

1990

# W. Daniel English v. Standard Optical Company : Petition for Rehearing

Utah Court of Appeals

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UTAH COURT OF APPEALS  
BRIEF

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DOCKET NO. 900422-CA

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COURT OF APPEALS

STATE OF UTAH

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W. DANIEL ENGLISH,

Plaintiff/Respondent,

PETITION FOR REHEARING  
Priority No. 16

vs.

STANDARD OPTICAL CO., a Utah  
corporation,

Case No. 900422-CA

Defendant/Appellant.

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APPEAL FROM THIRD JUDICIAL DISTRICT COURT OF UTAH

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**FILED**

JUL 9 1991

Mary T. [unclear]  
Clerk of [unclear]  
Utah Court of Appeals

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APPEAL FROM THIRD JUDICIAL DISTRICT COURT OF UTAH

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Pursuant to Rule 35, Utah Rules of Appellate Procedure, defendant/appellant Standard Optical Company ("Standard") submits the following Petition for Rehearing in the above-captioned appeal. This Court filed its opinion in this appeal on June 25, 1991. Standard respectfully requests that this Court rehear two issues which Standard believes the Court has overlooked or misapprehended.

The first issue is set forth in the Brief of Appellant on pages 22 through 26 and in the Reply Brief of Appellant on pages 7 to 9. In short, Standard's argument was that a lease, like any other contract, requires consideration to be given by both parties and, because the evidence at trial indicated that English

never gave any consideration to Standard in exchange for a promise to pay rent after September 1, 1988, there was no basis for the trial court's finding that the parties extended the valid term of the lease. To impose additional obligations on Standard beyond those imposed by the 1982 Lease Agreement and 1985 Addendum, consideration was required of plaintiff/respondent, Dr. English, i.e., possession and use of the leased premises. The evidence was unrefuted that Dr. English never gave or offered Standard any additional consideration after October 18, 1988. All the evidence presented at trial indicated English's intent to neither offer nor provide the consideration required of the landlord in any enforceable lease. Accordingly, Standard argued that the trial court's judgment, holding that from September 1, 1988 on, an enforceable lease existed between the parties, should be reversed. See Brief of Appellant, pp. 22-26.

This issue of consideration, was not only an important subject of Standard's briefs but also the primary focus of Mr. Hunt's oral argument before this Court. Despite this, the court's opinion filed on June 25, 1991 does not address the issue. The Court's opinion addresses only the statute of frauds argument and the issue of the "doctrine of surrender and acceptance" which was never raised by Standard. Standard never surrendered the premises and English never accepted them. Rather, English changed the locks, remodeled the premises and sent Standard the bill. English demanded payment without

granting use and possession, hence, failure of consideration. Standard submits that this Court's opinion fails to address the focal point of Standard's argument and, rather than restate that argument, Standard refers the Court to the above cited portions of the briefs which adequately state the argument and appropriate authoritative citations.

The second issue on which Standard requests a rehearing is that addressed in the argument set forth on pages 30-32 of the Brief of Appellant. In summary, Standard argued that there was no evidence presented to the trial court of any damage during the lease term and, consequently, there was no basis for the trial court finding that Standard failed to return the leased premises to English in as good as condition as the premises were at the commencement of the lease. See Brief of Appellant, pp. 30-31. This Court declined to address the issue and assumed the correctness of the judgment below based upon its decision that Standard failed to comply with Rule 24(a)(9) of the Utah Rules of Appellate Procedure. See Opinion, pp. 8-9.

In its opinion the Court stated:

Standard's Brief contains one and a half pages of evidentiary, factual and legal assertions under this point. This 'argument' contains two references to the lease agreement provisions regarding reasonable wear and depreciation and repairs. The point has no citations to the record and no legal authorities; accordingly, the assertive analysis is not meaningful. This point fails to comply with our appellate rules which require the brief of the appellant to contain an argument.

Id. at pg. 9. However, contrary to the Court's statement, Standard's argument under Point III of its Brief did contain a citation to the record as well as citations to the trial transcript and exhibits. Furthermore, the whole point of Standard's argument was that the record in the trial court was devoid of evidence necessary to support the trial court's finding that Standard failed to leave the premises in a sufficient condition on September 1, 1988. It is inconceivable how Standard could include in its argument citations to evidence in the record which does not exist.

As this Court noted in its opinion, Rule 24(a)(9) of the Utah Rules of Appellate Procedure states:

The argument shall contain the contentions and reasons of the appellant with respect to the issues presented with citations to the authorities, statutes and parts of the record relied on.

Standard, however, submits that this provision does not require that each part of an appellant's argument contain citations to authorities, statutes and the record unless they are relied upon. Certainly, there are cases in which it is possible for a sufficient argument to be made without citing authorities, statutes, and parts of the record. The rule that a trial court's findings of fact must be based upon evidence in the record seems so fundamental as to not require citation to an authority. Standard respectfully submits that the briefs of the parties have provided sufficient argument for this Court to

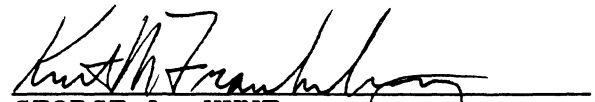
analyze and consider the issue of whether there was any basis for finding Standard liable for damage or lack of repairs.

**CONCLUSION**

For the foregoing reasons, defendant/appellant Standard Optical Company respectively requests that this Court rehear the appeal of this matter.

DATED this 9th day of July, 1991.

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Defendant/Appellant

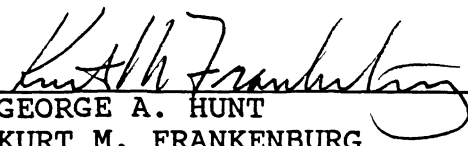


**CERTIFICATION OF COUNSEL**

The undersigned hereby certifies, as required by Rule 35(a) Utah Rules of Appellate Procedure, that this Petition is presented in good faith and not for the purpose of delay.

DATED this 9th day of July, 1991.

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Defendant/Appellant

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COURT OF APPEALS

STATE OF UTAH

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W. DANIEL ENGLISH,

Plaintiff/Respondent,

**CERTIFICATE OF SERVICE**

vs.

STANDARD OPTICAL CO., a Utah  
corporation,

**Case No. 900422-CA**

Defendant/Appellant.

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APPEAL FROM THIRD JUDICIAL DISTRICT COURT OF UTAH

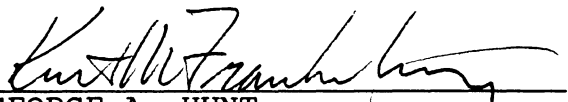
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I hereby certify that I served four (4) copies of the  
foregoing Petition for Rehearing upon the following parties by  
causing a true and correct copy thereof to be hand-delivered:

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DATED this 9th day of July, 1991.

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