

1992

## GNS v. Fullmer : Brief of Appellant

Utah Court of Appeals

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BRIEF

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920763 IN THE UTAH COURT OF APPEALS

GNS PARTNERSHIP; BRYSON  
GARBETT; JAN GARBETT; DAVID  
NIPPER; BETTY NIPPER; WHITE  
WATER CORPORATION, and BRIAN  
STEPHENSEN, Partners,

Plaintiffs-Appellants,

vs.

BRAD FULLMER,

Defendant-Appellee,

Civil No. 920763-CA

Priority No. 16

BRIEF OF THE APPELLANTS

APPEAL FROM JUDGMENT AND ORDER OF THE  
FIFTH JUDICIAL DISTRICT COURT OF WASHINGTON COUNTY  
THE HONORABLE JAMES L. SHUMATE PRESIDING

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**FILED**  
Utah Court of Appeals

FEB 16 1993

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Clerk of the Court



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## JURISDICTION

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

### STATEMENT OF ISSUES PRESENTED FOR REVIEW, STANDARD OF APPELLATE REVIEW, AND SUPPORTING AUTHORITY

1. Did the trial court err in granting summary judgment for appellee Brad Fullmer (hereinafter "Fullmer") and denying partial summary judgment for appellants (hereinafter "Garbett") on the grounds that Garbett's insurer, State Farm Fire and Casualty Company ("State Farm") could not maintain this subrogation action because Fullmer, a tenant of Garbett's, was an implied co-insured under State Farm's fire insurance policy?

Standard of Review: In reviewing the granting of summary judgment, the court views the facts and all reasonable inferences drawn therefrom in a light most favorable to the losing party. Because a summary judgment resolves only questions of law, the court gives no deference to the trial court's legal determinations and affirms only if the decision was correct as a matter of law. Retherford v. AT&T Communications, \_\_\_\_\_ P.2d \_\_\_\_\_, 201 U.A.R. 21 (Utah 1992), and cases cited therein. The court may reconsider the trial court's legal conclusions. Winegar v. Froerer Corp., 813 P.2d 104 (Utah 1991).

2. Did the district court err in striking paragraphs 5 and 6 of David Houston's affidavit and in refusing to strike portions of paragraphs 3 and 5 of Fullmer's May 14, 1992, affidavit?

Standard of Review: Affidavits must set forth facts admissible in evidence and must not simply be conclusory in form. Norton v. Blackham, 669 P.2d 857 (Utah 1983); Butterfield v. Okubo, 831 P.2d 97 (Utah 1992). The court must determine whether the affidavit was made upon personal knowledge and whether the affiant was competent to testify to the matter stated therein. Rule 56, U.R.C.P.; Treloggan v. Treloggan, 699 P.2d 747 (Utah 1985); Howick v. Bank of Salt Lake, 28 Utah 2d 64, 498 P.2d 352 (1972).

#### DETERMINATIVE STATUTES AND RULES

1. Rule 56, Utah Rules of Civil Procedure.
2. Utah Code Ann., § 31A-21-108.

The foregoing rule and statute are set forth verbatim and attached hereto as Addendum 1.

#### STATEMENT OF THE CASE

##### A. Nature of the Case

Garbett owned the Wedge Apartments in St. George, Utah. Garbett had fire insurance on the apartments with State Farm. The apartments were damaged as a result of a fire negligently caused by Fullmer, one of Garbett's tenants. State Farm paid for the fire loss. This is a subrogation action brought by State Farm in the name of its insured, Garbett, to recover for the property damage caused by Fullmer's negligence.

##### B. Course of Proceedings

Garbett filed a motion for partial summary judgment on the issue of liability and causation of damages with the only remaining issue being the exact amount of damages. Fullmer filed a cross



motion for summary judgment. [Record on Appeal, hereinafter R., 48-49, 57, 121-122] The contested issue on both motions was whether a subrogation claim could be maintained against the tenant Fullmer. Garbett argued he was entitled to summary judgment on the grounds it was undisputed Fullmer had negligently caused the property damage. [R. 50-58] Garbett further argued that subrogation was not barred under Utah law as applied to the facts of this case. [R. 54-57, 166-177] Fullmer admitted his negligence caused the fire and damages, [R. 65-66, 224-225] but asserted State Farm could not pursue a subrogation claim against him, as a matter of law, because he was a co-insured under the fire policy issued by State Farm. [R. 127-139] The parties presented memoranda and affidavits in support of and in opposition to the respective motions. The motions were argued to the trial court on July 22, 1992. [R. 118-119, 213, 248]

C. Disposition in the Trial Court

Despite recognizing Fullmer was clearly negligent in causing the fire damage, [R. 251] the trial court denied Garbett's motion for partial summary judgment, granted Fullmer's motion for summary judgment, and dismissed Garbett's complaint. The trial court concluded, based on his interpretation of Fashion Place Inv. v. Salt Lake County, 776 P.2d 941 (Utah App. 1989), that where the lease between Garbett and Fullmer was silent regarding the obligation to provide insurance on the apartment building, then Fullmer, as a tenant, was presumed to be a co-insured under the State Farm fire policy. Therefore, the court concluded State Farm was barred from

maintaining a subrogation action against Fullmer. [R. 226, 293] Findings of Fact and Conclusions of Law and Judgment were entered on August 18, 1992. [Addendum 2 attached hereto] Garbett's Notice of Appeal was filed on September 8, 1992. [Addendum 3 attached hereto]

Although the trial judge based his decision solely on his legal interpretation of the Fashion Place Inv. case, and did not rely either on Fullmer's affidavit or on various public policy arguments raised by Fullmer, [R. 295-296] the court nonetheless overruled Garbett's objections to Fullmer's May 14, 1992, affidavit, refusing to strike portions of paragraphs 3 and 5. [R. 163-165, 213, 233, 295-296] The court also refused to admit paragraphs 5 and 6 of David Houston's affidavit. [R. 218, 233, 258] In striking paragraphs 5 and 6, the court nonetheless held that "renter's insurance is available and plaintiffs do not need an affidavit to establish and argue the availability of renter's insurance to cover personal property owned by an insured and liability." [R. 233, 260-261]

A copy of the Houston Affidavit is attached hereto as Addendum 4. A copy of the Fullmer Affidavit is attached hereto as Addendum 5. A copy of the trial court's Order Regarding Motions to Strike is attached hereto as Addendum 6.

#### STATEMENT OF RELEVANT FACTS

On February 9, 1988, Fullmer signed a rental agreement with Garbett which permitted Fullmer to reside as a tenant in Apartment A6 of the Wedge Apartments for the winter and spring quarters of

the 1987-88 school year in St. George, Utah. [R. 7, 14, 59, 62-63, 223-224] Pursuant to the terms of the lease, Fullmer was obligated to pay rent of \$335 per quarter. [R. 62]

Under paragraph 1(b) of the lease, Fullmer agreed that:

Each tenant shall be responsible for all damages within their apartment on a joint and several basis. [R. 7, 14, 62, 224]

Under paragraph 4 of the lease, Fullmer agreed that:

No . . . destruction of property (Landlords or tenants's) shall be permitted on the premises (apartments, parking lot, sidewalks or lawns). [R. 7, 14, 62, 224] [Emphasis added]

The lease contained no terms or language which required the landlord to purchase fire insurance on the apartments. [R. 62-63, 224]

On February 22, 1988, approximately two weeks after Fullmer signed the lease agreement and while he was residing as a tenant in the Wedge Apartments, he used a hibachi barbecue at approximately 12:00 noon on the balcony of Apartment A6. [R. 60, 62-63, 224]

Following the noon barbecue on February 22, 1988, Fullmer left the coals in the hibachi. [R. 60, 224]

At approximately 7:00 p.m. on February 22, 1988, Fullmer prepared the same hibachi for another barbecue on the balcony of Apartment A6. In the process, Fullmer dumped the coals remaining in the hibachi from the noon barbecue in a cardboard box located in the balcony closet [R. 60, 224], which the trial court described as "a consummately negligent act." [R. 251]

At approximately 1:00 a.m. on February 23, 1988, a fire started in the storage area of Apartment A6. The fire was started by the smoldering coals and ashes negligently placed in the storage closet by Fullmer. [R. 7-8, 14, 65-66, 224-225]

Garbett insured the Wedge Apartments against fire losses through State Farm. State Farm's insurance policy does not include tenants (Fullmer) either as named insureds or as insureds by definition. [R. 68-97, 220-222, 225]

State Farm paid for the fire loss suffered by Garbett in this case in an amount in excess of \$70,000. This action was brought as a subrogation claim against Fullmer pursuant to contractual rights provided under Section I and Section II, General Condition No. 7 of the insurance policy. [R. 96, 225] State Farm's subrogation claim was submitted to Prudential Insurance Company, the home owner's insurer for Fullmer, through Fullmer's parents' home owner's policy with Prudential. Prudential never claimed to State Farm that Prudential's home owner's policy did not provide liability coverage for Brad Fullmer. [R. 217-219]

The lease between the parties is silent on the issue of insurance, and there was no discussion between the parties to the lease regarding insurance. [R. 62-63, 225]

The lease provides in part that:

It is the intent of the landlord and their managers to keep The Wedge in superior condition. [R. 62, 225]

The fire which is the subject of this action was caused by Fullmer's negligence. There was privity of contract between Garbett and Fullmer with respect to the lease agreement. [R. 225]

#### SUMMARY OF ARGUMENT

1. The trial court erred in concluding that a subrogation action could not be maintained against a tenant who negligently caused fire damage to the landlord's property even though the lease agreement did not require the landlord to provide fire insurance on the property. The trial court erroneously interpreted Fashion Place Inv. to confer implied co-insured status on Fullmer under Garbett's fire insurance policy even though the lease was silent regarding the obligation to maintain insurance. In fact, Fashion Place Inv. held just the opposite, i.e., a tenant was determined to be an implied co-insured only because the lease agreement expressly required the landlord to provide fire insurance on the property.

2. There are three possible circumstances under Utah law where a subrogation claim against a tenant could be barred: first, where the lease requires the landlord to obtain fire insurance; second, where the tenant is a named insured or an insured by definition under the policy; and third, where the lease agreement expressly exempts the tenant from liability for negligently caused fire damage. None of these circumstances are applicable in the instant case. The lease did not require Garbett to maintain fire insurance, Fullmer was not a named insured or an insured by definition under the terms of the policy, and the lease did not exempt Fullmer from liability for fire damage. Thus, under both

traditional tort and subrogation concepts, this subrogation action against Fullmer should not have been dismissed.

3. Public policy arguments espoused in some jurisdictions as a basis for holding a tenant to be a co-insured solely because he is a tenant, and thus free from liability on any subrogation action, should not be adopted by this court. Such public policy considerations ignore the basic premises underlying subrogation, i.e., that the loss should be borne by the party whose negligence caused it, and that the subrogated insurer's rights are the same as the rights of its insured. In the instant case, Garbett clearly would have a right of action against Fullmer for negligently caused damage. These rights should not be barred simply because Fullmer was a tenant. Courts which have adopted this rationale have based their conclusions on ill-conceived and/or clearly incorrect factual and/or legal assumptions. For example, one erroneous assumption is that allowing subrogation against a tenant will force the property to be double insured for fire loss.

4. It is not inequitable for Fullmer to be held responsible for his own negligence. Such is the common law rule absent an express agreement to the contrary.

5. In the event the Court of Appeals believes an affidavit is necessary to establish the availability of renter's insurance to cover tenant's personal liability, then the trial court's striking of paragraphs 5 and 6 of David Houston's affidavit should be overruled and the entire affidavit admitted. If no such affidavit

is necessary, then Garbett withdraws his objection to the court's striking of those paragraphs.

6. If the Court reverses the trial court's grant of summary judgment for Fullmer, then the Court should enter partial summary judgment for Garbett. The Court should reverse the trial court's overruling of Garbett's objections to portions of paragraphs 3 and 5 of Fullmer's affidavit regarding his reasonable expectations about insurance coverage on the building. Those provisions were conclusory in nature and did not properly meet the requirements of Rule 56 for an affidavit. Moreover, reasonable expectations of the parties is not a basis for establishing co-insured status under Utah law. The Utah Supreme Court has rejected the reasonable expectations doctrine in construing insurance policies. Fullmer's affidavit does not create any material fact issue which would preclude the Court of Appeals from ordering entry of partial summary judgment for Garbett.

#### ARGUMENT

#### POINT I.

THE TRIAL COURT ERRED IN GRANTING SUMMARY  
JUDGMENT FOR FULLMER AND DISMISSING STATE  
FARM'S SUBROGATION CLAIM.

The trial court's granting of summary judgment for Fullmer was based solely on the court's interpretation of Fashion Place Inv., Inc. v. Salt Lake County, 776 P.2d 941 (Utah App. 1989), stated as follows:

Where the lease between these parties was silent with respect to insurance or any obligation to provide insurance, the court

concludes, based upon the authority of Fashion Place Inv. v. Salt Lake County, . . . that the defendant-lessee Fullmer is presumed to be a co-insured under the landlord's fire insurance policy and therefore no subrogation action may be prosecuted against the tenant Fullmer.

[R. 226] Notwithstanding the foregoing conclusion, the trial court readily acknowledged "there's no question in my mind that this case needs to go up to the Court of Appeals because I think they have left a very questionable circumstance in the Fashion Place Inv. case." [R. 293]

It is Garbett's position that the trial court misinterpreted Fashion Place Inv., and in the process adopted a broad concept barring subrogation against a tenant solely because he is a tenant. None of the applicable Utah cases have adopted such a concept, and Garbett urges this Court not to do so.

A. Utah Law Allows Subrogation Against a Tenant Except in Three Specific Circumstances, None of Which Are Present in the Instant Case.

The applicable Utah cases set forth three circumstances in which a subrogation claim may not be maintained against a negligent party defendant -- first, where the fire insurance policy includes the defendant as a named insured or as an insured by definition, Board of Education of Jordan School Dist. v. Hales, 566 P.2d 1246 (Utah 1977); Fashion Place, Inv., supra; second, where the lease agreement exempts or excuses the tenant from liability for damages caused by fire, see Bonneville on the Hill Co. v. Sloane, 572 P.2d 402 (Utah 1977); and third, where the lease agreement specifically



requires the landlord to maintain fire insurance, Fashion Place Inv. v. Salt Lake County, supra.

1. Tenant Is Named Insured or Insured By Definition.

In Hales, supra, the defendant against whom the subrogation action was asserted was a subcontractor, and the insurance policy expressly stated that subcontractors on the job were covered insureds. The insurer even paid a first-party claim made by the defendant subcontractor. Under those circumstances, the Utah Supreme Court held no subrogation action could be maintained. Although the defendant in Hales was not a tenant, the principle set forth is applicable to the instant case. Fullmer was not a named insured, nor was he an insured by definition under the State Farm policy, and therefore State Farm's subrogation claim cannot be barred on those grounds.

2. Lease Exempts Tenant's Liability.

In Bonneville, supra, defendant-tenant had a lease agreement with the landlord which expressly absolved the tenant from damages caused to the premises by fire. Although the case does not specifically discuss subrogation, it is clear that the landlord obtained and paid for fire insurance. The Supreme Court held no claim could be maintained by the landlord against the tenant because of the exculpatory clause in the lease. Since an insurer's rights could be no greater than the insured's (landlord's), the exculpatory clause would not only bar the landlord's claim, but also a subrogation claim of the insurer. See also Rizzuto v. Morris, 22 Wash. App.

951, 592 P.2d 688 (Wash. App. 1979) (court disallowed subrogation where lease exempted tenant from liability for fire damage).

The Bonneville rule does not apply to Fullmer. The lease with Garbett does not exempt Fullmer from liability for damages caused by fire. On the contrary, under paragraph 4 of the lease, Fullmer expressly agreed that he would not destroy any property, including the apartments. He breached that contractual duty by negligently causing over \$70,000 in fire damage to the property.

3. Lease Requires Landlord to Provide Fire Insurance.

In Fashion Place Inv., the lease specifically required the landlord to obtain fire insurance on the building. The court concluded the tenant was a de facto co-insured under the policy because of this express requirement for the landlord to purchase insurance as part of its contractual obligations owed under the lease to the tenant. The court stated that "[w]here the insured [landlord] is required by contract or lease to carry insurance for the benefit of another, the other party [tenant] may attain the status of a de facto coinsured even if not named as an insured in the policy obtained." 776 P.2d at 944-45 (emphasis added).

There is a reasonable basis for the Fashion Place Inv. holding, namely that where the landlord has specifically promised to purchase fire insurance, then that insurance is part of the consideration to which the tenant is entitled under the terms of the lease, and the insurance so purchased is intended to cover the risk of the tenant's negligent acts. However, just like the Hales and Bonneville holdings, the Fashion Place Inv. rule also does not

apply to Fullmer because his lease did not require Garbett, nor did Garbett ever agree, to provide fire insurance on the apartment complex.

B. A Lease Which is Silent on Insurance Does Not Make Fullmer a Co-Insured Under State Farm's Fire Policy.

The trial court recognized that no Utah case, including Fashion Place Inv., has ever held a tenant, (solely because of his status as a tenant), to be a co-insured under a fire insurance policy obtained by his landlord.

If the Court of Appeals had intended to adopt such a broad principle in Fashion Place Inv., it could have easily said so. It did not.<sup>1</sup> The Court's express reliance on the language in the lease requiring the landlord to purchase fire insurance as a basis for denying subrogation shows the limited nature of the holding. Yet contrary to that holding, the trial court ruled that a tenant is a co-insured when the lease says nothing about insurance. Thus, instead of following Fashion Place Inv., the trial court reached the exact opposite result.

Garbett purchased fire insurance to protect his interests as owner of the property, not because of any contractual obligation owed to Fullmer. If Garbett had not purchased fire insurance, Fullmer would not have had a claim for breach of contract, but when

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<sup>1</sup>In fact, the Court of Appeals clearly identified the issue raised on appeal by Fashion Place was whether the lease provision requiring the landlord to obtain insurance made the tenant a coinsured. ("Fashion Place argues on appeal that the trial court erred in ruling that Salt Lake County is a coinsured of the landlord. Fashion Place contends that a lease provision requiring the landlord to provide insurance does not by itself expressly or impliedly exempt the tenant from the financial consequences of its own negligence." 776 P 2d at 943)

Fullmer negligently burned up the building, Garbett could have maintained an action against Fullmer for damages. See Cluff v. Culmer, 556 P.2d 498 (Utah 1976), confirming the tenant's common law implied covenant not to damage leased premises, and citing with approval 49 Am.Jur.2d Landlord and Tenant § 922 which states:

This implied covenant is as much a part of the contract of lease as if it were incorporated into it by express language. If, by the negligence . . . of a tenant, the demised property is materially injured, he is liable for the resultant damage, and the landlord may recover the amount thereof from him . . .

And since this is a subrogation claim, State Farm's rights of recovery are as great as the landlord's own rights to recover for damage caused by its tenant. U.S. Fidelity & Guar. v. Let's Frame It, 759 P.2d 819, 820 (Colo. App. 1988). Moreover, pursuant to Utah Code Ann. § 31A-21-108, the legislature has expressly authorized insurers to maintain subrogation actions in the name of their insureds.

Garbett submits the trial court's legal conclusion that Fullmer was a co-insured in the face of a lease silent on insurance was wrong. It was not only an incorrect interpretation of Fashion Place Inv.'s specific holding on subrogation against a tenant, but also ignored the basic concepts underlying the principle of subrogation. Specifically, subrogation authorizes the insurer who paid the loss to step into the shoes of its insured and recoup its losses from the party whose negligence caused the loss. See Fashion Place Inv., 776 P.2d at 944. This Court can correct the trial court's error by reversing the entry of summary judgment for

Fullmer and instructing the trial court to enter partial summary judgment for Garbett.

C. Public Policy Does Not Mandate Barring State Farm's Subrogation Claim.

In a recent decision, the Iowa Supreme Court held that the landlord's insurer could maintain a subrogation action for fire damage negligently caused by a tenant. Neubauer v. Hostetter, 485 N.W.2d 87 (Iowa 1992). The facts in Neubauer are instructive. Joyce Hostetter and her husband rented a farmhouse from the Neubauers, who maintained fire insurance on the house. Hostetters obtained renter's insurance to insure their personal belongings and to cover them for personal liability. Shortly after acquiring this policy, Joyce Hostetter negligently burned down the entire farmhouse.

Neubauers' fire insurer paid them \$22,000 on the loss, and Neubauers incurred \$6,176 in uninsured losses. Neubauers and their insurer (Farmers Mutual) brought suit against Hostetters. Hostetter's renters' insurer (Auto-Owners Mutual) defended the case and agreed it would be obligated to pay any judgment entered.

Defendants (through Auto-Owners Mutual) moved for summary judgment, arguing that Neubauers' insurer was "precluded as a matter of law from exercising any subrogation rights against a tenant." 485 N.W.2d at 88. The trial court rejected Hostetters' argument concluding they were not co-insureds under Neubauers' fire insurance policy, and judgment was thereafter entered in favor of

plaintiffs and against Ms. Hostetter.<sup>2</sup> Ms. Hostetter appealed, and the Iowa Supreme Court affirmed.

Although it was clear Ms. Hostetter was not a named insured under the Farmers Mutual fire policy, she argued on appeal that she was an implied co-insured based on the rationale of Sutton v. Jondahl, 532 P.2d 478 (Okla. App. 1975). The Iowa Supreme Court acknowledged the Sutton holding "that subrogation was not available because a tenant is considered a co-insured of the landlord absent an express agreement to the contrary" 485 N.W.2d at 88, and further identified the four major public policy reasons relied upon in Sutton for denying a subrogation claim against a tenant: (1) the landlord and tenant each have an insurable interest in the property; (2) the tenant pays for part of the insurance premium with his rent; (3) tenants reasonably rely on the landlord to buy fire insurance and to cover the tenant; and (4) equity requires the insurer, not the tenant, to bear the risk of loss.

The Iowa Supreme Court noted, however, that, "[s]everal courts have rejected Sutton and its progeny." Id. For example, Page v. Scott, 263 Ark. 684, 567 S.W.2d 101 (1978), where the Arkansas Supreme Court "rejected the 'fiction' that the tenant paid the insurance premium as a part of the rent, finding instead that market factors control the setting of rental prices." 485 N.W.2d at 89. The Arkansas Court further succinctly identified those circumstances where subrogation would not be allowed:

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<sup>2</sup>Since Mr. Hostetter was not at fault for starting the fire, the claims against him were dismissed.

Appellee contends, however, that a lessor's insurer has no subrogation to lessor's claim against the lessee. This undoubtedly would be true if the parties had agreed as part of the transaction that insurance would be provided for the mutual protection of the parties. . . . It would also be true if such an agreement could be implied from the terms of the agreement between the parties. Such an agreement has been implied when the terms of the lease require the landlord to carry insurance at the expense of the tenant, when the tenant's contractual obligation to return the leased property in good condition excepts loss by fire and when the agreement requires the lessor to carry insurance and use the proceeds for restoration of the property insured.

567 S.W.2d at 103 (emphasis added). As previously noted, none of these circumstances exist in the instant case.

The Neubauer court further examined the issue by reviewing 6A J. Appleman, Insurance Law & Practice § 4055 (1991 Supp.), wherein Appleman criticized what he perceived as "the modern trend . . . to find . . . a tenant is a co-insured based on the rationale in Sutton." 485 N.W. at 89. Quoting from Appleman, Neubauer stated:

Sutton, the leading modern case denying subrogation of lessees, cites no cases for the proposition that the lessee is a co-insured of the lessor, comparable to a permissive user under an auto insurance policy. Contrary to the court's statements, the fact both parties had insurable interests does not make them co-insureds. The insurer has a right to choose whom it will insure and it did not choose to insure the lessees, and under this holding the lessee could have sued the insurer for loss due to damage to the realty, e.g., loss of use if policy provides such coverage. Cases following Sutton, however, have at least impliedly restricted the co-insurance relationship to one limited solely to the purpose of prohibiting subrogation.

Id. (emphasis added) Having considered the various positions, the Iowa Supreme Court rejected Hostetter's argument that she was a co-insured. The court stated:

Consistent with the views expressed in the Appleman treatise, we also do not accept the rationale that the tenant has propounded in the present case. It is based on the theory that, because the whole is equal to the sum of its parts, fire insurance on an entire dwelling includes the interest of both landlord and tenant as a matter of law. This argument disregards the fact that these are separate estates capable of being separately valued and separately insured. To the extent that defendant and her husband also had a property interest in the dwelling, it was not automatically insured under the landlords' policy. There is nothing in the present record to suggest that the proceeds paid to the Neubauers by Farmers Mutual exceeded the value of the landlords' reversionary interest in the property. Even if such evidence existed, this would only establish an over-evaluation by the insurer of the landlords' loss.

485 N.W.2d at 89-90. The court further noted, analogous to the holding in Fashion Place Inv., that it might have reached a different result "[i]f the landlords had agreed to insure the tenants' interest in the property. . ."

Neubauer properly identifies the fallacies associated with Sutton's blanket conclusion that a tenant is a co-insured simply because he is a tenant. As noted, the Hostetters had their own insurance policy covering personal liability as well as their own personal property. In the instant case, Fullmer is insured through his parents' home owner's policy for liability. Sutton and its progeny erroneously surmise that allowing a subrogation claim against a tenant effectively requires the property to be double



insured against fire by the landlord and the tenant. This is clearly not the case.

Moreover, for some inexplicable reason, Sutton finds it inequitable to hold a tenant responsible for his own negligent acts. Such a conclusion runs counter to the basic premises underlying common law negligence and tort theory.

Furthermore, cases which are perceived by some to follow Sutton, in many instances are factually distinguishable or simply do not hold that tenant status alone makes one a co-insured. For example, that was not the holding in Fashion Place Inv. In Safeco Insurance Companies v. Weisgerber, 767 P.2d 271 (Idaho 1989), and Rizzuto v. Morris, supra, the leases specifically excepted the tenant from liability for fire damage. In Rizzuto the court focused on the intent of the parties. In addition to the specific exculpatory language in the lease exempting the tenant from fire damage liability, there was evidence the landlord expressly told the tenant at least two times that he had fire insurance on the building when the tenant asked about insurance. No such facts exist in the instant case. In Alaska Insurance Co. v. RCA Alaska Communications, 623 P.2d 1216 (Alaska 1981), the court narrowly stated its holding as follows:

Therefore, we hold that if the landlord in a commercial lease covenants to maintain fire insurance on the leased premises, and the lease does not otherwise clearly establish the tenant's liability for fire loss caused by its own negligence, by reserving to the landlord's insurer the right to subrogate against the tenant, the tenant is, for the limited purpose

of defeating the insurer's subrogation claim,  
an implied co-insured of its landlord.

623 P.2d at 1220 (emphasis added). Obviously RCA Alaska Commun. does not support the proposition that tenant status alone makes one a co-insured. Yet even this limited holding creates the strange result that a landlord could recover uninsured losses from his tenant in the same case in which the insurer's subrogation claim is disallowed.

Also, although in Safeco Insurance Co. v. Capri, 705 P.2d 659 (Nev. 1985), subrogation was denied, the facts showed the landlord expressly agreed to maintain fire insurance on the property.

Sutton's position that the tenant is a co-insured under the landlord's fire policy because they both have insurable interests in the same property is factually incorrect. If Fullmer indeed had any "insurable" interest, it encompassed nothing more than one apartment. Yet there is no indication damage was confined to that single apartment.

Adopting the Sutton rationale would effectively eliminate subrogation by a landlord's insurer against a tenant unless there was an agreement to the contrary.

However, even Sutton's apparent exception to the blanket rule barring subrogation where one can show an agreement to the contrary, is an illusory notion, as a practical matter. What type of agreement would satisfy Sutton? Would an agreement making the tenant responsible for the damages he causes be sufficient? If so, the lease between Garbett and Fullmer contains such a provision.

The lease specifically states that the property shall not be destroyed. Yet, such an express agreement is unnecessary for a landlord to hold a tenant responsible for damages negligently caused by the tenant. The tenant is responsible for such damage as a matter of common law, Cluff v. Culmer, supra. Thus, such an agreement expressly written into the lease gives a landlord no more rights than he has as a matter of common law. Presumably, such language would not constitute "an agreement to the contrary" under Sutton.

Sutton would probably allow subrogation if the lease contained language specifically stating that tenants are not co-insureds under any fire insurance policy purchased by the landlord on the property. The prospect, as a practical matter, of such language being included in a typical apartment lease is almost nil. Specifically, the Garbett-Fullmer lease says nothing whatsoever about insurance. If neither party even addresses the issue of insurance, how could there ever be an agreement between the parties contrary to Sutton's holding that a tenant is a co-insured simply because he is a tenant. Thus, Sutton's exception to the blanket rule of co-insured status for tenants, although it perhaps sounds fair, has no substance.

Moreover, the concept that a negligent party is only responsible for his negligence if he expressly so agrees turns traditional tort law upside down. Indeed, Utah law does not allow a negligent party to avoid responsibility for his conduct in the context of an indemnity agreement unless the agreement clearly and unequivocally

expresses the indemnitor's intent to indemnify the indemnitee for his own negligence. See Freund v. Utah Power & Light Co., 793 P.2d 362 (Utah 1990).

Page v. Scott, supra, also addressed and rejected the policy argument that allowing subrogation gives the insurer a windfall:

[W]e are not persuaded by appellee's [windfall] argument . . . . The same might be said about a recovery from a third party liable because of negligently causing a fire. It also could be said of the insurer affording collision coverage to an automobile owner suffering damage from the negligent acts of another. We have never recognized the validity of such an argument.

567 P.2d at 104 (emphasis added). This court should reject the so-called public policy arguments advanced by Sutton and other courts against allowing subrogation. The three circumstances set forth in the Utah cases are more than sufficient to protect tenants from improper subrogation claims, without emasculating the entire principle of subrogation in the landlord-tenant context.

#### POINT II.

PARAGRAPHS 5 AND 6 OF THE HOUSTON AFFIDAVIT ARE RELEVANT AND THERE WAS ADEQUATE FOUNDATION FOR ADMISSION.

The trial court struck paragraphs 5 and 6 of David Houston's affidavit finding they were either not relevant or not made upon personal knowledge. Paragraphs 5 and 6 were presented to address Sutton's public policy argument that allowing subrogation would result in the property being double insured for fire. Houston showed through his affidavit that renter's insurance is available to cover a tenant for personal liability, as well as to cover the

tenant's personal property. His statements were made based upon his personal knowledge and experience as a State Farm claim superintendent with extensive experience involving coverage provided by homeowners and fire insurance policies. [R. 217-18, 255-56]

Even though the trial court struck paragraphs 5 and 6, the court nonetheless held that no affidavit was necessary for State Farm to establish and argue the availability of renter's insurance to cover personal property and liability of a tenant. In the event this Court agrees that no affidavit is necessary then Garbett's objection to the court's striking of paragraphs 5 and 6 is withdrawn.

Garbett raises this point in the brief simply to preserve his rights in case this Court determines an affidavit regarding availability of renter's insurance is necessary. Garbett believes the trial court is correct in its conclusion that no affidavit is necessary. Numerous references in various cases to renter's insurance show without question that such insurance is available to insure tenants against their own personal liability. Neubauer v. Hostetter, supra, is a clear example of this. Other cases which make reference to the availability of renter's insurance as a matter of course include Prudential Property and Cas. Ins. Co. v. Mardanlou, 607 P.2d 291 (Utah 1980); Morales v. Fansler, 258 Cal. Rptr. 96 (Cal. App. 5 Dist. 1989); Smith v. Sellers, 747 P.2d 15 (Colo. App. 1987).

POINT III.

PORTIONS OF PARAGRAPHS 3 AND 5 OF FULLMER'S  
MAY 14, 1992 AFFIDAVIT SHOULD HAVE BEEN  
STRICKEN.

Fullmer submitted his May 14, 1992, affidavit for the purpose of establishing a fact issue which would preclude the court from granting summary judgment in favor of Garbett. Fullmer theorized that if the court granted Garbett's motion, it would imply an obligation on the tenant to purchase insurance. Garbett obviously disagrees with that theory. He never argued that Fullmer was required to purchase insurance on the apartment building. If this court reverses the trial court's grant of summary judgment for Fullmer, it should order the trial court to enter partial summary judgment, as requested, in favor of Garbett. There is no reason to find any material fact issue based on Fullmer's affidavit.

The underlying premise of Fullmer's argument is that it would be unfair to allow a subrogation claim against him presumably because he has no insurance to cover the claim. Obviously, this is incorrect. First, allowing the subrogation claim does not obligate him to purchase fire insurance for the entire building. Second, the facts show Fullmer is insured for this liability through his parents' homeowner's policy. To argue unfairness under these circumstances is specious.

Fullmer's affidavit supposedly establishes his reasonable expectation that the landlord would provide fire insurance on the building. His statements in paragraphs 3 and 5 are based on hindsight, and are not statements of his actual state of mind at

the time he entered the lease. The language of his affidavit was "I would have expected that the owner would have his own insurance of whatever type he felt necessary," and "I would have expected that the owner would have insurance in the event this occurred." [R. 144-45] (emphasis added) Significantly, Fullmer's affidavit does not state that he reasonably expected Garbett to carry insurance which would cover Fullmer for his own negligent acts. Fullmer's affidavit does not meet the requirements for affidavits under Rule 56(e), U.R.C.P., but is instead simply a reflection of his opinions and conclusions after the fact. Such is not adequate. See Webster v. Sill, 675 P.2d 1170 (Utah 1983).

Finally, Fullmer's statement of his reasonable expectations under the lease is not a basis to create a material fact issue in any event. In Allen v. Prudential Property & Cas. Ins., 839 P.2d 798 (Utah 1992), the Utah Supreme Court rejected the "reasonable expectation" doctrine in interpreting coverage under an insurance policy. The same rationale should apply to the lease agreement in this case.

The Court of Appeals can order the trial court to enter summary judgment in favor of Garbett because no material issues of fact preclude such.

#### CONCLUSION

The Court of Appeals should reverse the trial court's grant of summary judgment in favor of Fullmer and denial of summary judgment for Garbett. The Court should allow State Farm's subrogation action to be maintained against Fullmer under the facts and

circumstances of this case and should order the trial court to enter partial summary judgment in favor of Garbett and against Fullmer on the issue of liability and causation of damages and remand for a trial or other appropriate hearing solely for the determination of the exact amount of damages.

DATED this 16<sup>th</sup> day of February, 1993.

STRONG & HANNI

By Stuart H. Schultz  
Stuart H. Schultz  
H. Burt Ringwood  
Attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing Brief were mailed, first class postage prepaid, this 16<sup>th</sup> day of February, 1993, to the following:

KEITH W. MEADE  
COHNE, RAPPAPORT & SEGAL, P.C.  
525 East First South, Fifth Floor  
P. O. Box 11008  
Salt Lake City, Utah 84147-0008

Stuart H. Schultz

203387nh



#### ADDENDUM INDEX

1. Rules and Statutes
2. Findings of Fact and Conclusions of Law and Judgment dated August 18, 1992.
3. Bryson Garbett's Notice of Appeal dated September 3, 1992.
4. Affidavit of David K. Houston dated July 20, 1992.
5. Affidavit of Brad Fullmer dated May 14, 1992.
6. Order Regarding Motions to Strike dated August 18, 1992.

**ADDENDUM 1**

## Rule 56. Summary judgment.

(a) **For claimant.** A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof

(b) **For defending party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof

(c) **Motion and proceedings thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages

(d) **Case not fully adjudicated on motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the

action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly

(e) **Form of affidavits; further testimony; defense required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him

(f) **When affidavits are unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just

(g) **Affidavits made in bad faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt

### **31A-21-108. Subrogation actions.**

Subrogation actions may be brought by the insurer in the name of its insured.

History: C. 1953, 31A-21-108, enacted by L. 1986 ch. 204, § 141. Effective Dates: Laws 1986 ch. 204 § 299 makes the act effective on July 1, 1986.

#### NOTES TO DECISIONS

Cited in *Pickhover v. Smith's Mgt. Corp.*  
741 P.2d 664 (Utah Ct. App. 1989).

**ADDENDUM 2**

FILED  
FIFTH DISTRICT COURT  
'92 AUG 18 AM 9 54  
WASHINGTON COUNTY

Keith W. Meade (Bar No. 2218)  
COHNE, RAPPAPORT & SEGAL, P.C.  
525 East First South, Fifth Floor  
P.O. Box 11008  
Salt Lake City, Utah 84147-0008  
Telephone: (801) 532-2666  
Attorney for Defendant

BY \_\_\_\_\_

IN THE FIFTH JUDICIAL DISTRICT COURT OF WASHINGTON COUNTY

STATE OF UTAH

\* \* \* \* \*

GNS PARTNERSHIP; BRYSON	)	
GARBETT; JAN GARBETT; DAVID	)	
NIPPER; BETTY NIPPER; WHITE	)	FINDINGS OF FACT AND
WATER CORPORATION, and BRIAN	)	CONCLUSIONS OF LAW
STEPHENSEN, Partners,	)	
Plaintiffs,	)	
vs	)	Civil No. 910500012
BRAD FULLMER,	)	Judge James L. Shumate
Defendant.	)	

\* \* \* \* \*

This matter was before the court pursuant to competing Motions for Summary Judgment. The court, having considered the pleadings on file, the Memorandum submitted with respect to the Motion, and the argument of counsel on July 22, 1992, the court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

The court finds that the following facts are not disputed:

1. On February 9, 1988, Brad Fullmer ("Fullmer") signed a rental agreement with plaintiffs (hereinafter collectively referred to as "Garbett" or "Landlord") which permitted Fullmer to reside as

a tenant in Apartment A6 of The Wedge Apartments for the winter and spring quarters of 1987-88 school year in St. George, Utah. The rental agreement attached to plaintiff's Memorandum dated April 21, 1992, is a true and correct copy of said rental agreement.

2. Under paragraph 1(b) of the lease, Fullmer agreed that:

Each tenant shall be responsible for all damages within their apartment on a joint and several basis.

3. Under paragraph 4 of the lease, Fullmer agreed that:

No . . destruction of property (landlord's or tenant's) shall be permitted on the premises (apartments, parking lot, sidewalk or lawns).

4. The lease contained no terms or language which required the landlord to purchase fire insurance on the apartments.

5. On February 22, 1988, while residing as a tenant in The Wedge Apartments, Fullmer used a Hibachi barbecue at approximately 12:00 noon on the balcony of Apartment A6.

6. Following the noon barbecue on February 22, 1988, Fullmer left the coals in the Hibachi.

7. At approximately 7:00 p.m. on February 22, 1988, Fullmer prepared the same Hibachi for another barbecue on the balcony of Apartment A6. In the process, Fullmer dumped the coals remaining in the Hibachi from the noon barbecue in a cardboard box located in the balcony closet.

8. At approximately 1:00 a.m. on February 23, 1988, a fire

started in the storage area of Apartment A6. The fire was started by the smoldering coals and ashes negligently placed in the storage closet by Fullmer.

9. Plaintiffs insured The Wedge Apartments against fire losses through State Farm Fire & Casualty Company.

10. The insurance policy does not include tenants either as named insureds or as insureds by definition.

11. State Farm paid for the fire loss suffered by the plaintiff in this case in an amount in excess of \$70,000.00. This action was brought as a subrogation claim against Fullmer pursuant to contractual rights provided under Section I and Section II, General Condition No. 7 of the insurance policy.

12. The lease between the parties is silent on the issue of insurance. There was no discussion between the parties to the lease regarding insurance.

13. The lease provides in part that:

It is the intent of the landlord and their managers to keep The Wedge in superior condition.

#### CONCLUSIONS OF LAW

1. The fire which was the subject of this action was caused by Fullmer's negligence.

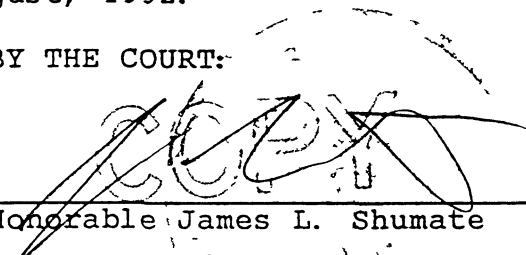
2. There was privity of contract between the landlords and Fullmer with respect to the lease agreement.



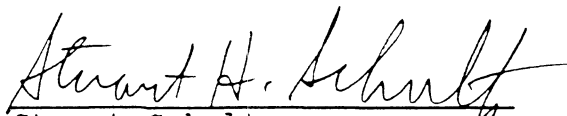
3. Where the lease between these parties was silent with respect to insurance or any obligation to provide insurance, the court concludes, based upon the authority of Fashion Place Inv. v. Salt Lake County, 776 P.2d 941 (Utah App. 1989) that the defendant-lessee Fullmer is presumed to be a co-insured under the landlord's fire insurance policy and therefore no subrogation action may be prosecuted against the tenant Fullmer.

DATED this 18 day of August, 1992.

BY THE COURT:

  
\_\_\_\_\_  
Honorable James L. Shumate

Approved as to form:

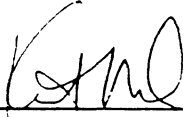
  
\_\_\_\_\_  
Stuart Schultz  
Strong & Hanni  
Attorney for Plaintiff

MAILING CERTIFICATE

The undersigned hereby certifies that on the 13 day of August, 1992, a true and correct copy of the foregoing was mailed, postage fully prepaid, to the following:

Stuart Schultz  
H. Burt Ringwood  
STRONG & HANNI  
Attorneys for Plaintiffs  
600 Boston Building  
Salt Lake City, Utah 84111

da/fullmer.fnd



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Keith W. Meade (Bar No. 2218)  
COHNE, RAPPAPORT & SEGAL, P.C.  
525 East First South, Fifth Floor  
P.O. Box 11008  
Salt Lake City, Utah 84147-0008  
Telephone: (801) 532-2666  
Attorney for Defendant

IN THE FIFTH JUDICIAL DISTRICT COURT OF WASHINGTON COUNTY

STATE OF UTAH

\* \* \* \* \*

GNS PARTNERSHIP; BRYSON  
GARBETT; JAN GARBETT; DAVID  
NIPPER; BETTY NIPPER; WHITE  
WATER CORPORATION, and BRIAN  
STEPHENSEN, Partners,

)

)

)

Plaintiffs,

)

vs

)

BRAD FULLMER,

)

Defendant.

)

\* \* \* \* \*

JUDGMENT

Civil No. 910500012

Judge James L. Shumate

This matter came before the court on July 22, 1992 pursuant to competing Motions for Summary Judgment. The court, having previously entered its Findings of Fact and Conclusions of Law, and having made its ruling in open court, hereby

ORDERS, ADJUDGES AND DECIDES that plaintiffs' Motion for Summary Judgment is denied, defendant's Motion for Summary Judgment is granted, and plaintiff's claims against the defendant be and hereby are dismissed, with prejudice and on the merits.

DATED this 18 day of August, 1992.

BY THE COURT

Honorable James L. Shumate

Approved as to form:

*Stewart H. Schult*

MAILING CERTIFICATE

The undersigned hereby certifies that on the 13 day of August, 1992, a true and correct copy of the foregoing was mailed, postage fully prepaid, to the following:

Stuart Schultz  
H. Burt Ringwood  
STRONG & HANNI  
Attorneys for Plaintiffs  
600 Boston Building  
Salt Lake City, Utah 84111



---

### **ADDENDUM 3**

STREET COURT  
92 SEP 8 PM 2 41  
WASHINGTON COUNTY  
BY \_\_\_\_\_

Stuart H. Schultz #2886  
H. Burt Ringwood #5787  
STRONG & HANNI  
Attorneys for Plaintiffs  
600 Boston Building  
Salt Lake City, Utah 84111  
Telephone: 532-7080

---

IN THE FIFTH JUDICIAL DISTRICT COURT OF WASHINGTON COUNTY  
STATE OF UTAH

---

GNS PARTNERSHIP; BRYSON	)	
GARBETT; JAN GARBETT; DAVID	)	
NIPPER; BETTY NIPPER; WHITE	)	
WATER CORPORATION, and BRIAN	)	NOTICE OF APPEAL
STEPHENSEN, Partners,	)	
	)	
Plaintiffs	)	
and Appellants,	)	
	)	
vs.	)	
	)	
BRAD FULLMER,	)	Civil No. 910500012
	)	
Defendant	)	Judge James L. Shumate
and Appellee.	)	

---

Pursuant to Rules 3 and 4, Utah Rules of Appellate Procedure, plaintiffs and appellants, GNS Partnership, Bryson Garbett, Jan Garbett, David Nipper, Betty Nipper, White Water Corporation, and Brian Stephensen, Partners, hereby give notice that they appeal the judgment entered August 18, 1992, by the Honorable James L. Shumate, District Judge. This appeal is taken

from the Fifth Judicial District Court of Washington County,  
State of Utah, to the Utah Supreme Court.

DATED this 3<sup>rd</sup> day of September, 1992.

STRONG & HANNI

By Stuart H. Schultz  
Stuart H. Schultz  
Attorney for Defendant

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the  
foregoing Notice of Appeal was mailed, postage prepaid, on  
September 3, 1992, to the following:

Keith W. Meade  
Cohne, Rappaport & Segal  
525 East 100 South #500  
Salt Lake City, Utah 84102

M. Angelle

STATE OF UTAH  
COUNTY OF WASHINGTON

I, the undersigned Clerk of the  
FIFTH DISTRICT COURT, certify that this document  
is a true copy of the original document on file in  
Clerk's office.  
WITNESS my hand and seal of the court  
on this date September 08, 1992

William Moore

**ADDENDUM 4**



FILED  
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HAS.  
BY Shumate COUNTY

Stuart H. Schultz #2886  
H. Burt Ringwood #5787  
STRONG & HANNI  
Attorneys for Plaintiffs  
600 Boston Building  
Salt Lake City, Utah 84111  
Telephone: 532-7080

---

IN THE FIFTH JUDICIAL DISTRICT COURT OF WASHINGTON COUNTY  
STATE OF UTAH

---

GNS PARTNERSHIP; BRYSON	)	
GARBETT; JAN GARBETT; DAVID	)	AFFIDAVIT OF DAVID K. HOUSTON
NIPPER; BETTY NIPPER; WHITE	)	
WATER CORPORATION, AND BRIAN	)	
STEPHENSEN, Partners,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
BRAD FULLMER,	)	Civil No. 910500012
	)	
Defendant.	)	Judge James L. Shumate

---

STATE OF UTAH            )  
                              )   ss.  
County of Utah         )

I, DAVID K. HOUSTON, do state as follows:

1. I am a claim superintendent for State Farm Fire and Casualty Company and have held this position for 5 years. I have extensive experience with the coverage provided by homeowners and fire insurance policies.

2. I have supervisory responsibility for the above-referenced subrogation claim.

3. I have personal knowledge that State Farm's subrogation claim was submitted to Prudential Insurance Company, the home owner's insurer for Brad Fullmer, through his parents' home owner's policy with Prudential.

4. At no time did Prudential notify me that Brad Fullmer did not have liability coverage under his parents' policy.

5. Homeowners insurance policies generally extend liability coverage for children of the homeowners who are living away from home as students.

6. I have personal knowledge that State Farm Fire and Casualty writes and sells rental insurance for tenants which provides first-party coverage for personal property and liability coverage for damage caused by the tenant by fire to the apartment complex they live in. However, Brad Fullmer, as a student living away from home, would have been covered for liability under his parents' homeowners policy, and would not have needed a separate renters liability policy.

Further affiant saith not.

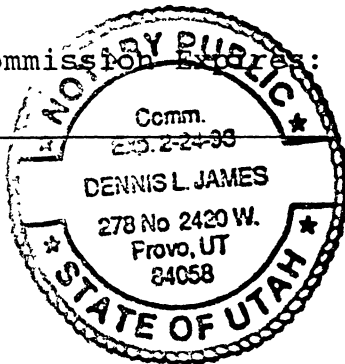
DATED this 20th day of July, 1992.

DKH  
DAVID K. HOUSTON

SUBSCRIBED AND SWORN to before me this 21st day of July,  
1992 by DAVID K. HOUSTON.

Dennis L. James  
Notary Public  
Residing at Ut. County

My Commission Expires:



**ADDENDUM 5**

Keith W. Meade (Bar No. 2218)  
COHNE, RAPPAPORT & SEGAL, P.C.  
525 East First South, Fifth Floor  
P.O. Box 11008  
Salt Lake City, Utah 84147-0008  
Telephone: (801) 532-2666  
Attorney for Defendant

IN THE FIFTH JUDICIAL DISTRICT COURT OF WASHINGTON COUNTY

STATE OF UTAH

\* \* \* \* \*

GNS PARTNERSHIP; BRYSON	)	
GARBETT; JAN GARBETT; DAVID	)	AFFIDAVIT OF
NIPPER; BETTY NIPPER; WHITE	)	BRAD FULLMER
WATER CORPORATION, and BRIAN	)	
STEPHENSEN, Partners,	)	
Plaintiffs,	)	
vs	)	Civil No. 910500012
BRAD FULLMER,	)	Judge James L. Shumate
Defendant.	)	

\* \* \* \* \*

Brad Fullmer, upon oath, states as follows:

1. I am the defendant in this action. I have personal knowledge of the matters set forth hereinafter.

2. To the best of my knowledge, the lease agreement attached hereto as Exhibit "A" was the lease that I signed to live at the Wedge Apartments. I did not negotiate the terms of the lease. It was on a printed form. The apartment was a furnished apartment that I shared with other students at Dixie College. I was 20 years of age at the time I signed the lease.

3. At no time did the owner or any person tell me that I needed to or should obtain insurance of any type on the structure

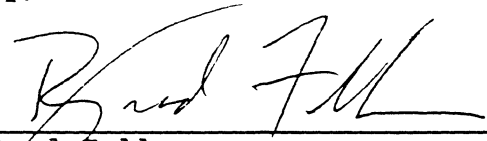
or property at the Wedge Apartments. This was never discussed, nor did I understand that it could possibly be required. I would have expected that the owner would have his own insurance of whatever type he felt necessary.

4. I never understood paragraph 1(b) of the lease to require me to obtain insurance. That paragraph does not mention the word insurance. The lease made no mention of insurance. I understood from paragraph 1(b) that if furniture or fixtures were damaged in the apartment as a result of abuse or roughhousing, that we would be responsible to replace those items. I never understood that if the apartment building burned as a result of something that happened in our apartment, that I would have to pay for the entire building. When I moved out of the apartments after the fire, the owners never advised me that I owed them any additional amount. No demand was made upon me by the owners or the apartment manager to pay for the damages caused by the fire.

5. I understood paragraph 4 of the lease, which addresses "disorderly, immoral or unlawful conduct of any kind . . ." to mean that I would have to adhere to standards of gentlemanly conduct and that I could be asked to move from the apartments if my conduct fell below these standards. I never understood from paragraph 4 of the lease that if the apartments burned, that I would be required to pay the cost of rebuilding the apartments. I would have

expected that the owner would have insurance in the event this  
occurred. No one ever requested or even suggested that I obtain my  
own insurance on the structure.

DATED this 14 day of May, 1992.

  
Brad Fullmer

STATE OF UTAH            )  
                                  : SS  
COUNTY OF SALT LAKE )

Subscribed and sworn to before me this 14 day of May,  
1992.

  
Notary Public

My Commission Expires:

Residing at:

Salt Lake City, Utah



NOTARY PUBLIC  
PYPER STIVERS  
525 East 100 South #500  
Salt Lake City, Utah 84102  
My Commission Expires  
August 27 1995  
STATE OF UTAH

HOME PHONE NUMBER 271-021  
HOME ADDRESS 7150 WILLIAMSBURG WAY  
(S)

SALT LAKE (City) (State) (Zip)

Name of Parent or Guardian \_\_\_\_\_

This agreement is made and entered into this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_ between the above named tenant and The Wedge Premier Student Housing ("The Wedge" of the "Landlord")

The landlord will provide the following service at The Wedge

UTILITIES Water, sewer and garbage collection

SERVICES Vacuums off street parking and mail boxes

HOUSING You are assigned Unit #A6 This is subject to change

Tenant is contracting for housing at The Wedge for the school year 1991 to include FALL WINTER and SPRING QUARTERS This is an agreement to pay \$770 for said housing plus deposit

Tenant will meet the following payment schedule for the housing contract period

DEPOSIT \$150.00 to be paid at the time of application for housing

RENT \$325 PER QUARTER (All rent is due and payable as indicated 10 days before the first day of classroom instruction for the indicated quarter. If rent has not been paid 10 days before classroom instruction begins, landlord may assume you are not going to stay at The Wedge and, at its option, may assign your space to someone else. No room may be occupied unless rent is paid in full, but failure to occupy premises does not negate tenants obligation to pay under this lease. There is a \$1.50 per day late fee for rents not paid on time. Rents must be paid quarterly in advance. NO MONTHLY PAYMENTS!

Landlord's mailing address is The Wedge 335 So 1000 E St George Utah 84770

Tenant hereby agrees to abide by the following rules and regulations

- 1 The landlord or its managers shall retain the right of entry at any time WITHOUT NOTICE to any apartment unit for the purpose of inspecting the premises
  - a Each apartment may be inspected on a weekly basis to check for general cleanliness and to determine the extent of any damaged or lost items provided by the landlord. Each apartment is to be kept clean and presentable at all times. Tenant will be given notice of these inspections. Management may also hold one unscheduled inspection during each quarter. If your apartment is unclean, has suffered any damage to premises, furniture or fixtures, and is missing any furniture or fixtures, tenant will be given 24 hour notice to correct the problem area. Failure to make the needed corrections will result in all members of the apartment receiving thereafter a 24 hour notice to vacate the premises.
  - b Each tenant shall be responsible for all damage within their apartment on a joint and several basis. Repairs or replacement of damaged items shall be made first from the collective deposits of all tenants within the apartment unit and, if necessary, for an assessment for additional repair or replacement expenses to the tenants not covered by the deposits. Refunds shall be made on a pro-rata basis with each tenant in the unit sharing equally in repair or replacement cost for the unit. Any repainting or other redecoration of the units shall not be allowed without prior written consent of the landlord.
- 2 No guest shall occupy in any fashion and at any time an apartment without the prior written approval of the landlord. Guests lodged may be subject to a fee as determined by the landlord, payable at the time permission is given. Guests are subject to all housing regulations and the tenants in the unit housing such guest will be held jointly and severally responsible for any breach of regulations or for any damage caused by said guest. All guests not given permission by landlord to occupy a unit shall leave the apartments no later than 12:00 p.m. Sun - Thurs, & 2:00 a.m. Fri - Sat.
- 3 Quiet hours begin at 10:00 p.m. After this time loud and boisterous talking, running on walks or other noise that cause any manner of disturbance or nuisance shall cease. Even though quiet hours do not begin until 10:00 p.m., students are expected to respect the rights of other students to privacy and quiet. Students or guests are expected to knock before entering any apartment or room other than their own. NO MEMBER OF THE OPPOSITE SEX IS ALLOWED IN THE BEDROOM, BATHROOM OR HALL AREAS! While there are no "dorm" hours, students are expected to leave and enter quietly after the 10:00 p.m. quiet hour. No guests are allowed in any apartments after 12:00 p.m. Sun - Thurs & 2:00 a.m. Fri - Sat.
- 4 DISORDERLY, IMMORAL OR UNLAWFUL conduct of any kind whatsoever is forbidden. No obscene pictures, alcohol, drugs, tobacco or chewing tobacco, foul or abusive language, loud or boisterous conduct, or destruction of property (Landlord's or tenants') shall be permitted on the premises (apartments, parking lot, sidewalks or lawns). Violation of any of the above will result in the immediate termination of tenant's rental agreement and mandatory vacation of the apartment within 24 hours. There are no exceptions to this rule. Any tenant whose conduct, in the sole opinion of the landlord, is detrimental to The Wedge and/or its other residents shall vacate the premises within 24 hours of notice by landlord. DEPOSITS AND RENTS WILL BE FORFEITED!
- 5 Each tenant agrees to the respectful use of all facilities provided by the landlord and to respect the privacy and property of the other tenants.
- 6 If the room shows no wear or damage beyond normal use, is properly cleaned, and all light bulbs are working, the tenant may, at the end of the contract period, receive a refund of the cleaning and security deposit less carpet cleaning and excess electricity charges. Charges to deposit could be as follows: \$10.00 per quarter for carpet cleaning, wear and tear and light bulbs, etc. Deposits are refunded 30 days after a written request for a refund has been received with proper forwarding address. If the student leaves before the end of the school year, no refund of the deposit will be allowed. No refunds will be made to tenants who have breached the rules and regulations contained herein.
- 7 One key to each apartment's mail box will be provided for a \$10.00 deposit. This key may be duplicated. If said key is returned, the \$10.00 deposit will be refunded.
- 8 No change of apartment or roommate assignments may be made without the prior written consent of the landlord. All complaints or problems concerning roommates shall be immediately and privately discussed with the landlord.
- 9 From time to time, it may be necessary to move one or more tenants to another apartment to accommodate remodeling and to achieve maximum occupancy per unit. Management does not intend to do any such shuffling, but reserves the right to change apartment assignments if necessary. Each tenant will not, if at all possible, be separated from those he or she chooses to room with.
- 10 A late fee of \$1.50 per day will be charged for rent not received 10 days before the first day of classroom instructions for each quarter. Each tenant agrees to pay a fee of \$15.00 if his or her rent check is dishonored and shall replace such dishonored check with cash, certified check, or money order.
- 11 The Wedge shall provide each apartment with beds, couch, chair, and dinette set. You may add your own \_\_\_\_\_ as desired. Each tenant shall bring a mattress, \_\_\_\_\_ of the tenant's deposit. The members of \_\_\_\_\_ personal linens.
- 12 Due to the nature of the student housing, no car washing, oil changing or any other mechanical work on cars will be allowed in the parking lot or property.
- 13 Large groups of friends are not to be invited to, nor are large parties to be held on the premises or in the apartments.
- 14 No animals or pets of any kind will be allowed on the premises or in the apartments.
- 15 The units may be occupied 10 days prior to the first day of classroom instruction. If a tenant desires to move in earlier, he or she may do so with permission of the Landlord and upon payment of a fee of \$5.00 per day per tenant.
- 16 Any tenant who is given notice to vacate the premises by the Landlord for any reason whatsoever shall not be entitled to a refund of his or her deposit or rent. Names of all such persons will be submitted to Dixie College as well as to their parents. It is the intent of the Landlord and their managers to keep The Wedge in superior condition. Please report any problems to management as soon as they occur. In the event any portion of this lease is found to be unenforceable or void at law and equity, the remaining portions hereof shall not be affected thereby and shall remain in full force and effect.

EXHIBIT - A



CONTRACTUALLY AGREED TO THE LANDLORD'S RIGHT AS OUTLINED ABOVE.

Tenant's signature

Date

Landlord's approving signature

Date

PARENTS' GUARANTEE: Because of the nature of Junior College Housing, we are usually providing a student with his or her first experience with tenant/landlord relationships. Although most students handle this well, some have problems. As the parent or guardian of the above-contracting tenant, by signing below you indicate that you understand the above agreement and will be responsible for the guarantee the performance by said tenant of all of his or her obligations under this agreement.

Parent or Guardian signature

Date

MAILING CERTIFICATE

The undersigned hereby certifies that on the 17<sup>th</sup> day of ~~May~~ June, 1992, a true and correct copy of the foregoing was mailed, postage fully prepaid, to the following:

Stuart Schultz  
H. Burt Ringwood  
STRONG & HANNI  
Attorneys for Plaintiffs  
600 Boston Building  
Salt Lake City, Utah 84111

  
\_\_\_\_\_

da/fullmer aff

## **ADDENDUM 6**

COPY

COPY

received  
8-21-92

Keith W. Meade (Bar No. 2218)  
COHNE, RAPPAPORT & SEGAL, P.C.  
525 East First South, Fifth Floor  
P.O. Box 11008  
Salt Lake City, Utah 84147-0008  
Telephone: (801) 532-2666  
Attorney for Defendant

IN THE FIFTH JUDICIAL DISTRICT COURT OF WASHINGTON COUNTY  
STATE OF UTAH

\* \* \* \* \*

GNS PARTNERSHIP; BRYSON	)	
GARBETT; JAN GARBETT; DAVID	)	
NIPPER; BETTY NIPPER; WHITE	)	ORDER REGARDING
WATER CORPORATION, and BRIAN	)	MOTIONS TO STRIKE
STEPHENSEN, Partners,	)	
Plaintiffs,	)	
vs	)	Civil No. 910500012
BRAD FULLMER,	)	Judge James L. Shumate
Defendant.	)	

\* \* \* \* \*

This matter came before the court for hearing on July 22, 1992, pursuant to competing Motions for Summary Judgment. The plaintiff was represented by counsel Stuart Schultz. Defendant was represented by counsel Keith W. Meade.

The court has entered a separate Order with respect to the Motion for Summary Judgment. During the course of the proceeding, the court considered and ruled upon the plaintiff's objection dated July 1, 1992 to the Affidavit of Brad Fullmer, said affidavit being dated May 14, 1992. A second Motion to Strike the Affidavit of David Houston was filed by the defendant and was made at the time of the hearing. The affidavit had been sent by telefax to the

court on July 21 with the original being filed on July 22 during the arguments.

The court, having considered the Affidavits and the Motions or Objections, hereby

ORDERS as follows:

1. Brad Fullmer Affidavit and Plaintiff's Objection. The plaintiff's objection to the Affidavits is overruled and the Affidavit is received as filed. The court believes that it can winnow out any language which might be inadmissible as evidence. The court further observes that this affidavit had no bearing on the court's ultimate ruling.

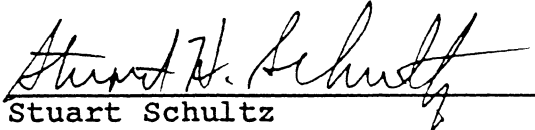
2. David Houston Affidavit. The court finds that the Affidavit was not offered with respect to the determination of liability. Statements set forth in paragraphs 1, 2, 3, and 4 of the Affidavit are received. Statements set forth in paragraphs 5 and 6 are stricken, in part upon the basis that they are not made upon personal knowledge and are not material or relevant to the proceedings. By striking these paragraphs, the Court remains mindful that renter's insurance is available and plaintiffs do not need an affidavit to establish and argue the availability of renter's insurance to cover personal property owned by an insured and liability.

DATED this 18 day of August, 1992.

BY THE COURT:

  
\_\_\_\_\_  
Honorable James L. Shumate  
District Judge

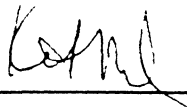
Approved as to form:

  
\_\_\_\_\_  
Stuart Schultz  
Strong & Hanni  
Attorney for Plaintiffs

MAILING CERTIFICATE

The undersigned hereby certifies that on the 3 day of August, 1992, a true and correct copy of the foregoing was mailed, postage fully prepaid, to the following:

Stuart Schultz  
H. Burt Ringwood  
STRONG & HANNI  
Attorneys for Plaintiffs  
600 Boston Building  
Salt Lake City, Utah 84111

  
\_\_\_\_\_