant to plead affirmative defenses under Rule 8(c) “is to ensure that parties have adequate notice of the issues and facts in the case.” *Prince v. Bear River Mut. Ins. Co.*, 2002 UT 68, ¶ 30, 56 P.3d 524. A plaintiff must have advance notice of the defendant’s affirmative defenses in order to adequately assess whether and when to bring a motion for summary judgment. *Valley Bank & Trust Co.*, 668 P.2d at 494. Therefore, affirmative defenses that are not pled in accordance with the rules of civil procedure are waived. *Id.*

Here, prior to D&K’s Motion to Reconsider, neither IHC nor the trial court were ever put on notice that D&K intended to rely on a substantial compliance defense. D&K offers no explanation as to how IHC or the trial court should have surmised that its defense of “unconscionability” encompassed a possible “substantial compliance” argument.<sup>6</sup>

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shall be simple, concise, and direct. No technical forms of pleading or motions are required.”)

<sup>6</sup> D&K attempts to fault IHC for never briefing “or even mention[ing]” the substantial compliance issue in its Motion for Judgment on the Pleadings. (Appellant’s Br. 28.) Yet, plaintiffs are never expected to anticipate defenses that a defendant such as D&K omits from its answer. Rather, the burden is always on *defendants* to adequately

D&K admits that substantial compliance is only a “part” of the broader doctrine of unconscionability. (Appellant’s Br. 24.) Yet, if the defensive of substantial compliance is *different from* unconscionability, then that defense has clearly been waived. There is no dispute that D&K did not plead or argue “substantial compliance” in its pleadings, in the motion for summary judgment before Judge Livingston, in the first appeal to this Court, in the renewed motion for summary judgment before Judge Hilder, or in the briefing before the trial court and the Court of Appeals on certification. It raised it for the first time in a Motion to Reconsider with Judge Hilder after each of those other rulings had already been handed down.

On the other hand, if “substantial compliance” and “unconscionability” are *the same* defense, as D&K suggests, then this matter has already been ruled on by this Court. In *D&K I*, this Court expressly held that it would not be “unconscionable” to allow IHC to forfeit D&K’s Lease based upon a single month’s missed rent. “Permitting IHC to enforce the forfeiture provision of the written lease after D&K’s failure to pay rent following a one month acquiescence and late payment is not unconscionable.” *D&K I*, 2003 UT 5, ¶ 11. Based upon the foregoing, this entire defense should be passed over by this Court. Simply put, the matter has been ruled upon to the extent it has not been waived.

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apprise plaintiffs of their expected defenses. Utah R. Civ. P. 8(c); *see also Valley Bank & Trust Co.*, 668 P.2d at 493-94 (holding that a defendant could not raise defenses in opposition to a motion for summary judgment that were not raised in its answer or by proper motion, because the plaintiff was entitled to proper notice of the defendant’s affirmative defenses *before* moving for summary judgment).

As this Court has recognized, if defendants such as D&K could omit defenses from their answers and later raise them when faced with summary judgment, “summary judgment could always be thwarted.” *Valley Bank & Trust Co.*, 668 P.2d at 494. It is even more egregious to attempt to raise omitted defenses *after* summary judgment. If D&K wanted to assert substantial compliance as grounds for defeating summary judgment, it should have followed the rules of civil procedure and sought leave from the trial court to amend its answer.<sup>7</sup> *See id.* It should have then briefed the defense in an attempt to defeat IHC’s renewed motion for summary judgment, if not IHC’s original motion for judgment on the pleadings.<sup>8</sup> D&K did not do so and thereby waived this defense. Moreover, because D&K waived this defense by failing to include it in its answer, D&K clearly cannot raise this defense now, on its *second* appeal. *See id.* (“Nor can the appellant raise [an affirmative] defense on appeal when it was not properly presented to the trial court.”).

C. Even if D&K Pled Substantial Compliance, it Waived This Defense By Failing to Argue it on Summary Judgment.

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<sup>7</sup> Although D&K added a “substantial compliance” defense to its answer to IHC’s supplemental complaint in November 2004, the supplemental complaint did not change any pleading regarding the forfeiture issue and never gave D&K grounds to add defenses. Accordingly, D&K was required to seek leave from the trial court to add this defense under Rule 15(a) of the Utah Rules of Civil Procedure. Because D&K never sought leave to do so, this defense was not properly asserted in the November 2004 answer.

<sup>8</sup> IHC’s initial motion leading to judgment was for judgment on the pleadings. It was only converted to summary judgment by D&K’s introduction of affidavits. Faced with the argument that nothing in the pleadings prevented judgment as a matter of law certainly obligated D&K to reference “substantial compliance” if it believed the doctrine would, as pleaded, prevent judgment.



As D&K concedes, IHC argued that “[a]ll of D&K’s affirmative defenses fail as a matter of law” during the summary judgment phase of this litigation. (Appellant’s Br. 7.) Yet, D&K never rebutted IHC’s argument by defending its supposed substantial compliance defense to the trial court. (*Id.* at 28.) Perplexingly, D&K attempts to pin the blame for this omission on IHC. (*Id.* at 7, “IHC did not attack or even mention the defense of unconscionability [and therefore] D&K was under no obligation to brief that defense or provide factual support for it.”) The Court should reject D&K’s attempt to evade responsibility for its own unexcused omission.

It is a basic rule of civil procedure that every party to litigation has a duty to “incorporate *all* relevant arguments in the papers that directly address a pending motion.” *Rocafort v. IBM Corp.*, 334 F.3d 115, 122 (1st Cir. 2003) (emphasis added). Moreover, a defendant bears the burden of proof on its affirmative defenses. *State Bank of S. Utah v. Troy Hygro Sys., Inc.*, 894 P.2d 1270, 1277 (Utah Ct. App. 1995). Accordingly, a defendant waives any defenses that it fails to raise in response to a plaintiff’s motion for summary judgment, even if those defenses were properly pled in the defendant’s answer. *H & G Ortho, Inc. v. Neodontics Int’l, Inc.*, 823 N.E.2d 718, 731 (Ind. Ct. App. 2005); *Diversey Lever, Inc. v. Ecolab, Inc.*, 191 F.3d 1350, 1353 (Fed. Cir. 1999).

More specifically, Rule 56(e) of the Utah Rules of Civil Procedure states that, when a party moves for summary judgment, the nonmovant “may not rest upon the mere allegations or denials of the pleadings, but the response . . . must set forth specific facts showing that there is a genuine issue for trial.” Utah R. Civ. P. 56(e). In other words, the party opposing a motion for summary judgment has an affirmative duty to respond to the

motion with affidavits or other materials allowed by Rule 56(e). *Waddoups v. Amalgamated Sugar Co.*, 2002 UT 69, ¶¶ 31, 36, 54 P.3d 1054; *State Bank of S. Utah*, 894 P.2d at 1277. Under Rule 56(e), a non-moving defendant must support *any* affirmative defenses it intends to rely upon to defeat the plaintiff's motion for summary judgment. *See Pantry, Inc. v. Stop-N-Go Foods, Inc.*, 796 F.Supp. 1164, 1167 (S.D. Ind. 1992) (holding that when a plaintiff moves for summary judgment on the issue of liability, the nonmovant has a duty to support any applicable affirmative defenses, and that simply pleading affirmative defenses in an answer does not preserve those defenses which are not argued in opposition to the motion for summary judgment). After summary judgment, a defense is no longer preserved simply because it was pled; under Rule 56(e), the defense must be *argued* to the trial court. *Id.*; *United States v. AMC Entm't, Inc.*, 232 F.Supp.2d 1092, 1118-19 (C.D. Cal. 2002).

Here, IHC moved for judgment on the pleadings as to whether D&K forfeited the Lease.<sup>9</sup> This triggered D&K's obligation to argue and support *any and all* affirmative defenses that would have defeated IHC's forfeiture claim.<sup>10</sup> D&K could have and should

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<sup>9</sup> IHC's Motion was converted into a motion for summary judgment. *D&K I*, 2003 UT 5, n.1.

<sup>10</sup> The fact that IHC specifically anticipated D&K's modification and waiver defenses in its motion is completely irrelevant. IHC had no burden to preserve D&K's substantial compliance defense by specifically rebutting it. Rather, D&K had a duty under Rule 56(e) to set forth all of its arguments—including its substantial compliance argument—which would have shown that there was a genuine issue for trial. D&K claims that because "waiver was dispositive" it did not need to raise substantial compliance to the trial court or in *D&K I*. The disingenuity of this argument is revealed by the fact that D&K found it necessary to argue estoppel below and in *D&K I*. If waiver truly was "dispositive" query why D&K found it necessary to not only bring and argue estoppel but to also seek a redetermination of this Court that its estoppel argument failed.

have raised the substantial compliance defense in its cross-motion for summary judgment. Yet, D&K did not do so. (Appellant's Br. 8 ("D&K asserted only waiver and an estoppel defense.")) Nor did D&K raise a substantial compliance defense on its appeal to this Court in *D&K I*, or on remand to the trial court after *D&K I*. In fact, at a March 2004 hearing to decide the forfeiture issue on remand, the trial court gave D&K's counsel repeated opportunities to raise other defenses in addition to waiver. In response, D&K continued to rely solely on its waiver argument.

THE COURT: . . . if this Court was to determine under the undisputed facts that are now in the record, that a waiver has not occurred, is there some reason under the law of summary judgment, this Court could not do that?

COUNSEL FOR D&K: Absolutely. . . waiver . . . .

(Hr'g Tr., 10:3-12, Mar. 2, 2004; R. 839. Attached hereto as Exhibit C.)

The very first time that D&K even *mentioned* substantial compliance was two motions after Judge Hilder's question, during a May 2004 hearing on IHC's Motion for Rule 54(b) Certification. (Appellant's Br. 9.) However, at that hearing, following repeated interrogation by the trial court, D&K twice conceded that the forfeiture issue was resolved and only damages remained to be determined:

COUNSEL FOR D&K: I would agree that, given this Court's ruling, *there are no facts left – no facts left that have to be decided. There were no facts initially with this motion for summary judgment.*

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COUNSEL FOR D&K: But given this ruling, *there are no facts that have to be decided for possession.*

(Hr'g Tr., 5:2-10, May 26, 2004; R. 999. Ex. A (emphasis added).)

In sum, D&K clearly did not meet its burden under Rule 56(e) to set forth specific facts showing that there was a genuine issue for trial on substantial compliance. Thus, D&K waived any substantial compliance defense.

D. The Trial Court Was Well Within Its Discretion To Refuse To Consider The Substantial Compliance Defense on D&K's Motion to Reconsider.

D&K concedes that it first briefed the doctrine of substantial compliance to the trial court in its October 2005 Motion to Reconsider, a full year and a half after the trial court expressly asked D&K if there was *any* defense that would preclude summary judgment besides waiver,<sup>11</sup> and a *half decade* after IHC moved for judgment on the pleadings. (Appellant's Br. 11.) D&K argues that the trial court erred in refusing to reconsider its grant of summary judgment in favor of IHC on the grounds that D&K substantially complied with the Lease. For several reasons, D&K is wrong.

1. The Trial Court Was Not Required to Consider Substantial Compliance Because D&K Raised it For the First Time on a Motion to Reconsider.

A trial court has discretion in declining to consider defenses that are argued for the first time in a motion for reconsideration. *Matosantos Comm. Corp. v. Applebee's Int'l, Inc.*, 245 F.3d 1203, 1209 (10th Cir. 2001) ("A motion for reconsideration is not, however, an opportunity for the losing party to raise new arguments that could have been presented originally."); *Ogunwo v. Amer. Nat'l Insur. Co.*, 936 P.2d 606, 611 (Colo. Ct.

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<sup>11</sup> D&K states that it first mentioned the issue of substantial compliance during the May 2004 hearing on IHC's Motion for Rule 54(b) Certification. (Appellant's Br. 9.) However, D&K concedes that it did not fully address the defense at the hearing, and instead argued that the defense was "yet to be decided." (*Id.*)

App. 1997) (“a court need not entertain new theories on a motion to reconsider following the grant of summary judgment”).

D&K did not raise substantial compliance during the summary judgment phase of the litigation, on appeal to this Court in *D&K I*, or on remand. This is especially surprising in light of D&K’s current contention that it has known about this argument since it filed its original answer. (See Appellant’s Br. 23 (arguing that D&K pled substantial compliance “at the outset of this litigation”).) Tellingly, D&K offers no justification for its failure to argue this defense to the trial court, despite the fact that it supposedly has been aware of the defense since the “outset” (other than the erroneous argument that IHC had the burden to raise the defense on its behalf). Accordingly, the trial court was under no obligation to consider D&K’s argument and therefore did not abuse its discretion in denying D&K’s Motion to Reconsider. See *Nance v. L.J. Dolloff Assoc., Inc.*, 126 P.3d 1215, 1221 (N.M. Ct. App. 2005) (finding that the trial court did not abuse its discretion in denying a motion to reconsider a defense that a party knew about but failed to raise during the summary judgment phase of the litigation.)

Further, once a trial court declines to consider a new theory raised by a party on a motion to reconsider, that party cannot pursue its theory on appeal, as D&K seeks to do here. *Cooper v. Dist. Court*, 133 P.3d 692, 716 (Alaska Ct. App. 2006). Accordingly, this Court should: (1) affirm the trial court’s discretion to refuse to reconsider D&K’s substantial compliance defense, and (2) refuse to consider that defense on this appeal.

2. The Trial Court Correctly Ruled That the Law of the Case Doctrine Precluded it From Considering D&K’s Substantial Compliance Argument.

In denying D&K's Motion to Reconsider, the trial court found that, in addition to the fact that D&K waived its substantial compliance argument, D&K was precluded from bringing the argument under the law of the case doctrine.<sup>12</sup> (Order, Jan. 23, 2006, ¶ 9; R. 1370-75.) Therefore, even if this Court were to conclude that D&K did not waive its substantial compliance defense, the trial court's decision to deny D&K's Motion to Reconsider under the law of the case doctrine should be affirmed.

Simply stated, the law of the case doctrine renders a decision made on an issue during one stage of a case binding on successive stages of the same litigation. *Thurston v. Box Elder County*, 892 P.2d 1034, 1037 (Utah 1995). The law of the case doctrine constrains a trial court's ability to reconsider its earlier rulings under Rule 54(b) of the rules of civil procedure.<sup>13</sup> *Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd.*, 952 F.2d 1245, 1255 (2d Cir. 1992) ("Even if Rule 54(b) allows parties to request district courts to revisit earlier rulings, the moving party must do so within the strictures of the law of the

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<sup>12</sup> D&K misstates the trial court's rationale for declining its Motion to Reconsider. D&K argues that the trial court relied "exclusively" on the *Smith v. Osguthorpe* decision, 2005 UT App 11. (App.'s Brief at 25.) In fact, the trial court simply relied on the law of the case doctrine, "as described in *Smith v. Osguthorpe*." (Order, Jan. 23, 2006, ¶ 9; R. 1372 (emphasis added).) D&K's critique of the *Osguthorpe* decision, therefore, is of little avail to D&K, because the trial court correctly applied the law of the case doctrine, rather than one particular decision, to the facts of this case.

<sup>13</sup> Although D&K brought its Motion to Reconsider under Rule 60(b) of the Utah Rules of Civil Procedure, the trial court's denial of the Motion is more properly analyzed under Rule 54(b) because a final judgment had not yet been rendered. *See Trembly v. Mrs. Fields Cookies*, 884 P.2d 1306, 1310 n.2 (Utah Ct. App. 1994) (holding that "the substance, not the caption of a motion is dispositive" and analyzing a motion to reconsider under Rule 54(b) rather than Rule 60(b) because a final judgment was not rendered in the case). However, it is noteworthy that D&K did not properly bring its Motion to Reconsider and that D&K's Motion "is not provided for under the Utah Rules

case doctrine”); 10 *Moore’s Federal Practice* § 54.25[4] (3d ed. 2006) (“If motions based on the court’s power under Rule 54(b) could compel the court to revisit those adjudications, much of the advantage in making the early rulings would be lost. For this reason, the law of the case doctrine provides some protection from routine reexamination of interlocutory adjudications.”).

D&K argues that the trial court was wrong to apply the law of the case doctrine because that the law of the case doctrine only applies to “issues actually or necessarily decided in a previous appeal,” and the substantial compliance issue was never “decided in a previous appeal.” (Appellant’s Br. 25.) However, D&K’s argument relies on the “mandate rule,” which is merely one application of the multifaceted law of the case doctrine. *Thurston*, 892 P.2d at 1038 n.2 (“Law of the case terminology has been employed when addressing at least four distinct sets of problems. It has been used to justify a trial court’s refusal to reconsider matters in a continuing proceeding and an appellate court’s declining to reconsider matters resolved on a prior appeal. The terminology has also been used to express the principle that inferior tribunals are bound to honor the mandate of superior courts within a single judicial system. . . .”). Thus, D&K is wrong in arguing that the requirements of the “mandate rule” applied to the trial court on its Motion to Reconsider.

In fact, in the context of a motion for reconsideration, the law of the case doctrine “is more flexible than the mandate rule.” *Id.* at 1038. Indeed, on a motion to reconsider,

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of Civil Procedure, and . . . has never been recognized as a proper motion in this state.” *Wisden v. Bangerter*, 893 P.2d 1057, 1058 (Utah 1995).

the law of the case doctrine simply holds that “a court is justified in refusing to reconsider matters it resolved in a prior ruling in the same case for reasons of efficiency and consistency” and that courts should not reopen issues previously decided unless narrow exceptional circumstances are present. *Id.* at 1039. Generally, the only “exceptional circumstances” under which a trial court should reopen an issue that is has previously decided are: (1) when there has been an intervening change of controlling authority; (2) when new evidence becomes available; or (3) when the prior decision was “clearly erroneous and would work a manifest injustice.” *Id.* Absent these “exceptional circumstances,” a trial court has *discretion* in refusing to revisit an issue that it had previously decided. *Mower v. Jorgensen*, 2006 UT App 329.

Here, the trial court, on remand from *D&K I*, decided that D&K forfeited the lease as a matter of law. (Order, July 29, 2004; R. 1098-1103.) Therefore, the law of the case doctrine applied and prevented the trial court from revisiting the issue on D&K’s Motion to Reconsider, absent “exceptional circumstances.” The trial court did not find any exceptional circumstances present. (See Order, Jan. 23, 2006, ¶ 7; R. 1372 (“The defense D&K wants to now argue is not new or novel, and indeed the main cases it relies upon in its present motion were all issued before D&K opposed IHCHS’s initial Motion for Partial Judgment on the Pleadings.”); ¶ 8 (“D&K cannot now, without cause, ask this Court to consider newly developed arguments that it denied existed more than a year ago.”).) In sum, the trial court was well within its discretion in refusing to reconsider the substantial compliance issue.



Furthermore, even assuming *arguendo* that the law of the case doctrine’s “mandate rule” applied rather than the more flexible standards applicable to a motion for reconsideration, D&K’s argument that the trial court erred under the “mandate rule” still fails. Under the mandate rule, lower courts are bound to implement “both the letter *and the spirit* of the [appellate court’s] mandate, taking into account the appellate court’s opinion and the circumstances it embraces.” *Thurston*, 892 P.2d at 1038 (emphasis added). In other words, an appellate court need not rule on each and every particular issue in a case in order for the appellate court’s ruling to have preclusive effect. *Id.*

Here, although this Court did not specifically rule on the substantial compliance defense in *D&K I*, this Court *did* decide the appropriate treatment of the forfeiture issue. The “spirit” of this Court’s ruling was that the trial court should grant summary judgment in favor of IHC on the forfeiture issue if, after reconsideration of the totality of the circumstances, it found that waiver did not occur as a matter of law. *D&K I*, 2003 UT 5, ¶ 12. The spirit of the Court’s decision was *not*, as D&K suggests, that the trial court should afford D&K an opportunity to raise new defenses if it ultimately were to lose on the waiver argument. In fact, this Court explicitly ruled out the opportunity for D&K to raise a defense based on unconscionability: “Permitting IHC to enforce the forfeiture provision of the written lease after D&K’s failure to pay rent following a one-month acquiescence in late payment is not unconscionable.” *Id.* at ¶ 11. Thus, the trial court was correct in applying the law of the case doctrine to preclude D&K from rearguing the issue of forfeiture.

D&K next argues that the trial court's May 31, 2001 summary judgment decision was "reversed and no part of it was affirmed" by the Utah Supreme Court in *D&K I*. (Appellant's Br. 27.) Therefore, according to D&K, the trial court erred in denying its Motion to Reconsider because the "vacated Memorandum Decision rendered May 31, 2001 cannot possibly serve as a basis for application of law of the case." (*Id.*) D&K's argument is non sequitur for the simple reason that, in its Motion to Reconsider, D&K moved the trial court to reconsider the July 29, 2004 Order, *not the May 31, 2001 Order*. (Def.'s Mot. to Reconsider, Oct. 3, 2005; R. 1252-68.) Thus, the trial court denied reconsideration of its *July 29, 2004 Order* in part on the basis of law of the case. The July 29, 2004 Order has never been reviewed by an appellate court, let alone reversed or vacated. *See IHC Health Servs., Inc. v. D&K Mgmt., Inc.*, 2005 UT App 33 (dismissing appeal of trial court's July 29, 2004 Order for lack of jurisdiction) (R. 1178-81.).<sup>14</sup>

In sum, the Court should affirm the trial court's decision to deny D&K's Motion to Reconsider on the grounds that D&K was precluded from raising its substantial compliance defense under the law of the case.

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<sup>14</sup> D&K further characterizes the trial court's initial summary judgment decision as having been "reversed" in an effort to distinguish the present case from the *Osguthorpe* case on which the trial court relied in denying D&K's Motion to Reconsider. (Appellant's Br. 27.) In *Osguthorpe*, the appellate court "generally affirmed" the trial court's analysis but remanded so that particular evidence could be considered by the trial court. 2005 UT App 11. Similarly, in *D&K I*, this Court did *not* reverse the trial court's decision but rather remanded for reconsideration in light of one corrected fact. 2003 UT 5 at ¶ 9. In other words, this Court did "generally affirm" the trial court's treatment of the forfeiture issue in *D&K I*. Thus, D&K's argument that *Osguthorpe* lies "[i]n sharp contrast [to] *D&K I*" (Appellant's Br. 27), completely lacks merit.

3. D&K Was Not Entitled To Reconsideration Under the Standards of Rule 54(b).

D&K is incorrect in arguing that “virtually every factor [under Rule 54(b)] would have supported reconsideration of [the trial court’s] July 29, 2004 Order.” (Appellant’s Br. 29.) First, as discussed above, a trial court’s decision to deny a motion to reconsider “is within the discretion of the trial court” and should not be disturbed absent an abuse of discretion. *U.P.C., Inc. v. R.O.A. Gen., Inc.*, 1999 UT App 303, ¶ 57, 990 P.2d 945 (quoting *Timm v. Dewsnup*, 921 P.2d 1381 (Utah 1996)). Further, D&K, as the party bringing the motion to reconsider, bears the burden of justifying reversal of the trial court’s summary judgment decision. *Id.* at ¶ 58. Although the factors discussed by D&K (change in governing law, manifest injustice, inadequate briefing, and the need to correct the court’s own errors) have been recognized by Utah courts as grounds that might warrant granting a motion to reconsider, *Trembly v. Mrs. Fields Cookies*, 884 P.2d 1306, 1311 (Utah Ct. App. 1994), none of these factors are present here.

i. Change In Governing Law Or Circumstances<sup>15</sup>

A trial court may reconsider its prior ruling if the applicable law subsequently changes so as to render the court’s ruling incorrect. *See Trembly*, 884 P.2d at 1311 (holding that trial court did not abuse its discretion in granting a motion to reconsider where, after summary judgment was denied, the Utah Supreme Court issued two

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<sup>15</sup> Although D&K cites “different circumstances” as a justification for granting its Motion to Reconsider (Appellant’s Br. 30), D&K does not develop this argument or suggest how it is different from the “change in governing law” analysis. Therefore, IHC will address the “different circumstances” factor as part of the “change in governing law” factor.

decisions that altered the applicable legal framework). Here, D&K manipulates this rule to suggest that, because this Court disagreed with its waiver analysis in *D&K I*, there was a “substantial change in governing law” sufficient to warrant reconsideration.

(Appellant’s Br. 30.) The Court should reject D&K’s argument. The simple truth is that, in *D&K I*, D&K misinterpreted Utah case law regarding the waiver analysis and lost its estoppel argument. Now, having the benefit of this Court’s ruling on the waiver and estoppel issues, D&K wants a chance to start from scratch. Obviously, this is not a legitimate basis for reconsideration of the trial court’s summary judgment ruling.

In *D&K I*, this Court did not, as D&K states, engage in a “remarkable change of course” with respect to the legal analysis of a waiver defense. (Appellant’s Br. 30.) To the contrary, this Court clearly stated that it was following the precedent established in *Soter’s, Inc. v. Deseret Federal Savings & Loan Assoc.*, 857 P.2d 935 (Utah 1993). *D&K I*, 2003 UT 5, ¶ 8 (“*Soter’s* essentially cleaned the slate of the type of categorical waiver rule suggested by D&K . . . We decline to depart from our general waiver rule for resolution of this case”) (internal cites omitted). In light of this Court’s express language that it was *following* precedent, D&K’s suggestion that this Court “rejected the settled rule” is blatantly false. Likewise, D&K’s argument that “the world abruptly changed when *D&K I* was decided” (Appellant’s Br. 31), is a gross exaggeration. Utah cases prior to *D&K I* suggested the erosion of *Woodland Theatres*, the case which D&K fatally relied upon. See, e.g., *Olympus Hills Shopping Ctr., Ltd.*, 889 P.2d at 461 (holding that acceptance of a rent payment “is just one fact to consider in determining whether there

was a waiver”). D&K’s decision to also argue and bring an estoppel defense shows that it was attempting to argue alternative theories to waiver in any instance.

In short, D&K attempts to stretch the meaning of “a substantial change in governing law” beyond feasibility. Followed to its logical conclusion, D&K’s argument would give litigants a “second bite at the apple” every time an appellate court disagreed with a litigant’s interpretation of the law. Accordingly, the Court should reject D&K’s argument that there was a “substantial change in governing law” sufficient to warrant reopening the trial court’s summary judgment decision.

ii. Inadequate Briefing

D&K also raises the unusual argument that its total failure to brief substantial compliance somehow justifies reconsideration of the trial court’s summary judgment decision. (Appellant’s Br. 30.) D&K’s argument is nonsensical. Because substantial compliance is an affirmative defense, D&K bore the burden of raising and arguing this defense to the trial court. *See Fibro Trust, Inc. v. Brahman Fin., Inc.*, 1999 UT 13, ¶ 17 n.8, 974 P.2d 288 (holding that the defendant bears the burden of proving each element of its affirmative defenses). One of the most rudimentary principles of modern civil procedure is that a party cannot merely rely on its pleadings to defeat summary judgment, and, when faced with such a motion, must demonstrate *why* its pleadings protect the party from judgment. *See* Utah R. Civ. P. 56(e). Simply put, D&K failed to meet this burden. By contrast, in *Trembly*, the Utah Court of Appeals explained that a court can consider whether “an issue was inadequately briefed *when first considered by the court*” in deciding whether to reconsider a prior summary judgment ruling, 884 P.2d at 1311

(emphasis added), suggesting that the issue must actually be raised. Because substantial compliance was never raised here, this case does not present the type of situation that should warrant reconsideration under the “inadequate briefing” factor.

D&K claims that its failure to brief substantial compliance should be excused because it thought its waiver defense would be dispositive under its interpretation of the case law. To be sure, D&K erroneously interpreted the case law on waiver. However, this does not excuse D&K’s failure to raise a substantial compliance argument. *See Hart v. Salt Lake County Comm’n*, 945 P.2d 125, 135 (Utah Ct. App. 1997) (holding that a party may not be excused from its failure to argue a defense “based on its erroneous interpretation of . . . case law” and affirming the trial court’s decision to deny the party’s motion to reconsider). And again, query why D&K briefed estoppel if it truly believed waiver was dispositive.

Undoubtedly, the “inadequate briefing” factor under *Trembly* is not meant to rescue litigants who fail to carry their burden of supporting their arguments with adequate briefing. To the contrary, courts routinely refuse to consider arguments that are unsupported by legal analysis or authority. *E.g., Jensen v. Sawyers*, 2005 UT 81, ¶ 61, 130 P.3d 325. Here, Rule 54(b) should not be used as a means for rescuing D&K from its failure to timely raise a substantial compliance argument.

### iii. Manifest Injustice & Need to Correct Error

In arguing that the trial court should have granted its Motion to Reconsider on the grounds of “manifest injustice,” D&K essentially argues that enforcement of the forfeiture provision of the Lease is unconscionable. D&K’s argument is untenable at

best, *cf. Mower v. Jorgensen*, 2006 UT App 329 (holding that enforcement of a liquidated damages provision in a contract would not work a “manifest injustice” under “basic principles of freedom of contract”), and has already been rejected by this Court, *see D&K I*, 2003 UT 5, ¶ 11 (enforcing the forfeiture provision of the Lease “is not unconscionable”).

As a general rule, an appellate court will not find “manifest injustice” to be present unless the trial court committed plain error. *Jensen* 2005 UT 81, ¶ 61, . Accordingly, the party moving for reconsideration on the grounds of manifest injustice must show three elements: (1) the demonstration of error; (2) a qualitative showing that the error was plain, manifest, or obvious to the trial court; and (3) evidence that the error affected the substantial rights of a party. *Id.*

Here, the trial court hardly committed “plain error” in refusing to alter its summary judgment ruling on the basis of D&K’s substantial compliance defense when the facts and the law demonstrate that D&K waived that defense. *Cf. State v. Alfatlawi*, 2006 UT App 511, ¶ 26, 153 P.3d 804 (“under the invited error doctrine a party on appeal cannot take advantage of an error committed at trial when that party led the trial court into committing the error.”). Simply put, it was not plain error for the trial court to refuse to revisit an argument that was waived.

4. The Trial Court Did Not Err In Concluding That D&K Failed To Present Evidence Of Substantial Compliance.

D&K also argues that it presented sufficient facts to support a finding of substantial compliance, relying on the Utah Court of Appeals case, *Beus v. Cache*

*County*, 1999 UT App 134. Even if this Court were to conclude that D&K did not waive its substantial compliance argument and reach the question of whether D&K presented sufficient facts to support such a defense, the Court should reject D&K's argument.

In fact, in *D&K I*, this Court already rejected D&K's proposed defense. There, this Court expressly rejected D&K's argument that IHC should be "equitably estopped" from terminating the Lease on the same argument that D&K now makes under its "substantial compliance" theory. In its current brief, D&K claims that substantial compliance is a defense to forfeiture because the adverse consequences that it will suffer if the Lease is terminated are outweighed by the damages suffered by IHC due to D&K's default. (Appellant's Br. 33-35.) In *D&K I*, D&K similarly argued that "equity and good conscience should preclude IHC from forfeiting the Lease based on the late payment of March rent," (Appellant's *D&K I* Br. 39, Oct. 31, 2001) and that "Utah law acknowledges that a landlord may be precluded from strictly enforcing lease payment deadlines by its continued acceptance of late rent," (*id.* at n.14 (citing *Living Scriptures, Inc. v. Kudlik*, 890 P.2d 7 (Utah Ct. App. 1995))). In ruling on D&K's estoppel argument, this Court explicitly stated, "Permitting IHC to enforce the forfeiture provision of the written lease after D&K's failure to pay rent following a one-month acquiescence in late payment is not unconscionable." 2003 UT 5 at ¶ 11.

Moreover, numerous Utah cases have affirmed the right of a landlord to insist on strict compliance with the requirement to pay rent in accordance with the terms of a lease agreement, and have allowed forfeiture of a lease based on the simple failure of the tenant



to pay rent. *E.g., Living Scriptures, Inc.*, 890 P.2d at 10-11; *Olympus Hills*, 889 P.2d at 461.

In sum, D&K's substantial compliance argument can fairly be construed as nothing other than an impermissible attempt to seek a second chance to present a defense that it could have, but did not, present to the trial court. *See, e.g., Slattery v. Covey & Co., Inc.*, 909 P.2d 925, 928 (Utah Ct. App. 1995) ("appellate review is not intended to grant litigants a second chance to present their case . . . [T]his rule is not only reasonable, but necessary, if litigation is ever to come to an end.") Accordingly, so that this litigation might properly come to an end, this Court should hold that D&K waived its substantial compliance defense and did not preserve it for appeal. In addition, the Court should affirm the trial court's decision to refuse to revisit its grant of summary judgment in favor of IHC on the forfeiture issue. The trial court was under no obligation to consider an affirmative defense that D&K waived. Finally, even if the Court reaches the merits of D&K's substantial compliance argument, the Court should reject it outright because it directly contradicts this Court's ruling in *D&K I*.

D&K invites this Court to issue an opinion which will be cited by litigants for years to come as the case standing for the proposition that a defense is not waived even if it is brought up for the first time *after* judgment has been issued. For the numerous reasons set forth above, the Court should decline to do so.

**3. The Trial Court Properly Granted IHC Its Attorneys' Fees Because the Present Action was Brought "Under the Lease."**

In appealing the trial court's award of attorneys' fees to IHC, D&K argues that there was no legal basis for the trial court to award attorneys' fees to IHC because IHC terminated the Lease with D&K effective as of its 1998 Termination Notice , thereby eliminating the Lease provision through which IHC could recover its attorneys' fees. (Appellant's Br. at 35-38.) D&K's argument is flawed.

At the hearing on IHC's Motion for Attorneys' Fees, the trial court found that the Lease entitled the prevailing party to any action brought during the "term" of the Lease to recover its attorneys' fees. The trial court then found that IHC's termination of the Lease was effective on April 15, 1998 when it sent the Termination Notice to D&K. (R. 1374.) Based on that language, the trial court speculated whether IHC brought this action after the "term of lease ended." (*Id.*) It invited further briefing from the parties. (*Id.*) After additional briefing by the parties, the trial court determined that this action was brought "during the term of the lease" because, until Judge Livingston ruled that IHC was entitled to terminate the Lease, the Lease was still in effect.<sup>16</sup> (R. 1385-86.)

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<sup>16</sup> D&K complains that the trial court issued "inconsistent rulings" during the process. (Appellant's Br. at 38-41.) Ironically, D&K argues that the trial court's change of position violated the law of the case doctrine. (*Id.* at 40.) This argument is inconsistent with its argument earlier in its brief that the trial court was free to revisit a prior ruling with respect to substantial compliance without violating the law of the case doctrine. (*Id.* at 29.) Moreover, the procedural history illustrates the thoughtfulness of the trial court in this matter. The trial court speculated whether declaring the tenancy forfeited as of the date of Termination Notice may invalidate the claim for attorneys' fees. (R. 1374.) It asked for supplemental briefing on this point. (*Id.*) After receiving the supplemental briefing and again convening oral argument, the trial court concluded that its initial impression was incorrect and IHC was entitled to attorneys' fees. (R. 1385-86.) This history shows careful deliberation rather than reversible error and is precisely the type of situation where reconsideration is warranted, in contrast to D&K's substantial compliance argument.

The trial court was correct in ruling that IHC is entitled to attorneys' fees under the Lease. The Lease specifically provides the landlord with the right to any fees necessary to enforce the Lease. (R. 20.) It is undisputed that D&K breached the Lease by failing to pay March 1998 rent. (Appellant's Br. at 5; Fact 9; R. 120.) It is also undisputed that D&K's breach triggered IHC's right to terminate the Lease. (See Fact 7.) In turn, this triggered D&K's obligation to leave the premises. (*Id.* "In the event of such termination, Tenant agrees to immediately surrender possession of the Demised Premises.") D&K refused to honor IHC's Termination Notice, requiring IHC to bring this action. Therefore, this action is an action to *enforce* D&K's obligation under the Lease to vacate the premises. IHC prevailed in this action to enforce its forfeiture remedy under the Lease. (Order, July 29, 2004; R. 1100-01.) Accordingly, IHC is entitled to attorneys' fees under the Lease.

The trial court further concluded, correctly, that there could be no other reasonable interpretation. Indeed, to hold otherwise would prevent a landlord from simultaneously exercising its rights to terminate a lease and enforce an attorneys' fees provision. Normally, following the expiration of a lease term, a landlord could bring an action for trespass and unlawful detainer and, by statute, gain attorneys' fees for the tenant's refusal to depart the premises. However, in this matter, the trial court stayed execution of the judgment, which precluded IHC from taking advantage of that statute. (R. 685-89.) In other respects, the stay required IHC to act as an ongoing landlord. For example, IHC continues to be required to provide utilities to the building so that D&K may remain in business. The stay also requires IHC to provide parking for D&K's customers. It would

be wholly unfair and inequitable for D&K to insist that, during this forced tenancy, IHC has all of the obligations, but none of the benefits, of a landlord as set forth in the Lease. Under D&K's interpretation of the attorneys' fee provisions, D&K would have the ability to demand performance from IHC in every aspect of the Lease, such as providing parking, utilities, and the like, but IHC is not entitled to the benefit of the Lease's attorneys' fee provision. Simply stated, D&K cannot have it both ways.

**4. The Amount of Attorneys' Fees Was Just and Reasonable.**

D&K next argues that the amount of attorneys' fees awarded by the trial court to IHC was improper. (Appellant's Br. at 40-48.) D&K argues both that IHC did not provide enough detail to justify the award (*id.* at 42), and that IHC provided too much information and did not adequately segregate time entries by subject matter to make it more easily objected to by D&K (*id.* at 47).

Determining the reasonableness of an award of attorneys' fees lies within the sound discretion of the trial court. *R.T. Nielson Co. v. Cook*, 2002 UT 11, ¶ 20, 40 P.3d 1119. Accordingly, the trial court's award should be affirmed unless D&K can show that it was clearly erroneous. *Id.* at ¶¶ 19-20. As a general rule, a trial court does not commit clear error if it awards a fee based on consideration of four factors: (1) what legal work was actually performed; (2) how much of the work performed was reasonably necessary to adequately prosecute the matter; (3) whether the attorney's billing rate is consistent with the rates customarily charged in the locality for similar services; and (4) whether circumstances require consideration of additional factors. *Dixie State Bank v. Bracken*, 764 P.2d 985, 990 (Utah 1988).

Here, the entirety of Volume 6 of the trial court record is devoted to the sole issue of attorneys' fees. Approximately 300 pages in the record are devoted to briefing, affidavits, interim rulings by the trial court, and other papers devoted exclusively to the topic of propriety, reasonableness, and amount of attorneys' fees and costs. (R. 1385-1663.) For eleven full months, the parties addressed no issue other than attorneys' fees before the trial court. To now argue that IHC did not provide enough information or marshal sufficient evidence to support the attorneys' fees it expended is, to say the least, a stretch.

An important point completely glossed over by D&K is its complete failure, despite repeated promises to the trial court, to raise any specific or concrete objection to the fees sought. IHC first moved for an award of attorneys' fees on August 25, 2005. (R. 1200-07.) After months of briefing and argument on whether any fees would be awarded at all, IHC filed its Affidavit of Attorneys' Fees and Verified Memorandum of Costs on July 10, 2006.<sup>17</sup> (R. 1388-1477.) D&K sought and obtained an extension of time from IHC to respond to IHC's Affidavit. (R. 1481, ¶ 3.) Nearly one month later, on August 8, 2006, D&K filed a motion for an additional extension of time to allow it even more time to respond to the voluminous papers filed, demonstrating the history of attorneys' fees accumulated by IHC. (R. 1480-83.) On August 21, 2006, a full month and a half after IHC filed its Affidavit of Attorneys' Fees and Costs, D&K finally filed a response. (R.

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<sup>17</sup> The trial court indicated and IHC agreed that until the trial court actually awarded attorneys' fees it would be premature for IHC to file an affidavit of specific attorneys' fees and costs.

1485-96.) However, that response was nearly devoid of any concrete objections. The trial court made a specific finding in a minute entry dated August 30, 2006 that:

[D&K's] response, as Plaintiff points out, is an attack on Plaintiff's failure to allocate fees incurred on matters on which Plaintiff prevailed. While allocation is the test of the party claiming fees, I agree with Plaintiff that the argument in the context of this case is disingenuous. Defendant spent weeks preparing a response, but it's submission made little effort to identify issues and/or fees for which Plaintiff should not be compensated, and none of the criticisms that were included make reference to Plaintiff's *detailed billing records*. (R. 1503) (Emphasis added.)

The trial court found IHC's submission detailed. (*Id.*) In that same ruling, though, the trial court noted that in order to comply with the analytical framework in *Bracken*, it would require IHC to resubmit a revised affidavit of fees, removing some of the fees sought on matters on which it found IHC had not prevailed (*e.g.*, supplemental pleading on lease term, etc.). (R. 1504.)

Thereafter, on September 12, 2006, IHC filed its second Affidavit of Attorneys Fees and Memorandum of Costs. (R. 1506-99.) D&K filed a response to the second affidavit a mere eight days later, again without providing any concrete objections to specific time entries or categories of times billed, other than several which were already stipulated or ruled upon by the trial court. (R. 1600-07.) Following briefing by the parties, the trial court issued another written order. (R. 1614-15.) In that order, the trial court expressly articulated that it was following the analytical framework laid out in *Bracken* and Rule 1.5 of the Utah Code of Professional Responsibility. (R. 1614.) The trial court then made several factual findings. First, it dealt with the average hourly rate over the numerous years this case has been litigated. (*Id.*) The trial court made an

express finding that the resulting average rate of \$191.35 per hour charged by IHC's counsel was lower than current market rates and was "clearly reasonable." (*Id.*) The trial court then made the express finding that even though this is an eviction matter, "it is a commercial eviction, with a great deal at stake, and the litigation has been both complex and very aggressively contested." (R. 1615.) Significantly, the trial court noted, "in the absence of specific challenges to tasks and/or time spent, I do not find that there is any substantial basis to challenge the total fee in light of the result." (*Id.*) Simply put, IHC briefed why its fees were incurred and why they were reasonable; D&K failed to rebut those arguments.

Additionally, the trial court made numerous discounts to the attorneys' fees IHC sought. The actual value of services that IHC received up to the point of the first Affidavit, based on counsels' standard rates, was \$427,518.00. (R. 1392.) A discount of \$91,205.96 was applied to those fees because IHC's counsel provided that discount to IHC, which the court properly passed on to D&K. (*Id.*) IHC then sought attorneys' fees through May 2006 of \$336,312.04. (R. 1393.) After an additional four months' worth of briefing and argument (which generated additional attorneys' fees), the trial court ultimately awarded a total of only \$303,514.59 to IHC. (R. 1615.) That is, the trial court had disallowed approximately \$40,000.00 worth of fees sought by IHC based upon the findings of the court that the fees sought were not expressly related to matters on which IHC prevailed.

This procedural history is in stark contrast to the story painted by D&K in its brief. The trial court did explicitly apply the legal standard set forth in *Bracken* for awarding


attorneys' fees. (R. 1614.) The trial court spent months asking for resubmissions of affidavits of fees and costs and gave D&K two separate opportunities to file objections to those affidavits. The trial court carefully evaluated all of the evidence in determining a reasonable award. There is no basis to conclude that the trial court abused its discretion. D&K, unhappy with the fact that it failed to articulate any reason why the fees sought by IHC were not reasonable, cannot show that the trial court committed patent error. *See Bracken*, 764 P.2d at 989 (holding that an appellate court should not disturb a trial court's findings and judgment regarding a reasonable award of attorneys' fees absent "patent error or clear abuse of discretion").

## VII. CONCLUSION

For the foregoing reasons, IHC asks this Court to uphold the trial court's ruling granting IHC summary judgment on the issue of forfeiture and to affirm the trial court's award of attorneys' fees to IHC.

DATED this 16 day of May, 2007.

STOEL RIVES LLP



---

D. Matthew Moscon  
Lauren A. Shurman  
Attorneys for Appellee

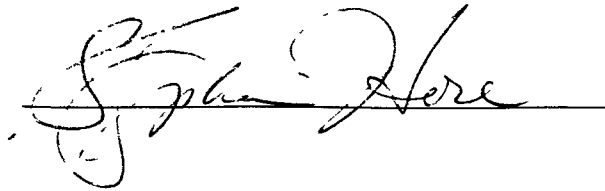


## CERTIFICATE OF SERVICE

I hereby certify on May 14<sup>th</sup>, 2007, two (2) true and correct copies of the foregoing

**BRIEF OF APPELLEE** were served by hand-delivery to:

Michael N. Zundel, Esq.  
PRINCE YEATES & GELDZAHLER  
175 East 400 South, Suite 900  
Salt Lake City, UT 84111

A handwritten signature in cursive script, appearing to read "Stephen Here", is written over a horizontal line.

**IN THE SUPREME COURT OF THE  
STATE OF UTAH**

---

IHC HEALTH SERVICES, INC., a	)	
Utah non-profit corporation,	)	
	)	
Plaintiff/Appellee,	)	Case No. 20061017-SC
	)	
v.	)	
	)	
D&K MANAGEMENT, INC., a Utah	)	
corporation.	)	
	)	
	)	
Defendant/Appellant.	)	

---

**ADDENDUM OF APPELLEE**

---

Tab A

IN THE THIRD JUDICIAL DISTRICT COURT

SUMMIT COUNTY, STATE OF UTAH

---

IHC HEALTH SERVICES,	:	Case No. 990905693
	:	
Plaintiff,	:	
	:	
v	:	
	:	
D & K MANAGEMENT, INC.,	:	
	:	
Defendant.	:	

---

HEARING ON MOTIONS MAY 26, 2004

BEFORE

THE HONORABLE ROBERT K. HILDER

---

**FILED DISTRICT COURT**  
Third Judicial District

JUN 11 2004

By Bn SALT LAKE COUNTY  
Deputy Clerk

---

CAROLYN ERICKSON, CSR  
CERTIFIED COURT TRANSCRIBER

1775 East Ellen Way  
Sandy, Utah 84092  
801-523-1186

FILED  
UTAH APPELLATE COURTS

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1 have come across the bench, that it is - I mean it's very clear  
2 that until you have a final order - put it this way. Only  
3 final orders are executable. Also, necessarily, only final  
4 orders, unless some exception of the rules apply, only final  
5 orders are appealable. So they would not be entitled to  
6 immediate possession of the property unless this Court rules  
7 that the order which grants forfeiture is a final order. So  
8 with that premise -

9 THE COURT: So you'll bow to that, is that you  
10 believe there's common facts underlying the breach-of-contract  
11 damage claim?

12 MR. BRONSON: Yes, your Honor. And then with that  
13 premise then we necessarily go to Rule 54(b), which is one of  
14 the exceptions to a standard historical final-order rule, and  
15 whether or not this is an issue, this is an order that can be  
16 certifiable under 54(b) as a final order, even though all  
17 claims in the case are not resolved. And the test under 54(b)  
18 is the *Kennecott* case, and the first prong of the *Kennecott*  
19 case for finality is whether or not there are overlapping  
20 facts.

21 THE COURT: There are no facts left unless you  
22 identify some for me, and that's one of my questions for you.

23 MR. BRONSON: Okay.

24 THE COURT: No facts left that determine possession,  
25 are there? Only the damages that result from forfeiture of

1 staying in possession.

2 MR. BRONSON: I would agree with your Honor that,  
3 given the Court's ruling, there are no facts left - no facts  
4 left that have to be decided. There were no facts initially  
5 with this motion for summary judgment.

6 THE COURT: Uh-huh (affirmative).

7 MR. BRONSON: But given this ruling, there are no  
8 facts that have to be decided for possession. However, there  
9 are a number of facts, and there are certainly issues that  
10 remain, with regard to their damages.

11 THE COURT: Oh, I agree with that. I think we're  
12 differing on that, but while there might have been facts in  
13 common at one point with - unless some of the remaining facts  
14 can go to the issue of possession, why isn't it a final - why  
15 cannot it not be a final judgment on that issue?

16 MR. BRONSON: Because *Kennecott* and its progeny are  
17 very clear that the Supreme Court of Utah has decided, for  
18 purposes of Utah law, to adopt the Seventh Circuit approach to  
19 finality and to certifications for 54(b) orders. And that  
20 analysis is that if the underlying facts are the same - not if  
21 the causes of action are different, not if the remedies are  
22 different - but if the underlying facts - and here the  
23 underlying fact is IHC wants possession of its property and  
24 wants damages for breach because we remain in possession.  
25 That's the underlying -

Tab B

---

**CONSENT, RESERVATION OF RIGHTS  
AND  
ESCROW DEPOSIT AGREEMENT**

---

This Consent, Reservation of Rights and Escrow Deposit Agreement (the "Escrow Agreement") is made and entered into as of the 1st day of March, 1999, by IHC HEALTH SERVICES, INC., a Utah nonprofit corporation ("IHCHS") and D&K MANAGEMENT, INC., a Utah corporation ("D&K Management") in connection with that certain Lease Agreement dated July 18, 1994 (the "Lease Agreement"), by and between IHCHS, as successor in interest to Medical Plaza 9400, as landlord, and D&K Management, as tenant.

**Covenants and Understandings**

1. On or about April 14, 1998, IHCHS, by certified mail and hand-delivery, caused a Notice of Default and Forfeiture to be sent to D&K Management, the contents of which instructed D&K Management that its leasehold tenancy in the real property located on or about 5142 South State Street, Murray, Utah (the "Leased Premises") was forfeited due to D&K Management's failure to comply with the terms of the Lease Agreement (the "Default Letter"). According to the Default Letter, D&K Management was to vacate the Leased Premises on or before May 15, 1998.
2. D&K Management disputes any claim by IHCHS that the Lease Agreement has been forfeited. D&K Management also claims, and IHCHS disputes any claims, that IHCHS has waived its remedy of forfeiture under the Lease Agreement. D&K Management further maintains, and IHCHS disputes, that D&K Management has been and continues to be entitled to occupy the Leased Premises pursuant to the terms and conditions of the Lease Agreement.
3. Pending resolution of the above disputes, the parties desire to establish and maintain an escrow account with ASSOCIATED TITLE COMPANY, Salt Lake City, Utah (the "Escrow Agent"), into which D&K Management will make monthly deposits of any and all amounts due and payable pursuant to and in accordance with the terms and conditions of the Lease Agreement (individually, an "Escrow Deposit" and, collectively, the "Escrow Deposits").
4. The parties agree that, by the execution and delivery of this Escrow Agreement, IHCHS does not waive its claims of default and/or forfeiture of the Lease Agreement against D&K Management by allowing D&K Management to continue to occupy the Leased Premises or to make any one or all of the Escrow Deposits, and all of IHCHS' claims and assertions against D&K Management, including without limitation those set forth in the Default Letter, and against any defenses of D&K Management, whether articulated



before or after the date of this Escrow Agreement, are expressly reserved and not waived by reason of this Escrow Agreement and shall not in any way be lessened or diminished by reason of or in connection with the execution and delivery of this Escrow Agreement.

5. The parties agree that, by the execution and delivery of this Escrow Agreement, D&K Management does not admit IHCHS is entitled to the remedy of forfeiture based upon a breach of any term or condition of the Lease Agreement, and all of D&K Management's defenses against the claims and assertions of IHCHS, whether articulated before or after the date of this Escrow Agreement, are expressly reserved and not waived by reason of this Escrow Agreement or otherwise and shall not in any way be lessened or diminished by reason of or in connection with the execution and delivery of this Escrow Agreement.

6. The parties agree that making an Escrow Deposit in accordance with the terms and conditions of the Lease Agreement shall constitute a tender of rent due and payable under the Lease Agreement by D&K Management to IHCHS; provided that the parties further agree that any failure of D&K Management to timely make an Escrow Deposit in accordance with the terms and conditions of the Lease Agreement shall constitute a breach of the terms and conditions of the Lease Agreement; provided further that the parties agree that all grace periods allowed by the Lease Agreement shall continue in force and not be waived by the execution and delivery hereof.

7. Within five (5) business days of the full and complete execution of this Escrow Agreement, IHCHS shall return to D&K Management all checks tendered by D&K Management as monthly lease payments under the Lease Agreement and, pending resolution of the above disputes, held by IHCHS, which checks, together with the two (2) checks tendered to IHCHS by D&K Management for March 1998 and May 1998 and returned to D&K Management<sup>1</sup>, total FORTY THOUSAND ONE HUNDRED EIGHTY-SIX AND 60/100 DOLLARS (\$40,186.60). The checks (with the corresponding dates of tender) are summarized as follows:

<u>Month</u>	<u>Date Tendered</u>	<u>Check Amount</u>
March 1998	April 17, 1998/April 23, 1998	3,608.00
May 1998	May 1, 1998	3,280.00
June 1998	May 29, 1998	3,280.00

---

<sup>1</sup> D&K Management tendered to IHCHS a check in the amount of \$3,608, inclusive of a \$328 late fee, on April 16, 1998 and, again, on April 23, 1998, for the lease payment due under the Lease Agreement for March 1998, and a check in the amount of \$3,280 on May 1, 1998 for the lease payment due under the Lease Agreement for May 1998. The check for \$3,608 was returned to D&K Management on April 17, 1998 and, again, on May 11, 1998, and the check for \$3,280 was returned to D&K Management on May 11, 1998.

July 1998	July 1, 1998	3,280.00
July 1998 (adj.)	July 9, 1998	55.40
August 1998	July 31, 1998	3,335.40
September 1998	September 2, 1998	3,335.40
October 1998	October 1, 1998	3,335.40
November 1998	October 30, 1998	3,335.40
December 1998	November 30, 1998	3,335.40
January 1999	December 29, 1998	3,335.40
February 1999	January 29, 1999	3,335.40
March, 1999	February 26, 1999	<u>3,335.40</u>

TOTAL: \$40,186.60

Within ten (10) business days thereafter, D&K Management shall deposit with the Escrow Agent an amount equal to the sum of the checks tendered to IHCHS (collectively, the "Initial Escrow Deposits"), as specified above, secure an "Acknowledgment and Acceptance" thereof from the Escrow Agent (as a part of this Escrow Agreement) and deliver a signed copy of such "Acknowledgment and Acceptance" to IHCHS. Further, from and after the date hereof, any and all other amounts due and payable pursuant to and in accordance with the terms and conditions of the Lease Agreement shall, pending resolution of the above disputes, be deposited with the Escrow Agent and shall constitute and be deemed part of the Escrow Deposits. Concurrently with the making of any Escrow Deposit (including the Initial Escrow Deposits), D&K Management shall provide written notice to IHCHS's counsel of the amount and date of deposit thereof.

8. The Escrow Agent shall take and hold all Escrow Deposits in an interest-bearing account. Interest shall accrue and inure to the benefit of IHCHS. Escrow Agent may invest the Escrow Deposits during the time it is held hereunder in certificates of deposit issued by federally-insured banks, U.S. government securities and in such other investments as may be approved by IHCHS from time to time in writing, and all interest earned on the Escrow Deposits shall become part of the Escrow Deposits and shall be disbursed by the Escrow Agent as part of the Escrow Deposits in accordance with the terms hereof.

9. The Escrow Agent shall be reimbursed by IHCHS for any expenses, attorneys' fees, court costs, taxes, or disbursements reasonably incurred by the Escrow Agent in the administration of this Escrow Agreement, which the Escrow Agent, by the execution hereof, confirms and agrees shall not exceed, in the aggregate during any twelve (12) month period, TWO HUNDRED AND FIFTY NO/100 DOLLARS (\$250). The Escrow Agent shall not be liable for any action taken or suffered by Escrow Agent in good faith in accordance with the advice of its legal counsel.

10. It is intended by the parties hereto that Escrow Agent's duty shall be solely administrative, and regardless of whether or not it has knowledge of any other agreements by the parties, the Escrow Agent shall not be bound by any such agreements or the knowledge

thereof, but must hold and dispose of the Escrow Deposits solely in accordance with the terms of this Escrow Agreement.

11. The Escrow Agent may resign at any time by notifying the parties and such resignation shall become effective on the date of mailing and Escrow Agent shall thereupon be relieved of all other responsibilities in relation to this Escrow Agreement, except the responsibility to hold the Escrow Deposits until a successor escrow agent is appointed by the parties and accepts the appointment or the Escrow Deposits are taken by reason of law or action of duly constituted authority, either state or federal.

12. If at any time Escrow Agent deems itself insecure as to proper methods for discharging its duties hereunder, then it is completely discharged of any liability whatsoever in this matter if it files an action in a court of competent jurisdiction and tenders or surrenders the Escrow Deposits.

13. The Escrow Agent shall not disburse any part or all of the Escrow Deposits until the Escrow Agent receives written authorization from both parties hereto or until the Escrow Agent is ordered to do so by a court of competent jurisdiction. The Escrow Agent, in connection with any amounts to be disbursed pursuant to this Escrow Agreement, shall request instructions for payment from the party entitled thereto or, if no such instructions are promptly given, shall make payment to the address of the payee as indicated below or such other address as may have been provided by and for any such party.

(a) If to IHCHS, to:

IHC HEALTH SERVICES, INC.  
36 South State Street  
21st Floor  
Salt Lake City, UT 84111  
Attention: Mr. Everett N. Goodwin, Jr.  
Senior Vice President

with a copy to:

Guy P. Kroesche, Esq.  
STOEL RIVES LLP  
201 South Main Street  
Suite 1100  
Salt Lake City, UT 84111

(b) If to D&K Management, to

D&K Management, Inc.  
4255 South 300 West, Suite 6  
Salt Lake City, Utah 84107  
Attention: Mr. Kent Bangerter  
President

with a copy to:

Michael N. Zundel, Esq.  
JARDINE LINEBAUGH & DUNN  
370 East South Temple  
Suite 400  
Salt Lake City, UT 84111

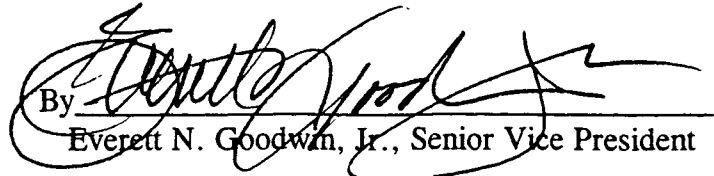
14. All demands and notices to be given hereunder shall be in writing and shall be sent either by the parties or by their respective attorneys who are authorized to do so on their behalf, by registered or certified mail, return receipt requested, postage prepaid, by confirmed facsimile or by hand-delivery, in any case addressed to the party to be notified at its address set forth in this Escrow Agreement or to such other address as such party shall have specified most recently by like notice. Notices given as provided above shall be deemed given three (3) days (excluding Saturdays, Sundays and legal holidays) after the date so mailed, on the date confirmed facsimile shall be delivered, or the date delivered if hand-delivered.

15. This Escrow Agreement shall be construed in accordance with the laws of the State of Utah.

16. This Escrow Agreement shall inure to the benefit of the successors and assigns of the parties hereto.

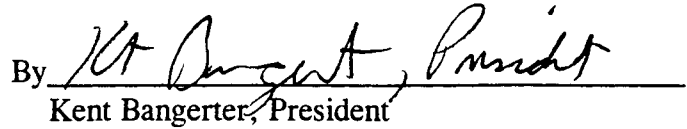
IN WITNESS WHEREOF, this Escrow Agreement is executed and entered into as of the date first set forth above.

IHC HEALTH SERVICES, INC.,  
a Utah nonprofit corporation

By   
Everett N. Goodwin, Jr., Senior Vice President

Dated this 23 day of March, 1999.

D & K MANAGEMENT, INC., a Utah  
corporation

By   
Kent Bangerter, President

Dated this 15<sup>th</sup> day of March, 1999.

Tab C

U0000h00M

IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE CITY  
SALT LAKE COUNTY, STATE OF UTAH

-o0o-

IHC HEALTH SERVICES, INC., )  
Plaintiff, ) Case No. 990905693  
vs. ) HEARING  
D & K MANAGEMENT, INC., ) (Videotape Proceedings)  
Defendant. )

-o0o-

BE IT REMEMBERED that on the 2nd day of March,  
2004, commencing at the hour of 8:01 a.m., the above-  
entitled matter came on for hearing before the HONORABLE  
ROBERT K. HILDER, sitting as Judge in the above-named  
Court for the purpose of this cause, and that the  
following videotape proceedings were had.

-o0o-

A P P E A R A N C E S

For the Plaintiff: MATTHEW M. DURHAM  
D. MATTHEW MOSCON  
Attorneys at Law  
Stoel Rives, LLP  
201 South Main, #1100  
Salt Lake City, Utah 84111

For the Defendant: MICHAEL N. ZUNDEL  
Attorney at Law  
Princes, Yeates & Geldzahler  
175 East 400 South, #900  
Salt Lake City, Utah 84111

**FILED DISTRICT COURT**  
Third Judicial District

MAR 15 2004

By Bh SALT LAKE COUNTY

FILED  
UTAH APPELLATE COURTS

Deputy Clerk

1

ALAN P. SMITH, CSR  
385 BRAHMA DRIVE (801) 266-0320  
SALT LAKE CITY, UTAH 84107

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1 in contracts.

2 The Supreme Court in 1983 said, you affirm a portion  
3 of a contract, you affirm the whole. Now, that's--goes all  
4 the way back to 1936, also. So--

5 THE COURT: Now, did you argue that to the Supreme  
6 Court?

7 MR. ZUNDEL: Yes, we did.

8 THE COURT: Then they didn't really say that, did  
9 they, when they discussed waiver? Justice Wilkins, I mean,  
10 that's--wouldn't that make sense, that if that was persuasive  
11 to the Supreme Court, they would have come back and said,  
12 under these facts, one way of raising waiver is you affirm the  
13 part, you affirm the whole?

14 I mean, it's a great phrase, I like it. But why  
15 didn't they pick it up?

16 MR. ZUNDEL: I--I think they too--I think they took  
17 the--the--they--they took the largest peg sticking out of the  
18 wall to hang the decision on, which was: You didn't even get  
19 the facts right, Judge.

20 THE COURT: Uh huh.

21 MR. ZUNDEL: So, I'm sending it back to you, it is  
22 premature, at best, at best, it's premature. At worst, it's  
23 wrong.

24 THE COURT: I guess we're reading it differently.

25 I hear your argument, Mr. Zundel, but I--I am not



1 sure that truly, except for at the beginning, you addressed my  
2 specific question, you've addressed whether a waiver's  
3 occurred and you made it well, I appreciate it; but if this  
4 Court was to determine under the undisputed facts that are now  
5 in the record, that a waiver has not occurred, is there some  
6 reason under the law of summary judgment, this Court could not  
7 do that?

8 MR. ZUNDEL: Absolutely. Because there are facts in  
9 the record which look--which addressed in the light most  
10 favorable to this client of ours--of mine, D & K, show a  
11 distinct, unequivocal act of waiver, inconsistent with any  
12 other result, any other intent.

13 You know, this idea of corporate intent, let's--

14 THE COURT: Uh huh.

15 MR. ZUNDEL: I see that--I see that IHC grabs onto  
16 this, but it doesn't want to acknowledge that, as a  
17 corporation, it's bound by the acts of its agent. You know,  
18 it--it talks about in its memoranda on its motion, this  
19 motion--

20 THE COURT: Uh huh.

21 MR. ZUNDEL: --it says, you know, we accepted the  
22 April rent, that should not be held against us because it was  
23 delivered to our home office, and--

24 THE COURT: Well,--

25 MR. ZUNDEL: --and we--