1989

Fashion Place Investment, Ltd., aka Fashion Place Associates, Fashion Place Investors, Ltd., Capitol Life Insurance Company, Valley Mortgage Company, Dr. Robert Anderson, Dr. Barlow L. Packer, Dr. Orlando T. Barrowes, and Dr. Carlson Terry v. Salt Lake County/Salt Lake County Mental Health and Holland & Pasker, Architects And Planners, Holmes & Anderson, Inc., J&J Electric, Dick's Plumbing, Thompson & Sons Heating And Air Conditioning, Eckman & Midgley Contractors, Thronton Plumbing & Heating, John Does 1 Through 5, John Does 1 Through 5, Air Care Industries, Inc. v. Richard Harman, dba

Building Management Services and Safeco Insurance Company et al. : Brief in Opposition to Certiorari

Utah Supreme Court

Theodore E. Kanell; John N. Braithwaite; Hanson, Epperson & Smith; Attorneys for Plaintiffs-Appellants and Petitioners.

I. Franklin Hunsaker; Dianne K. Ericsson; Bullivant, Houser, Bailey, Pendergrass & Hoffman; Ralph D. Crockett; Deputy Sale Lake County Attorney; Gary B. Ferguson; Gary L. Johnson; Richards, Brandt, Miller & Nelson; Attorneys for Defendant-Respondent.

DOCKET NO. 890370

IN THE SUPREME COURT OF THE STATE OF UTAH

FASHION PLACE INVESTMENT, LTD., a partnership, aka FASHION PLACE ASSOCIATES, FASHION PLACE INVESTORS, LTD., a limited partnership, CAPITOL LIFE INSURANCE COMPANY, VALLEY MORTGAGE COMPANY, DR. ROBERT ANDERSON, DR. BARLOW L. PACKER, DR. ORLANDO T. BARROWES, and DR. CARLSON TERRY, Plaintiffs-Appellants, and PETITIONERS, vs. SALT LAKE COUNTY/SALT LAKE COUNTY MENTAL HEALTH, Defendant-Respondent. [Caption continued on inside cover]	DC C84-302 (Consolidated) CA 870553-CA SC 890370

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent's Brief in Opposition to
Petition for Writ of Certiorari from the
Decision of the Court of Appeals on
Appeal from the Judgment of the Third District Court
Honorable David S. Young, Judge

Opinion filed: June 26, 1989
Author of Opinion: Judge Davidson
Joined by Judges Bench & Orme

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[Counsel continued on inside cover]

[Caption continued from front cover]

and

HOLLAND & PASKER, ARCHITECTS AND PLANNERS, HOLMES & ANDERSON, INC., J&J ELECTRIC, DICK'S PLUMBING, THOMPSON & SONS HEATING AND AIR CONDITIONING, ECKMAN & MIDGLEY CONTRACTORS, THRONTON PLUMBING & HEATING, JOHN DOES 1 THROUGH 5, JOHN DOES 1 THROUGH 5, AIR CARE INDUSTRIES, INC., an Illinois corporation,

Defendants.

SALT LAKE COUNTY/SALT LAKE COUNTY MENTAL HEALTH, et al.,

Third-Party Plaintiffs,

vs.

RICHARD HARMAN, dba BUILDING MANAGEMENT SERVICES and SAFECO INSURANCE COMPANY et al.,

Third-Party Defendants.

[Counsel continued from front cover]

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STATEMENT OF THE FACTS

The petitioner has made the following misstatement of facts in its Petition for Writ of Certiorari:

1. "Petitioners either had an ownership interest in the building or were tenants in the building at the time of the fire." [Brief at pp. 3 & 6.] In fact, the petitioner is Safeco Insurance Company, alone. None of the tenants in the building are petitioners seeking a Writ of Certiorari, nor were they appellants before the Court of Appeals. All of the tenants in the building have dismissed all lawsuits that they had against Salt Lake County, with prejudice. All tenants insured by Safeco dismissed those actions with no settlement sums being paid by Salt Lake County.

ARGUMENT

POINT I

SAFECO'S ONLY REMEDY AGAINST SALT LAKE COUNTY IS SUBROGATION

It should be noted at the outset that in the underlying action, Safeco pursued a subrogation action against Salt Lake County. Safeco realizes that it cannot succeed on the equitable issues presented by the law of subrogation. In the Petition for Writ of Certiorari, it does

not argue the issue of subrogation, equity, or insurance law. Instead, it attempts to twist the case into one of indemnification for one's own negligence. This is the reason that it includes in its definition of "petitioners" individuals as well as Safeco, and not Safeco alone. It is confusion with a purpose.

The sole issue before the Court of Appeals, and on Petition to this Court, is whether a liability insurance carrier may sue, in subrogation, an insured, co-insured or additional insured under a liability policy for a loss covered by the policy. Safeco says yes, it can. Safeco's position clearly violates the principles of liability insurance law and the equitable principles governing subrogation. See Board of Education v. Hales, 566 P.2d 1246 (Utah 1977). This is the reason why Safeco attempts to twist the issue into one of indemnity and not insurance or subrogation.

The majority position in the jurisdictions that have addressed the issue now before the Court on petition, is that a tenant who requires a landlord to obtain insurance on leased premises does so for the clear purpose of protecting the tenant from liability for damage insured under the policy. The ordinary and reasonable expectations of a landlord and a tenant are that insurance eliminates the risk for both. Otherwise, it is meaningless for the tenant to require the landlord to

provide fire insurance on the building. The tenant, logically, would not buy insurance to cover losses by fire to the building when the landlord has assumed the obligation to do so in the lease.

Both the landlord and the tenant, when negotiating the lease, are interested in eliminating the risk of loss to either of them caused by fire. This is the reason for the provision regarding the purchase of fire insurance on the building. The insurer's interest are not represented by anyone negotiating the lease. Therefore, it is not surprising to find that there is no express reservation of rights in Salt Lake County's lease with Fashion Place which reserves the right to the insurer to sue Salt Lake County in subrogation. Unless this express reservation is stated in the lease, Salt Lake County has no reason to suspect that it may be sued in subrogation by the insurance company that is supposed to be protecting it and the landlord from the risk of loss by fire.

POINT II

SAFECO LOSES UNDER THE EQUITABLE RULES THAT APPLY IN SUBROGATION

When equitable rules are applied to the case at bar, it is clear that it is inequitable to allow Safeco to subrogate against Salt Lake County.

1. The facts established at the Motion for Summary Judgment Hearing and at the Reformation Trial that Salt Lake County negotiated for as much insurance coverage as possible.

Judge Frederick found in the reformation case that:

> The evidence clearly indicates to this Court's satisfaction that Salt Lake County did not commit a mistake in its preparation of the agreement. It was the defendant Salt Lake County's intent to shift the personal property insurance obligation, among others, to the landlord.
>
> . . . .
>
> The defendant [Salt Lake County] sought to drive a hard bargain and was aware of plaintiff's [Fashion Place] need to be flexible in the lease terms due to substantial vacancies.
>
> . . . .
>
> Negotiating agents for the County specifically sought, due to unsatisfactory terms of the '78 Lease and previous insurance, distasteful insurance expenses to shift all maintenance, utilities, responsibility to the landlord, which they did, except for the telephone, and went over the changes thoroughly with the landlord before the final document was executed.

Salt Lake County was defended in the reformation case by Gary B. Ferguson and Gary L. Johnson. Safeco's interests were represented by its hired counsel, Wendell Bennett. No other counsel from any other interested party in the building was present at the reformation trial.

Salt Lake County reasonably expected that the fire insurance on the building would protect it. This is the conclusion of the majority of the appellate courts that have reviewed this issue.

2. Safeco has no reasonable expectation for subrogation. It was established during discovery, and presented at the Motion for Summary Judgment Hearing through deposition testimony that:

a) The insured can waive Safeco's right to subrogation at any time prior to the loss, without notice to Safeco, and with no premium charge. Further, there would be no premium charge to have Salt Lake County named as an additional named insured.

b) Safeco knew before filing this action, of the Alaska Ins. Co. v. RCA Alaska Communications, Inc., 623 P.2d 1216 (Alaska 1981) and other cases holding that it had no right to subrogation. This was adduced in the deposition of David Kipp and used at the time of the Motion for Summary Judgment hearing.

c) Had the landlord of the building not obtained fire insurance as it was required to do under the lease, and this same fire occurred, it is clear that the landlord could not have sued Salt Lake County,

the tenant, for fire damage to the building, even if Salt Lake County negligently caused the damage to the building. The landlord was required as a matter of contract to procure that insurance for the benefit of both parties.

POINT III

SAFECO CANNOT SUBROGATE AGAINST ITS INSURED UNDER A LIABILITY POLICY FOR ANY PART OF THE LOSS IT PAYS ON THE FIRE

Safeco argues that it can subrogate against any of its insureds for damages it paid in the fire case. Thus, if Safeco insured multiple tenants in the building, with one of those tenants causing the fire, then Safeco could sue anyone of its insureds for all the claims it paid to the other insured tenants in the building. This argument has been rejected by this Court in Board of Education v. Hales, 566 P.2d 1246, 1248 (Utah 1977) (an insurer, which has accepted one premium covering the entire property and has assumed the risk of the negligence of each insured party, ought not to be allowed to shift the risk to any one of them). The very cases Safeco cites in support of its position were disapproved by the Court in Hales, supra.

POINT IV

EVEN UNDER CONTRACT LAW, SAFECO LOSES

It is an axiom of contract law that the specific supersedes the general whenever there is a conflict or a contradiction. Here, the specific obligation was that the landlord buy fire insurance on the building. The general provision regarding redelivery and indemnification is superseded by the specific requirement that the landlord buy insurance. Further, the redelivery and indemnification provisions can be read so that there is no contradiction when it is understood that redelivery and indemnification does not apply to any loss covered by the insurance on the building.

The Utah Court of Appeals, when adopting the reasoning of the Alaska Supreme Court in Alaska Ins. Co. v. RCA Alaska Communications, 623 P.2d 1216 (Alaska 1981), found that the reasonable expectations of landlord and tenant in the commercial lease situation is that once fire insurance on the building is procured, it is for the benefit of both. Further, if the landlord's insurance carrier wished to reserve a right to subrogate against a tenant, then this must be clearly stated in the lease. There is no such written, express reservation to Safeco of the right to subrogate against Salt Lake County.

POINT V

THERE IS NO MATERIAL ISSUE OF FACT

Once the RCA Alaska case is accepted as controlling law, there is no reason to discover beyond the four corners of the lease. The RCA Alaska case requires the landlord's insurance company to prove that there is a specific and clear reservation to the landlord's insurance carrier of the right to subrogate against the tenant. This is nowhere to be found in the Fashion Place/Salt Lake County lease.

Safeco could not produce any witness who could show that Salt Lake County agreed to reserve to Safeco the right to subrogate against Salt Lake County. Such a reservation of rights to subrogate against Salt Lake County clearly is contradictory to the finding of Judge Frederick in the reformation case that Salt Lake County intended to obtain all the insurance coverage it possibly could.

SUMMARY

1.) The ordinary and reasonable expectations of a landlord and a tenant are that insurance eliminates the risk for both. Otherwise, it is meaningless for the tenant to require the landlord to provide fire insurance on the building.

2.) The tenant, logically, would not buy insurance to cover losses by fire to the building when the landlord has assumed the obligation to do so in the lease.

3.) Both the landlord and the tenant, when negotiating the lease, are interested in eliminating the risk of loss by fire by buying insurance. The insurer's interests are not represented by anyone negotiating the lease, so how could there be an express reservation of subrogation rights to the insurer? Without the express reservation, how is the tenant informed of the risk?

4.) If the landlord did not procure insurance as required by the lease, and a fire occurred, this court would not allow the landlord to collect from the tenant the amount of fire damage which would have been insured had the landlord not breached the contract. Why should the insurer be allowed to do what the landlord cannot?

5.) There will be a windfall to Safeco because there is no charge for a preloss waiver of subrogation, or the naming of Salt Lake County as an additional insured. Compare this with the $1 million plus unforeseen risk for Salt Lake County.

CONCLUSION

The decisions of Judge Young and the Court of Appeals should be affirmed. Safeco has no right under either insurance law or contract law to subrogate against Salt Lake County. This is so clear that Safeco must go so far as to incorrectly define the petitioner in order to make its argument, at all.

DATED this 1ST day of September, 1989.

RICHARDS, BRANDT, MILLER
& NELSON

Gary B. Ferguson
Gary L. Johnson
Attorneys for Respondent

MAILING CERTIFICATE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument was mailed, first class, postage prepaid on this 1ST day of September, 1989, to the following counsel of record:

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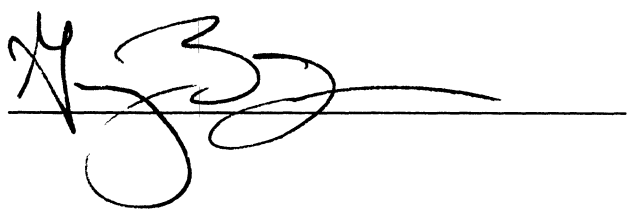

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