

2006

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

Utah Supreme Court

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IN THE SUPREME COURT OF THE
STATE OF UTAH

IHC HEALTH SERVICES, INC., a Utah
non-profit corporation,

Plaintiff/Appellee,

vs.

D&K MANAGEMENT, INC., a Utah
corporation,

Defendant/Appellant.

Case No. 20061017-SC

BRIEF OF APPELLANT

**APPEAL FROM FINAL ORDER AND JUDGMENT
DATED NOVEMBER 11, 2006 (AND ALL PRIOR
ORDERS INCORPORATED THEREIN) AND RULING
AND ORDER DATED MAY 8, 2006 IN THE THIRD
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UTAH, THE HONORABLE ROBERT K. HILDER
PRESIDING**

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STATEMENT OF JURISDICTION

The Court has jurisdiction of this appeal pursuant to Utah Code Ann. § 78-2-2(3).

STATEMENT OF THE ISSUES AND STANDARD OF REVIEW

1. Whether, in granting IHC Health Services, Inc. (“IHC”) summary judgment on the intensely fact dependent issue of waiver, the trial court failed to view the facts in the light most favorable to D&K and improperly drew inferences that were the province of the jury.

Standard of review: In an appeal from a summary judgment, “we view the facts and all reasonable inferences drawn therefrom in the light most favorable to [the non-moving party], and we give no deference to the trial court’s decision.” *State Farm Mut. Auto. Ins. Co. v. Green*, 2003 UT 48, ¶3, 89 P.3d 97. Whether a party is entitled to summary judgment is a question of law, which is reviewed for correctness. *See Mitchell v. Christensen*, 2001 UT 80, ¶8, 31 P.3d 572. “Whether the trial court properly complied, on remand, with [the appellate court’s] decision ... is a question of law which we review for correctness.” *Slattery v. Covey & Co.*, 909 P.2d 925, 927 (Utah App.1995).

Preservation: R798-806.¹

2. Whether, in refusing to allow D&K a jury trial on substantial compliance as a defense to forfeiture of D&K’s leasehold, the trial court erred in:

- a. declaring forfeiture without a pleading of materiality of breach;
- b. ruling that D&K had not raised substantial compliance in pleadings;

¹All references to the Record on appeal begin with R followed immediately by the page number(s) assigned by the clerk of the trial court in paginating the Record.

c. ruling that law of the case precluded consideration of substantial compliance;

d. failing to consider D&K's Motion for Reconsideration under the standards applicable to Rule 54(b), Ut.R.Civ.P.; and

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

Standard of review: Questions about the legal accuracy of the trial court's statements present issues of law, which are reviewed for correctness. *Van Dyke v. Van Dyke*, 2004 UT App 37, ¶ 9, 86 P.3d 767. All conclusions of law are reviewed for correctness, granting the district court no deference. *See Orton v. Carter*, 970 P.2d 1254, 1256 (Utah 1998). "We review for correctness the legal application of the law of the case doctrine." *Macris v. Sculptured Software, Inc.*, 2001 UT 43, ¶14; 24 P.3d 984. "The articulation of the proper legal standard . . . is a question of law which we review for correctness." *In re Estate of Beesley*, 883 P.2d 1343, 1347 (Utah 1994).

Preservation: R45 (Seventh Defense); R1252-68, 1284-93; Transcript R1108 at 15-16, 25-26, 34.

3. Whether the trial court's decision that IHC was entitled to attorney fees, under a lease provision allowing recovery of fees only in an action filed "during the term" of the lease, was erroneous because the court had ruled that the lease had been terminated prior to the action.

Standard of review: The award of attorney fees is reviewed for correctness. *Paul DeGroot Bldg. Servs., L.L.C. v. Gallacher*, 2005 UT 20, ¶18; 112 P.3d 490.

Preservation: R1233-41, 1318-23.

4. Whether, if IHC was entitled to attorney fees at all, the trial court committed error in awarding fees on the basis of the record below where:

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

b. IHC had 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;

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

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

Standard of review: The award of attorney fees is a matter of law reviewed for correctness.² *Paul DeGroot Bldg. Servs., L.L.C. v. Gallacher*, 2005 UT 20, ¶18; 112 P.3d 490. Whether sufficient evidence has been presented is reviewed for correctness. *Rose v. Provo City*, 2003 UT App 77, ¶7; 67 P.3d 1017.

Preservation: R1239-40, 1485-95, 1600-06.

STATEMENT OF THE CASE

IHC filed an action seeking forfeiture of D&K's lease and common law ejectment. After this Court reversed a decision in favor of IHC, the trial court granted partial summary

²D&K is not challenging the reasonableness of the amount awarded as a factual matter. It seeks review on legal issues, as identified above.

judgment to IHC, ruling as a matter of law that it had not waived forfeiture. By reason of the lower court's certification of finality, D&K filed a second appeal, which was dismissed by the Court of Appeals for lack of jurisdiction. D&K's motion for reconsideration of substantial compliance issues was rejected, remaining claims were dismissed at IHC's request, and the trial court granted summary judgment awarding IHC attorney fees of \$307,264.90. The final judgment granted the forfeiture sought by IHC and disposed of all issues. D&K obtained an order staying execution pending this appeal.

STATEMENT OF FACTS

Lease, Default, Forfeiture and Waiver

In January 1998, IHC purchased a shopping center in Murray, Utah, from Medical Plaza 9400 ("**Medical Plaza**") who, as landlord, had leased space in the center to D&K. R2, 39-40. Medical Plaza was owned and had been managed by Steve and Dan Rideout (the "**Rideouts**"). R118, ¶¶5-6. D&K had leased its space in the shopping center from Medical Plaza under a written lease agreement, dated July 18, 1994 (the "**Lease**"). R2, 12-22, 39. The initial term of the Lease was five years. It included three five-year renewal options. R12. Upon IHC's purchase of the shopping center, Medical Plaza assigned its interest in the Lease to IHC, and D&K became IHC's tenant. R2, ¶7; R39, ¶7. IHC's intent was to "get most of the tenants out of there." R390 (internal pages 28-29).

D&K's rent (initially \$3,280) was due "in advance on the first day of each calendar month." R12-13. The Lease afforded D&K a 10-day grace period to pay rent. R18, ¶17.1[a]. Upon the occurrence of any event constituting a "default" under the Lease, the Landlord may "[t]erminate this Lease by written notice to Tenant." R18-19, ¶17.2[c].

D&K had been late in making payments to Medical Plaza under the Lease on multiple occasions. R118-19. After IHC acquired the property, D&K was late in making its first payment to IHC in February 1998. R119-20. D&K neglected to pay its March 1998 rent in a timely manner under the Lease. R120, ¶10. D&K did, however, pay April 1998 rent in a timely manner, and IHC cashed D&K's April rent check on April 8, 1998. R120, ¶11; R100, ¶6; R258, ¶6; R278-79, ¶6.

Sometime after April 14, 1998, IHC sent D&K a Notice of Default and Forfeiture of Lease Agreement (“**Notice of Default**”) purporting to terminate the Lease based on D&K's failure to pay March and April rent.³ R29-30. On April 16, 1998, D&K paid March rent (plus a 10% late fee) to the Rideouts' office manager, who accepted D&K's check and issued D&K a receipt for the payment. R120, 127. Thereafter, on April 17, 1998, when IHC's corporate office learned that the Rideouts had accepted D&K's late payment of March rent, IHC attempted to revoke that acceptance by returning the March rent check uncashed to D&K. R3, ¶10; R40, ¶10; R120, ¶15; R292, ¶5. Each month from May 1998 until March 1999, D&K timely tendered monthly rent to IHC, which retained each of those checks but did not cash them. R100, ¶9; R120-21, ¶16-18; R259, ¶9.

On June 29, 1998, IHC sent a letter to D&K addressed “Dear Tenant,” demanding an increase in D&K's rent payments “[a]ccording to the terms of your lease agreement” from \$3,280.00 per month to \$3,335.40 per month, effective July 1, 1998.⁴ R120-21, ¶17; R129.

³IHC's Notice of Default was invalid as D&K had already paid the April rent in a timely manner and IHC had accepted and cashed that check.

⁴This was based on a rent escalation clause in the Lease. R13-14, ¶4.1

Each month thereafter: (a) D&K timely tendered the increased rent payments (R121, ¶18) and (b) IHC sent a monthly billing “Invoice” and a monthly “Statement” to D&K for the increased monthly rent amount. R121, ¶19; R131-49.

On January 21, 1999, IHC issued a letter to D&K addressed “Dear Tenant,” demanding that D&K, based on its “obligations” under the Lease, provide a certificate of insurance covering the leased property. R121, ¶20; R151. IHC further demanded proof that it had been added as an additional insured to D&K’s general liability policy.⁵ The letter gave D&K 30 days to produce the required certificate of insurance and warned that failure to do so “is a default under the terms of the Lease.” *Id.* On February 3, 1999, D&K responded by providing the required proof of insurance to IHC. R121-22, ¶21.

In March 1999, the parties signed an escrow agreement⁶ addressing the rent checks held by IHC and other issues. R157-62.

Additional Facts Concerning Substantial Compliance

From the inception of the Lease to January 1998, D&K had spent some \$200,000 in improving the leased property, in addition to substantial time and effort expended by D&K’s owner and his family members. R122, ¶23. The replacement cost of those improvements in May 2000 exceeded \$470,000. *Id.* D&K’s improvements to the leased premises included

⁵This was based on an insurance clause in the Lease. R17, ¶¶14.1 and 14.2

⁶The Consent, Reservation of Rights and Escrow Deposit Agreement provided that IHC could deposit into an escrow account the rent checks which D&K had thus far tendered and which IHC had kept but not cashed, but both D&K and IHC reserved their respective rights and arguments as they then existed. R157-58, ¶¶4 and 5.

bars, stages, a “DJ” box, dressing rooms, a kitchen, restrooms, sound systems, specialty lighting and electrical, floorings, HVAC and signage. *Id.*

D&K’s profits from its business on the leased premises are \$600,000 per year. R914. Its business is not transferable to another location due to its inability to obtain the necessary licensing elsewhere. *Id.* As of April 1998, D&K had available under the Lease more than sixteen additional years if it exercised all extensions. R12.

Interest at the 10% legal rate pursuant to Utah Code Ann. § 15-1-1(2) on the March 1998 rent payment from its March 1 due date until tendered on April 16, 1998 amounts to \$41.34 ($\$3,280 \times 10\% \times 46 \text{ days} / 365 \text{ days}$). The Lease provided for a 10% “service charge” if a payment was not timely made. R21. D&K’s payment of March 1998 rent tendered on April 16, 1998, included the 10% charge of \$328.00. R120, 127.

Procedural History and Rulings Below

In May 1999, IHC sued, seeking to enforce the Notice of Default issued thirteen months earlier, a declaratory judgment that D&K was in default for non-payment of the March 1998 rent, ejectment based on forfeiture of the Lease, and breach-of-contract damages. R1-10. D&K’s Answer and Counterclaim denied many of the factual allegations in the Complaint and raised the defenses of waiver, estoppel and unconscionability (which encompasses the doctrine of substantial compliance). R37-51. IHC filed “Defendant’s Motion for Partial Judgment on the Pleadings” and a supporting memorandum. R57-85. It asserted that “[a]ll of D&K’s affirmative defenses fail as a matter of law.” R58. IHC addressed only D&K’s defenses that the Lease had been modified and that IHC had waived the failure to pay rent in March 1998. R60-69. Since IHC did not attack or even mention the defense of

unconscionability and was seeking only partial judgment on the pleadings, D&K was under no obligation to brief that defense or provide factual support for it.

D&K countered with its Motion for Summary Judgment, a supporting memorandum (which also opposed IHC's motion for partial judgment on the pleadings) and the Affidavit of Kent Bangerter. R86-89, 94-116, and 117-62. D&K asserted only waiver and an estoppel defense based on the landlord's failure to require strict compliance with the Lease. Waiver appeared to be dispositive under *Woodland Theatres, Inc. v. ABC Intermountain Theatres, Inc.*, 560 P.2d 700 (Utah 1977). The estoppel defense in similar situations had been upheld in Utah and other jurisdictions (*see* authorities cited in R108-10). For these reasons and because IHC had not challenged the defense of unconscionability, D&K requested summary judgment on the basis of those two defenses. By doing so, it did not waive substantial compliance or any other defense, but simply retained the right to present its defenses at trial if summary judgment were not granted in favor of D&K.

Because IHC elected, under Rule 56(f), to conduct discovery before responding to D&K's Motion for Summary Judgment, over a year passed before the trial court ruled on these two motions. Judge Livingston issued a Memorandum Decision dated May 31, 2001 granting IHC's "motions for judgment on the pleadings and summary judgment,"⁷ addressing no defenses of D&K other than waiver and ignoring *Woodland Theatres*. R630-37. He did not at any time consider or rule on substantial compliance issues.

IHC then took the position that the Memorandum Decision constituted a "final order." R638. D&K filed an appeal which led to the Court's opinion in March 2003, *IHC Health*

⁷In reality, IHC had filed only a motion for partial judgment on the pleadings.

Services, Inc. v. D & K Management, Inc., 2003 UT 5; 73 P.3d 320 (“**D&K I**”). When the Court considered the first appeal, the issue of finality was not mentioned. The Court’s opinion addressed only the waiver and equitable estoppel defenses. It remanded to the trial court for “further proceedings consistent with this opinion.” After considering and denying a petition for rehearing on equitable estoppel issues, the Court issued its Remittitur on July 10, 2003. R722-23.

Nothing further occurred in the trial court until October 2003, when IHC filed a Motion to Modify Order or for Summary Judgment. Index of Record at 8; R730-97. In reality, it was a continuation of the prior motion for judgment on the pleadings plus an alternative motion for partial summary judgment, as the motion did not address all claims and issues in the case. IHC asked the trial court to “remove all references in the [Memorandum] Decision to the return of the April rent” or alternatively enter “judgment as a matter of law based upon the undisputed facts.” R795. In its supporting memorandum, IHC argued only the issue of waiver and did not challenge or address any other defense, including that of unconscionability. R730-42. After briefing and oral argument, the trial court rejected the waiver defense as a matter of law and signed an Amended Order and Judgment on April 9, 2004. R878-81. That order addressed the defense of waiver in detail, but did not discuss any other defenses.

During a May 26, 2004 hearing on IHC’s request for certification of that order as final pursuant to Ut.R.Civ.P. 54(b), D&K raised the doctrine of substantial compliance (Transcript R1108 at 15-16), and the court directed the following question to IHC’s counsel:

Is there an argument, factual or legal, regarding ejectment going to substantial breach? I mean I think we’ve determined this but I see reference to

Delgado and to other cases and I believe Mr. Bronson was making some statement to the effect that they still have some defenses based on this was diminimous [sic] maybe.

Id. at 25-26. D&K advised the court that the issues addressed in the substantial compliance cases “are yet to be decided in this case.” *Id.* at 34. The court responded as follows:

I don’t think the Court can determine forfeiture—wavier [sic] equaling forfeiture without implicitly dealing with the Delgado-Buse [sic] line and the non-substantial—whatever the term is.

Id. After granting the contested 54(b) certification and D&K’s request for a stay pending appeal, the trial court entered an Order, Judgment and Certificate of Final Judgment as to Certain Claims on July 29, 2004,⁸ which vacated the April 9, 2004 Order. R1098-1103. In the July 2004 Order, the court ruled that IHC was entitled to judgment on its claims for forfeiture and declaratory judgment and that “D&K has forfeited the Lease.” R1100-01.

In the meantime, because IHC sought a certification of finality, D&K filed an appeal from the April 9, 2004 Order on June 10, 2004. R992-94. On a *sua sponte* motion for summary dismissal, the Court of Appeals issued a Memorandum Decision on January 27, 2005, dismissing the appeal for lack of jurisdiction on the grounds that the order appealed from was not final and was not entitled to certification under Rule 54(b). R1178-81. The case was remitted to the trial court on April 15, 2005. R1176.

While the second appeal was pending, IHC filed a Motion for Leave to File Supplemental Complaint on September 10, 2004. R1116-30. D&K consented, and such leave was granted on October 13, 2004. R1139-40. The Supplemental Complaint asserted four

⁸This judgment and all other orders from which this appeal is taken are reproduced in the Addendum.

causes of action, including forfeiture of the Lease based on a repair issue that arose during the litigation and declaratory relief to the effect that if the Lease were in force, D&K's renewal rights had expired. R1115E-1115O. Typical pretrial procedures were employed, and discovery was conducted on the issues raised by the Supplemental Complaint. *See* Index of Record at 12-13; R1183; R1189; R1194; R1195; R1271.

IHC in August 2005 filed a Combined Motion to Dismiss Damages Claims and Award Attorney's Fees and Costs, in which it moved to "dismiss any remaining damage claims" and sought a ruling of entitlement to attorney fees. R1205-07. In its accompanying Memorandum, IHC made clear that it sought attorney fees solely pursuant to Section 23⁹ of the Lease. R1202. D&K opposed the award of attorney fees on several grounds, including that Section 23 of the Lease did not permit the requested award because IHC's action was not, under its theory of the case, instituted during the term of the Lease and that IHC was not the prevailing party on all issues. R1233-41. The trial court granted IHC's request to dismiss its claims for damages, as well as its Supplemental Complaint. R1373.

After the remittitur from the Court of Appeals, D&K on October 3, 2005, filed Defendant's Motion for Reconsideration. R1252-68. It requested reconsideration of the July 29, 2004 Order based solely on the doctrine of "substantial compliance." The trial court denied the motion on January 23, 2006, ruling that it had "no right or discretion to consider" substantial compliance. R1370, 1372-73. The court deferred ruling on IHC's entitlement to attorney fees pending briefing from the parties on the "effect of D&K's holdover following

⁹Section 23 of the Lease is a "successful party" attorney fee-shifting clause expressly applicable only to an action instituted "during the term of this Lease." R20.

IHCHS' termination of the Lease, which the Court rules became effective as of the date of its April 14, 1998 notice terminating the Lease." R1374.

The court's Ruling and Order of May 8, 2006, awarded IHC "reasonable and necessary" attorney fees under Section 23 on the theory that termination of the Lease did not occur until the court decided in favor of IHC's forfeiture claim. R1385-86. Two months later, IHC filed its 90-page Affidavit of Attorneys' Fees, including every minute billed by 24 attorneys and paralegals during a period of over seven years. R1388-1477. It made no attempt to categorize fees among successful and unsuccessful claims or issues.

D&K filed Defendant's Response to Plaintiff's Affidavit of Attorneys' Fees and Verified Memorandum of Costs (the "**Response**") on August 21, 2006. R1485. D&K pointed out IHC's failure to allocate time to matters on which it prevailed, complained of the lack of specificity in time descriptions and advocated that IHC should be awarded no fees because it had failed to carry its burden of proof as to reasonableness of the fees it claimed. R1486-88; R1491. D&K identified at least seven discrete matters in which IHC did not qualify as the prevailing party. R1488-90. These included IHC's original Motion for Partial Judgment on the Pleadings (reversed on appeal), D&K's successful appeal in *D&K I*, D&K's efforts to stay enforcement of the judgment in connection with that appeal, IHC's failed motion to modify order, IHC's Pyrrhic battle for Rule 54(b) certification and the ensuing dismissal of the second appeal over IHC's objection, a motion by D&K in connection with the second appeal to stay enforcement of the judgment, the filing and dismissal of IHC's Supplemental Complaint, and IHC's dismissal of its damage claims, rendering its third cause of action nugatory in that it added nothing to the relief obtained on the first two claims. *Id.*

In a decision dated August 29, 2006, the trial court acknowledged that “allocation is the task of the party claiming fees,” but ruled that “failure to allocate (beyond the detailed billing) shall not preclude an award.” R1503. The court ruled that it had no ability to award fees for the first and second appeal and ordered IHC to file a revised fee submission eliminating all fees and costs for either appeal. R1503-04.

In response to the order to remove fees for the two appeals, IHC filed a new submission, representing that it had removed “approximately \$34,742.40” of fees and costs. R1506, 1507. D&K responded, contending that IHC had failed to remove all fees and costs incurred on either appeal and to show how the revised amount of its requested fee award was calculated, which included numerous entries for work on stays pending appeal, appeal bond issues and docketing statements. R1600-06. IHC offered modest reductions in its claimed fees and costs, but continued to assert entitlement to fees for all work relating to stays pending appeal and related bonds on appeal. R1608-12.

The trial court issued its October 10, 2006 Order Re: Fees and Costs, awarding IHC \$303,514.59 in fees and \$3,750.31 in costs. R1614-15. The order stated “[i]n 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.” R1615. On November 11, 2006, the trial court entered a Final Order and Judgment incorporating four of the five previous orders appealed from and granting a money judgment for fees and costs. R1651-54.

SUMMARY OF ARGUMENTS

Waiver. Intensely fact dependent, an implied waiver can be found only inferentially, based on words, acts and failures to act. IHC’s agent accepted the critical March 1998 rent

payment, which IHC returned. Then it sent 21 documents to D&K over a period of eleven months, each treating the Lease as valid, and retained rent checks for each of those months. The trial court failed, on summary judgment, to view the facts in the light most favorable to D&K. It usurped the jury's role of drawing inferences.

Substantial Compliance. Forfeiture of a lease is disfavored. It is denied where the default is not material or the tenant has substantially complied with the lease in good faith. IHC failed to plead or prove materiality. D&K initially raised the substantial compliance defense within the purview of unconscionability. Based on an earlier appeal on other issues, the trial court wrongly ruled that D&K was precluded, based on an erroneous view of the doctrine of law of the case, from arguing substantial compliance. It failed to apply the standards of Ut.R.Civ.P. 54(b) in deciding D&K's motion for reconsideration and incorrectly held that the facts did not support substantial compliance.

Entitlement to Attorney Fees. IHC sought attorney fees solely pursuant to a Lease clause allowing fees to be awarded to the successful party in an action instituted "during the term of this Lease." It consistently maintained, and the trial court ruled, that the Lease had terminated upon notice of forfeiture. Since IHC filed suit thirteen months after termination, it was not entitled to an award of fees.

Fees Awarded. IHC failed to provide essential evidence of reasonableness and necessity of its attorney fees and failed to apportion fees to matters on which it succeeded. The trial court improperly shifted the burden of apportioning fees to D&K and awarded fees for matters on which IHC was not successful, contrary to clear precedent. It failed to make findings necessary for appellate review.

ARGUMENT

I. The Trial Court Erroneously Granted Summary Judgment in Favor of IHC on its Claims for Lease Forfeiture and Declaratory Judgment.

A. Waiver Is an Intensely Fact Dependent Question that Can Be Determined as a Matter of Law Only If There Is But One Inference that Can Be Drawn from the Totality of Circumstances.

In the first appeal, this Court laid down the following standards for determining whether a waiver has occurred:

Waiver is an intensely fact dependent question, requiring a trial court to determine whether a party has intentionally relinquished a known right, benefit, or advantage. *Soter's*, 857 P.2d at 940. In order to find that a waiver occurred, we held in *Soter's* that “a fact finder need only determine whether the totality of the circumstances ‘warrants the inference of relinquishment.’” *Id.* at 942 (internal citation omitted). Although “any waiver ‘must be distinctly made . . . it may be express or implied.’” *Id.* at 940 (quoting *Phoenix, Ins. v. Heath*, 90 Utah 187, 61 P.2d 308, 311 (1936)).

D&K I, 2003 UT 5, ¶7. The Court reversed the trial court’s summary judgment that a waiver had not occurred because the trial court was mistaken as to one of the material facts. The Court further held that “[b]ecause of the absence of this fact in the trial court’s analysis, the grant of summary judgment was premature, at best.” *Id.* ¶9.

The Court’s conclusion that the ruling was “premature, at best” suggests that the fact finder must thoroughly analyze the facts to determine fully what inferences could be drawn therefrom. It further suggests that the ruling may have been not only premature, but incorrect in result. To have been incorrect in result, there need only have been more than one possible inference that could be drawn from the “totality of the circumstances.” Waiver may be decided as a matter of law only when the facts permit but a single conclusion. *American Falls Canal Securities Co. v. American Savings and Loan*, 775 P.2d 412 (Utah 1989). If this Court

had not intended the issue of waiver to be tried to the jury, it could have simply decided it as a matter of law, as it did the estoppel issue. *See D&K I*, 2003 UT 5, ¶10; (“Although the trial court’s decision did not address D&K’s estoppel argument, it is readily resolvable as a matter of law.”).

B. The Court Below Failed to View the Facts Regarding Waiver in the Light Most Favorable to D&K and Improperly Drew Inferences that Were the Province of the Jury.

“The judge ‘may not on a motion for summary judgment, draw fact inferences as to [the moving party’s] purpose or intention [S]uch inference may only be drawn at trial.’” *Goodnow v. Sullivan*, 2002 UT 21, ¶13; 44 P.3d 704, quoting *Gray Tool Co. v. Humble Oil & Ref. Co.*, 186 F.2d 365, 367 (5th Cir.1951). Because IHC had demanded a jury trial at the outset of the case (R9), it was incumbent on the trial court not to invade the province of the jury in any respect, however strongly it might feel about the probable verdict of the jury.

On summary judgment, the court was required to view the facts concerning waiver in the light most favorable to D&K. *Tallman v. City of Hurricane*, 1999 UT 55, ¶1; 985 P.2d 892. Here, there was a substantial body of evidence concerning waiver, from which divergent inferences could reasonably have been drawn. Although the record may not support an express relinquishment by IHC of the right to forfeit the Lease, a relinquishment can nevertheless be inferred or implied by action or inaction.

If a party did not expressly relinquish its right, then a court must examine the party’s conduct to determine whether that party intended to relinquish the right in question. The intent to relinquish a right need not be express and “may be implied from action or inaction.” *K & T, Inc. v. Koroulis*, 888 P.2d 623, 628 (Utah 1994).

Continental Ins. Co. v. Kingston, 2005 UT App 233, ¶11; 114 P.3d 1158. When considering implied waiver, it is necessary to focus on whether “the totality of the circumstances ‘warrants the inference of relinquishment.’” *D&K I*, 2003 UT 5, ¶7; 73 P.3d at 323. The Court’s approach taken in negligence cases is instructive:

“Furthermore, because negligence cases often require the drawing of inferences from the facts, which is properly done by juries rather than judges, ‘summary judgment is appropriate in negligence cases only in the clearest instances.’” *Nelson*, 919 P.2d at 571 (quoting *Dwiggins v. Morgan Jewelers*, 811 P.2d 182, 183 (Utah 1991)).

Tallman, 1999 UT 55, ¶5; 985 P.2d at 894. By the same reasoning, summary judgment in waiver cases is appropriate only in the clearest instances.

The facts here are not one of the “clearest instances” of a question regarding waiver. After neglecting to pay its rent for March 1998, D&K timely paid its rent for April 1998. R120. IHC cashed D&K’s check for April rent on April 8, 1998. *Id.* On April 14, 1998, IHC issued a notice purporting to terminate the Lease based on failure to pay rent for both March and April 1998. *Id.* D&K delivered a check for March rent, including the 10% late fee, to IHC’s property manager on April 16, 1998, and received a receipt for such payment. R120; R127. The next day IHC returned that check. R120. From May 1998 through March 1999 D&K tendered monthly rent payments to IHC, which retained each of those eleven checks but did not cash them. R120-21.

On June 29, 1998, IHC sent a letter to D&K addressed “Dear Tenant,” wherein it demanded an increase in D&K’s rent payments “[a]ccording to the terms of your lease agreement” from \$3,280 per month to \$3,335.40 per month. R120-21; R129. IHC’s letter advised that the new rental amount was effective July 1, 1998. *Id.* Each month after this

letter, D&K timely tendered the increased rent payments. R121. Each month from July 1998 through February 1999, IHC sent a monthly “Invoice” and “Statement” for the increased monthly rent. R121; R131-49. On January 21, 1999, IHC addressed another letter to D&K as “Dear Tenant,” demanding that D&K, in accordance with its “obligations” under the Lease, provide to IHC a certificate of insurance covering the leased property. R121; R151. IHC further demanded proof that IHC had been added as an additional insured to D&K’s general liability policy. *Id.* IHC’s demand stated that D&K had 30 days to produce the required certificate of insurance and warned that failure to do so “is a default under the terms of the Lease.” *Id.*

Collectively, IHC generated and sent to D&K a total of 21 separate documents over a period of eleven months, each treating the Lease as valid and subsisting and each calling for D&K to perform in accordance with the precise terms of the Lease. During the same time, D&K consistently tendered each and every act of performance requested by IHC. Not one of those thirteen acts of performance was ever rejected by IHC.

Inasmuch as IHC is an inanimate entity whose actions are determined by a large number of individuals, it is not a simple matter to infer what the entity intended when various persons acting on its behalf have undertaken actions that could have sharply differing or inconsistent intent or purposes. The knowledge and actions of each of those persons are imputed to the entity. *See D&K I*, 2003 UT 5, ¶9 n.2; 73 P.3d at 324.

When an entity’s “intent” is at issue, it is vital to focus on what each individual actor intended to do. The general proposition that a person intends the natural and probable results of his conduct gives rise to an inference that the person intended such results. *E.g., Hoffman*

v. Life Ins. Co. of North America, 669 P.2d 410, 420 (Utah 1983). When one or more IHC employees chose to retain the April rent paid by IHC after IHC had relied on it as a basis for lease forfeiture, the relevant question is whether those persons intended to keep the money. When an IHC employee sent D&K a rent invoice or a “Dear Tenant” letter asking it to pay more rent under the Lease or to provide proof of insurance in accordance with the terms of the Lease, the relevant question is whether that person intended to enforce the terms of the Lease.

If the actors intended to keep or collect the money or to enforce the terms of the Lease, D&K is entitled to an inference in its favor that they intended the *results* of their actions as well. The result of such actions is to affirm the Lease. The Utah Court of Appeals recently recognized the continuing validity of this principle.

In the specific context of insurance, the Utah Supreme Court noted that if a party claims a right to rescission and then does any substantial act that recognizes the contract as in force, that party has usually waived its right to rescind. *See Farrington v. Granite State Fire Ins. Co.*, 120 Utah 109, 232 P.2d 754, 758 (1951).

Continental Ins. Co. v. Kingston, 2005 UT App 233, ¶14; 114 P.3d 1158. By analogy, waiver of forfeiture should likewise be the usual outcome when there has been “any substantial act that recognizes the contract as in force.” This conclusion is consistent with early decisions of this Court on forfeiture:

A party to a contract who has the right to terminate it by reason of some default by the other party may, nevertheless, waive such a right, and, if he does so, the contract remains in full force and effect. . . . Where a waiver prevents a forfeiture, the law ordinarily permits a liberal construction to be placed on the acts of the party waiving with the view of bringing about a waiver of such a forfeiture.

Sullivan v. Beneficial Life Ins. Co., 64 P.2d 351, 361 (Utah 1937), quoting *Loftis v. Mutual Ins. Co.*, 114 P. 134 (Utah 1911). D&K demonstrated dozens of acts on the part of IHC that recognized the Lease as in force.

In view of the jury's critical and exclusive role of inference-drawing when an implied waiver is claimed, summary judgment was improper on this record containing abundant evidence of acts and failures to act by IHC employees, all of which collectively could lead a jury to find an inference of relinquishment of the right to forfeit the Lease. Thus, the Court should remand for a jury trial on the issue of waiver.

II. It Was Error for the Trial Court to Deny D&K a Jury Trial on Substantial Compliance.

A. Substantial Compliance Precludes Forfeiture of a Lease.

The doctrine of substantial compliance in the landlord-tenant context has been well developed in Utah. In *Cache County v. Beus*, 1999 UT App 134, ¶28; 978 P.2d 1043, the Court of Appeals stated:

Although forfeitures are permitted pursuant to lease provisions . . . Utah's courts have generally disfavored forfeitures in landlord-tenant cases. *See, e.g., U-Beva Mines v. Toledo Mining Co.*, 24 Utah 2d 351, 354, 471 P.2d 867, 869 (1970). "The substantial compliance doctrine furthers that policy by allowing equity to intervene and rescue a lessee from forfeiture of a lease when the lessee has substantially complied with the lease in good faith." *Housing Auth. of Salt Lake City v. Delgado*, 914 P.2d 1163, 1165 (Utah Ct. App. 1996).

In *Beus*, the lease provided for monthly rental payments and granted the landlord the right to terminate the lease upon nonpayment of rent ten days after written notice. When the lessee failed to pay rent for four and one-half months, the landlord sent the tenant a notice exercising its right to terminate. After the ten-day cure period had expired, the landlord sent a second letter reaffirming the termination of the lease. The tenant's check for the

outstanding rent was then mailed and arrived four days after the cure period had expired, but the landlord continued to assert termination. Under the doctrine of substantial compliance, the trial court granted summary judgment denying forfeiture.

The Court of Appeals reversed, holding that the trial court “should determine the materiality of the breach” and then decide whether there was substantial compliance. *Id.* ¶36 (emphasis in original). It ruled that the landlord was entitled to a trial as to whether the tenant had substantially complied with the lease, including resolution of “fact issues in this matter concerning the adverse consequences of forfeiture suffered by Cache County in relation to the damages suffered by Beus by Cache County’s repeated failure to pay rent,” even though those facts had not “explicitly been explored by either party.” *Id.* ¶41. To determine the “particularly fact sensitive” issue of whether the breach was “substantial enough to foreclose the application of equitable principles,” *Beus* identified several factors that can be considered:

(a) the extent to which the injured party will be deprived of the benefit which he reasonably expected; (b) the extent to which the injured party can be adequately compensated for that part of the benefit of which he will be deprived; (c) the extent to which the party failing to perform or offer to perform will suffer forfeiture; (d) the likelihood that the party failing to perform or offer to perform will cure his failure . . . ; (e) the extent to which the behavior of the party failing to perform or offer to perform comports with standards of good faith and fair dealing.

Id. ¶37 (citing Restatement (Second) of Contracts § 241 (1981)).

An additional relevant factor is the landlord’s lack of good faith. *Kearns v. Barney’s Clothes, Inc.*, 38 Misc.2d 787, 789-791, 239 N.Y.S.2d 318, 320-22 (1963) (pretextual breach); *Schwarz v. Sorbello*, 139 N.J.Eq. 542, 548-549, 52 A.2d 683, 687 (1947) (landlord

motivated by desire to sell property to third party); *Cleveland v. Salwen*, 292 Pa. 427, 430-431, 141 A. 155, 156 (1928) (landlord seeking a better price).

B. IHC Failed to Plead and Prove Materiality of D&K's Breach.

Beus followed *Foundation Development Corp. v. Loehmann's, Inc.*, 788 P.2d 1189 (Ariz. 1990), which observed that “nearly all courts hold that, regardless of the language of the lease, to justify forfeiture, the breach must be ‘material,’ ‘serious,’ or ‘substantial.’” *Beus*, 1999 UT App 134, ¶35. *Beus* adopted *Foundation Development's* holding that:

Having been squarely presented with the question for the first time, we decline to hold that any breach, no matter how trivial or insignificant, can justify a forfeiture.

Id., quoting *Foundation Development*, 788 P.2d at 1196. *Beus* directs the trial court to determine materiality of the breach and “then decide whether the breaching party had substantially complied.” *Id.* ¶36. This analytical approach suggests that a landlord fails to state a claim for forfeiture unless it pleads materiality of the breach. Even if materiality is alleged, the tenant can assert substantial compliance as a defense. IHC did not plead materiality.¹⁰ D&K's Answer asserted that IHC had failed to state a claim upon which relief can be granted. R37. Whether a complaint states a claim upon which relief can be granted is a determination of law subject to plenary review on appeal. *5 Am.Jur.2d Appellate Review* § 698. IHC also failed to present evidence showing materiality of D&K's breach.

As a matter of policy, much oppression, expense and consumption of the courts' time could be avoided by requiring a landlord seeking common law ejectment to plead and prove

¹⁰Five years later, in its Supplemental Complaint, IHC recognized the need to allege materiality and did so. R1115F, 1115H, ¶52.

materiality of the tenant's breach, thereby weeding out numerous cases that should never be filed. D&K urges this Court to hold that IHC failed to state a claim upon which relief can be granted and to reverse the judgments below on that basis.

C. The Trial Court Incorrectly Ruled that It Could Not Consider Substantial Compliance after Remand.

In the January 2006 Order, the trial court began its analysis of D&K's substantial compliance defense as follows:

1. D&K requested the Court to reconsider its prior judgment in favor of IHCHS on grounds that D&K has never fully briefed the defense of "substantial compliance," which it claims would preclude IHCHS from exercising the forfeiture provision in the parties' Lease Agreement for the single missed rent payment in March, 1998.

2. The Court finds that D&K has never timely raised this argument and is precluded from making it at this late date on grounds of *res judicata* and/or specifically law of the case.

3. In making this ruling, the Court notes that although D&K's answer to the complaint included a defense of "unconscionability," D&K now argues that unconscionability is not the same defense as substantial compliance which it claims is a matter not yet considered by the Court. D&K never raised the specific defense of "substantial compliance" in its answer filed in 1999, and instead asserted it for the first time in its "Answer to Amended Complaint and Counterclaim" which it filed in 2004

R1370-71. The court was mistaken in stating that D&K had never raised substantial compliance as a defense and that D&K had argued that unconscionability was not the same defense as substantial compliance. Its legal conclusion that D&K was precluded from raising it "on grounds of *res judicata* and/or specifically law of the case" was erroneous.

1. *Substantial Compliance, Which D&K Raised in Its Answer, Is Encompassed by the Defense of Unconscionability.*

D&K raised unconscionability as a defense at the outset of this litigation. R45, Seventh Defense ("Plaintiff's claims are barred by the doctrine of unconscionability."). The

doctrine of substantial compliance is encompassed by and constitutes a major part of the defense of unconscionability in a lease context. *See U-Beva Mines v. Toledo Min. Co.*, 471 P.2d 867, 869 (Utah 1970), in which the Court held that:

at law substantial compliance with the contract, under the circumstances, would purge an erstwhile default under a generally accepted policy against forfeiture, and that otherwise, there would be an unconscionability heretofore condemned by us, justifying the invocation of equitable principles restricting even the freedom of contracting improvidently.

Id. at 869 (footnotes omitted). Thus, the trial court's conclusion that D&K had never raised the defense of substantial compliance was wrong.

2. *D&K Never Argued that Unconscionability Was Not the Same Defense as Substantial Compliance.*

Similarly, the court wrongly concluding that D&K had argued that unconscionability was not the same defense as substantial compliance. D&K is unable to find any support in the record for that conclusion.¹¹ It is most improbable that D&K would have ever made such an argument, as it is both inaccurate and at odds with its interests in this case.

3. *Law of the Case Did Not Prevent the Trial Court from Considering Substantial Compliance.*

In refusing to consider D&K's argument on substantial compliance, the trial court held that D&K "is precluded from making it" (R1371) on grounds of *res judicata* and law of the case, explaining:

[T]his Court does not believe it has had the right or discretion to consider new issues that could have been raised, but were not, from the point of remand. Regardless of when D&K did, in fact, lose the right to assert a new defense, this Court finds and rules that D&K is now *precluded* from asking this Court for reconsideration on the grounds of substantial compliance.

¹¹The fact that the court's language was taken from an order proposed by IHC's counsel may explain how this error occurred. *See* R1337.

January 2006 Order, R1372-73 (emphasis added). In so ruling, the trial court exclusively relied on the unpublished decision of the Court of Appeals in *Smith v. Osguthorpe*, 2005 UT App 11. R1372. The particular portion of the *Osguthorpe* decision quoted by the trial court was its statement that “when there has been an adjudication, it becomes *res judicata* as to those issues which the party had a fair opportunity to present and have determined in the other proceeding.” *Id.* While that statement is accurate when applied to the doctrine of *res judicata*, the *Osguthorpe* panel appears to have incorrectly engrafted that concept of preclusion onto the doctrine of law of the case.

The Court has consistently over the past hundred years applied the doctrine of law of the case only to issues actually or necessarily decided in a previous appeal. In a case decided over a century ago, the Court concluded that:

a decision of an appellate court constitutes the law of the case only as to such questions of law as were involved in the judgment, and as were presented to the court and expressly or impliedly decided

Herriman Irr. Co. v. Keel, 69 P. 719, 721 (Utah 1902). The Court further emphasized this principle in *Helper State Bank v. Crus*, 81 P.2d 359, 362 (Utah 1938):

A previous ruling of the appellate court upon a point *distinctly made* may be only authority in other cases, to be followed and affirmed, or to be modified and overruled, according to its intrinsic merits. But, in the case in which it is made, it is more than authority. It is a final adjudication, from the consequences of which the court cannot depart, nor the parties relieve themselves.”

We have italicized the words “distinctly made,” calling attention to the fact that it is only such points as are distinctly made that bind the court on a second appeal.

(Citations omitted; emphasis in original).

More recent decisions of the Court concerning law of the case have not deviated from the rule articulated in those early cases. *E.g.*, *Gildea v. Guardian Title Co. of Utah*, 2001 UT 75, ¶9; 31 P.3d 543 (“issues resolved by this court on appeal bind the trial court on remand”); *Thurston v. Box Elder County*, 892 P.2d 1034, 1037 (Utah 1995) (“a decision made on an issue during one stage of a case is binding in successive stages of the same litigation”); *Plumb v. State*, 809 P.2d 734, 739-740 (Utah 1990) (law of the case expresses the practice generally to “refuse to reopen what has been decided”). In *Thurston*, the Court added that “under the law of the case, the trial court was required to follow the decision of this Court in *Thurston’s* first appeal with respect to the *issues that were decided therein*.” 892 P.2d at 1038 (emphasis added). The Court’s longstanding adherence to the rule that law of the case applies only to issues actually decided is shared by the majority of courts in other jurisdictions.¹²

In deciding *Osguthorpe*, the Court of Appeals relied heavily upon and repeatedly quoted *D’Aston v. Aston*, 844 P.2d 345 (Utah Ct.App.1992), a case applying *res judicata*. For the most part *D’Aston* was cited for the proposition that any part of a judgment not appealed from remains in effect even if other parts are reversed. That rule appears to have been the primary basis for the *Osguthorpe* decision. Unfortunately, *Osguthorpe* also contains an

¹²*E.g.*, *Florida Dept. of Transp. v. Juliano*, 801 So.2d 101, 107 (Fla. 2001) (law of the case bars consideration only of legal issues actually considered and decided in a former appeal); *City of Kalamazoo v. Department of Corrections*, 229 Mich.App. 132, 135-136, 580 N.W.2d 475, 477-478 (1998) (same); *Gilligan v. Reers*, 255 A.D.2d 486, 487, 680 N.Y.S.2d 621, 622 (N.Y.A.D. 2 Dept. 1998) (law of the case applies only to legal determinations necessarily resolved on the merits in the prior decision); see 18B Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4478 at 649 (2002) (“Actual decision of an issue is required to establish law of the case. Law of the case does not reach a matter that was not decided.”).

overly broad dictum that tends to conflate the doctrines of *res judicata* and law of the case. The Court of Appeals said that, under law of the case, “we will not consider issues that arose prior to, and that could have been raised as issues in, the first appeal.” 2005 Utah App. 11. The trial court apparently interpreted this statement to mean that it was foreclosed from consideration of any issue that could have been raised prior to the first appeal. That reading of *Osguthorpe* would expand law of the case dramatically beyond the precedents of this Court, as discussed above.

There is another equally compelling reason why the trial court made a serious error in relying on *Osguthorpe*. In that case, the decision on the prior appeal was a “general affirmance” on multiple issues with a remand for a finding that the lower court had examined proffered extrinsic evidence in determining that the lease was an integrated document. *Id.* at 1. In other words, the judgment of the trial court was affirmed in nearly all respects but remanded so that a particular finding could be made or particular evidence could be considered if it had not been previously considered. In sharp contrast, in *D&K I*, the trial court’s decision was reversed and no part of it was affirmed. The conclusion is inescapable and virtually self-evident that “a vacated judgment has no preclusive force either as a matter of collateral or direct estoppel or as a matter of the law of the case.” *No East-West Highway Committee, Inc. v. Chandler*, 767 F.2d 21, 24 (1st Cir.1985); accord, 18B Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4478 at 655 (2002) and cases cited therein. Thus, the subsequently vacated Memorandum Decision rendered May 31, 2001, cannot possibly serve as a basis for application of law of the case.

From the foregoing analysis, it follows that the trial court's ruling that it was precluded from considering substantial compliance was plainly wrong.

Even if *Osguthorpe*'s dictum that issues that could have been raised in a prior appeal are closed to further consideration were correct, the trial court's assumption that the issue of substantial compliance could have been raised in the prior appeal was incorrect. That issue had not been briefed or even mentioned by IHC in its Motion for Partial Judgment on the Pleadings, nor had it been addressed by D&K or by the trial court. Under those circumstances, it could not have been raised in the prior appeal.

The general rule is that in order to appeal an issue, "a party must timely bring the issue to the attention of the trial court, thus providing the court an opportunity to rule on the issue's merits."

Albores v. Bracamontes, 2006 UT App 204, ¶4; 138 P.3d 106, quoting *LeBaron & Assocs. v. Rebel Enters.*, 823 P.2d 479, 482-83 (Utah Ct.App.1991).

4. *The Trial Court Should Have Considered Substantial Compliance in Light of Rule 54(b) and the Standards Applicable Thereto.*

At the trial court level, law of the case cannot override the principles established by Ut.R.Civ.P. 54(b),¹³ as the Court articulated in the following statement:

Because the trial court's initial fee determination was not a final order, it is subject to revision by the same judge who entered it until a final judgment is

¹³That rule provides in pertinent part:

[A]ny order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

handed down. *See* Utah R.Civ.P. 54(b). Therefore, the law-of-the-case doctrine was not offended by the trial court's October 31st order.

Plumb v. State, 809 P.2d 734, 740 (Utah 1990). The Court reaffirmed this principle in *Macris v. Sculptured Software, Inc.*, 2001 UT 43, ¶29; 24 P.3d 984, where the trial court had reversed its previous summary judgment:

However, the law of the case doctrine does not prevent a judge from reconsidering his or her previous nonfinal orders. *Plumb v. State*, 809 P.2d 734, 739 (Utah 1990). Rule 54(b) of the Utah Rules of Civil Procedure specifically contemplates reconsideration by the court prior to entry of a final judgment on all claims

The factors applied in reconsidering a prior decision under Rule 54(b) have been summarized as follows:

A court can consider several factors in determining the propriety of reconsidering a prior ruling. These may include, but are not limited to, when (1) the matter is presented in a "different light" or under "different circumstances;" (2) there has been a change in the governing law; (3) a party offers new evidence; (4) "manifest injustice" will result if the court does not reconsider the prior ruling; (5) a court needs to correct its own errors; or (6) an issue was inadequately briefed when first contemplated by the court. *State v. O'Neil*, 848 P.2d 694, 697 n. 2 (Utah App.), *cert. denied*, 859 P.2d 585 (Utah 1993).

Trembly v. Mrs. Fields Cookies, 884 P.2d 1306, 1311 (Utah App. 1994) ("[T]he law of the case doctrine does not prohibit a judge from catching a mistake and fixing it." *Gillmor v. Wright*, 850 P.2d 431, 439 (Utah 1993) (Orme, J., concurring).").

If the trial court had believed that it was free to apply the factors listed in *Trembly* to the unique procedural history of this case, virtually every factor would have supported reconsideration of the July 29, 2004 Order. Although D&K cited Rule 60(b)¹⁴ as the basis for its Motion for Reconsideration, it also expressly relied on Rule 54(b). R1261 n.3; R1285;

¹⁴Because Rule 60(b) applies only to final order, it was not literally applicable.

Transcript R1384 at 44. The factors addressed by D&K were those of different circumstances, change in governing law, manifest injustice, inadequate briefing and (implicitly) the need to correct an error.

As described in detail above, after IHC moved for partial judgment on the pleadings in April 2000, D&K countered with a motion for summary judgment. In its motion, D&K relied only on waiver and an estoppel defense based on the long-standing failure of the landlord to require strict compliance with the Lease. The waiver defense appeared to be dispositive under *Woodland Theatres* and could have resolved the case without a trial or extensive discovery. In a remarkable change of course, however, the Court in deciding *D&K I*, rejected the settled rule that acceptance of rent or other benefit under a lease, after notice of a breach, constitutes a waiver of the right to enforce forfeiture for that breach. The Court held that acceptance of rent is merely one factor to be considered in the waiver analysis and that *Soter's* had “implicitly overruled” *Woodland Theatres*. In *Soter's*, however, the Court had expressly rejected only “*Hunter* [*v. Hunter*, 669 P.2d 430 (Utah 1983),] and its progeny.” Inasmuch as *Woodland Theatres* was decided six years prior to *Hunter* and was consistent with century-old precedent, *Woodland Theatres* was clearly not “progeny” of *Hunter*, and D&K could not have foreseen its demise.

In light of the substantial change in governing law, as well as the unique procedural posture in which the issue of lease forfeiture first arose, there occurred a confluence of three of the *Trembly* factors—“different circumstances,” a change in governing law and inadequate (*i.e.*, no) briefing of the substantial compliance defense in the early stages of the case. However labeled, the effect was the same. Although D&K had relied on what it reasonably

believed to be sound defenses on which a judgment in its favor could be obtained as a matter of law, the world abruptly changed when *D&K I* was decided. In attempting to follow that decision, the parties initially focused their attention on the waiver defense, with IHC asking for a modification of the prior Memorandum Decision while D&K argued that the waiver issue could be resolved only after a trial on the merits. After it became apparent that the trial court was unwilling to conduct a jury trial on waiver, D&K in May 2004 began urging it to consider substantial compliance, which had never been briefed previously.

The other factors relied upon by D&K in seeking reconsideration are fairly characterized as manifest injustice and the need to correct error. In March 1998, D&K had possessed the leased premises for less than four years under a Lease that, if it so elected, could have had a total duration of 20 years. R12. D&K's sole offense was that it failed to tender the March rent payment of \$3,280 until April 16, 1998—a total of 36 days after the grace period had passed. R120, ¶10; R18, ¶17.1[a]. Interest on \$3,280 at the legal rate for the full 46 days would have come to \$41.34. Statement of Facts, at 7, *supra*. In contrast to such a trivial hurt to IHC, D&K had spent \$200,000 in improving the leased building. R913. D&K's profits from operating its business on the leased premises were \$600,000 per year. R914. Its business was not transferable to another location due to licensing issues. *Id.* Plainly, forfeiture of the Lease would have a devastating impact on D&K. Since the Lease provides for a 10% service charge on any past-due obligations owed to the landlord (R21), IHC would have been well-compensated for the short delay in payment of the March 1998 rent in that it would have received a full year's interest at the legal rate for a six-week delay. For D&K, considering only one year's profits, its loss upon forfeiture would be at least \$800,000 (cost

of improvements and one year's profits)—shockingly disproportionate to a 46-day delay in paying \$3,280. If just five years' losses are considered, the injustice to D&K rises to staggering proportions. It would lose \$3,200,000 in consequence of a delay worth \$41.34.

In *Beus*, after having failed to pay rent for six consecutive months followed by a termination notice and last-minute cure, the tenant again failed to pay rent for a period of over four months. The frustrated landlord again sent the tenant a notice exercising its right to terminate subject to a ten-day cure period. After the cure period had expired, the landlord sent a second letter reaffirming termination. The tenant's check for the outstanding rent was then mailed and arrived four days after the cure period had expired. The result was summary judgment in favor of the tenant on the issue of substantial compliance, followed by reversal, remand and trial, at which the tenant escaped forfeiture on the basis of substantial compliance. In light of *Beus*, D&K, which missed one month's rent and was given no cure period, presented a compelling factual basis for a trial on the issue of substantial compliance. The trial court's refusal to consider that issue under the unique circumstances of this case worked an extreme and manifest injustice on D&K.

D. D&K Submitted Sufficient Facts to Support a Finding of Substantial Compliance.

In a statement perplexing both for its patently erroneous conclusion and its complete lack of explanation, the trial court ruled in its January 2006 Order that it “does not find facts that would support a substantial compliance defense.” R1373. In *Beus*, the Court of Appeals directed the trial court first to determine “the *materiality* of the breach, and then decide whether the breaching party had substantially complied with the contract.” 1999 UT App.

¶36; 978 P.2d at 1050. To assist in the first step of the analysis, *Beus* identified several factors that can be considered:

(a) the extent to which the injured party will be deprived of the benefit which he reasonably expected; (b) the extent to which the injured party can be adequately compensated for the part of the benefit of which he will be deprived; (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture; (d) the likelihood that the party failing to perform or to offer to perform will cure his failure . . . ; (e) the extent to which the behavior of the party failing to perform or offer to perform comports with standards of good faith and fair dealing.

Id. ¶37; 978 P.2d at 1050 (citing Restatement (Second) of Contracts § 241 (1981)). The evidence necessary to evaluate each of these factors was present in the record, as shown by the following summary:

Factors a and b—Extent of deprivation of benefit to landlord and adequacy of compensation therefor. The Lease was in the record. R12-22. The benefits to the landlord thereunder consisted of the tenant's payment of rent, property taxes, common area expenses, insurance, maintenance costs and utilities. The only possible deprivation faced by the successor landlord, IHC, was interest on the March 1998 rent for 46 days—a total of \$41.34—in view of the fact that D&K actually paid the rent on April 16, 1998. R120. After its designated agent had given D&K a receipt verifying acceptance of the March rent, IHC changed its corporate mind and returned D&K's check for March rent plus the 10% service charge the next day. *Id.*; R127. In *Beus*, the court discussed *Foundation Development*, noting that "the landlord was not seeking rent, but rather forfeiture." Precisely the same is true of IHC. Thus, any deprivation of rent was self-inflicted. Given D&K's tender of the 10% service charge on the late payment (R127), IHC would have been more than fairly compensated for the trivial loss of interest on the March rent payment.

Factor c—Extent to which D&K will suffer forfeiture. The magnitude and gravity of the forfeiture advocated by IHC was a matter of record, as explained above. Relevant portions of the record are found at R913-14.

Factor d—Likelihood of cure by D&K. The fact that D&K had paid the March 1998 rent was a matter of record. R120. The likelihood of cure was 100% if IHC would only have accepted it rather than returning D&K's check.

Factor f—Extent to which D&K's conduct was consistent with good faith and fair dealing. The record showed that D&K had a history of late payments with IHC's predecessor in interest under the Lease. The Lease itself reflected that there were six months' rent owing when the Lease was signed. R13. D&K had been late in making payments to IHC's predecessor on multiple occasions. R118-19. After IHC acquired the property, D&K was late in making its first payment to IHC in February 1998. R119-20. Although March rent was missed, D&K paid April rent on time. R120. When D&K was notified of the missing rent payment for March, it immediately made that payment. R120. Thus, even though the original landlord had obviously permitted D&K to make rent payments on a delayed basis, when IHC entered the picture, D&K attempted in good faith to perform according to the stricter expectations of IHC. IHC, of course, did not want performance, but only forfeiture. The want of good faith is found only on IHC's part.

In *Beus*, the Court of Appeals determined that a trial was required concerning the "adverse consequences Cache County will suffer if the Lease is terminated compared to the damages suffered by the Beus Group due to Cache County's default." Certainly, D&K had presented evidence of the adverse consequences it would suffer upon termination of the

Lease. R913-14 and discussion at 6-7, *supra*. Since it cannot be said that D&K failed to present evidence that would support substantial compliance, the trial court's analysis of substantial compliance was fatally flawed and patently erroneous. This case should be remanded for trial on the issue of substantial compliance (as well as waiver).

III. The Trial Court's Award of Attorney Fees to IHC Had No Legal Basis.

A. Fees Can Be Awarded Only in Accordance with, and to the Extent Permitted by, the Explicit and Unambiguous Language of the Lease.

Attorney fees are awarded as a matter of right only under contract or statute. *Footte v. Clark*, 962 P.2d 52, 54 (Utah 1998). When fees are provided for by contract, they "are allowed only in strict accordance with the terms of the contract." *Id.*; *Maynard v. Wharton*, 912 P.2d 446, 451 (Utah App. 1996) ("attorney fees authorized by contract are awardable only in accordance with the explicit terms of the contract and only to the extent permitted by the contract"). Moreover, unless the attorney-fee provision is ambiguous, the plain language of the provision controls. *Premier Van Schaack Realty Inc. v. Sieg*, 2002 UT App 73, ¶17; 51 P.3d 24.

B. IHC's Award of Attorney Fees Relied Solely on Section 23 of the Lease, Which Did Not Apply Because the Action Was Not Filed During the Term of the Lease.

Two unambiguous provisions of the Lease address attorney fees. First, Section 17.2 of the Lease provides in part:

Upon occurrence of the events set forth in Section 17.1 [Default by Tenant], 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] Terminate this Lease by written notice to Tenant. In the event of such termination, Tenant agrees to immediately surrender possession of the Demised Premises. Should Landlord terminate this Lease, Tenant shall have no further interest in this Lease or in the Demised Premises, and the Landlord may recover from Tenant all damages it may incur by reason of Tenant's breach, including [1] the cost of recovering the Premises, [2] reasonable attorney's fees, and [3]

R18-19. Second, Section 23 of the Lease provides:

In the event that at any time during the term of this Lease either Landlord or the Tenant institutes any action or proceeding against the other relating to the provisions of this Lease or any default hereunder, then the unsuccessful party in such action or proceeding agrees to reimburse the successful party for the reasonable expenses of such action including reasonable attorney's fees, incurred therein by the successful party.

R20.

As between two contract provisions, one being more specific than the other, the more specific contract provision controls. *See* Restatement (Second) of Contracts § 203(c) (1981). Here, Section 17.2 addressed the precise situation in which the parties found themselves. In the "termination" for default context, "damages" for "recovering the Premises" include "reasonable attorney's fees." IHC purported to terminate the Lease on April 14, 1998, based on the asserted failure of D&K to pay rent. R4-5; R29-30. Subsequent to termination, IHC clearly had a claim to recover its reasonable attorney's fees as damages. IHC's Complaint asserted a claim for damages. R1, 8-9.

The Complaint contained three causes of action, each based on the fundamental premise that the Lease had been terminated on April 14, 1998. IHC's Complaint alleged:

"IHCHS properly and effectively terminated the Lease Agreement in the manner provided in the Lease Agreement."

"IHCHS properly and effectively terminated the Lease Agreement according to the provisions of Sections 17.1 and 17.2 therein by means of the April 14, 1998 Notice;"

“The Lease Agreement was terminated on April 14, 1998”

R6-8 at ¶¶26, 32.c, 32.e. IHC initially requested an award of attorney fees “as provided in Sections 17.2 and 23 of the Lease.” R9.

In the July 2004 Order, the court ruled that IHC was entitled to judgment on its claims for forfeiture and declaratory judgment and that “D&K has forfeited the Lease.” R1100-01. In so ruling, the trial court agreed with and granted relief on the premise stated in the above-quoted allegations of the Complaint. The trial court’s endorsement of this premise is explicit in its January 2006 Order that “termination of the Lease . . . became effective as of the date of [IHC’s] April 14, 1998 notice terminating the Lease.” R1374.

Assuming *arguendo* that IHC’s termination of the Lease was valid, the foregoing conclusion of the trial court was correct. Numerous decisions of this Court make clear that, when a landlord elects to terminate a lease for breach, the termination is effective, if at all, when the notice is given. *E.g.*, *Dang v. Cox Corp.*, 655 P.2d 658, 661 (Utah 1982) (“a notice of forfeiture is sufficient to terminate a lease”); *Shoemaker v. Pioneer Investments*, 381 P.2d 735, 736 (Utah 1963) (lease terminated on date of letter from landlord declaring termination); *Jacobson v. Swan*, 278 P.2d 294, 301 (Utah 1954) (notice unconditionally declaring lease terminated was sufficient to terminate the lease for breach); *Forrester v. Cook*, 292 P. 206, 213 (Utah 1930) (because tenancy ceased upon giving of a notice of forfeiture, action was not one to enforce contract and no attorney’s fees could be awarded). These cases are in accord with the general state of the law.

[A] forfeiture which the lessor elects to assert terminates the lease and with it all obligations, covenants, and stipulations contained in the lease dependent upon the continuance of the term

49 *Am. Jur. 2d Landlord and Tenant* §257 at 282 (2006). In short, the court's role is not to terminate the lease but to decide whether the landlord's termination was effective.

In August 2005, however, IHC filed a Combined Motion to Dismiss Damages Claims and Award Attorney's Fees and Costs. R1205. In it, IHC moved to "dismiss any remaining damage claims it has in its original amended complaint"¹⁵ and sought an award of attorney's fees. *Id.* IHC's accompanying Memorandum made clear that it sought attorney fees only pursuant to Section 23 of the Lease. R1202. In its response D&K stipulated "to IHC's waiver of damages." R1234.

Section 23 of the Lease unambiguously permits an award of attorney fees only in an action commenced "during the term of this Lease." IHC's action was filed thirteen months after the date IHC terminated the Lease as affirmed by the trial court. The inescapable conclusion, therefore, is that IHC could not recover attorney fees pursuant to Section 23.

C. After Ruling that the Lease Had Been Terminated in 1998, the Court Inconsistently Ruled that the Lease Was Still in Force Years Later So that It Could Award Attorney Fees.

The trial court made the following statement to IHC's counsel at the November 22, 2005 hearing on attorney fees:

But here's my dilemma. I think the lease, you terminated the lease and I think you're correct that the termination date relates back to the date of the notice of termination.

¹⁵Insofar as D&K can determine, IHC had never filed an amended complaint.

Transcript, R1384 at 66-67.¹⁶ Following the hearing on November 22, 2005, the court ruled with respect to attorney's fees as follows in its January 2006 Order (R1374):

15. IHCHS' request for attorney's fees is hereby deferred pending further briefing from the parties on the impact and effect of D&K's holdover following IHCHS' termination of the Lease, which the Court rules became effective as of the date of its April 14, 1998 notice terminating the Lease.

After consideration of further briefing by the parties "on the question whether fees may be awarded pursuant to the lease provision, following eviction" (R1385), the court issued a Ruling and Order dated May 8, 2006, awarding IHC entitlement to attorney fees under Section 23. The basis for this award was explained as follows:

The premise of my question, which I now find to be flawed, was that upon eviction the Lease terminated, and Section 23 could not be invoked, except possibly under a holdover theory. Careful consideration of the case cited by both parties, *Cottonwood Mall Company v. Sine*, 767 P.2d 499 (Utah 1989), persuades me of my error.

Section 23 refers to actions or proceedings instituted during the term of the Lease. Unlike the lease in *Cottonwood Mall*, and other leases referred to in defendant's analysis, the Lease in this case had not reached the end of its term. *Until this court (including my predecessor) determined that plaintiff's ejectment action at common law was successful, the Lease was not terminated.*

R1385-1386 (emphasis added). The court further ruled that IHC had expressly waived any claim to attorney's fees under Section 17.2 of the Lease and could not recover fees under that section. R1385 n.1.

In reversing field, the court, without briefing or argument thereon, adopted a novel theory advocated by neither side, in glaring contradiction of the consistent precedent of this Court cited above. That theory has a fatal logic flaw. If the Lease were still in force after IHC

¹⁶The nature of the court's "dilemma" is revealed by its statement earlier in the same hearing that "I detest the language here about in the term of the contract," apparently referring to the wording of Section 23 of the Lease. *Id.* at 56.

filed its Complaint for purposes of awarding attorney fees, then it must have remained in force for all other purposes as well, and when D&K paid the March 1998 rent, IHC would have had no justification for returning the payment. The trial court's award of attorney fees was diametrically inconsistent with its prior decision that termination had occurred on April 14, 1998, violating basic notions of law of the case. Its May 2006 Order is supported by neither legal authority nor logic and must be reversed, leaving no legal basis for an award of attorney fees to IHC.

IV. Even If IHC Were Entitled to Attorney Fees, the Trial Court Erred in Awarding Fees Without Essential Evidence and in Failing to Require IHC to Allocate Its Fees to Matters on Which It Prevailed.

A. An Award of Fees Requires Evidence of Reasonableness, Allocating of Fees to Successful Claims and Issues, and Specific Findings of Fact.

If, contrary to the foregoing analysis, IHC were entitled to an award of attorney's fees at all, it was required to provide evidence sufficient to (a) satisfy the standard in the trial court's May 8, 2006 Order requiring that the fees be "reasonable and necessary" and (b) comply with the following rules articulated in the decisions of this Court:

"An award of attorney fees must be based on the evidence and supported by findings of fact." *Cottonwood Mall Co. v. Sine*, 830 P.2d 266, 268 (Utah 1992). One who seeks an award of attorney fees, therefore, has the burden of producing evidence to buttress the requested award. *See id.* at 268; *Hal Taylor Assoc. v. Unionamerica, Inc.*, 657 P.2d 743, 750-51 (Utah 1982). When the evidence presented is insufficient, an award of attorney fees cannot stand. *See Dixie State Bank*, 764 P.2d at 989. In this regard, we have mandated that a party seeking fees must allocate its fee request according to its underlying claims. *See Cottonwood Mall*, 830 P.2d at 269-70. Indeed, the party must categorize the time and fees expended for "(1) successful claims for which there may be an entitlement to attorney fees, (2) unsuccessful claims for which there would have been an entitlement to attorney fees had the claims been successful, and (3) claims for which there is no entitlement to attorney fees." *Id.* at 269-70; *see also Valcarce v. Fitzgerald*, 961 P.2d 305, 317 (Utah 1998) (petition for rehearing pending).

Foote v. Clark, 962 P.2d 52, 55 (Utah 1998). The duty to allocate applies not only to claims but to issues if there are issues on which the party seeking an award did not prevail.

Of course, a reasonable fee will compensate [the prevailing party] only for those fees necessarily incurred in resolution of issues in [its] favor, and should not include fees relating to the issues resolved in [the other party's] favor.

Mountain States Broadcasting Co. v. Neale, 783 P.2d 551, 556, n.10 (Utah App. 1989) (citations omitted).

If the party seeking an award of attorney's fees has furnished the required evidentiary basis, the trial court is charged with the following duties:

The trial court should also document its evaluation of the requested fees' reasonableness through findings of fact. *See Cabrera*, 694 P.2d at 624. These findings should mirror the requesting party's allocation of fees per claims and parties and should support any award issued. *See id.*; *Valcarce*, 961 P.2d at 317. They enable the reviewing court to make an independent review of the fee award, and whether the findings are sufficient to support the award is a question of law reviewed for correctness. *See id.* at 315, 317. The findings of fact, furthermore, should detail the factors considered dispositive by the trial court in calculating the award. *See Cabrera*, 694 P.2d at 624.

Foote v. Clark, 962 P.2d at 55. With respect to the duty of the moving party to categorize and allocate its fees among successful and unsuccessful claims, this Court has warned:

Noncompliance with these requirements makes it difficult, if not impossible, for the trial court to award the moving party fees because there is insufficient evidence to support the award.

Jensen v. Sawyers, 2005 UT 81, ¶132; 130 P.3d 325.

B. IHC Failed to Make the Evidentiary Showing Required to Support Any Award of Fees.

1. *IHC Did Not Demonstrate Reasonableness or Necessity of Its Fees.*

When IHC submitted its 90-page Affidavit of Attorneys' Fees and Verified Memorandum of Costs, it included the time of 24 attorneys and paralegals over a period

beginning March 22, 1999 and ending May 17, 2006. R1388-1477. Its counsel made no visible attempt to exercise billing discretion to address inefficiencies, duplication of work by multiple lawyers, unnecessary activities, work unrelated to the litigation with D&K, or inadequate time descriptions. Instead, it apparently included every minute billed during the entire period of over seven years. No actual invoices to IHC were supplied. The Affidavit made no attempt to confine the fees requested to matters on which IHC was successful or to allocate time entries to specific matters.

IHC's Affidavit baldly asserted without foundation that the hourly rates "were reasonable and consistent with rates charged by lawyers with similar experience at similar firms." R1389. The description of services in the billing detail was often too cryptic to enable the reader to determine what was done or to which aspect of the case the services related.

The billing included activities having nothing to do with the litigation of the issues on which IHC prevailed in this case. By no means exhaustive, but only by way of example, such activities included interviews with newspaper reporters (R1472, 2/14/06 entry), monitoring a Utah Department of Alcoholic Beverage Control ("DABC") proceeding relating to another entity (R1440, 10/27, 10/28, 10/29/03 entries; R1441, 10/30, 10/31 and 11/4/03 entries; R1442, 11/10/03 entry; R1455, 6/14/04 entry), researching forfeiture based on "illegal activities" and related investigation (R1441, 10/29 and multiple 10/30/03 entries), communicating with Murray City officials (R1447, 3/10/04 entry; R1469, 6/10, 6/17, 6/22/05 entries; R1473, 4/25/06 entry), preparing papers to obtain restitution of the premises without having obtained a legitimately final order (R1447, 3/11/04 entry; R1448, 3/11 and 3/19/04 entries; R1457, 6/21/04 entry), seeking information about other lawsuits (R1456, 6/18/04

entry), “getting out of mediation” in a prior appeal (R1464, 9/8/04 entry), and dealing with issues involving a fire protection system and a new notice of default later abandoned by IHC (R1462, 8/20, 8/23, 8/24/04 entries).

Since IHC’s Affidavit was liberally laced with scores of improper entries, counsel’s duty of candor required them to identify such entries and deduct all charges for them, rather than simply hoping they would go undetected. The Affidavit did not satisfy IHC’s burden of showing that its hourly rates were reasonable, that the number of lawyers working on the case was reasonable, that the time spent on the case was reasonable or that the fees were “necessarily incurred” as required by *Neale*.

In D&K’s Response filed on August 21, 2006 (R1485), it pointed out IHC’s failure to allocate time to matters on which it prevailed, complained of the lack of specificity in time descriptions and advocated that IHC should be awarded no fees because it had failed to carry its burden of proof as to reasonableness of the fees it claimed. R1486-88, 1491. Having largely failed to rectify these deficiencies, IHC did not meet its burden of proof as to reasonableness and necessity of the fees and costs for which it sought judgment against D&K.

2. *IHC Failed to Restrict and Allocate Fees and Costs to Matters on Which It Was Successful.*

In its Response, D&K identified at least seven discrete matters in which IHC did not qualify as the prevailing party. R1488-90. These are listed at 12-13, *supra*. D&K identified specific periods of time covered by the billing detail that appeared to relate to matters on which IHC was not successful. R1491-95. Obviously reluctant or unable to do the work of allocation, IHC argued that “D&K’s response has also proven what a fruitless exercise would

result if IHCHS attempted the allocation D&K now demands.” R1499. Although IHC offered to attempt to “make a more detailed assessment of where fees were spent” if the court required it (R1500), the Court did not do so.

In its August 29, 2006, ruling the trial court acknowledged that “allocation is the task of the party claiming fees,” but faulted D&K for not having done IHC’s allocation work and ultimately ruled that “failure to allocate (beyond the detailed billing) shall not preclude an award.” R1503. The trial court agreed with D&K in one respect, ruling that it had no ability to award fees for the first or second appeal. *Id.* It ordered IHC to file a revised fee submission eliminating all fees and costs for either appeal. R1504.

IHC’s revised fee submission improperly *added* time from August 10, 1998, to March 22, 1999 (all of which predated the action), and from May 18 through July 25 of 2006. R1512-14; R1598-99. In response to the court’s order to allocate fees for the two appeals, IHC unverifiably represented that it had removed “approximately \$34,742.40” of fees and costs. R1507. However, the number of pages used to itemize fees grew from 86 to 88 in the revised submission.

D&K responded, contending that IHC had failed to comply with the trial court’s order to remove all fees and costs incurred on either appeal, to show how the revised amount of its requested fee award was calculated, and to deduct any costs, and that the new submission still included numerous time entries *identified by D&K* for work relating to stays pending appeal, appeal bond issues and docketing statements. R1600-06. IHC conceded on a few minor items and offered modest (and unverifiable) reductions in its claimed fees and costs, but continued to assert entitlement to fees for all work relating to stays pending appeal and related bonds

on appeal. R1608-12. The trial court issued its October 10, 2006 Order Re: Fees and Costs, awarding IHC \$303,514.59 in fees and \$3,750.31 in costs. R1614-15. The court's reasoning included the statement, "[i]n 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." R1615.

The burden of providing a clear and adequate evidentiary basis for an award of attorney fees rested squarely on IHC. It chose to ignore its duty to allocate and instead asked the court to award fees indiscriminately on the basis of "IHCHS' entire billing history , including all time worked on every issue, the rates charged and the like." R1501. This Court's warning in the *Sawyers* case fell on obstinate ears. IHC's noncompliance with the requirement that it present the evidence necessary for a proper allocation of fees and costs to matters on which it was successful made it impossible for the trial court properly to award fees because there was insufficient evidence to support the award requested.

C. The Trial Court's Fee Award Was Legally Erroneous.

1. *The Trial Court Erroneously Awarded IHC Fees for Matters on Which it Was Not Successful, Contrary to Applicable Precedent.*

D&K argued IHC could not be awarded attorney fees for the battle IHC waged from early March until July 29, 2004 to obtain a judgment which it could immediately execute to obtain possession of the leased premises. R1489-90. The battle hinged on IHC's quest for certification of the trial court's order as final pursuant to Ut.R.Civ.P. 54(b).¹⁷ The initial

¹⁷See documents filed beginning with R838, R840, R858, R867, R882, R894, R897, R904, R906, R1098, and R1108. Dozens of time entries mentioning Rule 54(b) are included in the fees awarded by the trial court. See R1572-79.

result was that the trial court certified its order as final. Transcript, R1108 at 37-38; R1098, 1101. That quickly led to another pitched battle over D&K's request for a stay of execution pending appeal.¹⁸ D&K prevailed in obtaining the stay. R1089-95.

D&K specifically objected to IHC's inclusion of fees devoted to the battles over Rule 54(b) certification and stay pending appeal, citing *TS 1 Partnership v. Allred*, 877 P.2d 156 (Utah App. 1994). R1489. In that case, a landlord, like IHC, had obtained partial summary judgment and an improper Rule 54(b) certification, forcing the tenant to file an appeal and seek a stay of execution pending appeal. The tenant's appeal was dismissed for lack of jurisdiction. On remand the trial court awarded the landlord attorney fees both for the certification and the appeal. On the next appeal, the Court of Appeals reversed, explaining as follows:

Thus, although this court dismissed Allred's appeal, it agreed with Allred that the summary judgment on TS1's complaint was not a final executable order. *Under these circumstances, the trial court's award of attorney fees to TS1 for its unsuccessful certification of a nonfinal judgment is unreasonable.* Further, the improper certification created a procedural morass that left Allred with no reasonable option but to appeal the summary judgment motion. Accordingly we hold that both parties should bear their own costs relating to the certification and appeal of TS1's original summary judgment. Thus we reverse the trial court's award of attorney fees relating to the certification procedure and appeal therefrom

Id. at 160 (emphasis added) (footnote omitted). In light of *Allred*, a party who obtains an improper Rule 54(b) certification is entitled to recover neither its attorney fees for having

¹⁸See documents filed beginning with R912, R944, R947, R950, R1003, R1053, R1076, R1081, R1086, R1089. Numerous time entries relating to the stay of execution are included in the fees awarded by the trial court. See R1578-86.

done so nor the fees resulting from the ensuing “procedural morass,” including the ill-fated appeal. Such fees are unreasonable as a matter of law and cannot be awarded.

Even after the trial court ordered IHC to eliminate all fees and costs relating to the first two appeals, IHC’s revised (and longer) fee submission included dozens of entries relating to those appeals, as D&K clearly demonstrated. R1601-06. Although IHC conceded with respect to a minute portion thereof (those relating to mediation), it continued to claim all the fees to which D&K had repeatedly objected relating to the appeals or stay motions. R1609-11. The trial court awarded those fees, incorrectly faulting D&K for the “absence of specific challenges to tasks and/or time spent.” R1615. For this reason alone, the award of attorney fees must be reversed.

2. *The Trial Court Improperly Shifted the Burden of Allocating Fees to D&K and Failed to Make Essential Findings.*

In fairness to it, the trial court should never have been charged with the monumental task of sifting through 88 pages of often cryptic time entries and attempting to allocate them among numerous matters arising in the course of a seven-year fight. It was unfair and improper, however, for the trial court to impose that task on D&K, yet that is the effect of faulting D&K for not making “specific challenges to tasks and/or time spent.” Although D&K had assisted the court by identifying specific time entries for which an award of fees was not permissible (R1601-06), those efforts were disregarded.

The court’s failure to require IHC to allocate fees except with respect to the two appeals unfairly prejudiced D&K where the court relied on D&K’s perceived failure to challenge specific tasks or time entries as a basis for awarding fees to IHC without the necessary allocation.

The only “findings” made by the trial court with respect to the amount of fees were those contained in the October 10, 2006 Order addressing hourly rates, designating IHC as the prevailing party (except on its “voluntarily dismissed supplemental complaint”), characterizing the litigation as “complex and very aggressively contested” and ruling that the cost of mediation in connection with the second appeal was not part of IHC’s effort in prevailing on its claims. R1614-15. Beyond this, the trial court did not venture to make the findings required by *Footte*, namely that they must “mirror the requesting party’s allocation of fees per claims and parties and should support any award issued.” 962 P.2d at 55. In the absence of such findings, the award of attorney fees cannot be sustained.

CONCLUSION AND RELIEF SOUGHT

In light of the serious errors discussed above, the Court should:

1. Reverse and vacate the July 29, 2004 Order and the November 11, 2006 Final Order and Judgment insofar as they ruled that IHC is entitled to judgment as a matter of law on its claims for lease forfeiture and declaratory judgment;
2. Reverse and vacate the January 23, 2006 Order and the November 11, 2006 Final Order and Judgment insofar as they denied D&K’s motion to reconsider with respect to substantial compliance;
3. Remand for jury trial on waiver, materiality and substantial compliance;
4. Reverse and vacate the May 8, 2006 Order and the November 11, 2006 Final Order and Judgment (as to attorney fees) and rule as a matter of law that IHC is not entitled to an award of attorney fees;

5. In the alternative to item 4, reverse and vacate the August 29, 2006 Order, the October 10, 2006 Order and the November 11, 2006 Final Order and Judgment and deny fees altogether for IHC's failure to apportion fees or remand with instructions to require IHC to remove from its fee request all work performed on matters as to which it did not prevail; and

6. Award D&K its attorney fees and costs for this appeal in accordance with the terms of the Lease if it should be the prevailing party upon trial of this case.

DATED this 12th day of April, 2007.

PRINCE, YEATES & GELDZAHLER
A Professional Corporation

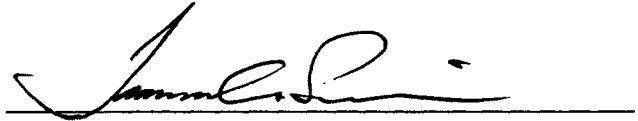
By: 

Michael N. Zundel
James C. Swindler
Glenn R. Bronson
Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of April, 2007, I served two copies of the foregoing by hand delivery to the following:

D. Matthew Moscon, Esq.
Stoel Rives
One Utah Center
201 South Main Street, Suite 1100
Salt Lake City, UT 84111

A handwritten signature in black ink, appearing to read "James R. [unclear]", is written over a horizontal line.

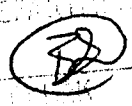
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**ADDENDUM TO
BRIEF OF APPELLANT**

The judgment and orders appealed from are as follows:

1. Order, Judgment and Certificate of Final Judgment as to Certain Claims dated July 29, 2004
2. Order Regarding Defendant's Motion to Reconsider and Plaintiff's Motion to Dismiss Remaining Claims and Award Fees dated January 23, 2006
3. Ruling and Order dated May 8, 2006
4. Minute Entry (Attorney's Fees) dated August 29, 2006
5. Order Re: Fees and Costs dated October 10, 2006
6. Final Order and Judgment dated November 11, 2006

Tab 1

01 JUL 29 10:10
SALT LAKE COUNTY


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

IHC HEALTH SERVICES, INC., a Utah
non-profit corporation,

Plaintiff,

v.

D & K MANAGEMENT, INC., a Utah
corporation,

Defendant.

ORDER, JUDGMENT, AND
CERTIFICATE OF FINAL JUDGMENT
AS TO CERTAIN CLAIMS

Civil No. 990905693
The Honorable Robert K. Hilder

IHC Health Services, Inc. ("IHC") initiated this action on May 22, 1999, seeking forfeiture of a lease agreement (the "Lease") between itself and Defendant, D&K Management, Inc. ("D&K"), declaratory judgment and damages for breach of the Lease. On April 26, 2000, IHC moved for judgment on the pleadings. D&K thereafter filed a cross-motion for summary judgment, arguing that IHC had waived its right to terminate the Lease, or alternatively, that it should be estopped from terminating the Lease. On May 31, 2001, Judge Roger Livingston granted IHC's motion and denied D&K's motion. D&K appealed this ruling to the Utah Supreme Court on both the waiver and estoppel issues.

The Utah Supreme Court affirmed on the issue of estoppel. On the issue of waiver, the Utah Supreme Court concluded that there were no disputed issues of material fact, but

that Judge Livingston had mistakenly concluded that IHC had returned a rent payment tendered by D&K in April 1998 (the "**April Rent Payment**"). IHC Health Services, Inc. v. D&K Management, Inc., 73 P.3d 320, 324 (Utah 2003). The Utah Supreme Court noted that, under relevant law, Judge Livingston was required to evaluate the totality of the circumstances to determine whether IHC had intended to waive its right to terminate the Lease. See Soter's, Inc. v. Deseret Fed. Sav. & Loan Ass'n, 857 P.2d 935, 940-42 (Utah 1993). Because Judge Livingston could not have properly examined the totality of the circumstances having misapprehended the fact regarding IHC's retention of the April Rent Payment, the Utah Supreme Court remanded to this Court with instructions to "reconsider its prior ruling in light of the correct facts regarding the [April Rent Payment]."

On March 2, 2004, this Court heard oral argument on IHC's motion to reconsider and modify the prior order of this Court granting IHC summary judgment. The Court granted this motion, and on April 9, 2004 entered an order. Prior to entry of the April 9 order, however, IHC moved for certification of finality under Rule 54(b) of the Utah Rules of Civil Procedure, which motion D&K opposed.

On May 26, 2004, the court heard argument on IHC's motion for certification and entry of final judgment on its forfeiture and declaratory judgment claims. On June 10, 2004, even though this Court had not previously issued a written order finalizing its grant of IHC's motion for summary judgment and certifying that ruling as final under Rule 54(b), D&K filed a Notice of Appeal regarding those rulings. Also on June 10, 2004, D&K filed a Motion for Stay Pending Appeal of the Court's summary judgment and Rule 54(b) rulings.

Having carefully considered the papers and pleadings in this matter, having heard the oral argument of counsel, and having now reconsidered Judge Livingston's prior order in light of the undisputed fact that IHC received and retained the April 1998 Rent Payment, along with IHC's motion for certification under Rule 54(b), and having considered D&K's Motion for Stay Pending Appeal,

IT IS HEREBY ORDERED

1. IHC is entitled to judgment as a matter of law on its claims for forfeiture, declaratory judgment, and to judgment as a matter of law as to liability only on its claim for breach of contract because the undisputed facts show that D&K breached the Lease and defaulted thereunder by failing to pay rent in March 1998;

2. Under the totality of the circumstances and the undisputed facts presented to this Court, IHC at no time distinctly and intentionally relinquished its right to terminate the Lease after D&K's failure to pay rent in March 1998, but rather thereafter always pursued a course of action consistent with an intent to terminate the Lease and protect its rights thereunder;

3. The undisputed fact that IHC received and retained the April Rent Payment does not alone, or in combination with the other undisputed facts and the totality of the circumstances of this case, raise a genuine issue of whether IHC distinctly and intentionally relinquished its right to terminate the Lease;

4. Because IHC did not intend to relinquish the right to terminate the Lease, it has therefore, not waived its contractual right to terminate the lease for D&K's breach;

5. IHC's claims for forfeiture and declaratory judgment are separate claims from its claim for breach of contract in that they do not include any facts or issues relating to monetary damages, which are the only remaining issues on IHC's breach of contract claim;

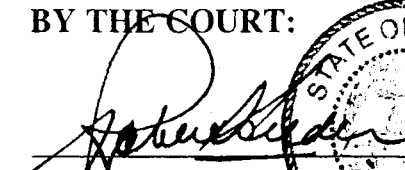
6. There is no just reason for delay in entry of final judgment on IHC's forfeiture and declaratory judgment claims because the undisputed facts demonstrate that IHC is entitled to judgment as a matter of law.

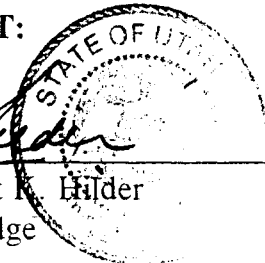
WHEREFORE, based upon the preceding order, the Court enters judgment as follows:

1. That D&K has forfeited the Lease and breached the contract;
2. IHC is entitled to possession of the property at issue;
3. Pursuant to Rule 54(b) of the Utah Rules of Civil Procedure, this Court certifies that the judgment as to the forfeiture and declaratory judgment claims is final;
4. Issues relating to ejectment, damages, costs and attorneys fees are reserved for disposition at a future date;
5. The Court's April 9, 2004 Order on IHC's motion for summary judgment is vacated;
6. By separate order entered concurrently herewith, any enforcement of the instant Judgment against D&K is stayed pending D&K's appeal of this Order and Judgment.

DATED this 29th day of July, 2004

BY THE COURT:

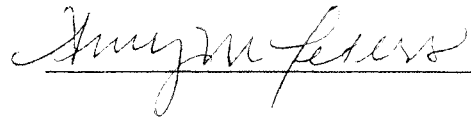

Honorable Robert L. Elder
District Court Judge



CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing **ORDER, JUDGMENT, AND CERTIFICATE OF FINAL JUDGMENT AS TO CERTAIN CLAIMS** was served on the following by U.S. mail, first class postage prepaid thereon, this 15th day of July, 2004:

Guy P. Kroesche
D. Matthew Moscon
STOEL RIVES
201 South Main, Suite 1100
Salt Lake City, Utah 84111-4904



GraphiHC - D&K Mgmt 13399-1hp-proposed order 6-10-04.wpd

CLERK'S CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing **ORDER, JUDGMENT, AND CERTIFICATE OF FINAL JUDGMENT AS TO CERTAIN CLAIMS** was served on the following by U.S. mail, first class postage prepaid thereon, this _____ day of July, 2004:

Guy P. Kroesche
D. Matthew Moscon
STOEL RIVES
201 South Main, Suite 1100
Salt Lake City, Utah 84111-4904

Glenn R. Bronson
Prince, Yeates & Geldzahler
175 East 400 South, Suite 900
Salt Lake City, Utah 84111

Tab 2

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

FILED DISTRICT COURT
Third Judicial District

JAN 1 2006

By _____
SALT LAKE COUNTY

AM
Deputy Clerk

**IHC HEALTH SERVICES, INC., a
Utah non-profit corporation,**

Plaintiff,

v.

**D&K MANAGEMENT, INC., a Utah
corporation,**

Defendant.

**ORDER REGARDING DEFENDANT'S
MOTION TO RECONSIDER AND
PLAINTIFF'S MOTION TO DISMISS
REMAINING CLAIMS AND AWARD
FEES**

Civil No. 990905693

The Honorable Robert K. Hilder

The captioned matters came before the Court pursuant to Defendant D&K Management, Inc.'s ("D&K's") motion to reconsider the partial judgment previously granted in favor of IHC Health Services, Inc. ("IHCHS") and IHCHS' motion to dismiss its remaining claims and award it attorneys fees. The matters were briefed by the parties, and the Court entertained oral argument on November 22, 2005. Based upon the facts and authorities submitted in the parties' papers, and the additional arguments and authorities discussed at oral argument, and being fully apprized in the premises, the Court now rules and orders as follows:

I. D&K's Motion to Reconsider

1. D&K requested the Court to reconsider its prior judgment in favor of IHCHS on grounds that D&K has never fully briefed the defense of "substantial compliance," which it claims would preclude IHCHS from exercising the forfeiture provision in the parties' Lease Agreement for the single missed rent payment in March, 1998.

2. The Court finds that D&K has never timely raised this argument and is precluded from making it at this late date on grounds of res judicata and/or specifically law of the case.

3. In making this ruling, the Court notes that although D&K's answer to the complaint included a defense of "unconscionability," D&K now argues that unconscionability is not the same defense as substantial compliance which it claims is a matter not yet considered by the Court. D&K never raised the specific defense of "substantial compliance" in its answer filed in 1999, and instead asserted it for the first time in its "Answer to Amended Complaint and Counterclaim" which it filed in 2004, approximately five years after IHCHS' forfeiture claim had been pending¹.

4. Furthermore, D&K did not brief or argue the defense of substantial compliance before this Court in response to IHCHS' motion for judgment on the pleadings, which motion ultimately resulted in the judgment D&K now wants reconsidered.

5. Additionally, D&K did not brief the issue of substantial compliance to the Utah Supreme Court as grounds to reverse this Court's (Judge Livingston's) award of partial judgment in favor of IHCHS and against D&K on the lease forfeiture issue, although it concedes it was free to do so.

6. This court believes that failure to raise substantial compliance at the first trial court determination (before this court's predecessor, Judge Livingston), and failure to address the issue on appeal, probably precluded D&K from raising or briefing this defense after the Utah Supreme Court remanded the case to this Court on the specific and narrow issue of waiver. Whether or not D&K was so limited, it in fact did not brief substantial compliance, seek leave to

¹ IHCHS argues that D&K never had cause or leave to add new defenses to IHCHS' forfeiture claims and IHCHS never filed an "Amended Complaint" which would allow an "Amended Answer" at an earlier date. Because the Court denies D&K's motion on other grounds, it does not address this argument.

brief the issue, or even allude to the issue in oral argument in response to IHCHS' restated motion for summary judgment following remand of this matter from the Utah Supreme Court.

7. 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' initial Motion for Partial Judgment on the Pleadings.

8. Finally, at the hearing on IHCHS' Rule 54(b) motion for certification of finality of judgment, which hearing occurred after remand from the Utah Supreme Court, and this court's subsequent ruling, again in favor of IHCHS, D&K told this Court that there were no undecided issues or facts left to be determined on the forfeiture issue. D&K cannot now, without cause, ask this Court to consider newly developed arguments that it denied existed more than a year ago.

9. This Court is persuaded, as described in Smith v. Osguthorpe, 2005 UT App. (Utah Ct. App. 2005) (unpublished opinion) p.2 that "when there has been an adjudication, it becomes res judicata as to those issues which the party had a fair opportunity to present and have determined in the other proceeding." (citation omitted). It is undisputed that D&K could have raised this defense at some earlier point, and certainly prior to or at the time of appealing the first judgment entered by this court's predecessor (and entered again by this court following remand by the Utah Supreme Court, which latter decision D&K now wants reconsidered). In fact, D&K did not previously raise or argue the defense of substantial compliance. It had a "fair opportunity to present and have determined" the defense of substantial compliance, but elected not to do so.

10. Although this Court has recited every substantial missed opportunity to for D&K to have raised the issue of substantial compliance, this Court does not believe it has had the right

or discretion to consider new issues that could have been raised, but were not, from the point of remand. Regardless of when D&K did, in fact, lose the right to assert a new defense, this Court finds and rules that D&K is now precluded from asking this Court for reconsideration on the grounds of substantial compliance.

11. Alternatively, as the parties have now briefed the matter of substantial compliance in the papers before the Court on D&K's motion for reconsideration, and having considered all the arguments, facts, and cases cited by the parties in those papers, the Court does not find that D&K has presented the Court with facts that would support a substantial compliance defense.²

12. Accordingly, D&K's motion to reconsider is DENIED.

II. IHCHS' Motion to Dismiss Remaining Claims and For Attorney's Fees

Also before the Court at the hearing on November 22, 2005, was IHCHS' motion to dismiss remaining claims and motion for attorney's fees. Having reviewed the papers submitted by the parties and entertained oral argument, the Court finds, rules, and orders as follows:

13. D&K has stipulated to the dismissal of IHCHS' remaining claims in its complaint for damages resulting from D&K's breach of Lease for failing to pay March, 1998 rent, and the Court therefore DISMISSES the same without prejudice.

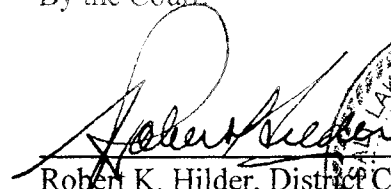
14. At the hearing, IHCHS also made an oral motion for leave to dismiss its supplemental complaint filed on October 4, 2004 without prejudice. That oral motion is hereby GRANTED and the supplemental complaint of IHCHS is also DISMISSED, without prejudice.

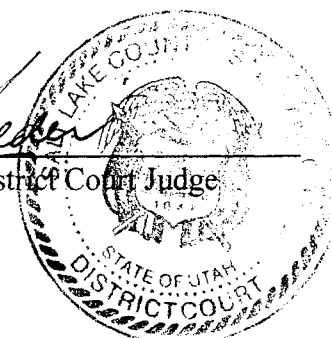
² At the hearing on this matter, D&K again conceded that the facts surrounding all parties' conduct with respect to D&K's failure to pay rent were undisputed.

15. IHCHS' request for attorney's fees is hereby deferred pending further briefing from the parties on the impact and effect of D&K's holdover following IHCHS' termination of the Lease, which the Court rules became effective as of the date of its April 14, 1998 notice terminating the Lease.

DATED this 23rd day of January, 2006.

By the Court:


Robert K. Hilder, District Court Judge



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 990905693 by the method and on the date specified.

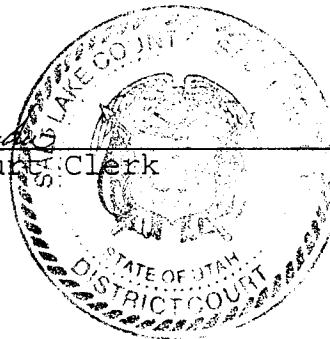
METHOD NAME

Mail D. MATTHEW MOSCON
ATTORNEY PLA
201 S MAIN ST STE 1100
SALT LAKE CITY, UT
84111-4904

Mail MICHAEL N ZUNDEL
ATTORNEY DEF
175 E 400 S STE 900
SALT LAKE CITY UT 84111

Dated this 23rd day of January, 2006.

Mal Paulsen
Deputy County Clerk



Tab 3

IN THE THIRD JUDICIAL DISTRICT COURT

MAY - 8 2006

SALT LAKE COUNTY, STATE OF UTAH

SALT LAKE COUNTY

Deputy Clerk

IHC HEALTH SERVICES, INC.,
A Utah non-profit corporation,

Plaintiff,

vs.

D&K MANAGEMENT, INC., a
Utah corporation,

Defendant.

RULING AND ORDER
(Attorney's Fees)

Civil No. 990905693

Judge Robert K. Hilder

Following argument and ruling on plaintiff's Motion for Leave to Dismiss its remaining claims, I deferred ruling on the issue of any entitlement to attorney's fees pursuant to Section 23 of the Lease, pending further briefing on the question whether fees may be awarded pursuant to the lease provision, following eviction. The Lease (at Section 23) provides for attorney's fees to be awarded to the prevailing party "in the event that at any time during the term of this lease [either party] institutes any action or proceeding . . . relating to the provisions of this lease . . ."

The premise of my question, which I now find to be flawed, was that upon eviction the Lease terminated, and Section 23 could not be invoked, except possibly under a holdover theory. Careful consideration of the case cited by both parties, *Cottonwood Mall Company v. Sine*, 767 P.2d 499 (Utah 1989), persuades me of my error.

Section 23 refers to actions or proceedings instituted during the term of the Lease. Unlike the lease in *Cottonwood Mall*, and other leases referred to in defendant's analysis, the Lease in this case had not reached the end of its term. Until this court (including my predecessor) determined that plaintiff's ejectment action at common law was successful, the Lease was not

¹ I briefly note the validity of defendant's argument that, in the unlikely event that IHCHS is also claiming fees under section 17.2 of the Lease, that section is unavailing. Section 17.2 provides for attorney's fees as an element of "damages," and any damage claim arising from the eviction proceeding has been expressly waived, and my Order of January 23, 2006, makes that waiver law of the case.

terminated. The action filed by plaintiff to achieve that result was necessarily instituted during the lease term, and it related to a key provision of the lease; namely, timely payment of the monthly rent.

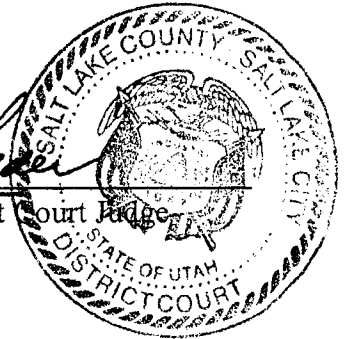
Accordingly, as prevailing party in the trial court, IHCHS is entitled to a reasonable and necessary attorney's fee, to be determined upon submission of counsel's affidavit and defendant's response (which will be limited to reasonableness and necessity, and which may not further address entitlement).

This Ruling shall be the Order determining IHCHS's entitlement to a reasonable attorney's fee. A further Order shall issue upon determination of the amount. Counsel are advised at this time (to avoid unnecessary additional briefing), that the fee award, whatever it may be, will be stayed pending appeal, consistent with the stay already in place in this case.

DATED this 8th day of May, 2006.

By the court.


Robert K. Hilder, District Court Judge



CERTIFICATE OF NOTIFICATION

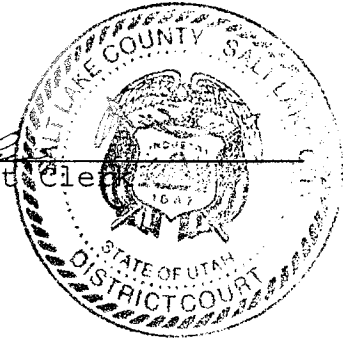
I certify that a copy of the attached document was sent to the following people for case 990905693 by the method and on the date specified.

METHOD NAME

Mail GLENN R BRONSON
ATTORNEY DEF
175 E 400 S STE 900
SALT LAKE CITY, UT 84111
Mail D. MATTHEW MOSCON
ATTORNEY PLA
201 S MAIN ST STE 1100
SALT LAKE CITY UT
84111-4904

Dated this 8th day of May, 2006.

M. R. R.
Deputy Court Clerk



Tab 4

FILED FOR THE
Third Judicial District

IN THE THIRD JUDICIAL DISTRICT COURT

AUG 5, 2006

SALT LAKE COUNTY, STATE OF UTAH

SALT LAKE COUNTY

W. J. Hilder

IHC HEALTH SERVICES, INC.,
A Utah non-profit corporation,

Plaintiff,

MINUTE ENTRY
(Attorney's Fees)

vs.

D&K MANAGEMENT, INC., a
Utah corporation,

Defendant.

Civil No. 990905693

Judge Robert K. Hilder

The parties have briefed the issue of reasonableness of plaintiff's attorney's fees claim, as previously ordered by the court. Defendant's response, as plaintiff points out, is an attack on plaintiff's failure to allocate fees to isolate fees incurred on matters on which plaintiff prevailed. While allocation is the task 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 its 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. In addition, plaintiff did not use the analytical framework set forth in *Bracken v. Dixie State Bank* to assist the court in determining reasonableness.

Accordingly, I agree with plaintiff that failure to allocate (beyond the detailed billing) shall not preclude an award. There is, however, a need for plaintiff to revise its submission to remove all fees and costs claimed on appeal. While the parties have not addressed the issue, I believe two Court of Appeals cases from 2005 require this action. As to the first appeal, the matter was remanded for further proceedings without any award for fees included in the Utah Supreme Court decision. In *Cache County v. Beus*, 2005 UT App 503, the Court of Appeals noted that "the trial court . . . had no discretion to award Cache County the attorney fees it incurred on appeal in Cache County I." at fn. 7. The quoted authority stated the rationale:

A trial court cannot consider the issue of entitlement to attorney fees on its own initiative because this decision is the sole prerogative of the appellate court. The only time a trial court has any discretion in the matter of appellate attorney fees is when an appellate court

determines that appellate fees are warranted, but remands the issue to the trial court for a determination of the amount to be awarded.

Slattery v. Covey & Co., 909 P.2d 925, 929 (Utah Ct. App. 1995).

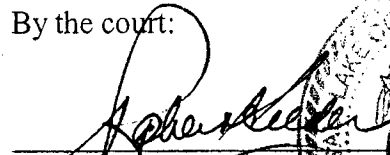
As to the second appeal, a different rule applies. The second appeal was dismissed for lack of jurisdiction (without prejudice to filing of a timely appeal after entry of a final judgment). The dismissal for lack of jurisdiction precludes an award of appellate fees by either the appellate court, or this court, at this time. See, *Gordon Case & Company v. West*, 2005 UT App 304, at fn. 3:

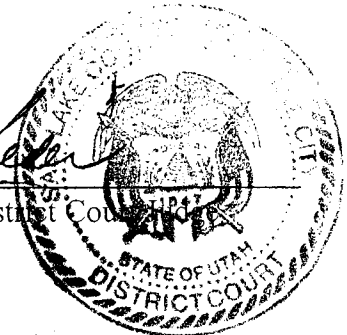
Defendants request attorney fees and costs on appeal. However, because we dismiss this case for lack of jurisdiction we are unable to entertain this request. "When a matter is outside a court's jurisdiction it retains only the authority to dismiss the action." (Citation omitted).

I regret the further delay, but plaintiff must file a revised fee submission eliminating all fees and costs incurred on either appeal. The filing should be made on or before September 12, 2006. I will then consider the remaining claim pursuant to the applicable case law.

DATED this 29th day of August, 2006.

By the court:


Robert K. Hilder, District Court



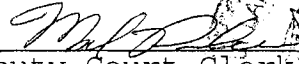
CERTIFICATE OF NOTIFICATION

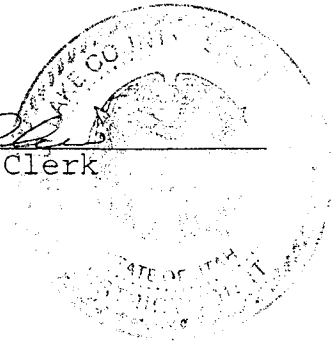
I certify that a copy of the attached document was sent to the following people for case 990905693 by the method and on the date specified.

METHOD NAME

Mail GLENN R BRONSON
ATTORNEY DEF
175 E 400 S STE 900
SALT LAKE CITY, UT 84111
Mail D. MATTHEW MOSCON
ATTORNEY PLA
201 S MAIN ST STE 1100
SALT LAKE CITY UT
84111-4904

Dated this 30th day of August, 2006.


Deputy Court Clerk



Tab 5

FILED DISTRICT COURT
Third Judicial District

OCT 6 2006

By _____ *am*
Deputy Clerk

ORDER RE: FEES AND COSTS

Civil No. 990905693

Judge Robert K. Hilder

Defendant.

The foregoing requests; therefore, are the beginning point for the court's final decision, and the questions is whether there is any basis for the court to order any further reduction. As substantial as the request for fees is, I do not see any basis for further reduction. Applying (albeit in summary form), the various guidelines for fee awards, including Rule 1.5, Utah Code of Professional Responsibility, and applicable case law, including specifically *Dixie State Bank v. Bracken*, 764 P.2d 985 (Utah 1988), I find the following: First, the rates charged by plaintiff's counsel are reasonable for attorneys of similar experience in this community. It is true that many attorneys worked on the case, and some of the stated rates are high for this community, but they are within the upper limits of the range and, more importantly, the actual rates charged (resulting in an average rate of \$191.35), are substantially lower and clearly reasonable.

Second, the result so far has been favorable for plaintiff. Third, even though the matter is an eviction, it is a commercial eviction, with a great deal at stake, and the litigation has been both complex and very aggressively contested. 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.

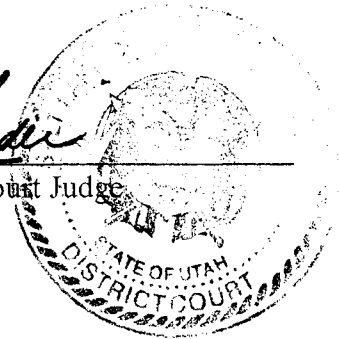
There comes a point in evaluating reasonableness of attorney's fees that the court is doing no more than second-guessing litigation decisions, and in the context of this difficult and hard-fought case, we are now at that point. I find no objective basis to apply further reductions than have already been applied.

Based on the foregoing, plaintiff may prepare a Judgment for attorney's fees in the amount of \$303,514.59, and costs in the amount of \$3,750.31. No further Order is required.

DATED this 10th day of October, 2006.

By the court:


Robert K. Hilder, District Court Judge



CERTIFICATE OF NOTIFICATION

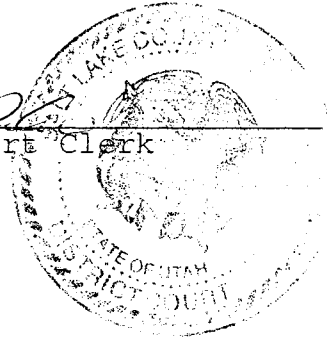
I certify that a copy of the attached document was sent to the following people for case 990905693 by the method and on the date specified.

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ATTORNEY DEF
175 E 400 S STE 900
SALT LAKE CITY, UT 84111
Mail D. MATTHEW MOSCON
ATTORNEY PLA
201 S MAIN ST STE 1100
SALT LAKE CITY UT
84111-4904

Dated this 10th day of October, 2006.


Deputy Court Clerk



Tab 6

FILED DISTRICT COURT
Third Judicial District

NOV 1, 2006

By AM
SALT LAKE COUNTY
Deputy Clerk

IMAGED

Michael N. Zundel (3755)
Glenn R. Bronson (7362)
PRINCE, YEATES & GELDZAHLER
City Centre I, Suite 900
175 East 400 South
Salt Lake City, Utah 84111
(801) 524-1000

ENTERED IN REGISTRY
OF JUDGMENTS
DATE 11/14/06

Attorneys for Defendant D&K Management, Inc.

IN THE THIRD DISTRICT COURT IN AND FOR SALT LAKE COUNTY

STATE OF UTAH

<p>IHC HEALTH SERVICES, INC., a Utah non-profit corporation,</p> <p>Plaintiff,</p> <p>vs.</p> <p>D&K MANAGEMENT, a Utah corporation,</p> <p>Defendant.</p>	<p>FINAL ORDER AND JUDGMENT</p> <p>Civil No. 990905693</p> <p>Judge: Robert K. Hilder</p>
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This matter has been pending before this Court since 1999, inclusive of time during which this case has been before both the Utah Supreme Court and the Utah Court of Appeals on appellate issues. The Court has now ruled on all matters before it and hereby makes this Final Judgment and Order.

Final Order and Judgment @J



JD20790821
990905693 D & K MANAGEMENT INC

1651

1. Upon remand by the Utah Supreme Court, this Court reconsidered the previous ruling of Partial Summary Judgment in favor of IHC Health Services, Inc. ("IHC") under the totality of all the facts and circumstances surrounding this case, as directed by the Utah Supreme Court. The Court has upon motion, argument, and good cause showing again found and ordered that IHC is entitled to judgment as a matter of law on its claims for forfeiture, declaratory judgment, and breach of contract for the reasons set forth in this Court's previous Order and Judgment dated July 29, 2004, and as dictated by the Court in its verbal ruling which Order and ruling are incorporated herein by this reference.

2. Defendant D&K Management is not entitled to a reconsideration of the Court's Order and Judgment of July 29, 2004, for the reasons set forth in the Court's Order dated January 23, 2006, which Order is incorporated herein by this reference, and for all the reasons articulated by the Court at the hearing on D&K's matter.

3. IHC's remaining claims were dismissed by the motion of IHC and made effective by Order of this Court also dated January 23, 2006, which Order is incorporated herein by this reference.

4. The Court's rulings, granting IHC the relief sought in its claims for forfeiture, declaratory judgment and breach of contract, act to defeat or render moot the causes of action in the defendant D&K Management, Inc.'s Amended Counterclaim, which sought declaratory judgment, attorneys fees, and judgment for breach of an implied covenant in the Lease Agreement, all contrary to the rulings previously made by the

Court.¹ Accordingly, all claims in defendant D&K Management's Amended Counterclaim are hereby dismissed with prejudice.

5. IHC timely moved for attorneys' fees under the attorney fee provision of the Lease Agreement at issue in this case. By minute entries dated August 29, 2006 and October 10, 2006, both of which minute entries are adopted and incorporated into this Judgment, the Court has found and ruled that IHC is entitled to recover attorneys' fees in the amount of \$303,514.59 and costs in the amount of \$3,750.31.

6. Based upon the foregoing rulings and orders of the Court, a money Judgment is hereby order in favor of IHC Health Services, Inc. and against D&K Management Inc. for the principal amount of \$307,264.90. This sum will accrue interest from the date this judgment is signed forward at the rate of ____%.

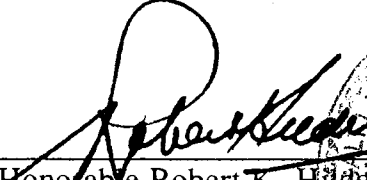
7. Enforcement of the Court's Orders against D&K Management, Inc., including those rulings dated July 29, 2004, January 23, 2004, May 8, 2006, August 29, 2006, October 10, 2006, and this Final Order and Judgment are stayed pending final resolution upon appeal and until order of the Court directing enforcement.

¹Plaintiff has previously noted that D&K never had leave to file the Amended Counterclaim. Because the Court denies the relief sought therein in any event, it does not need to respond to IHC's argument about the propriety of amendment.

990905693

Dated this November 11th, 2006.

BY THE COURT


Honorable Robert K. Hilder
District Court Judge

