

2006

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

Utah Supreme Court

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## Recommended Citation

Reply Brief, *IHC Health Services INC v. D&K Management INC*, No. 20061017.00 (Utah Supreme Court, 2006).  
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IN THE SUPREME COURT OF THE  
STATE OF UTAH

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non-profit corporation,

Plaintiff/Appellee,

vs.

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

Defendant/Appellant.

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Case No. 20061017-SC

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**REPLY BRIEF OF APPELLANT**

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**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  
JUDICIAL DISTRICT COURT, SALT LAKE COUNTY,  
UTAH, THE HONORABLE ROBERT K. HILDER  
PRESIDING**

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FILED  
UTAH APPELLATE COURTS  
JUN 29 2007

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## ARGUMENT

### **I. IHC's Arguments Cannot Avoid a Trial on the Intensely Fact-Dependent Question Whether, Under All the Circumstances, IHC Waived Forfeiture.**

As to waiver, D&K made two compelling arguments: (1) that 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 the circumstances, and (2) that the trial court 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. IHC fails to rebut either of these arguments in any meaningful way.

#### **A. IHC Misstates this Court's Treatment of the Facts in *D&K I*.**

With respect to D&K's Statement of Facts, IHC attempts to dismiss all facts that support D&K's waiver defense with the assertion that they are "the same facts that this Court already found to be irrelevant in *D&K I*," citing footnote 2 of that opinion. IHC Brief at 4. Later, IHC argues that this Court noted that "any factual disputes were 'irrelevant' or 'immaterial.'" *Id.* at 16. In reality, footnote 2 characterized one fact as irrelevant—whether D&K's rent payment for February 1998 (prior to the March rent default) was timely—and one fact as immaterial—whether April 1998 rent (which IHC accepted) was delivered to its property manager or to its corporate office.<sup>1</sup> D&K makes no issue in this appeal regarding those facts. IHC also overstates this Court's ruling in *D&K I*, claiming that "this Court held that the material facts in this case regarding waiver are undisputed." *Id.* Instead, the Court noted that "the material facts in this case appear to

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<sup>1</sup> Thus, rather than relegating to irrelevance the facts on which D&K now relies to show waiver, *D&K I* implicitly acknowledges their significance.



be undisputed,” *D&K I*, 2003 UT 5, ¶9, while holding that the trial court misapprehended “one material fact.” *Id.* However, the ultimate “fact” remaining in dispute in this case is whether a waiver occurred, a mixed question of law and fact to be decided under the totality of the circumstances test. Prior to *D&K I*, that issue could be decided in the affirmative as a matter of law under *Woodland Theatres, Inc. v. ABC Intermountain Theatres, Inc.*, 560 P.2d 700 (Utah 1977), because IHC accepted the April 1998 rent and other consideration under the Lease after D&K had defaulted on the payment of rent for March. After *D&K I*, that issue requires a trial.

B. IHC Confuses the Standard of Review Regarding Waiver.

The standard of review of a summary judgment requires the appellate court to “view the facts *and all reasonable inferences drawn therefrom* in the light most favorable to [the non-moving party] . . . .” *State Farm Mut. Auto. Ins. Co. v. Green*, 2003 UT 48, ¶3, 89 P.3d 97 (emphasis added). IHC takes the position that, when waiver is the issue, the standard for reviewing a summary judgment is completely different, advocating that “trial courts have broad discretion in determining whether a waiver has occurred.” IHC Brief at 8. While this Court accorded “some measure of deference” to a trial court’s legal conclusions underlying its grant of summary judgment, *D&K I*, ¶6, it reiterated the universal rule that “[s]ummary judgment is proper only where there is no genuine issue as to any material fact,” *id.*, and described its three-step analytical approach as follows:

In a waiver case decided on a motion for summary judgment, we must first inquire whether there are disputed material facts. If there are no disputed material facts, we consider all undisputed material facts in the light most favorable to the nonmoving party, *Peterson*, 2002 UT 42 at ¶7, 48 P.3d 941, before determining whether the trial court’s decision on the

application of the law of waiver to those facts falls within the bounds of its discretion.

*Id.* Discretion is accorded the trial court only at the third step—application of the law. On the waiver issue, this appeal focuses on the first two steps—whether there is a disputed material fact (in the ultimate sense of whether a waiver occurred) and whether the trial court considered all undisputed material facts from which waiver could be inferred in the light most favorable to D&K. Those issues are addressed below.

IHC’s reliance on *Living Scriptures, Inc. v. Kudlik*, 890 P.2d 7 (Utah App. 1995), for the proposition that a summary judgment as to waiver is reviewed for abuse of discretion is unavailing. *Kudlik* did not involve a summary judgment motion at all, but rather a ruling, based on a trial in an unlawful detainer case, that no waiver had occurred.

C. IHC Misconstrues the Escrow Agreement and Overstates its Effect.

Relying in whole or in part on the Consent, Reservation of Rights and Escrow Deposit Agreement dated March 1, 1999 (the “Escrow Agreement”), R157-162, IHC makes the following points:

1. “The Escrow Agreement was designed to preserve the status quo of the landlord/tenant relationship, without either party being accused of having waived their arguments in this litigation.” IHC Brief at 7.
2. “IHC’s post-Termination Notice conduct cannot now be claimed a waiver of its rights to terminate D&K’s leasehold.” *Id.* at 8.
3. “Moreover, the trial court properly concluded that IHC’s actions were . . . undertaken pursuant to the Escrow Agreement by which D&K agreed that IHC’s conduct would not constitute a waiver.” *Id.* at 10.

4. “The parties do not dispute that IHC never accepted<sup>2</sup> or cashed any rent check after April 1998, except under the Escrow Agreement, pursuant to which D&K agreed that IHC did ‘not waive its claims of default and/or forfeiture of the Lease.’” *Id.* at 18.
5. “D&K argues that IHC’s . . . receipt of rent checks under the Escrow Agreement . . . create[s] a triable dispute as to whether an implied waiver occurred.” *Id.* at 19.
6. “D&K’s argument that IHC engaged in ‘dozens of acts . . . that recognized the Lease as in force’ (Appellant’s Br. at 20), is directly contrary to D&K’s contractual agreement . . .” *Id.* at 21-22.

Each point is demonstrably false. Points 3 and 5 lack any factual basis and are not true. The other points claim too much for the Escrow Agreement. It was dated March 1, 1999, long after IHC had declared D&K’s Lease forfeited. Prior to that date, numerous affirmative acts occurred (such as acceptance of April 1998 rent, “Dear Tenant” letters seeking to hold D&K to the strict terms of the Lease and many invoices for rent), and there were numerous instances of inaction by IHC (such as retention of numerous rent checks by IHC for months and failure to file suit). D&K summarized and discussed those facts, Brief of Appellant at 5-6, 17-18, and IHC has not disputed them. The Escrow Agreement expressly reserved D&K’s right to argue waiver on those facts.<sup>3</sup> It provided that neither party waived any of its claims or defenses by signing the Escrow Agreement or by D&K being allowed to remain in possession of the leased premises or to make

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<sup>2</sup> The reality is that D&K has maintained the position throughout this case that, by retaining most of D&K’s rent checks tendered from May 1998 through February 1999 (prior to the Escrow Agreement), IHC accepted D&K’s tendered rent. R42, ¶18.

<sup>3</sup> “[A]ll of D&K Management’s defenses against the claims and assertions of IHCHS, whether articulated before or after the date of this Escrow Agreement, are expressly reserved and not waived by reason of this Escrow Agreement or otherwise and shall not in any way be lessened or diminished by reason of or in connection with the execution and delivery of this Escrow Agreement.” R158.

deposits thereafter with the escrow agent. Thus, it is IHC's argument that is "directly contrary" to its contractual agreement.

D. D&K'S Counsel Never Conceded that There Was Not a Triable Issue as to the Waiver Defense.

Another fallacy on which IHC places enormous reliance is its contention that D&K's counsel conceded at a hearing on May 26, 2004, that "there were no disputed facts on the issue of possession." IHC Brief at 17. The hearing in question took place after the trial court had granted IHC's Motion to Modify Order or for Summary Judgment rejecting the defense of waiver following remand from this Court in *D&K I*. The purpose of the hearing was to address IHC's request for a certification of finality under Rule 54(b). In the exchange between the trial court and D&K's counsel, the court inquired as to the presence of "overlapping facts" for purposes of applying the *Kennecott*<sup>4</sup> analysis to Rule 54(b). Counsel's response was that, "given the Court's ruling [summary judgment against D&K], there are no facts left—no facts that have to be decided." Transcript, R1108 at 4-5. Counsel then repeated his qualification, "given this ruling," meaning that his response was premised on the Court having already ruled against D&K on waiver.

In opposing IHC's Motion to Modify Order or for Summary Judgment following remand, D&K argued that it was entitled to an inference of waiver based on the true facts concerning the April 1998 payment (which the trial court had misapprehended). R799 ("[c]orrection of this factual error adds one more fact from which an inference of waiver can be drawn"). D&K argued that waiver was "a genuine issue of fact to be resolved by the jury." R803. It argued that "[i]t is only when the facts permit of a single conclusion

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<sup>4</sup> *Kennecott Corp. v. Utah State Tax Comm'n*, 814 P.2d 1099 (Utah 1991).

that waiver may be decided as a matter of law.” R804. D&K argued that waiver “cannot be resolved on a motion for summary judgment if the evidence can give rise to differing inferences.” *Id.* It further cited controlling authority holding that on a motion for summary judgment the court may not draw fact inferences regarding intent. *Id.*

Having carefully presented these arguments in its memorandum, it is inconceivable that D&K’s counsel would, in an off-the-cuff response to a question of the court on a different point, volunteer that everything he had argued in writing was wrong. Counsel’s statement must be considered in context of the entire transcript. Counsel stated that “D&K firmly believes that IHC waived its remedy,” Transcript, R1108 at 9 (Addendum A), reminded the court that waiver is “an intensely factual issue,” *id.*, clearly expressed his view that “D&K is entitled to a trial on that issue,” *id.* at 9-10, and reiterated “that we’re entitled to a trial on that issue because it is a factual issue.” *Id.* at 10.

Thus, counsel was not abandoning D&K’s central argument that it was entitled to a trial to determine what inferences should be drawn from the undisputed historical facts. While counsel may have been speaking to the first step of the three-part analysis discussed in *D&K I* (*i.e.*, historical, but not inferential, facts were undisputed), he was not addressing the second, that of viewing the facts in the light most favorable to D&K, which includes considering all reasonable inferences that can be drawn from those facts.

E. When Viewed in the Light Most Favorable to D&K, the Facts Support an Inference of Waiver by IHC.

IHC purports to analyze the facts in the light most favorable to D&K and, not surprisingly, concludes that they could not possibly support an inference that IHC waived the right to forfeit the Lease. IHC’s analysis suffers from several glaring flaws.

First, it begins with the premise that *D&K I* limited the trial court, in performing the three-step analysis described above, to the narrowest of roles—that of considering IHC’s retention of the April 1998 rent payment on the assumption that the trial court’s previous ruling was otherwise correct in all respects. That premise collides with this Court’s opinion of that ruling as being “premature, at best”:

Under the totality of the circumstances test required by *Soter’s*, the fact that IHC retained D&K’s payment for April rent is material. D&K presented the trial court with a list of actions by IHC that D&K believed amounted to waiver. The trial court considered each of them, but it could not have considered the cumulative impact of those facts coupled with the retention of April rent because it apparently believed that the rent was not retained by IHC. Because of the absence of this fact in the trial court’s analysis, the grant of summary judgment was premature, at best.

*D&K I*, 2003 UT 5, ¶9. On remand for “further proceedings consistent with this opinion,” *id.* ¶12, the trial court was to apply the three-step analysis prescribed by the Court.<sup>5</sup> On the second step, it was required to “consider *all* undisputed material facts in the light most favorable to the nonmoving party.” *Id.* ¶6 (emphasis added). It was not authorized to analyze the facts concerning the April payment to the exclusion of all others.

Second, IHC quarrels with this Court’s opinion that “the fact that IHC retained D&K’s payment for April rent is material.” *Id.* ¶9. After discussing its own views on the significance of the April rent, IHC concludes, “the April rent is irrelevant to either the question of default by D&K or waiver by IHC.” IHC Brief at 20. In fact, IHC is bound by this Court’s opinion that IHC’s retention of the April rent is material.

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<sup>5</sup> The third step is slightly different at the trial court, which must itself apply the law of waiver to the facts after they have been viewed in the light most favorable to the nonmoving party.

Third, knowing that its narrow perception of the trial court's role on remand may be incorrect, IHC contends that all of the other facts relied on by D&K to support waiver "do not give rise to an inference that IHC intended to affirm the Lease for two main reasons." *Id.* at 21. The first is that the trial court's "stay" forced IHC to "act as D&K's 'landlord'" and to "undertake certain actions to protect itself, such as requiring that the building be insured." *Id.* IHC throws time out of joint. Every fact D&K relies upon to show waiver occurred between March 1998 (when a breach occurred) and March 1, 1999 (signing of Escrow Agreement). During that entire period, not only was there no stay, but there was no case pending in which a stay could have been issued.

The second "main reason" proffered by IHC as vitiating all of the actions and inactions of IHC as bases for inferring waiver is the Escrow Agreement. As discussed above, the Escrow Agreement did not extinguish, but expressly preserved, all previously existing defenses, including all grounds for waiver.

Apart from these "two main reasons," IHC offers no other reason why D&K should not be entitled, on summary judgment, to an inference of waiver based on all of the facts apart from IHC's retention of the April 1998 rent. When reviewing a grant of summary judgment, this Court liberally construes all inferences that may be reasonably drawn from the facts in favor of the nonmoving party. *Johnson v. Morton Thiokol, Inc.*, 818 P.2d 997, 1000 (Utah 1991). Moreover, "[w]here 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). The trial court's grant of summary judgment was erroneous, and this case should be remanded for a jury trial on the issue of waiver.

## **II. Substantial Compliance Should Be Considered on the Merits.**

Both parties recognize the trial court's power to reconsider and revise its non-final orders. D&K submits that this power is broad, giving the court a valuable and flexible tool for reaching just results. IHC perceives this power as a timid, hide-bound concept hedged about by numerous virtually impenetrable checkpoints designed to keep the court as far from the merits as possible. These differing views reflect the inherent tension between the goal of fairly deciding controversies based on the facts and the law and that of judicial efficiency. Underlying this debate lurks the stark reality that the loss to D&K from forfeiture would cost it \$3.2 million based on a five-year damage horizon, while the loss to IHC of 46 days' interest on \$3,280 was only \$41.34, which D&K offered to pay eightfold, Brief of Appellant at 31-32, and IHC would, if the Lease survives, receive exactly what it bargained for when it bought the property subject to the Lease.

As will be shown below, the trial court did not soundly exercise discretion on this question, as it both ruled that it had none and based its decision on critical legal errors. In its brief, IHC makes many dubious or wrong assumptions and arguments, as well as inaccurate representations or characterizations concerning the record. D&K will address those matters but will first offer a larger perspective.

### **A. Based on Correct Legal Conclusions and Applying Proper Standards, It Would Have Been an Abuse of Discretion to Refuse Consideration of the Substantial Compliance Defense.**

IHC argues that its motion for partial judgment on the pleadings in the earliest stage of this case (prior to any discovery, with no supporting affidavits and based solely



on the pleadings) put D&K under obligation to support all of its defenses factually and with legal authority even though IHC's motion mentioned only two of them. Its argument fails to comprehend the limitations of a motion for judgment on the pleadings.

A motion by plaintiff for judgment on the pleadings can only stand upon the basis that defendants' answer admits all plaintiff's material allegations and offers nothing in bar or by way of avoidance. It is in order only when the answer raises no issue or states no facts which in law could be a defense to any part of plaintiff's claim as covered in the motion.

*Harman v. Yeager*, 110 P.2d 352, 353-354 (Utah 1941). Such motions are disfavored, and great liberality in construing the assailed pleading should be allowed. *MBNA America Bank, N.A. v. Williams*, 2006 UT App 432, ¶2, 147 P.3d 536.

Three months after the remittitur following *D&K I*, IHC renewed its effort to obtain a forfeiture ruling by seeking partial summary judgment. IHC cites several cases for the proposition that a party opposing a motion for summary judgment must support any affirmative defenses or waive them. IHC Brief at 27-28. On this question the cases are sharply divided. While *Pantry, Inc. v. Stop-N-Go Foods, Inc.*, 796 F.Supp. 1164 (S.D.Ind. 1992), supports IHC's position, it has been soundly rejected in *Cytec Industries, Inc. v. B.F. Goodrich Co.*, 232 F.Supp.2d 821, 829 (S.D. Ohio 2002) ("The reasoning of the *Pantry* court is not supported by any provision of the Federal Rules of Civil Procedure nor any case law.").

In the context of summary judgment, it is well settled that the moving party always bears the initial responsibility of informing the district court of the basis for its motion. This initial burden remains with the moving party, even when the issue involved is one on which the non-movant will bear the burden of proof at trial, such as the Defendant's affirmative defenses in the present case.

Given the Plaintiff's failure to address the Defendant's affirmative defenses in its initial summary judgment Memorandum, the Defendant had

no obligation in its opposing Memorandum to demonstrate a genuine issue of material fact with respect to those defenses. . . . Regardless of the Court's ruling on the Plaintiff's Motion, those affirmative defenses will remain viable in this litigation, as the Plaintiff has not properly moved for summary judgment on them.

*Books-A-Million, Inc. v. H & N Enters., Inc.*, 140 F.Supp.2d 846, 851 (S.D. Ohio 2001) (emphasis added) (citations omitted). Similarly, in *Waddoups v. Amalgamated Sugar Co.*, 2002 UT 69, ¶31, 54 P.3d 1054, this Court clarified the order of business to be that “once the moving party challenges an element of the nonmoving party's case on the basis that no genuine issue of material fact exists, the burden then shifts to the nonmoving party to present evidence that is sufficient to establish a genuine issue of material fact.”

Other cases relied on by IHC should be distinguished. In *Rocafort v. IBM Corp.*, 334 F.3d 115 (1st Cir. 2003), the issue was whether a party's failure to explicitly raise an issue before the district court foreclosed that party from raising the issue for the first time on appeal. *Rocafort* pointed out as a significant ground for its decision that such party “never called the district court's attention to its alleged error by way of a motion for reconsideration.” *Id.* at 122. In contrast, D&K did exactly that. In *H & G Ortho, Inc. v. Neodontics Intern., Inc.*, 823 N.E.2d 718 (Ind. App. 2005), the ruling that an issue not raised in the trial court could not be reviewed on appeal was based on the rule that “once the moving party designates evidence relevant to an affirmative defense, the burden shifts to the defendant to come forward with competent evidence to support the affirmative defense.” *Id.* at 731. In the present case, IHC's motion for summary judgment, after *D&K I*, did not address the defense of unconscionability/substantial compliance. Since IHC never challenged D&K's case with respect to unconscionability, D&K was not

obligated to present evidence supporting it. Thus, the defense should not be deemed waived.

An oral forfeiture ruling issued on March 2, 2004, but the written order was not settled until July 29, 2004. Meanwhile, on May 26, 2004, D&K advised the court that substantial compliance remained to be decided, reiterated that the law abhors a forfeiture and referred to *Housing Auth. of Salt Lake City v. Delgado*, 914 P.2d 1163 (Utah App. 1996), and *Cache County v. Beus*, 1999 UT App. 134; 978 P.2d 1043. Brief of Appellant at 9-10; see p. 19, *infra*. The court expressed its incorrect opinion that those issues had already been decided as part of its ruling on waiver. *Id.* Counsel's statements constituted "inadequate briefing" or the oral equivalent thereof. D&K was entitled to ask the court in a fully briefed motion to reconsider its erroneous legal conclusion that a decision on waiver is a decision on substantial compliance.

Turning to the topic of judicial efficiency, no case management order was entered (except as to IHC's later abandoned Supplemental Complaint), nor was there a time limit set for amending pleadings or completing discovery. No trial date was ever set. D&K specifically raised substantial compliance with the court a short time after it ruled in favor of forfeiture but two months before the order ultimately memorializing the ruling was entered. The facts supporting substantial compliance were in the record by June 10, 2004, R912-927, and IHC had ample opportunity to investigate them in the battle over a stay pending appeal. Since D&K was entitled to a trial on damages and waiver, the incremental burden of trying substantial compliance would have been minor. Moreover, even if it had been the only issue, a trial on substantial compliance would have consumed

far less of the court's time than the parties' battles over Rule 54(b) certification, stays pending appeal and IHC's attorney fees. In short, efficiency considerations were not compelling.

Efficiency cannot hold a candle to the countervailing consideration of doing justice between the parties. Here, forfeiture was declared without any cure period whatsoever being afforded to D&K. Even the forfeiture notice was suspect, relying on a claimed failure to pay April 1998 rent, when IHC had already received that rent. Upon receiving the notice, D&K immediately tendered the March 1998 rent (along with a 10% late fee), which IHC's designated agent accepted and receipted. IHC then returned it. The loss of D&K's leasehold would have a devastating financial impact, with losses amounting to millions of dollars. Forfeiture would be manifestly unjust. The trial court made an error. Even if the error, however, were solely that of D&K's counsel, it would be manifestly unjust to refuse to consider a defense so compelling as substantial compliance against a claim so draconian as forfeiture. With such extreme harm juxtaposed against pallid excuses for refusing to consider the defense, the trial court's ruling, had it chosen to exercise its discretion based on a correct application of legal principles, would have been an abuse of discretion.

**B. The Elements of the Trial Court's Decision Are Reviewed for Correctness.**

With respect to the trial court's denial of D&K's motion for reconsideration, IHC simplistically advocates that the standard of review is simply whether the trial court abused its discretion, citing *Timm v. Dewsnup*, 921 P.2d 1381 (Utah 1996). IHC Brief at 9. In *Timm*, however, the Court held that, if the trial court's decision was based on an

erroneous legal conclusion, that alone constitutes an abuse of discretion. *Id.* at 1388. Similarly, one of the cases cited by *Timm* for the abuse of discretion standard is *Gillmor v. Wright*, 850 P.2d 431, 434 (Utah 1993), in which the Court articulated the standard of review for a motion to reconsider (in the context of Rule 60(b)) as follows:

“A motion or action to modify a final judgment is addressed to the discretion of the trial court, the exercise of which must be based on sound legal principles in light of all relevant circumstances.”

*Id.*, quoting *Laub v. South Central Utah Tel. Ass’n.*, 657 P.2d 1304, 1306 (Utah 1982).

An abuse of discretion occurs when a decision is premised on an erroneous legal conclusion or is not based on “sound legal principles in light of all relevant circumstances.”

C. IHC’s Arguments Concerning Materiality and Unconscionability Are Premised on the Assumption that Such Matters Are Affirmative Defenses.

D&K argued in its opening brief that a landlord fails to state a claim for forfeiture unless it pleads materiality of the breach. Appellant’s Brief at 22. Disputing that conclusion, IHC premises its arguments concerning materiality, substantial compliance and unconscionability on the assumption that all aspects of such matters are affirmative defenses. Many courts reject that assumption, placing the burden of proof on the landlord.

In order to evict a tenant in North Carolina, *a landlord must prove*: (1) That it distinctly reserved in the lease a right to declare a forfeiture for the alleged act or event; (2) that there is clear proof of the happening of an act or event for which the landlord reserved the right to declare a forfeiture; (3) that the landlord promptly exercised its right to declare a forfeiture, and (4) that the result of enforcing the forfeiture is not unconscionable.

*Charlotte Housing Authority v. Fleming*, 473 S.E.2d 373, 375 (N.C.App. 1996) (emphasis added). Accord, *Oxford Associates Real Estate, L.P. v. TSI Society Hill, Inc.*, 2007 WL 128886, \*3 (E.D.Pa. 2007) (“Since Landlord has failed to show that it is

entitled to the extraordinary remedy of forfeiture and that the result would not be unconscionable, judgment in favor of Tenant is appropriate.”). See *Helsam Realty Co., Inc. v. H.J.A. Holding Corp.*, 781 N.Y.S.2d 554, 557 (N.Y. Supp. App. Term 2004) (“In order for a forfeiture clause to be enforced . . . the result of enforcing the forfeiture must not be unconscionable.”), citing 2 Dolan, *Rasch’s Landlord and Tenant Summary Proceedings* § 23:39 [4th ed].

This issue is of such importance that it ought to be decided, both to guide the parties and the trial court in this case and to clarify for future cases what elements must be pleaded and proven to accomplish forfeiture of a lease. While IHC contends that the issue has been waived, its argument fails to recognize the unique status of the defense of failure to state a claim afforded by Rule 12(h), Ut. R. Civ. P., which provides as an exception to the general rule of waiver applicable to matters not presented by motion, answer or reply that:

the defense of failure to state a claim upon which relief can be granted . . . may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits . . . .

Decisions applying the identical federal rule clarify its effect. *E.g.*, *Martin v. Southwestern Virginia Gas Co.*, 135 F.3d 307 (4th Cir. 1998) (“If the defendant pleaded as an affirmative defense that the plaintiff failed to state a claim, the defense is preserved even if the trial court did not rule upon it.”); *Westland v. Sero of New Haven, Inc.*, 601 F.Supp. 163 (D. Ill.1985) (defendant did not waive motion to dismiss for failure to state a cause of action since that defense was raised in its answer to the complaint). Further, in

*Martin* the court held that the issue of failure to state a claim was preserved for appeal even though not addressed by the trial court.

D. IHC's Hypertechnical Argument that D&K Did Not Plead Substantial Compliance Is Inconsistent with the Concept of Notice Pleading.

D&K asserted “unconscionability” as a separate defense in its Answer. R45, Seventh Defense. Despite that, IHC relies upon hypertechnical hairsplitting, arguing that it was never “put on notice that D&K intended to rely on a substantial compliance defense” and that “D&K offers no explanation as to how IHC or the trial court should have surmised that its defense of ‘unconscionability’ encompassed a possible ‘substantial compliance’ argument.” IHC Brief at 24. The answer lies in the case law.

It is only when the forfeiture would be so grossly excessive as to be entirely disproportionate to any possible loss that might have been contemplated, so that to enforce it would shock the conscience, that a court of equity will refuse to enforce the provision.

*Jacobson v. Swan*, 278 P.2d 294, 298 (Utah 1954). If a result would “shock the conscience” or cause forfeiture “disproportionate to any possible loss,” it is unconscionable.

It is also axiomatic that a Court of equity may relieve a lessee against forfeiture when the effect of enforcing the tenant’s default would result in an eviction which would be unconscionable, inequitable or unjust under the circumstances.

*Smith v. Winn Dixie Stores, Inc.*, 448 So.2d 62, 63 (Fla.App. 1984).

Over the years, Utah courts began to use the term “substantial compliance” to refer, or give greater definition to, this concept of unconscionability of result. See *U-Beva Mines v. Toledo Min. Co.*, 471 P.2d 867, 869 (Utah 1970); *Cache County v. Beus*, 1999 UT App 134, ¶28; 978 P.2d 1043. In a lease forfeiture action, a tenant opposing forfeiture

could allege that the breach was not material<sup>6</sup>, serious or substantial, that the result sought would “shock the conscience of the court,” that the tenant had “substantially complied” with the lease, or that the result sought is barred by the doctrine of “unconscionability.” In notice pleading it ought not matter which of these terms is chosen by the tenant’s lawyer.

It is evident from these statements that the fundamental purpose of our liberalized pleading rules is to afford parties “the privilege of presenting whatever legitimate contentions they have pertaining to their dispute,” subject only to the requirement that their adversary have “fair notice of the nature and basis or grounds of the claim and a general indication of the type of litigation involved.” *The functions of issue-formulation and fact-revelation are appropriately left to the deposition-discovery process.* The rules “allow examination into the settlement of all issues bearing upon the controversy,” with latitude for proof that extends beyond the pleadings, where appropriate. Rule 15(b). It also appears from the cited decisions that *these principles are applied with great liberality in sustaining the sufficiency of allegations stating a cause of action or an affirmative defense.*

*Williams v. State Farm Insurance Co.*, 656 P.2d 966, 971 (Utah 1982) (citations omitted) (emphasis added).

Even if it had the burden to plead this point, D&K is entitled to liberality in sustaining the sufficiency of its allegation of “unconscionability” as preserving the defense that there was no material default *a la Beus* and D&K had substantially complied with the Lease in good faith.

E. D&K I Did Not Purport to Rule on the Defense of Unconscionability.

In an attempted verbal sleight of hand, IHC argues that *D&K I* disposed of all issues involving unconscionability in its ruling as to equitable estoppel, merely because

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<sup>6</sup> Under *Beus*, the materiality analysis includes the five factors listed in Restatement (Second) of Contracts § 241 (1981), as quoted in Brief of Appellant at 33.



the Court used the word “unconscionable” twice in its analysis of estoppel by acquiescence. IHC Brief at 25. When this Court analyzed D&K’s estoppel defense in *D&K I*, it did not wander afield and attempt to determine, without briefing or argument, whether forfeiture of the Lease was an unconscionable result under *U-Beva* and *Beus* standards. Its analysis was strictly confined to the estoppel defense:

Estoppel by acquiescence is applicable when “it would be unconscionable to permit a person to maintain a position inconsistent with one in which he . . . has acquiesced.” Permitting IHC to enforce the forfeiture provision of the written lease after D & K’s failure to pay rent following a one-month acquiescence in late payment is not unconscionable, and D & K’s estoppel argument therefore fails as a matter of law.

2003 UT 5, ¶11 (citation omitted). This language did not purport to be and was clearly not intended to be a ruling, as a matter of law, that forfeiture of a leasehold worth millions was not an unconscionable result in light of *U-Beva* and *Beus*, which the Court never mentioned. Surely, where forfeiture is sought, D&K is entitled to the same solicitude and even-handed analysis afforded to Cache County in *Beus*.

F. The “Concessions” of Counsel Claimed by IHC Are Belied by Context.

IHC trumpets as the centerpiece of its heroic effort to prevent a decision on the merits of the doctrine of substantial compliance a claimed concession by D&K’s counsel in the course of a hearing on a different matter—that of Rule 54(b) certification. As discussed at 5, *supra*, counsel’s statement was subject to the qualification “given the Court’s ruling.” At that point, the trial court was not conducting a rehearing on its prior grant of summary judgment on possession. Rather, it wanted to know whether “there are . . . facts yet to be resolved with respect to the issue of forfeiture and possession *that are in common with* the facts to be resolved regarding the breach of contract damages claim.”

Transcript, R1108 at 37<sup>7</sup> (emphasis added). More importantly, the transcript as a whole clearly reveals that, whatever counsel may have thought the court was asking, he did not intend to waive D&K's ability to rely on the doctrine of substantial compliance.

When the court raised the issue of “where we go from here procedurally,” *id.* at 34 (Addendum A), counsel referred to the *Delgado* and *Beus* cases and advised the court that the issues thereunder “are yet to be decided in this case.” *Id.* The court expressed its opinion that those issues had necessarily been decided as part of its ruling on waiver, saying:

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.* Twice in the same hearing counsel had stated the principle that “the law abhors a forfeiture.” *Id.* at 8,<sup>8</sup> 16. He used the term “substantial compliance” thrice. *Id.* at 15-16, 34. He noted that there are cases striking down forfeiture where a party “may have missed on a technicality.” *Id.* at 15-16. When viewed as a whole in their context, the statements of D&K's counsel demonstrate the opposite of what IHC claims for them.<sup>9</sup>

Another instance of IHC's reliance on statements of D&K's counsel taken out of context is its argument that the trial court gave, and D&K declined, repeated opportunities to raise defenses other than waiver. IHC Brief at 29. IHC's argument is

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<sup>7</sup> The herein-cited pages of the Transcript are attached in Addendum A.

<sup>8</sup> The reporter inaccurately transcribed this phrase as “the law enforce the forfeiture.”

<sup>9</sup> Moreover, since the trial court incorrectly conflated waiver and the substantial compliance doctrine, a motion for reconsideration was precisely the right procedure.

wrong in every way. It cites but one short passage of the record, not many.<sup>10</sup> The trial court's question, whether the law of summary judgment precluded a ruling as a matter of law that no waiver had occurred, cannot be rationally construed as an invitation to present other affirmative defenses. Attempting to cast the response as something different from what was said, IHC resorts to extreme editing of the two-page long response by D&K's counsel (interspersed with comments by the court) to reduce it to two words, "Absolutely . . . waiver . . . ." IHC's argument is absolutely unfounded.

G. The Trial Court Exercised No Discretion on Reconsideration.

Curiously, IHC argues that the trial court acted within its discretion in refusing to consider substantial compliance even though it: (1) ruled, based on law of the case, that it had no discretion, (2) failed to apply the standards applicable to a Rule 54(b) decision, and (3) turned a blind eye to the compelling facts in the record supporting D&K's substantial compliance argument. As discussed at 13-14, *supra*, an exercise of discretion "must be based on sound legal principles in light of all relevant circumstances" and, if it is based on an erroneous legal conclusion, constitutes an abuse of discretion for that reason alone.

1. *Law of the Case Did Not Deprive the Trial Court of Discretion.*

Stating it "does not believe it has had the right or discretion to consider" substantial compliance on the merits, R1372-73, the trial court cited only *Smith v. Osguthorpe*, 2005 UT App 11 (unpublished opinion), and said it was persuaded by a statement therein that "when there has been an adjudication, it becomes res judicata as to

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<sup>10</sup> The relevant pages of the March 2, 2004 Transcript are attached in Addendum B.

those issues which the party had a fair opportunity to present and have determined in the other proceeding.” R1373. Implicitly conceding that *Osguthorpe* does not correctly state the law, IHC attempts to recast the trial court’s ruling as having been based on some other uncited case(s) and some other unarticulated rule(s).

The January 2006 Order plainly evinces the trial court’s opinion that the prior appeal resulting in *D&K I* had a preclusive effect, both with respect to issues decided therein and with respect to any issues that might have been raised prior to or in the course of that appeal. R1371, ¶6, R1373, ¶9. In its opening brief, D&K discussed the principle, contrary to the trial court’s view, that a ruling on a prior appeal is a basis for law of the case only with respect to issues actually or necessarily decided in that appeal. In support thereof D&K cited five decisions of this Court. Brief of Appellant at 25-26. IHC does not dispute this rule and does not question any of the authorities cited by D&K in support thereof. Instead, IHC incorrectly describes it as the “mandate rule”<sup>11</sup> and employs the straw man tactic of arguing that “D&K is wrong in arguing that the requirements of the ‘mandate rule’ applied to the trial court on its Motion to Reconsider.” IHC Brief at 33. In fact, D&K made no such argument. At bedrock, since the trial court’s decision that it had no discretion in the matter was based on an erroneous legal principle, the January 2006 Order cannot stand.

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<sup>11</sup> The mandate rule is that an inferior court is required to honor the mandate of a superior court within a single judicial system. Here, there was no ruling or mandate in *D&K I* with respect to substantial compliance issues, yet the trial court acted as if it had received a mandate not to consider those issues.

D&K cited two decisions of this Court holding that law of the case does not prevent a judge from reconsidering previous nonfinal orders pursuant to Rule 54(b). Brief of Appellant at 28-29. IHC ignores both cases, advocating instead a rule opposite to their holdings. IHC offers no rationale to persuade this Court to abandon its prior decisions, and it should not do so.

2. *The Trial Court Failed to Apply Correct Legal Principles.*

In failing to apply the standards governing Rule 54(b), the trial court failed to apply sound legal principles. The reasoning in its January 2006 Order consisted primarily of four elements. First, the court repeated six times with minor variations the view that D&K did not raise, argue or brief the defense of substantial compliance. Second, it incorrectly ruled (as discussed above) that it was precluded by law of the case and res judicata from considering the issue. Third, it relied, adopting language proposed by IHC, on the erroneous notions discussed above that D&K was arguing that unconscionability is not the same defense as substantial compliance and that D&K told the court at a 54(b) certification hearing that there were no facts left to be considered on forfeiture. Fourth, it ruled that the facts presented did not support substantial compliance.

3. *D&K Presented Compelling Facts Showing Substantial Compliance.*

One of the most astounding errors of the trial court was its conclusion that the facts presented by D&K did not support substantial compliance. This error was thoroughly exposed in D&K's opening brief. Brief of Appellant at 32-35. IHC's response is yet another iteration of its refrain that *D&K I* had rejected unconscionability as a separate defense. IHC Brief at 42. This time, however, IHC also cites, out of context, passages from D&K's brief filed in the prior appeal. That brief is not part of the record,

but should the Court choose to review it anyway, it will be abundantly clear that D&K's prior argument addressed its estoppel defense exclusively.

IHC sedulously avoids any mention of the facts relied on by D&K and never contradicts D&K's argument that it has a far more compelling case for substantial compliance than did Cache County in *Beus*. IHC incorrectly claims *Kudlik* and *Olympus Hills Shopping Ctr., Ltd. v. Smith's Food & Drug Ctrs., Inc.*, 889 P.2d 445 (Utah App. 1994), "allowed forfeiture of a lease based on the simple failure of the tenant to pay rent." *Id.* at 42-43. *Kudlik* never mentioned forfeiture but was an unlawful detainer case, in which the tenant was afforded multiple opportunities to cure, unlike D&K, which received none. *Olympus Hills* allowed termination of a lease after notice of default, a thirty-day cure period and absence of cure, for violation of a continuous operations clause—not for a rent default. The trial court, relying apparently on the same argument made by IHC below, R1281, erroneously determined that D&K's substantial compliance defense would be futile. Since that defense was not futile, but supported by compelling facts, the trial court's ruling was fatally based on an erroneous legal conclusion.

### **III. IHC Fails to Show Any Contractual Basis for the Attorney Fees Award.**

The trial court ruled that IHC expressly waived any claim to attorney's fees under Section 17.2 of the Lease and cannot recover fees thereunder. R1385 n.1. IHC did not appeal that ruling. It chose to rely solely on Section 23, which requires for an award of fees that the action be filed "during the term of this Lease." D&K cited four decisions of this Court that when a landlord elects to terminate a lease for breach, the termination is effective, if at all, when the notice is given. Brief of Appellant at 37. That occurred over a

year prior to the action. Nowhere has IHC questioned those decisions or cited any authority for the trial court's novel conclusion that the Lease was not terminated until the court ruled in favor of ejectment.

**IV. The Fee Award Was Not Supported by Sufficient Evidence, Included Fees for Matters on Which IHC Did Not Succeed and Resulted from an Improper Shifting of the Burden of Proof to D&K.**

IHC mistakenly argues that a 300-page record created over a period of eleven months in obtaining a fee award, based on sheer volume, constitutes sufficient evidence to support the fees awarded. A mass of information without the mandatory allocation among successful and unsuccessful matters remains insufficient to sustain IHC's evidentiary burden. As D&K demonstrated with extensive detail, the information submitted by IHC reveals numerous time entries irrelevant to the case and therefore unreasonable or that obviously applied to matters on which IHC did not prevail.

The only defense offered for the trial court's improper shifting of the burden of allocating fees to D&K is IHC's argument that, despite a one-month extension, D&K did not do IHC's job of sifting thousands of time entries in a 90-page affidavit and allocating them among the seven discrete matters named by D&K on which IHC did not prevail. IHC cites no precedent for the strange proposition that the burden of allocating fees can be shifted to the party against whom an award of fees is sought merely by granting it an extension of time.

Straining to make the fee award appear reasonable even in the absence of sufficient evidence and compliance with the allocation task, IHC argues that the trial court "made numerous discounts" to the fees requested. IHC Brief at 49. As the first

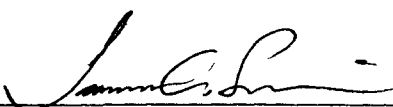
example, IHC points to a “discount of \$91,205.96” from counsel’s standard rates. *Id.* In reality, counsel billed IHC at the discounted levels, and the court imposed no reduction from the levels at which IHC was billed. The only reductions made by the court were incomplete reductions for some of the matters on which IHC did not prevail.

### **CONCLUSION AND RELIEF SOUGHT**

As stated with more specificity in the Brief of Appellant at 48-49, each of the trial court’s orders from which this appeal was taken should be reversed, and this case should be remanded for trial, with a conditional award of attorney fees to D&K for this appeal.

DATED this 29th day of June, 2007.

**PRINCE, YEATES & GELDZAHLER**  
A Professional Corporation

By:   
\_\_\_\_\_  
Michael N. Zundel, Esq.  
James C. Swindler  
Glenn R. Bronson  
Attorneys for Appellant



**CERTIFICATE OF SERVICE**

I hereby certify that on the 29th day of June, 2007, I caused two copies of the foregoing to be served 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



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Tab A

IN THE THIRD JUDICIAL DISTRICT COURT

SUMMIT COUNTY, STATE OF UTAH

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

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HEARING ON MOTIONS MAY 26, 2004

BEFORE

THE HONORABLE ROBERT K. HILDER

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**FILED DISTRICT COURT**  
Third Judicial District

JUN 11 2004

By Bn SALT LAKE COUNTY  
Deputy Clerk

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CAROLYN ERICKSON, CSR  
CERTIFIED COURT TRANSCRIBER

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

FILED  
UTAH APPELLATE COURTS

SEP 16 2004

ORIGINAL

20040505-CA

1 SALT LAKE CITY, UTAH - WEDNESDAY, MAY 26, 2004; 12:00 NOON

2 HONORABLE ROBERT K. HILDER, JUDGE PRESIDING.

3 P R O C E E D I N G S

4 THE COURT: We are on the record in the matter of  
5 IHC Health Services, Incorporated, against D & K Management,  
6 case number 990905693. Please state appearances.

7 MR. DURHAM: Matthew Durham on behalf of IHC Health  
8 Services. I have Matthew Moscon with me.

9 MR. BRONSON: Glenn Bronson and Mike Zundel on behalf  
10 of D & K Management -

11 THE COURT: Okay.

12 MR. BRONSON: - principals of D & K with us, Mr.  
13 (inaudible).

14 THE COURT: Thank you. I think I'm glad we're here  
15 together on this. It's one of those ones that in a way becomes  
16 very messy, and I apologize. I think I've contributed to the  
17 mess in some efforts to keep the thing moving, and the most  
18 recent amended order, I don't even think that's correct,  
19 unfortunately.

20 But we're here really on the issues of (inaudible)  
21 judgment to Rule 54(b), certification, et cetera. And there's  
22 not much disagreement that the Court has made a final  
23 determination on summary judgment on forfeiture, a declaratory  
24 judgment. There is remaining the breach-of-contract claim on  
25 damages. Do we all agree on that, which I think I messed up in

1 unlawful-detainer statutes are that - first of all, that the  
2 law enforce the forfeiture. And so the unlawful detainer  
3 statutes are set up to give a tenant to - this is rent, a  
4 monetary obligation under a lease, numerous obligations - at  
5 least two in writing, one by the court and one by a landlord,  
6 the option to cure any monetary defaults.

7 That is not the procedure under which IHC elected to  
8 proceed. They elected to proceed under the common-law  
9 ejectment rules, which do not give a tenant the opportunity to  
10 cure. You're in breach, then you go before the court, you  
11 argue your breach, but it also delays an immediate eviction  
12 remedy. And so it puts the court in a position where, instead  
13 of the statutory provisions, where you can't separate  
14 possession and damages, we're not in a position to do that.  
15 This is common-law ejectment, and many cases do uphold that.

16 So - well, we didn't get the opportunity to cure.  
17 They also don't get the opportunity to kick us out on a  
18 possession order that's not final and it's not appealable.

19 THE COURT: The problem is I do understand the  
20 reasons of the rule; I understand that it's efficiency in terms  
21 of appellate review. But isn't it subject to incredible abuse  
22 in a landlord-tenant context where someone whose right to  
23 possession has been determined to no longer exist, can stay in  
24 possession, increase the damages for a potentially long time,  
25 simply because there can be factual disputes and the need to

1 get to trial on the damage claims, whereas it seems like it can  
2 give a - it can sort of trump the right to possess one's own  
3 property -

4 MR. BRONSON: Well, your Honor -

5 THE COURT: - on almost a technicality?

6 MR. BRONSON: Your Honor, the issue of whether or not  
7 someone is wrongfully in possession is the issue that is at  
8 stake here.

9 THE COURT: Well, that's the question. Is that at  
10 stake? If that was at stake, I'd say I'm with you all the way.  
11 What is still at stake about possession?

12 MR. BRONSON: Well, our argument, and the reason we  
13 would appeal, is because D & K firmly believes that IHC waived  
14 its remedy -

15 THE COURT: Sure.

16 MR. BRONSON: - of forfeiture. And so -

17 THE COURT: - So why don't we give you the  
18 certification and you go up and appeal it? Do you think they  
19 won't accept it at the Supreme Court?

20 MR. BRONSON: No. The point is - the point is, we go  
21 back to our original argument. Waiver, as you have  
22 acknowledged and the Supreme Court acknowledged, waiver is an  
23 intensely factual issue.

24 THE COURT: Oh, absolutely.

25 MR. BRONSON: D & K is entitled to a trial on that

1 issue, and the only way the court can separate the possession -

2 THE COURT: Well, you're entitled if your right that  
3 my ruling's wrong -

4 MR. BRONSON: Correct.

5 THE COURT: - yes.

6 MR. BRONSON: Our argument, of course, is that we're  
7 entitled to a trial on that issue because it is a factual  
8 issue. So your question is, isn't that ripe for abuse. Well,  
9 in some situations, perhaps.

10 THE COURT: Well, whether a Rule 54(b) certification  
11 of whether we have trial, will we resolve the remaining the  
12 damage issue, then the court then issues a possession order,  
13 what happens to possession pending appeal, whether it's off of  
14 54(b) or at the close of all the issues in the case? You're  
15 still in the same position.

16 MR. BRONSON: We are, and I think we get the  
17 opportunity to argue a stay upon appeal and to go through the  
18 proper elements of the stay upon appeal -

19 THE COURT: And that stay, would that be argued to  
20 this court or to the appellate court?

21 MR. BRONSON: We'll argue with both - to both -

22 THE COURT: Probably so. But wouldn't -

23 You're warned. He's going to argue it every where,  
24 but you knew that.

25 Okay. But say I do the 54(b), you just get to move

1 trial on. I mean -

2 THE COURT: Well, wait a minute. What are going to  
3 trial on? It gets to this back to whether you're entitled to  
4 possession, period, doesn't it? And I guess I'm not sure how  
5 that issue's still alive, and that - I mean that's a very  
6 sincere question.

7 MR. BRONSON: Okay. There are mechanisms for IHC to  
8 get immediate possession and to have those rights at their  
9 disposal. The mechanism to get immediate possession is not  
10 common-law ejectment. The mechanism which the legislature has  
11 laid out is the unlawful detainer enforceable -

12 THE COURT: Could they amend and do that?

13 MR. BRONSON: Pardon?

14 THE COURT: Could they amend at this stage of the  
15 proceeding and do that?

16 MR. DURHAM: I would stipulate, Judge.

17 MR. BRONSON: They can certainly amend. In fact, I  
18 think we would openly stipulate them to amending that, because  
19 those statutes which permit the right to a very accelerated  
20 ejection are based upon a public policy that a tenant in  
21 default, under a technical term, a monetary term, has the right  
22 to cure it.

23 There are a number of cases. They go from the waiver  
24 cases to the substantial-compliance cases, where courts have  
25 struck down the forfeiture because the party is in substantial



1 compliance, but may have missed on a technicality. That's the  
2 policy underlying unlawful detainer statutes, to give a tenant  
3 who missed a late payment the opportunity to cure and not  
4 immediately eject them. That's the policy here. And -

5 THE COURT: Is that -

6 MR. BRONSOW: - because -

7 THE COURT: - a right available after the court's  
8 found a forfeiture or a waiver?

9 MR. BRONSON: They didn't proceed under that.

10 THE COURT: Well, I'm saying if they now amended to  
11 use the unlawful detainer, would the right to cure still be  
12 available?

13 MR. BRONSON: Oh, yes. Oh, yes. It's a three-day  
14 right to cure for the notice to pay or quit, and then, once the  
15 action is filed, there's a notice from the court for a right to  
16 cure, if I understand the statutes correctly.

17 But my point is, the law abhors a forfeiture, and  
18 here we never got the option to cure. D & K never got the  
19 option to cure. That's the policy behind the immediate  
20 possession argument. That's not what they have. They  
21 deliberately elected to proceed in a common-law ejectment.  
22 That means they're saddled with the rules with regard to  
23 common-law ejectment, and that means they don't get possession  
24 until there's a final order, nor do we get to appeal until  
25 there's a final order.

1           THE COURT: And what other good is served? What other  
2 judicial economy? What other right of the parties is served if  
3 really this issue, as you say for the Supreme Court to decide.  
4 If this Court decides it wrongly it needs to go back to the  
5 finder of fact.

6           MR. BRONSON: This Court has the authority to revisit  
7 its decision at any point.

8           THE COURT: Well, sure, but I'm not going to  
9 reconsider that because I think it's right.

10          MR. BRONSON: As your Honor mentioned -

11          THE COURT: - tougher issue is where we go from here  
12 procedurally.

13          MR. BRONSON: I didn't cite the cases but your Honor  
14 cited the cases, Delgado and Buse and those cases with regard -  
15 those are yet to be decided in this case potentially and those  
16 issues may very well be on appeal. It is appropriate that this  
17 Court not certify this issue as a final (inaudible) now.

18          THE COURT: I don't think the Court can determine  
19 forfeiture - wavier equaling forfeiture without implicitly  
20 dealing with the Delgado-Buse line and the non-substantial -  
21 whatever the term is.

22          MR. BRONSON: Substantial compliance.

23          THE COURT: Substantial compliance, yeah.

24          MR. BRONSON: That maybe the case. That, I think, is  
25 probably another issue that could be ripe for more Supreme

1 Court review as well. My point -

2 THE COURT: I don't disagree with that. I guess my  
3 befuddlement a little bit is since there are these issues and  
4 they may well be good ones and I'll be directed by what the  
5 appellate court says, shouldn't it be getting up there as soon  
6 as possible and whenever that happens you're going to have to  
7 deal with the stay issue.

8 MR. BRONSON: I think Kennecott says no, it shouldn't  
9 get up there as soon as possible. What they should do is you  
10 resolve all these issues and let the court learn the facts one  
11 time and decide all -

12 THE COURT: I think that's the core point, whether  
13 Kennecott applies, whether we have here common factual issues.  
14 I mean I know what Kennecott says and I agree that if we have  
15 common factual issues we shouldn't be certifying anything. I  
16 think where we disagree is I probably disagree on the waiver.  
17 I don't think we have any common factual issues left and I  
18 don't think there's any factual dispute left on the issue of  
19 totality on waiver but that's for another day. That ruling's  
20 behind me and that's going to be decided separately.

21 But on Kennecott, it's sort of the same dispute we  
22 have, we just disagree, don't we?

23 MR. BRONSON: From what I'm - without you having yet  
24 ruled, I think we - I think I can -

25 THE COURT: Just on the understanding of how

1 Kennecott would apply with that.

2 MR. BRONSON: I think the Court may be disagreeing  
3 in principle somewhat with Kennecott but I believe Kennecott  
4 and its progeny is very clear.

5 THE COURT: No, I wouldn't admit to disagreeing in  
6 principle. I don't. I think it's a good rule.

7 (Both talking)

8 THE COURT: - once a common factual issue always a  
9 common factual issue. I guess what I'm missing, Mr. Bronson,  
10 is how we really have common factual issues anymore and if you  
11 can point those to me -

12 MR. BRONSON: It's not the factual issues underlying  
13 the remedies that count. It's the common facts that underlie  
14 the claims and we have three claims arising out of what they  
15 continue to call wrongful possession and a breach of contract.  
16 Everyone of the remedies that are available, potentially, arise  
17 out of that same nexus of facts. That can't be disputed. And  
18 all the cases, Kennecott and all the cases that interrupt that  
19 say we want a narrow appeal rule and the underlying - the  
20 nexus, the overlap of facts when the remedies are different  
21 that arise out of the same underlying facts, there is no  
22 certification on appeal. So - and that issue was dealt with in  
23 Kennecott. And to the extent that there are circuits and  
24 districts that go the other way and except another rule, they  
25 were dealt with in Kennecott.

1           Their cited case is Olympia. Olympia was disposed of  
2 in Kennecott. That's not the rule in Utah. The rule in Utah  
3 is a very narrow approach. And the (inaudible) court, of  
4 course, has its justifications, but the primary justification  
5 is to condense or appeal all issues and almost inevitably there  
6 certainly will be other issues on appeal from this case.

7           THE COURT: I'm sure that's true. Although not quite  
8 true. I mean there could be a damages trial where there isn't  
9 that much at issue, but that's for another day.

10          Anything else, Mr. Bronson?

11          MR. BRONSON: I think that's it, your Honor.

12          THE COURT: Thank you, and thank you both for a real  
13 aggressive argument.

14                I think the bottom line is that the Court has  
15 determined, yet to be decided whether the Court is right or  
16 wrong but the Court has determined that there is forfeiture.  
17 That forfeiture leads to a right to retake the possession. The  
18 only remaining issues this Court can identify are those that go  
19 to the issues of damages resulting from that possession  
20 following the forfeiture. The Court agrees that there were  
21 common facts initially but at this stage there are no facts yet  
22 to be resolved with respect to the issue of forfeiture and  
23 possession that are in common with the facts to be resolved  
24 regarding the breach of contract damages claim.

25                The Court finds no reason not to, one, agree to issue

Tab B

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

-o0o-

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

-o0o-

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

-o0o-

A P P E A R A N C E S

For the Plaintiff:	MATTHEW M. DURHAM D. MATTHEW MOSCON Attorneys at Law Stoel Rives, LLP 201 South Main, #1100 Salt Lake City, Utah 84111
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For the Defendant:	MICHAEL N. ZUNDEL Attorney at Law Princes, Yeates & Geldzahler 175 East 400 South, #900 Salt Lake City, Utah 84111
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**FILED DISTRICT COURT**  
Third Judicial District

MAR 15 2004

By bn SALT LAKE COUNTY

Deputy Clerk

FILED  
UTAH APPELLATE COURTS

1  
ALAN P. SMITH, CSR  
385 BRAHMA DRIVE (801) 266-0320  
SALT LAKE CITY, UTAH 84107

ORIGINAL

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1 in contracts.

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

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

7 MR. ZUNDEL: Yes, we did.

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

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

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

20 THE COURT: Uh huh.

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

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

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



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

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

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

14 THE COURT: Uh huh.

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

20 THE COURT: Uh huh.

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

24 THE COURT: Well,--

25 MR. ZUNDEL: --and we--

1           THE COURT: --what they're saying there, though, is  
2 still consistent. They're saying, within the facts of this  
3 case that are undisputed, when you have to find a knowing, an  
4 intentional waiver, these facts cannot support that under the  
5 totality of the circumstances, which include that that was not  
6 the place the rent was directed to go, plus all the other  
7 facts.

8           I don't think it's disavowing the acts of their  
9 agents. They do take--IHC took it, IHC cashed it, IHC kept  
10 it, but that is not, under these circumstances, evidence of  
11 intent.

12           MR. ZUNDEL: How do you determine intent? Are you--  
13 are you saying they couldn't have wanted to waive because they  
14 wanted to do something else with this property that would be  
15 better for them? And I can divine--I can divine that because  
16 they--somebody wanted to do that and nobody would have wanted  
17 to waive this contract that they didn't waive, or do you say  
18 that they don't have a corporate resolution, so they didn't  
19 waive?

20           What--what--what are we saying? I--and if I'm--

21           THE COURT: I mean, I think you plead waiver, you've  
22 got to show the facts that support waiver.

23           MR. ZUNDEL: Well, let's--let's show this then,  
24 let's ask--let me ask you this, Judge.

25           THE COURT: Uh huh.

1           MR. ZUNDEL: Take the hypothetical in a 15-minute  
2 increment.

3           THE COURT: In a what? I'm sorry.

4           MR. ZUNDEL: Or--take a hypothetical, you've got a--  
5 you've got a ten-minute increment, three statements in ten  
6 minutes.

7           THE COURT: Oh. Okay.

8           MR. ZUNDEL: The first statement is, I default you,  
9 I want--I terminate the contract.

10           Five minutes later, you say, okay. I don't  
11 terminate the contract, I waive.

12           Five minutes after that, you say, I--I terminate, I  
13 was only kidding before.

14           So, now, do you say, under the totality of the  
15 circumstances, I got two against one? Or do you say, look, in  
16 that instant, you waived and you're bound by it.

17           THE COURT: You show me those facts and you're going  
18 to win.

19           MR. ZUNDEL: Okay. Mr. Uriona's letter. Dear  
20 Tenant: The--

21           THE COURT: That's not what--the intent. The intent  
22 isn't even to D & K. This fits the Court of Appeals decision  
23 sets--suggests enforcement of certain contract conditions  
24 during a period of unlawful possession are not inconsistent  
25 with a desire not to waive. It's not your hypothetical.