

1993

Medical Leasing, LTD., a Utah partnership v.
Anthony W. Middleton, Jr., Carol S. Middleton,
George W. Middleton, Jean H. Middleton, Delores
B. Middleton, Richard G. Middleton, Jane G.
Middleton, Mary Middleton Dahl and Richard P.
Middleton, executor of the Estate of Victoria Ann M.
Stearn : Brief of Appellant

Utah Court of Appeals

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BRIEF

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DOCKET NO. 930218CA

IN THE UTAH SUPREME COURT

MEDICAL LEASING, LTD., a Utah :
partnership, :

Plaintiff and Appellee, :

v. :

ANTHONY W. MIDDLETON, JR., :
CAROL S. MIDDLETON, GEORGE W. :
MIDDLETON, JEAN H. MIDDLETON, :
DELORES B. MIDDLETON, :
RICHARD G. MIDDLETON, JANE :
G. MIDDLETON, MARY MIDDLETON :
DAHL and RICHARD P. MIDDLETON, :
executor of the ESTATE OF :
VICTORIA ANN M. STEARN, :

Defendants and Appellants. :

93-0218-CA

Appellate Court No. **[REDACTED]**

Priority Number of the Case: 15

Nature of Proceeding:
Appeal from Judgment of
Third District Court
Honorable Kenneth Rigtrup

**BRIEF OF APPELLANTS/DEFENDANTS
DELORES MIDDLETON, RICHARD G. MIDDLETON,
JANE G. MIDDLETON, MARY MIDDLETON DAHL, AND
RICHARD P. MIDDLETON AS EXECUTOR OF THE
ESTATE OF VICTORIA ANN M. STEARN**

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Middleton as executor of the
estate of Victoria Ann M. Stearn

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**CLERK SUPREME COURT
UTAH**

IN THE UTAH SUPREME COURT

MEDICAL LEASING, LTD., a Utah	:	
partnership,	:	
	:	
Plaintiff and Appellee,	:	
	:	
v.	:	
	:	Appellate Court No. 920439
ANTHONY W. MIDDLETON, JR.,	:	
CAROL S. MIDDLETON, GEORGE W.	:	Priority Number of the Case: 15
MIDDLETON, JEAN H. MIDDLETON,	:	
DELORES B. MIDDLETON,	:	Nature of Proceeding:
RICHARD G. MIDDLETON, JANE	:	Appeal from Judgment of
G. MIDDLETON, MARY MIDDLETON	:	Third District Court
DAHL and RICHARD P. MIDDLETON,	:	Honorable Kenneth Rigtrup
executor of the ESTATE OF	:	
VICTORIA ANN M. STEARN,	:	
	:	
Defendants and Appellants.	:	

BRIEF OF APPELLANTS/DEFENDANTS DELORES MIDDLETON, RICHARD G. MIDDLETON, JANE G. MIDDLETON, MARY MIDDLETON DAHL, AND RICHARD P. MIDDLETON AS EXECUTOR OF THE ESTATE OF VICTORIA ANN M. STEARN

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JURISDICTION OF THE SUPREME COURT:

The Supreme Court has jurisdiction in this matter pursuant to Section 78-2-2-(3)(j), Utah Code Ann. 1953, as amended.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the 1980 Amended Ground Lease or law required written notice of default as a condition precedent to suit for breach of an express provision of the Lease or for breach of the covenant of good faith and fair dealing.

STANDARD OF REVIEW: De novo review for correctness. Kimball v. Campbell, 699 P. 2d 714, 716 (Utah 1985).

2. Whether these Middletons are jointly liable for the acts of Anthony Middleton when Medical Leasing knew that Anthony did not have authority to act for these Middletons.

STANDARD OF REVIEW: De novo review for correctness. Kimball v. Campbell, supra.

3. Whether a threat of litigation by one tenant-in-common constitutes a breach of the lease, or whether all tenants-in-common must join as plaintiffs in any legal action against their tenant.

STANDARD OF REVIEW: De novo review for correctness. Kimball v. Campbell, supra.

4. Whether the common-law rule, that tenants-in-common made separate leases with their common tenant, applies, or whether under the Amended Lease or by operation of law

Middletons agreed to be jointly and severally liable for the torts or breach of contract of another tenant-in-common.

STANDARD OF REVIEW: De novo review for correctness; interpretation of contract is question of law and trial court's interpretation of a contract as a matter of law is accorded no particular weight. Kimball v. Campbell, supra. Determination of whether writing is ambiguous is question of law. Correction-of-error standard accords no deference to trial court. D'Aston v. D'Aston, 808 P.2d 111, 114 (Utah App. 1990).

5. Whether Anthony Middleton's action constitute a breach of the express provisions of Paragraph 8 of the Amended Lease.

STANDARD OF REVIEW: De novo review for correctness. Kimball v. Campbell, supra.

6. Whether there was a breach of the covenant of good faith and fair dealing by Anthony Middleton, a tenant-in-common, and, if so, whether such breach, based on acts which are unauthorized and not ratified, results in joint liability for all tenants-in-common.

STANDARD OF REVIEW: De novo review for correctness. Kimball v. Campbell, supra.

7. Are all Middletons jointly liable for breach of contract and/or breach of covenant of good faith and fair dealing, when Medical Leasing neither pleaded joint liability nor alleged facts to support a claim of joint liability, and where Medical Leasing did not move to amend its pleadings to assert joint liability?

STANDARD OF REVIEW: De novo review by Supreme Court for correctness. Trial court's conclusions of law are not given special deference. Bountiful v. Riley, 784 P.2d 1174 (Utah 1989).

8. Whether the trial court erred in awarding Medical Leasing attorneys' fees where (a) the verdict did not specify a finding of a breach of the express terms of the Lease, (b) there was no breach of the express terms of the Lease, and (c) Medical Leasing did not give Middletons notice as required by the Lease.

STANDARD OF REVIEW: De novo review as a question of law. Cottonwood Mall v. Sine, 830 P. 2d 266 (Utah 1992).

9. Whether Middletons are entitled to attorneys' fees for proceedings in the trial court and on this appeal, or whether on remand the trial court should determine if Middletons are entitled to attorneys' fees.

STANDARD OF REVIEW: De novo review as a question of law. Cottonwood Mall v. Sine, supra.

ADOPTION OF ISSUES AND ARGUMENT IN BRIEF OF OTHER APPELLANTS:

These Appellants adopt the following issues and points in Argument from the Brief of Anthony W. Middleton, et al.:

Issues:

- I. Whether admission of MLL's evidence regarding the Zions litigation was prejudicial error.
- VI. Whether MLL failed to present substantial evidence to establish that threats of litigation by Anthony W. Middleton, Jr. caused damaged to MLL.
- VII. Whether, as a matter of law, a threat of litigation not followed by suit and adjudication favorable to MLL is legally sufficient to satisfy the "improper means" element of MLL's tortious interference claims.
- VIII. Whether the trial court erred in failing to rule as a matter of law that Middletons, as landlords to MLL and owners of the real property in question, were privileged to interfere in negotiations for sublease of the property.

IX. Whether the jury instructions erroneously stated the applicable law respecting damages, thereby permitting a double recovery and relieving MLL of its duty to mitigate.

ARGUMENT:

POINT I: ADMISSION OF MLL'S EVIDENCE REGARDING THE ZIONS LAWSUIT WAS PREJUDICIAL ERROR.

POINT VI: MLL'S CLAIMED DAMAGES WERE NOT SUPPORTED BY ANY SUBSTANTIAL EVIDENCE.

POINT VII: AS A MATTER OF LAW, MLL FAILED TO SATISFY THE IMPROPER PURPOSE AND IMPROPER MEANS ELEMENTS OF ITS TORTIOUS INTERFERENCE CLAIM.

POINT VIII: MIDDLETONS, AS OWNERS OF THE SUBJECT REAL PROPERTY AND LANDLORDS TO MLL WERE ABSOLUTELY PRIVILEGED TO INTERFERE IN SUBLEASE NEGOTIATIONS.

POINT IX: THE JURY INSTRUCTIONS ERRONEOUSLY PERMITTED A DOUBLE RECOVERY AND THE JUDGMENT IMPROPERLY RELIEVED MLL OF ITS DUTY TO MITIGATE DAMAGES.

CONSTITUTIONAL PROVISIONS, STATUTES ORDINANCES, RULES AND REGULATIONS WHOSE INTERPRETATION IS DETERMINATIVE:

Section 68-3-1, Utah Code Ann. which reads:

The common law of England so far as it is not repugnant to, or in conflict with, the constitution or laws of the United States, or the constitution or laws of this state, and so far only as it is consistent with and adapted to the natural and physical conditions of this state and the necessities of the people hereof, is hereby adopted, and shall be the rule of decision in all courts of this state.

This statute and its application are discussed in Point IV of the Argument.

STATEMENT OF THE CASE:

A. NATURE OF THE CASE.

Medical Leasing, Ltd. ("MLL"), as Tenant, leased ground from the Middletons, owners as tenants-in-common. MLL was negotiating with Roger Boyer ("Boyer"), president

of The Boyer Company ("Boyer Co."), for the sublease and development of the property. When those negotiations failed, MLL sued the Middletons based solely on acts of Anthony Middleton, for (as pertinent to this appeal) (a) the tort of intentional interference with prospective economic relations, (b) breach of the lease and (c) breach of the covenant of good faith and fair dealing.

B. COURSE OF PROCEEDINGS, DISPOSITION IN LOWER COURT.

The jury found in special interrogatories: (a) Anthony and his wife, Carol Middleton,¹ (i) intentionally interfered with MLL's prospective economic relationship with Boyer Co. (R. at 1569) and (ii) breached the express terms of the lease "and/or" the covenant of good faith and fair dealing (R. at 1572), and that (b) the other Middletons did not interfere (R. at 1569-70) or breach the lease (R. at 1572-73), implicitly finding MLL had been told and knew Anthony was not authorized to act for the others, and (c) MLL should recover general damages of \$2,582,780 from Anthony and Carol Middleton (R. at 1574) and punitive damages of \$75,000 from Anthony Middleton (R. at 1584).

After the jury's verdict, the trial court ruled that, the jury verdict notwithstanding, all Middletons were jointly and severally liable for the breach of lease by Anthony and Carol Middleton (R. at 2962) solely because they signed the Lease as "Landlord." After denying Middletons' motions for JNOV and new trial, the Court entered judgment against all Middletons for \$2,582,780 plus interest, attorney's fees of \$275,000, costs, and for \$75,000 in punitive damages against Anthony Middleton. R. at 2964.

¹ Carol Middleton's liability could be based only on a finding that her husband, Anthony Middleton, was her agent. See Special Interrogatory No. 25, R. at 1543, and Answer to Special Verdict, ¶ 1, 4, R. at 1569, 2572.

C. STATEMENT OF FACTS.²

The Middletons own as tenants in common³ 10 acres of raw ground at the northwest corner of 7th East and 39th South in Salt Lake County, Utah. Dr. R. P. Middleton and Dr. Anthony Middleton, (Sr.), brothers, and Delores Middleton, widow of another brother, originally owned the property. R. P. Middleton's one-third interest in the property was conveyed to his children, Dr. Richard G. Middleton (R. at 4972), Dr. Mary Middleton Dahl and Victoria Ann Stearn, and R. G.'s wife, Jane. The one-third interest of Anthony Middleton, Sr. was conveyed to his sons, Dr. Anthony Middleton, Jr. (R. at 4317) and Dr. George Middleton, and their wives, Carol and Jean. The aged widow, Delores Middleton, a resident of the District of Columbia (R. at 321, ¶ 9; 412, ¶ 9), has retained her one-third interest.

MLL is a partnership (Amended Complaint, ¶ 4, R. at 320) whose general partners are Dr. Wallace H. Ring, Dr. John C. Adair and Dr. Harry C. Wong. R. at 3988.

In 1975, MLL's predecessor proposed to construct a surgical center on two acres of the property. Because the Middletons wanted to keep the parcel intact rather than lease only the two acres, the entire parcel was leased for 50 years with a 30-year option to renew (the "Ground Lease") R. at 4999, l. 22. The rent was set at a modest level⁴ to cover just the two acres of land to be used for the surgical center. R. at 4999, l. 19-22. The Middletons

² The lengthy Statement of Facts is not necessary to raise or identify the issues asserted in this Brief. Indeed, the issues raised in this Brief by these Middletons are all issues of law; and only Issue VI and the corresponding Point VI in the Brief of Anthony Middleton, et al., adopted by these Middletons, challenges the sufficiency of the evidence. The detail is provided, however to assist the Court in understanding the case. The evidence is stated in the light most favorable to the findings of the jury in its answers to interrogatories in the Special Verdict, R. at 1569. See Koer v. Mayfair Markets, 431 P.2d 566 (Utah 1966).

³ Ownership as tenants in common was alleged in the amended complaint, ¶¶ 5-13, R. at 321-22, and admitted in Middletons' answers, R. at 391-92 and 412. See also R. at 899, l. 16-18.

⁴ For the whole parcel, the rent was only \$260 per month during construction of the surgical center, and \$6,240 for the following year. The rent was \$15,000 for the fifth year of the Lease. Ex. P-1, ¶ 1.2.

believed they would be able to participate in further development rentals because if MLL undertook to sublease the remaining property to a major independent developer, as a practical matter, the developer or the developer's lender would likely insist that MLL obtain the Middletons' agreement to subordinate⁵ (i.e., mortgage) the fee to the development lender's lien (R. P. Middleton, R. at unnumbered page following 5701) or that the lenders would require consent to the development or changes in the lease; then the parties would work together on the development and Middletons would participate therein. R. at 4998-99, 5001-2, 5004. The Middletons subordinated to MLL's construction lender their fee interest in the two acres where the surgical center would be built (Ex. P-1 at 9-14), but expressly did not subordinate the rest. Id. at 14.

Five years later, Middletons were asked to subordinate another .75 acre. An Amended Ground Lease (Ex. P-3) ("Amended Lease") made in 1980 provided for the requested subordination.⁶ Ex. P-3 at 7-12. It changed the renewal period from 30 to 15 years.

Each Middleton signed the Amended Lease separately as "Landlord" and it refers throughout to "Landlord" in the singular. The Lease is silent concerning whether the parties intended the Middletons, as tenants-in-common, to be jointly liable for the acts of one of them.

The Amended Lease specifically states the Middletons are not required to give further consent or subordination for development, but that such consent is "solely at

⁵ The original Ground Lease in 1975 stated: "Tenant has represented to Landlord that it will be impossible for it to finance the construction of the Surgical Center without the subordination of the Landlord of its fee title to the two acres. . . ." Ex. P-1 at 10.

⁶ For the first three years of the Amended Lease, rent for the whole property was only \$25,200 per year. MLL was responsible for utilities and taxes.

landlord's discretion." ¶ 8. Therefore, if MLL asked for consent or subordination for development, the Middletons anticipated asking for more lease income in return. R. at 5004. MLL had a similar view: if MLL asked Middletons for consent, Middletons would ask for more money. Dr. Wong, R. at 4916.

The Amended Lease contains at paragraph 12 a "notice and right to cure provision" benefitting MLL and its lenders and subtenants:

Landlord further agrees that in the event of any default by Tenant under this Ground lease, any mortgagee or other holder of a security interest in Tenant's leasehold or improvements and/or any assignee or subtenant of Tenant may cure such default within the time allowed Tenant for same hereunder and continue this Ground Lease in full force and effect.

The following additional provisions of the Amended Lease are pertinent: paragraph 6, regarding default; paragraph 8, regarding development of the remaining property; paragraphs 12 and 13 regarding notices; and paragraph 16 regarding attorneys' fees. These provisions are set out in the Argument.

Three weeks after the Amended Lease was signed, MLL subleased a part of the property to Zions Bank. ("Zions Sublease" dated August 22, 1980, Ex. P-4). Coinciding with the Amended Lease's notice and right to cure clause, Zions Sublease paragraph 15 reads:

In the event Lessor receives any notice of any default under said Amended Ground Lease, Lessor shall promptly, no later than three (3) days from the receipt of said notice by Lessor, deliver to Lessee a copy of said notice. Lessee may elect, in its sole discretion, to cure said default on behalf of Lessor and thereby reinstate and continue in effect said Amended Ground Lease. In the event Lessee remedies any such default [Lessor is responsible for Lessee's costs].

Although the Middletons were not asked to subordinate, Zions insisted that it needed Middletons' consent to its sublease and MLL insisted that consent be given by the Middletons without compensation. Ex. P-6. Zions, even over MLL's objections (R. at 4161),

sued MLL and the Middletons for a declaration that consent was not necessary or, if necessary, that MLL must obtain it from Middletons. Zions Utah Bancorporation v. Medical Leasing Limited, et al. See Zions' Complaint, Ex. P-10. The Zions' complaint alleged: "Paragraph 8 of the Lease requires the consent of the Middletons" (§ 14); "Medical Leasing asserts that the consent of the Middletons is not required" (§ 16); "Medical Leasing refuses to procure the consent of Middletons" (§ 20); and "it is uncertain whether the consent of Middletons is required . . ." (§ 22). In 1985, the parties reached a settlement by which MLL paid the Middletons \$21,000 (R. at 4162, l. 5-9) and the parties agreed to a mutual release of all claims and a stipulation that restated paragraph 8 of the 1980 Amended Ground Lease to cure the "uncertainty" Zions had pleaded as to whether consent to subleases or development of the property was or was not required and under what conditions. Ex. P-16 at 4-5.

Prior to and during the Zions case, Anthony Middleton and George P. Middleton and their wives were represented by one law firm and the other Middletons had different counsel. R. at 4030, 4033; see Exs. P-8, P-11, P-15. Different positions were taken by each group. Id.

In 1987, MLL began discussing development of the remaining property (5.135 acres) with Boyer Co. (R. at 4050) expressly on a non-subordinated basis. Because MLL did not want to share any proceeds from such development with the Middletons, the Middletons were not told of the negotiations (Ring, R. at 4170, 4181) until 1989 (Dr. Wong, R. at 4894-95) when Boyer insisted on it.

In June 1988, MLL and Boyer Co. signed a letter agreement (Ex. P-22) (the "Development Agreement") for Boyer Co. to sublease and develop the remaining 5.135 acres, conditioned, among other things, upon Boyer Co. getting the property zoned

commercial and the parties signing a sublease by December 31, 1988. In December 1988, the time to sign the sublease was extended to January 31, 1989. Ex. P-32.

The Boyer Co. obtained rezoning and removed the contingencies of the Development Agreement (Ex. P-32), but MLL did not prepare the first draft of the proposed sublease until February 3, 1989, after the Development Agreement expired. Boyer Co.'s lawyer, Victor Taylor of Kimball, Parr, Crockett & Waddoups, on March 14, 1989 wrote (Ex. D-14) MLL's lawyer, John Parsons, that a number of "major business hurdles" must be resolved. He identified changes MLL would need to make in the Amended Lease, including:

- 1) MLL must obtain Middletons' consent to the Boyer Co. sublease; and
- 2) MLL and the Middletons must again amend the Amended Lease to provide that if MLL defaults on the Amended Lease the Middletons will "attorn" to Boyer Co. and will perform MLL's obligations to Boyer Co.⁷ under the sublease and Middletons would accept Boyer Co.'s performance of its obligation under the sublease by Boyer or by any sublessee of or lender to Boyer; and
- 3) measuring the rent to MLL in part on Boyer Co.'s rentals received from subtenants "violates the letter and spirit" of the provision in paragraph 8 of the Amended Lease under which MLL might sublease without Middleton consent,⁸ and that "the Sublessee [Boyer Co.] is unwilling to take the risk of such violation, the result of which could be termination" of the Amended Lease;

⁷ This attornment provision would impose MLL's duties to Boyer Co. on Middletons. Under the Amended Lease, Middletons are not required to do so. The trial court so ruled. R. 301-2.

⁸ Taylor said "having rental payable under the sublease determined on the basis of the rental income from the premises violates the letter and spirit of this provision," referring to ¶ 8 of the Amended Lease that an independent third party could develop without subordination. Ex. D-14. Taylor was referring to the text of the Amended Lease. He testified that his opinion did not change when he later was provided the text of paragraph 8 as modified by the Zions Stipulation. R. at 5439.

MLL objected to Boyer making requests of the Middletons for such concessions, anticipating the Middletons would ask for more rent. Dr. Ring, R. at 4170. MLL's position was that Boyer Co.'s lawyer was wrong on the first two points; it refused to change the rent clause and said Boyer Co. ought to be content with the "right to cure" clause that Zions accepted, rather than the attornment clause demanded.⁹ MLL's lawyer wrote to Boyer Co. on April 10, 1989 that . . . "MLL believes the consent of the Middleton's is not only unnecessary but the Middletons very likely will consider such a request unreasonable . . .". R. at 4399, Ex. D-15. MLL told Boyer the Middletons were "litigious" as evidenced by the Zions action, when in fact Middletons asserted counter-claims only after being sued by Zions and MLL. Exs. P-11 and P-15. MLL insisted that Boyer Co. was bound by the Development Agreement to sign the proposed sublease as is, threatening suit if necessary. R. at 4570.

Boyer Co. explained to its mortgage broker, Bonneville Mortgage Company, the nature of the proposed transaction and asked if financing could be arranged for the project using the proposed sublease. Banks, R. at 5396. Boyer Co.'s mortgage broker asked its legal counsel, Greg Bell of Kirton, McConkie & Bushnell, for an opinion as to the "financeability of the proposed arrangement," and

If in your professional opinion the proposed ground lease(s) are not acceptable to our investors, please so advise at your earliest convenience so that we can so advise our client. [Ex. D-17].

By letter of May 30, 1989, Greg Bell rendered his opinion to Bonneville Mortgage Company and Boyer Co. that Middletons' consent and attornment, inter alia, would be required by a lender, that he agreed "heartily" with Taylor's March 14, 1989 letter, and that

⁹ Boyer Co.'s lawyer, Mr. Taylor, testified as to the purpose and importance of the proposed provisions (R. at 5431-33, 5498-99, 5501-02).

the proposed transaction was too complex even if "very substantial changes are made in the leases." Ex. D-18.

On July 25, 1989, Drs. Ring, Wong and Adair, partners in MLL, met with Boyer, his attorney, Vic Taylor, and Greg Gardner, his employee. R. 4116. They discussed the major business hurdles Taylor had raised in his March 14, 1989 letter. Parsons, R. at 4531. Dr. Ring interrupted and said "we are not going to the Middletons." *Id.* at 4532. According to Dr. Ring, Boyer said¹⁰ "we can work around that," (Dr. Ring, R. at 4121, l. 5-6) and that he wanted "to make a deal, not break a deal." R. at 4121. Although the Amended Lease directed that all notices be sent to Dr. Richard P. Middleton, nevertheless, Boyer told the group he wanted to speak to Dr. Anthony Middleton, Jr. ("Anthony"), his friend, about the project. R. at 4122. MLL continued to insist that the sublease be signed without contacting the Middletons at all. Boyer stated to MLL that he was concerned about getting into a "litigation box," that is, he feared he would be sued either way he went. R. at 4121.

Finally, MLL acquiesced and agreed Boyer could talk to Anthony Middleton. R. at 4298. Boyer approached Anthony at church in late July, 1989 (R. at 5530), told him briefly of his proposed development and said he wanted to meet with him to discuss it. This was the first time any of the Middletons knew of the negotiations between MLL and Boyer Co. (R. at 4895, 4981, and 5530) which had been going on for almost two years. Two weeks later, Anthony talked with Boyer who told him MLL wanted Boyer Co. to develop retail shops and offices on the property. Ex. P-37. Knowing no more, Anthony recorded in his diary:

¹⁰ Middletons objected to Dr. Ring's hearsay testimony on this subject. R. at 4119.

Roger's company is so strong that they can do without subordination, and I suspect we are dead in the water the way that stupid contract is put together by Uncle Dick and [his lawyer]. I am going to meet with Roger this coming Tuesday morning to go over the plans and see if there is something that can be done about it, but my strong hunch is that we are sunk and will have to live with the idea that those birds will derive a very handsome income off the development without actually including the actual owners of the land at all. [Ex. P-37]

Meanwhile, MLL's Dr. Wong, who worked daily in the same hospital with D. Richard G. Middleton ("R.G."), was sent by MLL to tell R.G. that Boyer was going to talk to Anthony. They met in the hospital hall and Dr. Wong said Boyer was going to develop the property without subordination, that Boyer was going to talk to Anthony about it and asked if R.G. wanted to attend. Dr. Wong, R. at 4895, 4909. Dr. Wong testified R.G. said his presence at the meeting was not necessary if subordination were not requested, that Anthony only represents a third of the Middleton family, and that his side of the family did not always agree with Anthony's. R. at 4910.

On August 7 or 8, 1989, Boyer met with Anthony. Boyer told Anthony that he and his lawyers were of the opinion that Middletons' consent to a sublease was needed. R. 5534, l. 5-9; R. 5601, l. 19-20. Boyer also told Anthony that MLL had threatened to sue Boyer Co. if it didn't proceed with the project. R. 5539, 5540. But Boyer did not tell Anthony the specifics of why his lawyer said Middletons' consent was necessary, nor of the concessions necessary to make the sublease financeable. Anthony said he was glad Boyer was developing the property.

On September 26, 1989 there was a meeting among Roger Boyer, Greg Gardner, Dr. Ring and Anthony. Dr. Ring testified:

THE WITNESS: Roger continued his addressing Tony. . . . And he had in his hand a document. The document was the Ground Lease, as modified by the Zions'

declaration or the Zions' determination. And He said " -- And he read from it and He said: "It seems to me that this is very clear, Tony, that your consent is not required."

MR. BURBIDGE: What, if anything, did Tony Middleton say in response?

A. He said "Well, I don't think that makes any difference." He said, "If a stake goes in the ground, the Middletons will sue." (indicating) ["I'm not saying I'll sue, but I'll guarantee you there are members of the Middleton family that will sue, because we have a right to participate."

Q. All right. Now, did anyone ask Tony what the basis of this statement was?

A. Roger did.

Q. Did Tony respond?

A. Yes.

Q. What did he say?

A. He says: "As the rightful landowners, we have a right to participate on any development that's goes on out there on a" -- he says, "It is just a philosophical basis. It may not be in the contract, but, philosophically, we have that right." [R. at 4126-27]

...

Boyer said he could not go forward with the threat of litigation. [R. at 4135]

On cross-examination, Dr. Ring testified he said "whatever [Boyer Co. feels] it needs from the Middletons its something they should obtain from them." R. at 4440.

Anthony recorded in his diary regarding the September 26, 1989 meeting with Boyer, Greg Gardner and Dr. Ring:

We sat down and went through the history of the contract and leases, me giving my side of it and Wally Ring giving his side of it, and in a rather amicable session I felt that everybody had agreed that there would be some compensation paid the Middleton family. . . .

At any rate, we got the point made since then that the only thing we are interested in is increasing the income realized from the property in return for which

the Middleton family will agree not to challenge the contract in court. The way things now stand is that Wally understands that we are bargaining and deliberating to see how much of an increase is acceptable. . . . Roger Boyer is aware of that as well, and I pointed out to Roger that Wally as a point of principle has stated several times to me that the Boyer Company is going to have to give a little something up to make this contract go, and I asked Roger to see if there isn't any way they can do that. [Ex. P-37]¹¹

On October 10, 1989, Dr. Wong and Dr. Ring met with Anthony at the Marriott Hotel. Dr. Ring presented a possible revision to the Amended Lease, a "revised escalator." R. at 4135-36. Dr. Ring testified:

A. Tony said . . . "I've got to have some kind of a bone to throw to the family. I can't just walk away from this. Tell me that you are willing to pay something." He said: "I know I can do it for \$25,000."

And I said, "I don't think I could talk my people into \$10,000."

. . . "There is nothing in here that gives you any immediate money, and the only escalator that you will get to your monthly, or your annual income, would be that increase that you would get as the rents go up."

And he said, "Well, you realize that if we don't get this, we are going to sue?" And I became a little hot under the collar.

Q. Just tell me what you said.

A. And I told him there was no way that we were going to go along with that kind of extortion.

That's when he came up with: "Well, I've got to have some kind of a bone to throw to the family or I know there's going to be a lawsuit." [R. at 4141-42]¹²

Dr. Ring and Anthony met on the first Tuesday in November 1989, at the Fort Douglas Club. Dr. Ring told Anthony that MLL had decided that it would not pay anything

¹¹ Dr. Ring testified further and other witnesses testified about the September 26, 1989 meeting: Ring, R. at 4432-46; the testimony in the text is consistent with the other witnesses' testimony or is more favorable to MLL than the other witnesses' testimony.

¹² Other witnesses testified about the October 10, 1989 meeting: Anthony Middleton, Jr.: R. at 4367-70; the testimony in the text is consistent with the other witnesses' testimony or is more favorable to MLL than the other witnesses' testimony.

to the Middletons. R. at 4142-43. Dr. Ring testified that Anthony said "If we don't get some money, we are going to sue." R. at 4144.

On November 11, 1989, Boyer held a meeting at his house. The meeting was secretly recorded by Dr. Ring. Ex. D-27. Boyer proposed a deal where both MLL and the Middletons would participate as equity owners in development of the property. Id. at 3. Boyer was making the proposal because he wanted to develop the property, but it was at a stalemate. Id. at 1, 17. Anthony expressed his enthusiasm for exploring Boyer's proposal. Id. at 12. Boyer said he did not think he was bound by the development agreement and that he would have to obtain financing to develop the property. Id. at 18. Dr. Ring responded:

MR. RING: I think what my position was at that meeting is that we felt that what Roger was asking for here was nothing that would increase the risk of the Middletons. It was something that should be drafted because it was nothing but a favor. If you will, as any responsible landlord would recognize the responsibilities to do so, and what you're saying is give us the right to cure, give us some piece of presence so that we won't be sued, and I think that we did not come away from there with the feeling that that was available. As a matter of fact, as you said right off the bat, you said it then and you've said it at every meeting we've had, is that if any development happens out there, you're going to sue.

MR. ANTHONY MIDDLETON: No, that's only half of what I said. There would be -- very likely be a suit entered if zero participation on the part of the owners. [Ex. D-27 at 18.]

Boyer was attempting to find a solution:

MR. RING: . . . If you remember, the last time there was, I believe, on the part of you, Roger, and you, Tony, we were talking about taking what would be received from Roger and dividing it. That isn't what I had in mind.

So when I left there I thought what you were asking for was the future increase on the land, not what --

MR. BOYER: I thought that's what both of you said. That's the implication. He said we would litigate if they don't participate, and you suggested that I think we have a binding agreement.

MR. RING: I think we do.

MR. BOYER: What my point is, if we don't proceed I think the implication is that we litigate. If we did proceed, the implication is we litigate.

MR. RING: There is a third opportunity. There is an opportunity to litigate, and that's simply to go to court and get clarification of what might be required of the landowner without any further approval, and rather than take the passive approach (inaudible), we can take the active approach and find out what it's all about.

This is what happened last time. We got it clarified (inaudible). That isn't litigation in the sense that we would be trying to force your contract, it would be a litigation attempt to try to clarify so that we can proceed without it being litigated.

MR. ANTHONY MIDDLETON: Basically, the reason we're all meeting here is to avoid litigation in the first place. I'd like to hear what your proposal is, Roger. I don't think I can understand what you're talking about without a scenario, and I suspect you fellows wouldn't understand without running it past your attorneys. [Ex. D-27 at 32, 33]

At those meetings Anthony stated he was in favor of Boyer developing the property and when asked to assure that the Middletons would not sue, said he believed the Middletons would agree not to contest the contract in court if more rent were paid. (R. 4462-63) He also said he believed that if the development went forward without additional rent, that it was likely some member of the family in this or future generations would sue. R. at 4463, 4464 He said he felt philosophically that the Middletons were entitled to share in rent from any future development. R. at 4440, 4446-47.

At these meetings held among Anthony, Boyer and MLL representatives, never did Anthony say to MLL or to Boyer that he spoke for the rest of the Middletons; MLL knew he did not and never made any inquiry of these Middletons as to their position or Anthony's authority. Dr. Ring, R. at 4460-61.

On November 17, 1989, MLL wrote (Ex. P-39) to Anthony directing him to stop threatening suit, and threatening suit if the Middletons did not amend the Amended Lease

to provide an attornment clause¹³, give further consent to the Boyer Co. sublease, and give other concessions, as set forth in an attached "Second Amendment to Ground Lease," which quoted virtually verbatim the provisions requested by Boyer's lawyer in his March 14, 1989 letter. When Anthony's lawyer asked for a copy of the proposed sublease and Development Agreement to consider approving the sublease (Ex. D-31), MLL by letter of December 8, 1989 (Ex. P-42) refused to provide it unless the Middletons first agreed not to ask for more rent and not to sue, and said that even if the Middletons so agreed, "the rental provisions [in the sublease] will be masked," these being the very provisions to which Boyer's lawyer objected saying they created the risk of breach of the Amended Lease. Ex. P-42. MLL kept Boyer's lawyer's objections secret, too.

Simultaneously, on November 17, 1989, MLL wrote Boyer Co. threatening suit if it did not sign the proposed sublease in 10 days and stating that Anthony's "threats of litigation" were unfounded. Ex. P-40. Boyer Co. twice declined to sign, first writing on November 22, 1989 that "The Boyer Company does not view the threats made by Tony Middleton as 'without basis in law or fact...'" and that the Boyer Co. was not bound to sign the sublease. Ex. D-30. Boyer Co.'s lawyer then wrote on February 5, 1990 again that Boyer Co. was not bound to sign the sublease because the Development Agreement had expired a year before and that Boyer Co. was terminating negotiations because "Medical Leasing has been unable to obtain the necessary cooperation of the landowner to make the ground lease financeable." Ex. D-39.

¹³ That is, that the Middletons would perform MLL's obligations to Boyer under the sublease if MLL defaulted on the Amended Ground Lease.

Throughout all this, the only attempt of MLL to communicate with the other Middletons was by MLL's counsel, John Parsons, by letter dated December 8, 1989 (Ex. P-41), sent by regular mail to Dr. Richard P. Middleton, which merely transmitted a copy of Mr. Parson's previous November 17, 1989 letter (Ex. P-39) to Anthony and asked that it be sent to all Middletons.

At a meeting on February 15, 1990, MLL's Dr. Ring continued to ask Boyer if he would not be satisfied with a right to cure clause as Zions had accepted instead of the attornment clause and other provisions Boyer's lawyer wanted, but Boyer still did not agree to go forward. Ex. D-58, p. 3, 8.

The Amended Lease specifically provides that a party is not in default until 30 days after written notice specifying how a party has failed to perform and those particulars remain uncured for that period (Ex. P-3, ¶ 8, p. 6-7). It requires notice to the landlord be given by certified mail addressed to the person to whom rent is payable, which is Dr. Richard P. Middleton. Ex. P-3, ¶ 12, p. 15. No such notice was given to Anthony, to Richard P. Middleton, nor to counsel for these Middletons, Moyle & Draper, with whom prior negotiations had been conducted. Neither did Dr. Wong ever mention any complaint about Anthony to R.G. (R. at 4909), even through they continued to work daily in the same hospital, Dr. Wong often attending as anesthesiologist in R.G.'s surgeries. R. at 4908.

Neither the Middletons nor Boyer Co. acceded to MLL's November 17, 1989 demands. On February 16, 1990, MLL filed this action. R. at 2. The original Complaint had five claims. Count I prayed for a declaratory judgment and injunction requiring the Middletons to consent and agree to the terms demanded in MLL's November 17, 1989 letter

to Anthony. Count II was a claim for breach of implied covenants of good faith and fair dealing in the Amended Lease. Count III was for intentional interference with MLL's Development Agreement with Boyer Co. Count IV was for intentional interference with prospective economic relations, and Count V was for attorney's fees under the Amended Lease. All of the claims were asserted against the other Middletons on the basis that Anthony's acts were as agent of the other Middletons; no claim of joint and several liability was made. Complaint, R. at 2-26.

Upon defendants' Motion to Dismiss, the trial court dismissed Count I, finding the Middletons had no contractual obligation to consent to attornment or to the proposed Boyer sublease. R. 301-2. Plaintiff filed an Amended Complaint (R. 319) which included the original claims except those for declaratory judgment and injunctive relief. The claims again asserted the other Middletons were liable because Anthony acted as their agent; no claim of joint and several liability was made, nor were any facts pleaded to support such a claim.

Defendants moved for summary judgment. R. at 447, 584. The court granted summary judgment against plaintiff only on its second claim, for intentional interference with the Development Agreement. The court held as a matter of law that there was no contract between Boyer Co. and MLL which could be the subject of an interference claim. R. at 1078. The case proceeded to trial on the remaining claims.

At trial, Roger Boyer testified that financing was necessary if the project were to go forward (Boyer, R. at 4874); that the items identified by his counsel in the March 14, 1989 letter (Ex. P-36, D-14) would be necessary to obtain financing (R. at 4876-77); that MLL's attorney never changed Boyer's mind about whether those items "would have to be

addressed . . . to get financing" (R. at 4877); and that he had no recollection of Anthony threatening to sue him or Boyer Co. at the meetings where Anthony was present. Boyer, R. at 4877. Greg Gardner, Boyer's project manager, similarly testified that financing was required, that at meetings with MLL, Boyer Co. and Anthony, that Gardner said to obtain financing Boyer Co. needed the requested financing items and an agreement from Middletons (R. at 4821-22), and that he did not recall Anthony making any threats to sue Boyer Co. nor Boyer ever mentioning Anthony had made threats to sue. R. at 4808. Boyer also testified that he agreed with his attorneys' letter of November 22, 1989 (Ex. D-30) (which included: "The Boyer Company does not view the threats made by Tony Middleton as 'without basis in law or fact . . .',") and his letter of February 5, 1990 (Ex. D-39)(calling off negotiations for a sublease because "Unfortunately, Medical Leasing has been unable to obtain the necessary cooperation of the landowner in order to make the ground lease financeable.") Boyer, R. at 4880-81.

Taylor testified that even after the letter of MLL's counsel of April 10, 1989 (Ex. D-15), he (Taylor) continued in his view about the necessity for the items in his March 14, 1989 letter (Ex. D-14) and continued to have concerns whether MLL was independent of Boyer when MLL could receive rents based on rents received by Boyer. R. at 5442-44, 5448-49.

The evidence that Boyer Co. did not proceed with the project because MLL did not provide a ground lease in form suitable to Boyer was uncontradicted. While Boyer was concerned about litigation, including MLL's threats, there is no evidence in the record that Boyer did not proceed because of any threats by Anthony; indeed Roger Boyer testified he did not remember any threats from Anthony. R. at 4877.

At the conclusion of the trial, before the jury was instructed, the trial court ruled that neither the Amended Lease nor the law required MLL to give Middletons written notice and 30 day cure right as a condition precedent to a claim for default under the contract. R. at 5889-90.

Defendants objected to various jury instructions given by the Court, including submission of any issue of breach of express contract or implied covenant of good faith. R. at 5914-15.

The jury returned a verdict, finding:

a. Anthony and Carol¹⁴ Middleton tortiously and intentionally interfered with MLL's prospective economic relations but the other defendants did not (Answer to Interrogatory No. 1, R. at 1569); and

b. Anthony and Carol Middleton breached "the express terms of the Amended Ground Lease and/or their implied covenant of good faith and fair dealing" but the other defendants did not. Answer to Interrogatory No. 4, R. at 1572.

The jury found \$2,582,780 compensatory damages (R. at 1574), derived from MLL's CPA's calculations of the present value of all of the lease payments to be made by Boyer Co. to MLL under the proposed sublease for its full term through 2055 as though the Boyer sublease were signed and in effect.

The jury found the other Middletons did not tortiously interfere with plaintiff's prospective economic relations (R. at 1569-70), and did not breach the lease or any covenant

¹⁴ There is no claim that Carol had any communications with Boyer Co. or MLL. She testified that Anthony represents her regarding the property. R. at 5034. The jury found against Carol only on the basis that Anthony was her agent.

of good faith (R. at 1572-73). Hence, the jury found MLL knew Anthony was not an agent for these Middletons defendants as to the Boyer development and that the other Middletons did not ratify Anthony's acts. The Court's Instruction No. 25 told the jury " . . . The Middletons claim that Anthony Middleton was not the agent of any of them, and that (MLL) had been told and knew that Anthony Middleton was not the agent of any member of the Group." R. at 1543. All defendants except Anthony's wife, Carol, prevailed on that claim and there was substantial evidence to support the jury's finding. See, i.e., R. at 4910-13, 5005.

MLL's application for attorneys' fees and costs (R. at 1752) included time spent on claims which were asserted in the original, dismissed complaint, and for which attorneys' fees are not awardable. The application also included \$25,000 for expenses for MLL's damages expert. Middletons filed objections to MLL's application for fees. R. at 2305 and 2329.

After trial, the trial court held, as a matter of law: (a) there was substantial evidence that paragraph 8 of the Amended Ground Lease was expressly breached by Anthony (R. at 2944, l. 9-13); (b) that all Middletons were jointly liable for the breach (R. at 2962); and (c) that MLL was entitled to \$275,000 attorneys' fees (R. at 2941-42).¹⁵

SUMMARY OF ARGUMENTS

NOTICE: The default provision, paragraph 6 of the Amended Lease, requires notice and an opportunity to cure before a party may be "deemed to be in default." Such notice is a condition precedent to the commencement of an action under the Lease. MLL failed to give the required notice.

¹⁵ Middletons' Stipulation as to the amount of the \$275,000 allowance reserved their right to contest MLL's claim for attorneys' fees and to contest the award of fees and/or the amount of fees for MLL's failure to "allocate time and fees for (1) successful claims for which there may be an entitlement to attorney fees, (2) unsuccessful claims for which there would have been an entitlement to attorney fees had the claims been successful, and (3) claims for which there is no entitlement to attorney fees." R. at 2951.

TENANTS-IN-COMMON: MLL had actual knowledge that Anthony Middleton was not the agent for these Middletons and that any actual or apparent authority was withdrawn. The other Middletons (except Carol) are not liable for Anthony Middleton's acts.

Common law rules establish: where the lessors are tenants-in-common, the lease operates as separate leases of each undivided interest. Consequently, the Middletons are not jointly liable for Anthony's acts. Tenants in common are not agents for each other. The jury found that Anthony Middleton was not the agent for these Middletons. The trial court erred in finding, as a matter of law, joint liability among all Middletons.

If Middletons are jointly bound, Anthony's actions, independent of and unauthorized by these Middletons were ineffective because all tenants-in-common must join as plaintiffs in any legal action against their tenant.

The rules of contract interpretation establish the Middletons did not promise the same performance and thus are not jointly liable. At the very least, the Amended Lease is ambiguous as to whether the parties intended Middletons would be jointly liable. Extrinsic evidence should have been submitted to the jury, as the trier of fact, to resolve the ambiguity.

MLL failed to plead joint liability in its Amended Complaint. MLL did not seek to amend the Complaint to add a joint liability claim. Except for Carol Middleton, the jury found against MLL on the claim it asserted, agency.

BREACH OF LEASE AND COVENANT OF GOOD FAITH: Paragraph 8 of the Amended Lease does not contain any express obligation. Middletons did not breach the express terms of paragraph 8 of the Amended Lease. The covenant of good faith and fair

dealing was not breached by Middletons. Even Anthony's actions were consistent with the parties' expectations. The covenant of good faith and fair dealing does not create a joint obligation; only Anthony is liable for its breach.

ATTORNEYS' FEES: The trial court erred in awarding attorneys' fees because the Middletons were not "a defaulting party" absent written notice and opportunity to cure, and because the jury did not find breach of the express covenants of the Lease. The evidence on which fees were awarded did not distinguish between the tort claim, other losing claims and the contract claim; since fees cannot be awarded for the tort claim and losing claims, the entire fee claim fails.

If the judgment is reversed, Middletons may be the prevailing party and entitled to fees under the Amended Lease. The case should be remanded with direction to the trial court to determine whether Middletons are entitled to attorney's fees.

ARGUMENT

I. MEDICAL LEASING FAILED TO GIVE MIDDLETONS THE NOTICE REQUIRED BY THE AMENDED GROUND LEASE AND BY LAW; SUCH NOTICE IS A CONDITION PRECEDENT TO ANY SUIT.

A. Medical Leasing Failed to Give Middletons the Notice Required by the Amended Ground Lease.

MLL did not give the notice and cure opportunity required by paragraph 6 of the Amended Lease (Ex. P-3). It reads:

6. Default. A party shall be deemed to be in default upon the expiration of thirty (30) days from the date of written notice from the other party specifying the particulars in which such party has failed to perform the obligations of this lease unless that party, prior to expiration of said thirty (30) days, has rectified the particulars specified in the notice. Upon such default occurring, the non-defaulting party may incur any expenses necessary to perform the obligation of the other party

as specified in such notice, and if the defaulting party is the Landlord, Tenant may deduct such expenses from the rents thereafter to become due. If the defaulting party is the Tenant, Landlord may decree the term ended and enter the Leased Premises with or without process of law. The remedies in this article conferred do not exclude any other remedies provided in the Lease or by law.

For Middletons to be in default, MLL was required by the contract to give Middletons written notice "specifying the particulars in which such party has failed to perform the obligations of this lease" The party to whom the notice is directed will be "deemed to be in default" only if the alleged defects are not cured within the 30-day period.

Paragraph 12 of the Lease provides in applicable part:

12. Notices. Any notice provided for herein shall be given by registered or certified United States mail, postage prepaid, addressed, if to Landlord, to the person to whom the rent is then payable at the address to which the rent is then mailed, and, if to Tenant to Salt Lake Surgical Center, Inc., 617 East 3900 South, Salt Lake City, Utah.

Paragraph 13 of the Amended Ground Lease states:

13. Where Rent Payable. Until further notice in writing, rent shall b[e] paid to Richard P. Middleton, 1437 Harvard Avenue, Salt lake City, Utah.

MLL does not claim it gave notice. R. at 2412-13. It argues that because of the last sentence of paragraph 6, written notice of default is required only "before the non-defaulting party may incur expenses necessary to perform the obligation of the other party. . . ." R. at 2413. That is contrary to oft-stated principles of contract interpretation. See Jones v. Hinkle, 611 P.2d 733 (Utah 1980) rejecting the argument that one paragraph negated another and holding: "It is axiomatic that a contract should be interpreted so as to harmonize all of its provisions." Id. at 735 (citation omitted).

The last sentence of paragraph 6 does not affect the absolute obligation of giving notice and right to cure before claiming default. The last sentence deals only with "remedies

in this article"; remedies are mentioned only in the middle two sentences of the article, but remedies are not mentioned in the first sentence; ergo, the last sentence does not modify the first. The middle two sentences deal with two remedies of many available at law: on the Landlord's default, the Tenant may deduct from rent the expense of performing the Landlord's obligation; or, on the Tenant's default, the Landlord may decree the term ended. The last sentence merely provides that other remedies, in addition to those stated in the middle two sentences, are not excluded. The last sentence in no way negates the obligation in the first sentence to give notice to a party and the 30-day cure right.

Indeed, MLL agreed with this analysis before trial when it moved to exclude evidence of these Middletons' attorneys' fees for lack of notice. R. at 1225. MLL said:

[P]aragraph 16 only provides for the collection of attorneys' fees against a "defaulting party" and pursuant to the terms of the Amended Ground Lease a party is only in default if given written notice and thirty days upon which to correct any defaults. . . . In this case, [MLL] never received written notice of any default of thirty days upon which to cure any alleged default from [Middletons]. [See Affidavit of Wallace Ring attached hereto.] Therefore, pursuant to the terms of paragraph 6 of the Amended Ground lease, [MLL] cannot be 'deemed to be in default' under the terms of the Amended Ground lease . . .

Middletons assume MLL's counsel was in good faith in advancing that argument in its memorandum¹⁶. Not only is this interpretation by MLL reasonable, it is the only interpretation which allows all provisions of the article to be given effect.

Bentley v. Potter, 694 P.2d 617, 620 (Utah 1984) held:

When a lease provides that if a party to the lease is in default then the other party may terminate the lease after giving notice of the default, the notice must plainly indicate the nature of the default or breach and give reasonable notice that failure to cure the default within the time allowed may lead to termination.

Hadlock v. Showcase Real Estate, Inc., 680 P.2d 395, 398 (Utah 1984) held:

¹⁶ MLL forgot that these Middletons did give notice of default at their first opportunity, in the Second Cause of Action of their Counterclaim claiming fees for defense. R. at 424.

[U]ntil an appropriate notice and demand has been given him in accordance with paragraph 16A [of the uniform real estate contract], the plaintiffs, as sellers, have no cause of action under that instrument to terminate his interest. See First Security Bank of Utah v. Maxwell, 659 P.2d 1078 (Utah 1983).

MLL failed to give Middletons the proper notice and opportunity to cure. Therefore, Middletons were not in default under the Amended Lease, and therefore the claim for breach of the Lease should have been dismissed as a matter of law.

B. Notice is Required by Law.

Even if the Amended Lease did not require notice, notice is required by law. Section 7.1 of the Restatement (Second) of Property provides remedies for a tenant for the landlord's failure to perform a valid promise contained in the lease where the tenant is deprived of a significant inducement to the making of the lease "if the landlord does not perform his promise within a reasonable period of time after being requested to do so."

(Emphasis added.) Comment d to this section amplifies the requirement of notice:

d. Requirement of request to landlord to perform promise and allowance of reasonable time to comply. The tenant may hold the landlord in default, under the rule of this section, for the landlord's failure to perform a promise contained in the lease only if the tenant has requested the landlord to perform and given him a reasonable time to do so.

(Emphasis in text.) Comment d illustrates the notice requirement: landlord, having promised tenant that landlord will not permit use of his other property for food sales, leases property adjacent to tenant to another, exacting a promise that no food will be sold there. Notwithstanding, the second tenant sells food. Two months later, the first tenant notifies landlord of termination of the lease because of the competing food sales. The illustration indicates that the tenant's notice is not sufficient because the landlord "has not been given a reasonable time to force the second tenant to comply with the terms of his lease."

That illustration applies to the situation in this case. Had MLL given the Middletons proper notice claiming default under the Amended Lease, Middletons (and not just Anthony) would have known MLL believed the Middletons collectively should act. They would have had opportunity to consider what action to take, which might have included: (a) in terms of the illustration to comment d, "to force [Anthony Middleton] to comply with the terms of his lease"; (b) to advise MLL and/or Boyer Co. that Middletons would not sue if there were no violation of the Amended Lease;¹⁷ or (c) to remind plaintiff and/or Boyer that Anthony had no legal basis to act without the involvement of the others Middletons, though such reminder was legally unnecessary because MLL and Boyer were bound to know that. See Point II, infra.

Instead of giving the Middletons such notice of default under the Amended Lease and opportunity to act, MLL, by letter of November 17, 1989 (Ex. P-39), addressed only to Anthony, demanded, among other things, that all the Middletons consent to the Boyer sublease and sign amendments to the Amended Lease agreeing to attornment and other matters. The trial court ruled, properly, that the Middletons were not required to do so. The irony of this case is that had the Middletons acceded to what they were not required to do, and for which they were sued in the first count of the first Complaint, they would have avoided this judgment of over three million dollars!

The notice provision takes on greater significance when MLL claims joint liability, that is, that all Middletons are liable for Anthony's acts because they signed as "Landlord."

¹⁷ That is in essence what R.G. Middleton told Anthony when they discussed possible suit:

A. I am sure. He asked me if I thought we should consider a lawsuit, and I was generally opposed to that.

Q. And why were you opposed to it?

A. I didn't have enough information, and I didn't think we had any basis for such a suit. [R. at 5009]

MLL seeks to hold all Middletons for the acts of Anthony, without notice, even though it knew Anthony did not have authority to act.

The Amended Lease's notice requirements must be met before the claim of the breach of covenant of good faith can be asserted. The parties' expression in the contract cannot be abrogated or changed by an implied covenant. Ted R. Brown & Associates v. Carnes, 753 P.2d 964 (Utah 1988).

Because MLL failed to give notice of the claimed default, Middletons cannot be "deemed to be in default." The judgment should be reversed.

II. MEDICAL LEASING KNEW THAT ANTHONY MIDDLETON WAS NOT AUTHORIZED TO ACT FOR THESE MIDDLETONS; ANTHONY MIDDLETON'S ACTS CANNOT BE ATTRIBUTED TO THESE MIDDLETONS ON ANY THEORY.

These Middletons are not responsible for Anthony's breach of contract in connection with the MLL-Boyer negotiations because MLL was specifically on notice that Anthony did not have the authority to represent these Middletons in matters concerning Boyer's proposed development. In finding Anthony was not the agent of the other Middletons (except Carol), the jury found that MLL knew Anthony did not speak for the other Middletons. See Jury Instruction 25, R. at 1543; Dr. Wong, R. at 4908-4911. Even where joint liability is presumed, advanced notice to a third party that he or she will not be bound by the acts of another eliminates the third party's ability to assert joint liability.

For example, a third person is on notice that an agent's authority is revoked "when the principal states such fact to the third person." Restatement of Agency (Second) § 136(a). See, Alano Club 12, Inc. v. Hibbs, 150 Ariz. 428, 742 P.2d 47, 52 (1986): ("The apparent authority that might otherwise exist vanishes if the third party gains knowledge of

the agent's lack of authority.") Also: "Every partner is an agent of the partnership . . . unless . . . the person with whom he is dealing has knowledge of the fact that he has no such authority." U.C.A. § 48-1-6(1).

In First National Bank & Trust Co. of Williston v. Scherr, 467 N.W.2d 427 (N.D. 1991), a bank attempted to recover on a note executed by one of two partners, though it was on notice that both partners' signatures were required to bind the partnership. The court held:

A partner, as an agent of the partnership, normally binds the partnership by executing any instrument that carries on the business of the partnership in the usual way. [citation omitted]. But, as with any agent, that is not so if the partner's authority is restricted, and if the restriction is known to the person with whom the partner deals. [citation omitted].

Id. at 429.¹⁸ The court noted:

Many decisions by other courts have ruled that a person cannot recover from a second partner or the partnership for additional transactions with an acting partner after that person had notice of a later restriction on the acting partner's authority.¹⁹

This principle also applies to tenants-in-common. In Wilkinsburg Real Estate & Trust Co. v. Lewis, 173 Pa.Super. 372, 98 A.2d 746, 748 (1953), the court held:

Hopper knew that his co-tenant [in common] Lewis had engaged the services of the plaintiff to find a tenant for the joint property and that the plaintiff was making efforts to procure such tenant. Being aware of these facts, Hopper, if he did not wish plaintiff to represent him, had the duty to make that fact known to plaintiff.

Joint liability is not an immutable, absolute implication; it can be limited, just as partner's or agent's authority to deal on a future situation can be limited. Whenever individuals enter a business relationship, whether it be as partners, principal and agent,

¹⁸ The court in Scherr interprets the North Dakota Uniform Partnership Act, NDCC 45-06-01 (1) and (4), which is identical to Utah Code Ann. § 48-1-6 (1) and (4).

¹⁹ The court cites eleven cases, the most recent being: Arrington v. Columbia Nitrogen Corp., 168 Ga.App. 455, 309 S.E.2d 428 (1983); Owens v. Palos Verdes Monaco, 142 Cal.App.3d 855, 191 Cal.Rptr. 381 (1983).

tenants-in-common or any other form, limits on their liability are recognized if third parties have notice of authority limitations.

In this case, there was no doubt MLL knew Anthony did not represent these Middletons in dealing with MLL and Boyer Co. on the proposed development. Dr. Wong acknowledged that R.G. Middleton so told him before Boyer's first meeting with Anthony in August of 1989 and the jury so found. These Middletons are not jointly liable to MLL for Anthony's acts.

III. IF MIDDLETONS ARE JOINTLY BOUND, A THREAT OF LITIGATION BY ONE TENANT-IN-COMMON CANNOT CONSTITUTE BREACH OF LEASE, AS ALL TENANTS-IN-COMMON MUST JOIN AS PLAINTIFFS IN ANY LEGAL ACTION.

If the Middletons are jointly liable as MLL claims, each would be required to join in any action against their tenant:

[I]n actions . . . against lessees to recover rent, joinder of all cotenants as plaintiffs is usually required. . . . [I]ndividual tenants in common may file separate actions for recovery of proportionate shares of rent if the cotenants have not bound themselves jointly in the lease.

R. Powell & P. Rohan, Law of Real Property ("Powell"), ¶ 606[1] (1991), p. 50-34 to 36, footnotes omitted.

No one would claim Anthony had unilateral power to extend the lease term or to lower the rent. If the Middletons were jointly bound by the Amended Lease, Anthony had no power to make good on any threat of suit for more rent without participation of the other Middletons in the suit, just as he could not alone extend the term of the lease or lower the rent. See Mayo v. Jones, 505 P.2d 157 (Wash. App. 1972). If the Middletons are jointly bound, as MLL has argued, then Anthony's separate, unauthorized, unratified threat to sue,

as a matter of law, cannot constitute a breach of contract because an action or suit by Anthony alone, without the other Middletons, could not stand as an act of "Landlord" under the Lease.

In Mast v. Passman, 70 P.2d 271 (Cal. 1937), a tenant in common who, as lessor, gave notice to the tenant of a rent increase was determined to have increased the rent only as to her one-half interest, since she could not bind or act for the other cotenants.

MLL cannot have it both ways: if Middletons are jointly bound under the Amended Lease, MLL had no right to consider the act of one as the act of all. Thus, MLL was bound, as a matter of law, to consider Anthony's alleged threat as his own independent, unenforceable position. Had MLL given it any real credence, MLL would have given the rest of the Middleton family notice of Anthony's "threats" and asked if that were the position of all the Middletons, as MLL was bound to do from its knowledge that Anthony did not represent the rest of the Middletons. See Points I and II, supra.

IV. AS TENANTS-IN-COMMON, THE LEASE BY MIDDLETONS IS REGARDED BY LAW AS SEPARATE LEASES OF THEIR SEPARATE INTERESTS; MIDDLETONS ARE NOT JOINTLY LIABLE FOR THE UNAUTHORIZED, UNRATIFIED ACTS OF ANOTHER TENANT-IN-COMMON; AS A MATTER OF INTERPRETATION OF CONTRACT, MIDDLETONS DID NOT PROMISE THE SAME PERFORMANCE, OR THE AMBIGUOUS PROVISIONS OF THE LEASE SHOULD HAVE BEEN SUBMITTED TO THE JURY.

Tenancy-in-common is derived from the English common law, Powell, ¶ 602[1], is specifically recognized by statute, § 57-1-5, Utah Code, and is the preferred form of ownership of real property among two or more persons. Id.; Powell, ¶ 602[2].

As tenants-in-common, each Middleton owns an undivided fractional part of the property, none owning the whole as in joint tenancy. Each tenant-in-common could transfer only his or her undivided fractional part or any portion thereof, by deed or by will without

affecting the other tenants-in-common and each may so transfer without the others' permission. See, Smith and Boyer, Survey of the Law of Property, p. 63 (2nd Ed. 1971).

A. The Common Law Rule is That As Tenants-In-Common, Each Middleton Made a Separate Lease with Medical Leasing.

A lease of land by two or more tenants-in-common is not regarded as one lease by all of them, but as several leases by the tenants in common of their undivided separate and respective shares. 1 E. Washburn, The American Law of Real Property, ch XIII § 3 (1887); C. Tiedemann, The American Law of Real Property, § 178 (1906). A. Freeman, Cotenancy and Partition, § 220 (2nd. ed. 1886) states the rule: If, however, the lessors be coparceners or tenants in common, the lease operates as the separate demise of each, and must be so treated.

Based upon this long-standing legal principle, by leasing his/her own interest, no Middleton promised a lease of the whole or that the others would lease their interests. "[T]he act of a single cotenant will bind only his fractional share." Powell, ¶ 606[3], p. 50-37; Swanson v. Swanson, 250 P.2d 40 (Okla. 1951); Milkes v. Smith, 204 P.2d 419 (Cal. 1949).

First v. Byrne, 28 N.W.2d 509 (Iowa 1947) holds: In a joint mortgage given by cotenants each pledges his own undivided interest. Separate liens are created upon the separate interests. If the interest of one is mortgaged to secure the individual debt of the other, a relationship of suretyship is created. Consequently, as a matter of law, the underlying form of ownership dictates that the promise of each of the Middletons in the Amended Lease was a promise of his or her separate and individual performance and not a promise to be surety for the others. Had the parties intended a co-surety provision, that

each would be liable for the others' acts, they would have said so in the document, with the words "jointly and severally" but those words are not to be found in the Amended Lease.

B. The Common Law Rule Is That One Tenant-In-Common Is Not Liable For the Acts of Other Tenants-In-Common.

The very idea that one cotenant is liable for the act of another cotenant is repugnant to the doctrine underlying tenancy in common. As stated in the leading treatise on cotenancy, an admission, action or representation of one cotenant

can create no estoppel, nor furnish a basis of any claim against the other cotenants in common. The objection to binding one by the representations of another is, that this cannot be done without doing an injury to him who has not participated in the representations, and making him responsible for the default of one over whom he can exercise no control.

A. Freeman, Cotenancy and Partition, §§ 169 & 170 (2nd ed. 1886).

Tenants-in-common may transfer their interests without consent of others, (Powell at ¶ 602[9], p. 50-13), unlike a partnership. One tenant-in-common "cannot convey away or alienate the interest of another cotenant unless he is clearly and properly authorized so to do"; Beckstrom v. Beckstrom, 578 P.2d 520 (Utah 1978). Tenants-in-common by virtue of that relationship, cannot bind the others. Williams v. Singleton, 723 P.2d 421 (Utah 1986); Rocky Mountain Stud Farm Co. v. Lunt, 151 P.2d 521 (Utah 1915). That is so because new persons can be brought into the tenancy-in-common without consent of the others, unlike a partnership. Unquestionably, no tenant-in-common contemplates being liable for the unauthorized acts of other, unknown persons, who might later become tenants-in-common through deed or will of a cotenant.²⁰ The policy of the law is not to hold a tenant-in-common liable for the unauthorized acts of another tenant-in-common.

²⁰ "Without consent of cotenants, a tenant in common may sell or encumber his interest, and thus inject a stranger into the cotenancy." Powell, ¶ 606[4], 50-38.

C. The Common-Law Rule Should Be Retained: Tenants-In-Common Make Separate Leases of Their Separate Interests.

At the end of the trial, MLL asserted Middletons were all liable based upon joint liability. See Points VI, infra. In post-trial briefing, MLL relied on Section 289(1) of the Restatement (Second) of Contracts:

Where two or more parties to a contract promise the same performance to the same promisee, each is bound for the whole performance thereof, whether his duty is joint, several, or joint and several.

MLL's position demands that common law principles regarding tenancy-in-common be abandoned in favor of this contract principle.

If the common-law principle applies, only those tenants-in-common who, as lessor, breach their lease with the tenant will be liable; the non-acting or non-breaching tenants-in-common will not be liable for the cotenant's breach. If MLL's claimed contract principles apply, the lease must be construed to determine whether the tenants-in-common made the same promise.²¹ See Part D to this Point IV, infra.

The landlord-tenant relationship is a combination of property and contract principles, which has undergone gradual change over the centuries and is continuing today. Powell, ¶ 221[2] at 16-11. Powell cautions:

While the trend of current cases is towards application of contract rules, . . . Contract rules, however, are not always the panacea for lease problems that they may initially seem to be, nor are property rules always regressive in lease cases. As the work of reforming landlord-tenant law continues, it is useful for all interested parties to remember that neither property nor contract principles (nor any other rules) are ends in themselves, but only means to the efficient and just ordering of the landlord-tenant relationship in a complex society.

Id. (Emphasis added, footnote omitted.)

²¹ This analysis is independent of the analysis in Point V, to the effect that no express promise was breached at all by Anthony Middleton.

This Court has been very cautious in adopting a contract approach over a common law rule. In Reid v. Mutual of Omaha Ins. Co., 776 P.2d 896 (Utah 1989), the "traditional rule" (that a landlord is not required to mitigate by reletting when the tenant abandons the premises) was rejected in favor of the "trend rule" (that a landlord is required to take steps to mitigate its losses).

The common-law rule of non-liability for torts of another tenant-in-common²² should not be discarded in favor of the contract approach for a number of reasons. First, tenancy-in-common is recognized and preferred as a form of ownership by two or more persons by statute. § 57-1-5, Utah Code Ann. The legislature has specifically recognized the importance of this form of property ownership.

Second, the common law of England has been adopted so far as "it is consistent with and adapted to the natural and physical conditions of this state and the necessities of the people hereof" and it "shall be the rule of decision in all courts of this state." § 68-3-1, Utah Code.²³

Third, the common law rule allows recourse against the breaching tenant-in-common without punishing the innocent, non-acting tenant-in-common.

Fourth, the common law is appropriate to this special, unique form of ownership. For example, as tenants-in-common, no Middleton was able to give the same performance; none could convey exclusive possession of the whole property; each could only convey his or her undivided interest in the whole. Carr v. Deking, 765 P.2d 40 (Wash. 1988). While a

²² Simpson v Seavey, 8 Me 138 (1831); Marsh v. Hand, 24 NE 463 (N.Y. 1890).

²³ Several cases have recognized the adoption of the common law in this state. See, for example, State in Interest of R.R. & C.R., 797 P.2d 459 (Utah App. 1990) ("the common law doctrine of emancipation is, by virtue of section 68-3-1, a part of the law of this jurisdiction constituting the rule of decision in Utah courts . . .").

cotenant may lawfully lease his own interest in common property without the consent of another cotenant, the non-consenting cotenant is not bound by the terms of the lease and can demand to be let into co-possession.

Policy considerations require that the common law rules be retained. This Court should reverse the trial court and hold that each Middleton, as a tenant-in-common, entered into a separate lease with MLL.²⁴ The jury having found no agency between Anthony and all other Middletons (except Carol), only Anthony and Carol can be liable if there was a breach of the lease or the covenant of good faith and fair dealing.

D. Rejection of the Common-Law Rules Will Require Interpretation of the Lease Under Principles of Contract Interpretation.

If this Court determines the common law rule (that tenants-in-common as lessors enter into a lease separately) should be rejected in favor of contract principles, the Amended Lease must be analyzed based on principles of contract interpretation to determine the intent of the parties or if there is any ambiguity in its terms.

The key issue in the analysis of the Amended Lease based on principles of contract interpretation is whether the Middletons promised the same performance. Whether the same performance or separate performances are promised is to be determined by "the manifested intention of the parties." Section 288 of the Restatement of Contracts (Second), states:

(1) Where two or more parties to a contract make a promise or promises to the same promisee, the manifested intention of the parties determines whether they promised that the same performance or separate performances shall be given. [Emphasis added.²⁵]

²⁴ This is so even though the Amended Lease calls for rent payments to be paid to Dr. R. P. Middleton; undoubtedly Middletons and MLL agreed to that arrangement for their mutual convenience.

²⁵ The comment to the Restatement provision concerning "same performance" is helpful in understanding the concepts involved. Comment a. addresses the issue of what constitutes the same performance.

Section 2 of the Restatement defines or interprets "manifestation of intention" as "the external expression of the intention as distinguished from undisclosed intention. . . ." See, also, Comments to § 20 of the Restatement.

The proper approach to contract interpretation is to consider: first, if the meaning of the words can be determined from the contract itself and the circumstances of the parties at the time the contract was entered into, Hal Taylor Associates v. Unionamerica, Inc., 657 P.2d 743 (Utah 1982);²⁶ second, if an ambiguity exists, by extrinsic evidence, including negotiations, Utah Valley Bank v. Tanner, 636 P.2d 1060 (Utah 1981)²⁷; and third, the interpretation given by the parties through their course of dealing or conduct after the contract, Zeese v. Siegel's Estate, 534 P.2d 85 (Utah 1975).

E. Words of the Amended Lease Establish that Middletons Are Not Jointly Bound.

The court must first consider the words and lack of words of the contract in light of the circumstances of the parties at the time of the contract. Utah State Medical Ass'n, supra.

It is clear from the Lease that the promises it contains were made severally rather than joint:

Ordinarily, a promise by two or more in the singular number is prima facie several, while a promise in the plural is prima facie joint.

Federal Deposit Ins. Corp. v. Bismark Invest. Corp., 547 P.2d 212, 214 (Utah 1976). The Lease uses the term "Landlord." The use of the word "Landlord" in the Lease is in the

²⁶ See also: Larrabee v. Royal Dairy Products Co., 614 P.2d 160 (Utah 1980), Utah State Medical Ass'n v. Utah State Employees Credit Union, 655 P.2d 643 (Utah 1982) ("In interpreting the terms of the contract, the Court must look to the contract as a whole, to the circumstances, nature and purpose of the contract.").

²⁷ See, subsection (2) of § 212 of the Restatement, fn. 3. Comment b. to § 212 for discussion of the use and role of extrinsic evidence.

singular, constituting prima facie an intention by each Middleton of a separate or several promise.

No words of joint promise are found in the lease, only words of separate undertaking. According to the court in Lithia Lumber Company v. Lamb, 443 P.2d 647, 649 (Or. 1968):

The theory of joint and several liability, however, applies to contracts only when the contracts themselves expressly or by implication, impose joint and several liability.

Separate, rather than joint obligations arise from a tenancy-in-common relationship.

F. The Circumstances of the Parties At the Time Show That Joint Liability Was Not Intended.

The court must look to the underlying circumstances of the parties in the analysis of whether the obligation of promisors is joint or several. Utah State Medical Assn., supra. In Lithia Lumber Company v. Lamb, supra, the plaintiff joined Drew and Zelma Lamb, a corporation, and a partnership, as defendants. The Lambs "controlled the corporation and were two of the partners in the partnership, but no argument was made that these entities should be disregarded." There were three contracts, one of which was signed by all of the defendants. The plaintiff asserted that all the contracts constituted one transaction. The court concluded that

since the different defendants owned different parcels of timber their liabilities, if any, were several.

. . . [T]he contracting parties are liable only severally, if at all, for the nonperformance of any specific contractual duties which each party severally may have undertaken to perform.

Id. at 649.

The Middletons are: tenants-in-common, in a divergent family, with a trust and a remote widow (Delores in Washington, D.C.). These circumstances demonstrate an informal

association among Middletons, as opposed to partnership or some other legal entity, and the intent of making separate leases.

G. If There Is Ambiguity, Or If Extrinsic Evidence Is Required To Interpret The Contract, The Question Of Interpretation Is To Be Determined By The Trier Of Fact.

At the very least, the Amended Lease is ambiguous as to whether the parties intended Middletons' promises to be joint or several, necessitating consideration of extrinsic evidence.²⁷ C.J. Realty, Inc. v. Willey, 758 P.2d 923 (Utah App. 1988)("This [an ambiguity] requires the taking of evidence and the making of factual findings." 758 P.2d at 929). Any ambiguity on the joint or several liability question was resolved in these Middletons' favor by the jury when it found in favor of these Middletons on the breach of the express or implied covenants questions. The jury found Anthony and Carol breached the Lease; it did not find "Landlord" breached it. See Verdict, R. at 1569.

H. Construction of Terms of the Contract by the Parties Also Establishes that Middletons Are Not Jointly Bound.

If a contract is ambiguous, a court may consider the construction of the terms by the parties, through their actions. Eie v. St. Benedict's Hospital, 638 P.2d 1190 (Utah

²⁷ Section 212 of the Restatement provides that:

(2) A question of interpretation of an integrated agreement is to be determined by the trier of fact if it depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence. Otherwise, a question of interpretation of an integrated agreement is to be determined as a question of law.

(Emphasis added.) MLL's argument at best involves a choice of reasonable inferences; that is, did the parties intend to follow traditional common law real property rules (tenants-in-common), or did the use of the word "Landlord" infer that they intended separate promises or to discard those rules. Hence the issue is a question of fact, and on that question of fact, the jury verdict found that these defendants did not breach the contract.

1981)("[T]he course of dealing of the parties gives some indication of their intentions.") 638 P.2d at 1195; Zeese v. Siegel's Estate, 534 P.2d 85 (Utah 1975).²⁸

The parties' conduct demonstrates that MLL treated the various Middletons as having different and distinct positions and that MLL recognized the promises of the Middletons to be promises of their separate, distinct performance, not promises of the same performance.

Anthony, Carol, George and Jean Middleton had counsel separate from counsel for the other Middletons in the Zions case and those groups took different positions before and during that litigation.

It is undisputed that Dr. Wong, one of MLL's general partners, asked and R.G. informed him, that Anthony did not represent these Middletons, and Dr. Wong raised no objection thereto. The separateness of the Middletons' promises was further reflected in the letters describing MLL's belief that "it [was] necessary that the entire Middleton family be involved in any further dialogue" (Ex. 42). If the Middletons' obligations were joint, it was not necessary to include the other Middletons "in any further dialogue" for MLL to have recourse against all Middletons.

Turner v. Gunderson, 60 Wash. App. 696, 807 P.2d 370 (1991), held an obligee could not escape such subsequent correspondence referring to separate promises. Here as well, MLL's claim that the Middletons all promised the same performance is contradicted by its own correspondence and performance.

In conclusion, the contract analysis points to the conclusion that joint liability was not intended. If the Amended Lease was ambiguous, the finding of the jury should be sustained.

²⁸ Zeese cites: Bullfrog Marina, Inc. v. Lentz, 28 Utah 2d 261, 268, 501 P.2d 266 (1972); Bullough v. Simons, 16 Utah 2d 304, 308, 400 P.2d 20 (1965); Vernon v. Lake Motors, 26 Utah 2d 269, 275, 488 P.2d 302 (1971); Harding Co. v. Eimco Corp., 1 Utah 2d 320 323, 266 P.2d 494 (1954).

V. MIDDLETONS DID NOT BREACH PARAGRAPH 8 OF THE LEASE, AS IT CREATES NO EXPRESS OBLIGATION; THE COVENANT OF GOOD FAITH AND FAIR DEALING WAS NOT BREACHED AND IS IMPOSED UPON EACH PARTY TO A CONTRACT BY LAW, NOT AS AN IMPLIED PROVISION OF THE CONTRACT.

A. There Was No Breach Of The Express Provisions Of Paragraph 8 Of The Amended Lease.

MLL claims the express terms of ¶ 8 of the Amended Lease were breached. Instruction No. 23 (R. at 1540) specifically identifies paragraph 8 as the provision which the Middletons allegedly breached:

[Y]ou should find for Medical Leasing on its express breach of contract claim if you find by a preponderance of the evidence each of the following elements:

(1) That a Defendant breached the express terms of paragraph 8 of the Amended Ground Lease;

As amended by the Zions stipulation, paragraph 8 of the Amended Lease provides:

[C]onsent of the Middletons to the future development of the leased premises is not required unless the lessee shall seek to develop the property or an independent third party sublessee or assignee requires that the interest of the Middletons be subordinated to the interest of a development lender. In other words, the lessee may not develop the property without the consent of the Middletons, but a third party sublessee or assignee totally independent of the lessee may further develop the property without the consent of the Middletons using its own or borrowed capital provided subordination of the interest of the Middletons is not required for said development.

This provision means consent of Middletons is not required if an independent third-party developer does not ask the Middletons to subordinate; consent is required if MLL or subordination is asked for. No action whatever is required by Middletons under paragraph 8, even as now restated in the Zions stipulation.

MLL claimed Boyer Co. was an independent third party³⁰ developer which could develop the property without subordination, so no consent was required from Middletons. Middletons did not, by the terms of paragraph 8, promise to do anything and they did not promise not to do anything. They did not promise that, if approached and told by the independent third party that their consent was required, they would not ask for more rent. As a matter of law, none of the defendants breached an express provision of the Amended Lease.

B. The Covenant of Good Faith Was Not Breached.

Anthony explained on cross-examination that because Boyer told him his lawyer said Middleton consent was required, that he believed Middletons would be requested to give some concession or change the Amended Lease. He explained his understanding that if subordination or changes in the Agreement were necessary to accommodate future development, the Middletons could ask for more rent. The original language of the Lease expressly left consent and subordination to Middletons' discretion. Dr. Wong testified of his expectation, that if MLL asked for consent or changes, the Middletons would ask for more rent. St. Benedict's Dev. v. St. Benedicts Hosp., 811 P.2d 194, 199 (Utah 1991)³¹ indicates that "In [Utah], a covenant of good faith and fair dealing inheres in most, if not all, contract relationships." However, St. Benedicts's (811 P.2d at 200), explains:

To comply with his obligation to perform a contract in good faith, a party's actions must be consistent with the agreed common purpose and the justified expectations of the other party.

³⁰ Boyer's lawyer told Boyer these conditions did not exist and Boyer never changed his mind.

³¹ MLL's counsel here represented The Boyer Company there, in St. Benedicts.

Anthony's conduct in threatening MLL with suit for more rent under these circumstances was consistent with both parties' expectations that to get further consent or lease changes more rent had to be paid; it was MLL who breached the implied covenant of good faith, not only when it demanded the attornment and other changes without compensation, but in suing for them and in continuing suit after the court correctly ruled Middletons were not required to give the attornment changes. Indeed, the Zions case had addressed the identical issue and the parties stipulated that Middleton's consent was not required if the developer/sublessee were independent and no subordination was required. Similarly, Ted R. Brown & Associates v. Carnes Corp, 753 P.2d 964, 970 (Utah 1988) holds:

Where a party's expectations under a contract are frustrated, he may seek recovery from the other party only if his injury is the direct result of a breach of an agreed term of the contract as modified. . . . an express agreement or covenant relating to a specific contract right excludes the possibility of an implied covenant of a different or contradictory nature. . . . a court may not make a better contract for the parties than they have made for themselves; furthermore, a court may not enforce asserted rights not supported by the contract itself.

The parties expressed in the contract when consent is and is not needed. If it were not needed by the contract MLL (and Boyer, knowing the contract) had no business approaching Anthony on the subject, to make the specious "request for assurance of no suit," much less to expect or demand consent and attornment. Having been wrongly approached and told consent was necessary, Anthony was well within his rights to be suspicious and to threaten suit in accordance with his and MLL's expectancy.

C. The Covenant of Good Faith and Fair Dealing Is Imposed on "Each Party"; It Does Not Result In Joint Liability.

Corbin on Contracts explains the obligation of good faith:

It is often said that an obligation of good faith is "implied" in every contract, perhaps because a leading decision on good faith from New York uses this language, see Kirke LaShalle Co. v. Paul Armstrong Co. [198 N.E. 163, 263 N.Y. 79 (1933)]. While it is true that courts impose an obligation of good faith in every aspect of the contractual relationship; under the terminology used in this treatise, the obligation of good faith is "constructive" rather than "implied." That is because it is imposed by law, either by statute (see U.C.C. § 1-203) or the common law of the state (see Subsec. (d) below). . . .

3A Corbin, § 654A, 1991 Pocket Part at 81.³²

As stated in § 205 of the Restatement, the covenant is imposed upon each party.³³

"Each party" is each Middleton, separately, and MLL. The jury found that only Anthony breached the covenant of good faith.

To show a breach of the covenant of good faith and fair dealing, an element of subjective intent on the part of the breaching person must be shown. The jury specifically found that no one other than Anthony and Carol were liable, so it cannot be said MLL proved the others formed this intent and accordingly breached the contract. The other Middletons cannot be held liable.

No case has been found which holds that breach of the covenant of good faith results in liability to anyone other than the person who breaches the covenant. This Court has held that breach of an implied covenant does not support a claim under an express covenant of a contract, see Cluff v. Culmer, 556 P.2d 498 (Utah 1976), discussed infra, so even if the parties assumed joint liability under the express terms of the contract, it does not follow that the joint liability flows into Anthony's breach of an constructive obligation. The trial court

³² Corbin aptly illustrates the limitation on the notion that the obligation of good faith is "implied". 3A Corbin, § 654A, 1991 Pocket Part at 81.

³³ "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." (Emphasis added). Restatement Second, Contracts, § 205.

should be reversed as the jury found only Anthony and Carol breached the covenant of good faith.

VI. MEDICAL LEASING'S CLAIM AND THEORY OF LIABILITY AGAINST THESE DEFENDANTS WAS BASED SOLELY ON AGENCY; MEDICAL LEASING DID NOT PLEAD JOINT LIABILITY AND THE TRIAL COURT ERRED IN ENTERING JUDGMENT AGAINST ALL DEFENDANTS ON THE BASIS OF JOINT LIABILITY.

A. Medical Leasing's Pleaded and Tried Theory Against All Middletons Other Than Anthony Middleton Was Based Solely on Agency.

MLL's Amended Complaint asserts liability on the part of all Middletons other than Anthony solely on the basis of agency, including ratification. Amended Complaint ¶ 5, 34-38; R. at 320-21, 329-30. The Amended Complaint contains no allegation of joint liability.

The only theory raised and litigated by MLL was agency. See MLL's Memorandum in Opposition to Middleton's Motion for Summary Judgment dated April 23, 1991, (fn. 6 in R. at 627); "Claims of the Parties" in the jury instructions, R. at 1530-31, similarly, and the instruction on agency (R. at 1543).

B. Medical Leasing Failed To Plead Joint Liability; The Trial Court Erred In Finding Liability Based On That Unpleaded Theory.

The claim of "joint liability" was mentioned for the first time in MLL's response to Middleton's motion for directed verdict after MLL had rested. R. at 5274. See also R. at 5883, l. 24-25, 5884, l. 1-9. The claim was repeated on the evening prior to the last day of testimony when plaintiff submitted a Trial Brief containing the assertion of "joint contract liability" (Trial Brief, R. at 1479-82.)

The Trial Brief asserted that all who signed the Amended Lease as "Landlord" are liable as a matter of law to MLL if there is a breach of an express or implied covenant of the Amended Lease by any of them.³⁴

Rule 8(a) U.R.C.P. directs "a pleading . . . contain . . . a short and plain statement" to assure the complaint gives fair notice of the nature and basis of the claim. Blackham v. Snelgrove, 280 P.2d 453 (1955). The pleading must describe the nature of the acts complained of and the allegations sufficient to establish the basis of the plaintiff's theory of the claim. See Williams v. State Farm Ins. Co., 656 P.2d 966 (Utah 1982).

Joint liability should be separately pleaded. New Jersey Office Supply, Inc. v. Feldman, 1990 LW 74477 (U.S.D.C. N.J. 1990); Sharkey v. Lathram, 156 N.E.2d 502 (Ohio 1959).³⁵

A case cannot be determined on an unpleaded theory unless the issue has been tried by express or implied consent of the parties. Rule 15(b) U.R.Civ.P.; Gill v. Timm, 720 P2d 1352, 1354 (Utah 1986)(no consideration of issue neither pled nor tried); Mitchell v. Palmer, 121 Utah 245, 251, 240 P.2d 970, 972 ("restricted to the ground set forth in the complaint . . . or tried by the express or implied consent of the parties. Rule 15(b) U.R.C.P."). See also Heitz v. Carroll, 788 P.2d 188, 191 (Idaho 1990)("the parties to an action are bound by

³⁴ MLL claimed: "The duties of the Middletons are joint, and any breach of the Landlord's duty to the plaintiff is a breach of the joint obligation of all the Middletons who executed the Amended Ground Lease." Trial Brief, R. at 1480. Plaintiff's Trial Brief concludes (R. at 1481):

The execution by all of the Middletons of the Amended Ground Lease was, in and of itself, a grant of agency to each of them "to act for the landlord."

Middletons immediately and persistently objected to plaintiff's new theory. R. at 1617, 1631.

³⁵ "A 'shot-gun petition' leads to careless and inexact preparation for trial, and if such is allowed, neither the defendants nor the court know what is the claim of the plaintiff, under such style of pleading -- does the claim come under the laws relating to partnership, principal and agent, master and servant, independent contractor, debtor and creditor, bailor and bailee, joint tort-feasors, or joint adventure?"

the theory on which they try it")(citation omitted); see also, M.K. Transport, Inc. v. Grover, 612 P.2d 1192, 1196 (Idaho 1980).³⁶ Middletons objected to the last-minute assertion of the claim³⁷ and MLL never requested leave to amend its pleadings to include the claim. The claim was not tried by express or implied consent of Middletons.

Had an issue of joint liability been timely raised, the Middletons would have had the opportunity to discover and present evidence of the parties' intentions and discussions that may have related to the issue, for example, with respect to the term "Landlord" in the Amended Lease or with respect to the importance of description of the Middletons in the lease as tenants-in-common. Perhaps the Middletons, their attorneys, or the representatives of MLL would have given testimony regarding the intention of the parties on joint liability in these circumstances. The failure of MLL to plead or to seek to try the issue of joint liability deprived the Middletons of a fair opportunity for trial of the issue. For those reasons, the court should not have considered the joint liability claim.

The trial court erred in entering judgment based on the unpleaded, untried theory of joint liability. MLL chose the agency theory. Middletons' discovery, trial preparation, and trial strategy, were based on that theory. These Middletons were unavoidably prejudiced by the new issue on which they had no notice and inadequate time to do discovery or to

³⁶ Grover involved an action being tried on a breach of contract theory. The Court granted relief on a rescission of contract theory. That theory, however, was not raised by either party in their pleadings or at trial. The Supreme Court of Idaho reversed, finding that the trial court is limited by Rule 15(b). Id. at 1196. "The requirement that the unpleaded issues be tried by at least the implied consent of the parties assures that the parties have notice of the issues before the court and an opportunity to address those issues with evidence and argument." Grover, at 1196 citing Cook v. City of Price, Carbon County, Utah, 566 F.2d 699 (10th Cir. 1977). "Implied consent to the trial of an unpleaded issue is not established merely because evidence relevant to that issue was introduced without objection. At least it must appear that the parties understood the evidence to be aimed at the unpleaded issue." Grover, at 1196 citing MBI Motor Co., Inc. v. Lotus/East, Inc., 506 F.2d 709 (6th Cir. 1974).

³⁷ For instance, plaintiff submitted a proposed jury instruction that directed the jury to find joint liability to which Middletons objected and the court rejected.

respond. See, Bekins Bar V Ranch v. Huth, 664 P.2d 435 (Utah 1983). See, Ringwood v. Foreign Auto Works, Inc., 786 P.2d 1350 (Utah App. 1990), cert. denied, 795 P.2d 1138 (Utah 1990).

The trial court erred in allowing MLL to change its theory of the case, more than two years after commencement of the case, and after resting at trial.

VII. MEDICAL LEASING IS NOT ENTITLED TO ATTORNEY'S FEES.

A. Middletons Were Not Given The Required Notice of Default and Right to Cure.

Paragraph 16 of the Amended Lease provides:

16. Attorney's Fees. If Landlord or Tenant default hereunder or file a suit against the other which is in any way connected with this lease, the defaulting party shall pay to the prevailing party a reasonable sum for attorney's fees, which shall be deemed to have accrued on the commencement of such action and shall be enforceable whether or not such action is prosecuted to judgment.

Whether Landlord or Tenant is in default is to be determined by paragraph 6 of the Amended Lease. See Point I, supra.

Middletons were never in default under the lease because MLL failed to give Middletons notice of any alleged default, a prerequisite to being "deemed to be in default" under the Amended Lease. That analysis is applicable here: since Middletons were not given the required notice, they cannot be deemed to be in default under the Lease.

B. Attorney's Fees Are Not Awardable for Breach of Implied Obligations.

MLL has never identified any breach by defendants of the express terms of the Lease; there is no express breach of the Amended Lease. Plaintiff's claim can only be for breach of the covenant of good faith.

The issue of attorney's fees for breach of an implied obligation was specifically addressed in Cluff v. Culmer, 556 P.2d 498 (Utah 1976):

[T]his court has numerous times said that such a provision for attorney's fees makes them allowable only for enforcement of the covenants in the contract. Therefore it does not extend to implied covenants or obligations not expressly included therein.

(Emphasis added.)

Because MLL's claim for attorney's fees is based on breach of a law-imposed covenant, there can be no recovery for contract-provided attorney's fees.

C. The Jury Did Not Find, And Medical Leasing Did Not Request The Jury To Find, Middletons Expressly Breached The Lease.

Even if MLL could identify a breach of an express term of the Amended Lease, MLL still cannot recover attorney's fees. The jury verdict cannot be relied upon as determining a breach of an express provision of the lease, because, over defendants' objection, the special interrogatory was given in the alternative. See Special Interrogatory No. 4:

Did the defendants, or any of them, breach the express terms of the Amended Ground Lease and/or their implied covenant of good faith and fair dealing owed to Medical Leasing?

Though the jury answered this "and/or" question "yes" as to Anthony and Carol, there was no determination by the jury that these Middletons breached an express term of the Lease.

This case is exactly like McKenzie v. Kaiser-Aetna, 127 Cal. Rptr. 275 (1976). There, plaintiff asserted various theories of recovery including breach of a written contract and breach of an implied warranty. Plaintiff's action was successful, but the trial court denied attorney's fees, saying:

Plaintiff has not sustained his burden of proof to establish that the portion of the jury verdict and judgment in plaintiff's favor against defendant was based on the written

contract which contains the provisions regarding attorney's fees, as opposed to having been based upon breach of . . . an implied warranty, or one or more of plaintiff's other theories not constituting an action on a contract which specifically provides for attorney's fees.

Id. The decision was affirmed, with the appellant court stating:

The net verdict and judgment were in appellant's favor, but there is no way to ascertain, in the absence of special jury findings, on which of the theories of recovery (breach of contract . . . or breach of implied warranty) the jury mainly based its award to appellant.

(Emphasis added.) Id.

MLL has not met its burden here. MLL cannot now establish that the jury found a breach of an express provision of the Amended Lease. Therefore, MLL cannot recover attorney's fees.

D. Medical Leasing's Claim is Defective For Failing To Set Out The Time And Fees Expended For Unsuccessful Claims And Claims For Which There Is No Entitlement To Attorney's Fees.

Of the substantive claims of Counts I through IV of MLL's original complaint, only Count II contained a contractual claim under the Amended Lease, the other claims being claims in tort or for injunctive relief, for which attorney's fees are not allowable under the terms of the attorney's fee provision of the Amended Lease.

In Cottonwood Mall v. Sine, 830 P.2d 266 (Utah 1992), this Court reversed an award of attorney's fees, stating:

One who seeks an award of attorney's fees must set out the time and fees expended for (1) successful claims for which there may be an entitlement to attorney's fees, (2) unsuccessful claims for which there would have been an entitlement to attorney's fees had the claims been successful, and (3) claims for which there is no entitlement to attorney's fees. See Graco Fishing & Rental Tools, Inc. v. Ironwood Exploration, Inc., 766 P.2d 1074, 1079-80 (Utah 1988); Trayner v. Cushing, 688 P.2d 856, 858 (Utah 1984).

See Trayner v. Cushing, 688 P.2d 856 (Utah 1984):

[A] party is entitled only to those fees attributable to the successful vindication of contractual rights within the terms of their agreement.

Id. at 858. As it did in the Cottonwood Mall case, the Supreme Court reversed the attorney's fee award in Trayner v. Cushing.

MLL is not entitled to an award of attorney's fees for its claims of interference with contract, interference with prospective economic relations, or breach of covenant of good faith. The interference with contract claim was dismissed. MLL, under the Cottonwood Mall v. Sine and Trayner v. Cushing standards, is not entitled to attorney's fees for a complaint which was dismissed for failure to state a claim. All time associated with preparing the complaint, responding to the Motion to Dismiss and preparing for and attending the hearing, must be disallowed. MLL has failed to allocate the fees claimed between these non-fee claims and its claim of breach of contract.

The claim also included \$25,000 for the cost of MLL's damage expert. That cost is not recoverable as attorneys' fees. Morgan v. Morgan, 795 P.2d 684, 686-87 (Utah App. 1990).

MLL's entire claim is defective and should be entirely disallowed for plaintiff's failure to designate the time and fees expended for claims for which there is no entitlement to attorney's fees.

VIII. IF THE JUDGMENT IS REVERSED, MIDDLETONS MAY BE THE PREVAILING PARTY AND ENTITLED TO ATTORNEY'S FEES; THE TRIAL COURT SHOULD DETERMINE THE ENTITLEMENT AND AMOUNT OF FEES.

If the judgment is reversed, Middletons may be the prevailing party. Paragraph 16 of the Amended Lease provides the defaulting party shall pay attorneys' fees. See text of

¶ 16 at Point VII.A., supra. These Middletons qualify for attorney's fees under this provision as they gave MLL notice in their Answer and Counterclaim. R. at 411, 424. However, it also provides that if MLL files a suit against Middletons "in any way connected with this lease" the prevailing party shall be paid its attorney's fees. If the judgment is reversed, these Middletons may be prevailing parties.

This Court should remand to the trial court to determine Middletons' eligibility for fees and the amount.

CONCLUSION

The bottom line is the judgment against these Middletons is not proper. The jury found in favor of these Middletons on all claims. MLL failed to provide notice to Middletons, as required by the Amended Lease. MLL knew that Anthony did not represent these Middletons. Ownership of the property by Middletons as tenants-in-common defeats MLL's claim against these Middletons, and MLL did not plead a joint liability theory.

The judgment against these Middletons must be reversed with instructions to the trial court to dismiss MLL's claims with prejudice.

DATED: February 8, 1993.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of February, 1993, two copies of the Brief of Appellants Richard G. Middleton, Jane G. Middleton, Mary Middleton Dahl, Delores Middleton, and Richard P. Middleton as Executor of the Estate of Victoria Ann M. Stearn and two copies of the Joint Addendum were mailed, postage prepaid, to the following:

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