

1978

## Lynn C. Stephenson v. John E. Warner And Steve F. Greenwood : Respondent's Brief

Utah Supreme Court

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IN SUPREME COURT  
OF THE STATE OF UTAH

LYNN C. STEPHENSON,

Plaintiff and  
Appellant,

vs.

JOHN E. WARNER and  
STEVE F. GREENWOOD,

Defendants and  
Respondent.

Case No. 15,333

RESPONDENT'S BRIEF

Appeal from the Directed Verdict  
Of the District Court for Juab County  
Honorable J. Robert Bullock, Judge

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STEVE F. GREENWOOD,	)	
	)	
Defendants and	)	
Respondent.	)	

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RESPONDENT'S BRIEF

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STATEMENT OF THE NATURE OF THE CASE

This is an action for personal injuries sustained by Appellant, Lynn C. Stephenson, while he was cleaning a service station floor with gasoline at his place of employment. Appellant sued his employer, John E. Warner, who carried no workmen's compensation insurance. Appellant also sued Respondent, Steve F. Greenwood, who owned and had leased the service station to John E. Warner.

DISPOSITION IN LOWER COURT

The case was tried to a jury before the Honorable J. Robert Bullock, Fourth Judicial District Court Judge. At the end of the evidence, and upon all parties resting, and

Respondent having moved for a directed verdict, the Court directed a verdict in favor of Respondent, Steve F. Greenwood. The case against the employer, John E. Warner, was submitted to a jury, which returned a verdict against the employer and in favor of Appellant, and awarded damages.

The Appellant does not appeal this judgment against his employer. The Appellant appeals as to the directed verdict granted to Respondent Greenwood.

#### RELIEF SOUGHT ON APPEAL

Respondent Steve F. Greenwood requests this Court to affirm the judgment on the directed verdict rendered in his favor by the Trial Court.

#### STATEMENT OF FACTS

Appellant's Statement of Facts is inaccurate and misleading. Therefore, Respondent, Steve F. Greenwood, is compelled to submit the following Statement of Facts.

On May 6, 1972, Plaintiff-Appellant Lynn C. Stephens was employed by Defendant John E. Warner at John's Conoco Service Station in Nephi, Utah. (T. 68) On that date, Stephens was using gasoline to clean the service station floor when an explosion and fire occurred, injuring him. (T. 117-119) He

blames the accident on a car wash water heater, which he claims was positioned incorrectly in the station.

The service station in question was leased and operated by Warner. (T. 51-52, 77) He had leased the station from Defendant-Respondent Steve F. Greenwood. (T. 77) Greenwood was the owner of the station, but he was not the owner of the car washing equipment or its hot water heater. (T. 40, 53) These items belonged to Warner. (T. 80-81, 53) The relationship between Warner and Greenwood was simply one of lessee-lessor. (T. 77, 40) Greenwood's only interest was rent. (T. 40)

At the commencement of the Warner lease, the service station consisted of an office, a supply room, two lubrication bays, and an open "addition" attached to one end of the building, which was used for car washing purposes. (Ex. P-2) The supply room housed the car wash hot water heater. The supply room floor was 6 inches higher than the rest of the station (T. 93, Ex. D-3) and was separated from the lubrication bays, as well as the rest of the station, by a wall. (Ex. P-2, T. 63, 84) This supply room wall was removed by Warner prior to the fire. (T. 63-65) Stephenson helped Warner tear down the wall. (T. 65, 86) Warner had asked Greenwood for permission to remove the wall, and Greenwood had given it. (T. 63-64) However, Greenwood left



the entire matter in Warner's hands. (T. 85-86) Greenwood was not present when the wall was removed, nor did he visit the premises after its removal. (T. 65-66)

Warner stored "full" cans of oil and cleaners in the supply area. Such cleaners were removed to other areas of the station when used. (T. 84-85) Greenwood never observed Warner stored in the storeroom. (T. 58) It is unknown what the prior lessee had stored in the said supply room.

In addition to the water heater, located in the supply room area, a compressor was located above the first lubrication bay near the furnace, at ceiling level. (Ex. P-2) Also, it was common for Stephenson and Warner to throw their cigarette on the station floor. (T. 87)

At the time of the accident, Stephenson was cleaning the floor of the first lubrication bay with gasoline when the explosion and fire occurred. (T. 117-119)

Stephenson does not know what caused the fire. (T. 117-119) Warner does not know what caused the fire. (T. 88) The fire chief found no physical evidence as to the cause of the fire. (T. 98) The source of ignition was unknown to the fire chief but he stated it could have been a cigarette on the floor, the compressor near the ceiling, or the said water heater. (T. 100-101) He was of the opinion, based upon what others had told

him, that the gasoline fumes were ignited by the water heater. (T. 98-99) He testified that it was dangerous to clean with gasoline inside such buildings, since gasoline fumes can spread throughout the building to a source of ignition. (T. 102)

Stephenson had prior knowledge of gasoline and its dangerous propensities, and testified that he knew not to use gasoline to clean near water heaters. (T. 135-136, 139-140) He was aware of the said water heater and its pilot light prior to the fire. (T. 140)

After the accident, Stephenson filed suit against his employer, Warner. Warner carried no workmen's compensation insurance. Stephenson also filed suit against the landlord, Greenwood. Stephenson claims that Greenwood was the owner of the water heater in question, and that he was negligent in regard to its location and in allowing Warner to remove the wall that separated the supply room containing the water heater from the rest of the station. (Appellant's Brief)

Greenwood was not the owner of the car washing equipment or its water heater. (T. 39, 40, 81) The water heater in question, and its associated car washing equipment, had originally been purchased and installed in the station by the prior lessee, Joe Allen. (T. 28, 38) The said equipment

was installed by the company that sold Allen the equipment. (T. 28) The heater was installed in the supply room which, at that time, was separated from the rest of the service station by a wall. It was this wall which was removed by Warner and Stephenson. (Ex. P-2, T. 63-65, 86) The supply room floor was 6 inches higher than the rest of the station. (T. 93, Ex. D- The rest of the car washing equipment was installed in the op "addition" at the side of the station. Allen had requested that Greenwood build the said "addition" for Allen's car washing equipment. (T. 38) Greenwood built the addition and charged Allen additional \$40.00 a month rent for the same. (T. 27-28, 38-39) The car washing equipment, including its heater, was installed after the "addition" had been built. (T. 106) This was some time after December 22, 1970. (Ex. P

Allen had purchased the said car washing equipment by making a loan at the bank. (T. 38-39) However, the bank would not loan Allen the money without a co-signer on the note (T. 39) Greenwood co-signed the note to allow Allen to make his loan. (T. 39, Ex. P-1) Greenwood had no ownership interest in the said equipment. (T. 39) Greenwood has never operated the equipment. (T. 37)

When Joe Allen died, Warner took over the station as lessee. (T. 52) The terms of the lease were the same as they had been between Allen and Greenwood. (T. 52) Warner purcha

the car washing equipment, with its water heater. (T. 39, 53-54) Warner purchased the said car washing equipment and heater by paying off Allen's note at the bank and making a new loan. (T. 54) However, the bank would not make a loan to Warner unless he had a co-signer on the note. (T. 39, 54) Greenwood co-signed the note so that Warner could make his loan. (T. 54) Greenwood had no ownership in the said equipment. (T. 40, 81) The equipment was solely Warner's. (T. 80-81) Warner testified that the equipment was his alone, (T. 80-81) and that he could have moved the said equipment at any time to another location. (T. 80-81) When Warner subsequently gave up the station, he sold the equipment to the new lessee. (T. 45, 81) When the new lessee failed to make payments on the said car washing equipment, Warner personally locked the said equipment with a lock and key and would not release the same until the payments were made and his equity paid in full. (T. 81-82)

At no time during the trial did Stephenson offer into evidence city codes or building ordinances. At the end of all evidence, Greenwood moved for a directed verdict. (T. 158) Stephenson then requested the Trial Court to take judicial notice of old Nephi ordinances and building codes. No testimony or evidence was offered in regard thereto. (Trial Transcript.)

The Trial Court granted Defendant-Respondent Greenwood's motion for directed verdict. (T. 167)

The Trial Court then submitted the matter to the jury, which returned a verdict in favor of Stephenson and against his employer, Warner, and awarded damages accordingly (T. 184, R. 155)

### ARGUMENT

POINT I. THE TRIAL COURT DID NOT ERR IN DIRECTING THE VERDICT IN FAVOR OF RESPONDENT GREENWOOD AND AGAINST APPELLANT.

Stephenson claims that the landlord, Greenwood, should be liable, upon the grounds that the water heater in question was situated in violation of Nephi City Ordinances. He further claims that the 1964 Uniform Building Code is applicable, and required a flame or pilot light to be at least 24 inches above the floor in rooms where flammables were stored or used. The Nephi City Ordinances are not in evidence and are not applicable as will be discussed in Point II.

However, even assuming that the ordinances and building code apply, as claimed by Appellant, the evidence clearly shows without question of fact, that the water heater was purchased and installed by the prior lessee, Joe Allen, and at that time was not in violation of the said city ordinances or alleged

building code relied upon by Appellant. Furthermore, when the station was leased to Warner, Warner purchased the water heater and car washing equipment, and the said water heater was not in violation of the said city ordinances or building code at that time.

When the service station was leased to Warner, the water heater was located in a separate room from the rest of the station. The said room was separated from the rest of the station by a wall. Furthermore, the floor of the said room was 6 inches higher than the rest of the station. Subsequently, the lessee, Warner, asked Greenwood for permission to tear down the wall which separated the said room from the rest of the station. Greenwood gave Warner permission to remove the wall, but left the entire matter in Warner's hands. It was Warner who, with the help of Appellant Stephenson, tore down the wall.

With the wall removed, the supply room then became part of the larger room housing the two lubrication bays, as well as what once had been the supply room, with its water heater.

Since the removal of the wall was left up to the lessee, Warner, and since Warner was the one that removed the said wall, he had the responsibility to assure that such alterations did not result in a violation of the city ordinances

or building code. If by removal of the wall, the water heater became subject to the code by then being located in the same room where flammables were used or stored, and therefore was required to be 24 inches off the floor as alleged by Appellant, it was the responsibility of the lessee, Warner, to adjust the heater accordingly.

Greenwood did not participate or observe the removal of the wall, nor did he visit the premises after the change was made. Furthermore, Greenwood had no knowledge of what Warner stored in the supply area.

As stated in 49 Am. Jur. 2d, Landlord and Tenants, Sec. 786:

A landlord is not deemed to be the principal of his tenant, and he is not responsible for his tenant's torts, active or negligent, or for his tenant's failure to keep the premises in repair. The landlord is not liable for injuries, to a person on the premises in the right of the tenant, caused by a defect in the premises which results from an act of the tenant.

The general law is well stated in the Restatement of Torts, Sec. 355, which reads as follows:

. . . A lessor of land is not subject to liability to his lessee or others upon the land with the consent of the lessee or sub-lessee for physical harm caused by any dangerous condition which comes into existence after the lessee has taken possession.

However, even if the alleged defect had existed at the time the premises were leased to Warner, the lessor, Greenwood, still could not be held liable. The general law is well stated in Restatement of Torts, Sec. 356, which reads as follows:

A lessor of land is not liable to his lessee or to others on the land for physical harm caused by any dangerous condition, whether natural or artificial, which existed when the lessee took possession.

49 Am. Jr. 2d, Sec. 780, Landlord and Tenant, page 722, states it this way:

At common law, subject to certain exceptions, the occupier or tenant, and not the landlord, is liable for injuries to a third person, on or off the premises, caused by the condition or use of the demised premises. It is the well-settled general rule that the duties and liabilities of the landlord to persons on the leased premises by the consent of the tenant are the same as those owed to the tenant himself; for this purpose they stand in his shoes. This rule applies to the tenant's wife, child, or other members of the tenant's family. Where the tenant has no redress against the landlord, those on the premises in the tenant's rights are likewise barred. Visitors, customers, servants, employees, invitees, and licensees in general of the tenant are on the premises as guests, etc. of the tenant and not of the landlord. Whatever rights such invitation or license from the lessee may confer as against such lessee, it can, as against the lessor, give no greater right than the lessee himself has. Accordingly, it is a general rule that the landlord is not liable to persons on the premises in the right of the tenant for injuries from defects in the condition of the demised premises. This



rule has been deemed to extend even to structural defects. Thus, a lessor is not, as a general rule, responsible for injuries to third persons in privity with the tenant which are caused by failure to keep or put the demised premises in good repair--in other words, for injuries caused by defects arising before or during the term from failure to make repairs. These rules apply to the tenant's employees, even though the property is leased for a business purpose . . .

The same annotator, at Sec. 771, states the following while citing a Utah case as one of numerous authorities:

The logical conclusion from the principle that the landlord is under no implied obligation as to the condition of the demised premises or as to the repair of defects therein is that the landlord is not responsible to the tenant for injuries to person or property caused by defects in the demised premises where the landlord had not made any warranty or contract as to the condition of the demised premises or as to the repair of defects and is guilty of no willful wrong or fraud. (Citing numerous cases, including Wilson v. Woodruff, 65 Ut. 118, 235 P. 368.)

In Wilson v. Woodruff, supra, a Utah case, the defendants were owners of a two-story brick building in the business section of Salt Lake City. There was evidence that the east wall of the building was defectively constructed. That portion of the building collapsed, causing injury to the lessee. This Honorable Court stated:

The general proposition is well settled that in the absence of warranty, deceit,

or fraud on the part of the landlord, the lessee takes the risk of the quality of the premises, and cannot make the landlord answerable for any injuries sustained by him during his occupancy by reason of the defective condition of the premises or their faulty construction . . .

The Utah Supreme Court further stated:

We think the evidence in this case clearly shows that the injuries sustained resulted from defects in the premises demised to plaintiff, which risk he assumed when he entered under his lease.

The Restatement of Torts, Sec. 356, states it this way:

. . . A lessor of land is not liable to his lessee or to others on the land for physical harm caused by any dangerous condition, whether natural or artificial, which existed when the lessee took possession.

Therefore, even if the alleged defect had existed at the time the premises were leased to Warner by Greenwood, Greenwood still would not be liable. However, such is not the case. When the premises were leased to Warner, no defect existed even under the ordinances and building codes relied upon by the Appellant. If there was any violation of such ordinances and codes, such came into being only after the lessee, with the help of the Appellant, Stephenson, altered the leased premises in the removal of the wall and door.

The Appellant, in his brief, claims that Greenwood created a nuisance, and relied upon the case of Larson v. Calder's Park Co., 54 Ut. 325, 108 P. 559. There, a building had been used for eight years as a shooting gallery, and had been a dangerous nuisance for many years. It was common for bullets to pass through the cracks and holes in the wall of the building, and such facts were known to the landlord. When the landlord leased the premises, he did so with the knowledge that the building was a nuisance, that the public passed in back of the building, and that the new tenant would continue to use the building as a shooting gallery and, therefore, the would be a continuation of the nuisance. However, such case has no application to the case at bar. Ours is not a case of nuisance, but even if it were, there was no nuisance when the car washing equipment was installed by Joe Allen, nor when the premises were leased to Warner. If a nuisance ever existed, it was after Warner and Stephenson tore down the supply room wall, therein exposing the heater flame to the rest of the service station, including the lubrication areas.

Furthermore, Larson v. Calder's Park Co., supra, preceded Wilson v. Woodruff, supra, and Montoya v. Berthana Investment Corp., 21 Ut. 2d 37, 439 P.2d 853. It will be recalled in Wilson v. Woodruff, supra, that the defective

## Chapter 11

## REQUIREMENTS FOR GROUP F OCCUPANCIES

NOTE: Tables in Chapter 11 appear at the end of the Chapter.

## Group F Occupancies Defined

Sec. 1101. Group F Occupancies shall be:

Division 1. Gasoline service stations, storage garages where no repair work is done except exchange of parts and maintenance requiring no open flame, welding, or the use of highly flammable liquids.

Division 2. Wholesale and retail stores, office buildings, drinking and dining establishments having an occupant load of less than 100, printing plants, municipal police and fire stations, factories and workshops using materials not highly flammable or combustible, storage and sales rooms for combustible goods, paint stores without bulk handling. (See Section 402 for definition of Assembly Buildings.)

Buildings or portions of buildings having rooms used for educational purposes beyond the 12th grade with less than 50 occupants in any room.

Division 3. Aircraft hangars where no repair work is done except exchange of parts and maintenance requiring no open flame, welding, or the use of highly flammable liquids.

Open parking garages.

Heliports.

For occupancy separations see Table No. 5-B.

For occupant load see Section 3301.

## Construction, Height, and Allowable Area

Sec. 1102. (a) General. Buildings or parts of buildings classed in Group F because of the use or character of the occupancy shall be limited to the types of construction set forth in Tables No. 5-C and No. 5-D and shall not exceed, in area or height, the limits specified in Sections 505, 506, and 507.

Other provisions of this Code notwithstanding, a Group F, Division 1 Occupancy located in the basement or first story of a building housing a Group F, Division 2 or a Group H Occupancy may be classed as a separate and distinct building for the purpose of area limitation, limitation of number of stories and Type of Construction, when all of the following conditions are met:

1. The Group F, Division 1 Occupancy is of Type I Construction.
2. There is a Three-Hour Occupancy Separation between the Group F, Division 1 Occupancy and all portions of the Group F, Division 2 or Group H Occupancy.
3. The Group F, Division 1 Occupancy is devoted to the storage of passenger vehicles (having a capacity of not more than nine persons per vehicle), but may contain laundry rooms and mechanical equipment rooms incidental to the operation of the building.

# UNIFORM BUILDING CODE

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of the floor in any room in which volatile flammable liquids are used or stored.

Special  
Hazards  
(Continued)

Every boiler room or room containing a central heating plant shall be separated from the rest of the building by not less than a One-Hour Fire-Resistive Occupancy Separation as defined in Chapter 5 with openings protected as specified in Section 3320.

**EXCEPTION:** Buildings not more than one story in height of Group F, Division 2 Occupancy with an occupant load of less than 30.

**Sec. 1109. (a) Scope.** Except where specific provisions are made in the following Subsections, other requirements of this Code shall apply.

Open  
Parking  
Garages

**(b) Definition.** For the purpose of this Section, an open parking garage is a structure of Type I, II, or IV construction more than one tier in height which is at least 50 per cent open on two or more sides and is used exclusively for the parking or storage of passenger motor vehicles having a capacity of not more than nine persons per vehicle.

Open parking garages are further classified as either ramp-access or mechanical-access. Ramp-access open parking garages are those employing a series of continuously rising floors or a series of interconnecting ramps between floors permitting the movement of vehicles under their own power from and to the street level. Mechanical-access parking garages are those employing parking machines, lifts, elevators, or other mechanical devices for vehicles moving from and to street level and in which public occupancy is prohibited above the street level.

**(c) Construction.** Construction shall be of noncombustible materials. Open parking garages shall meet the design requirements of Chapter 23. Adequate curbs and railings shall be provided at every opening.

**(d) Area and Height.** Area and height of open parking garages in Fire Zones No. 1, No. 2, and No. 3 shall be limited as set forth in Table No. 11-A except for increases allowed by Subsection (e).

In structures having a spiral or sloping floor, the horizontal projection of the structure at any cross section shall not exceed the allowable area per parking tier. In the case of a structure having a continuous spiral floor, each 9 feet 6 inches of height or portion thereof shall be considered as a tier.

The clear height of a parking tier shall be not less than 6 feet 6 inches, except that a lesser clear height may be permitted in mechanical-access open parking garages when approved by the Building Official.

Light,  
Ventilation,  
and  
Sanitation  
(Continued)

**EXCEPTION:** In storage garages and aircraft hangars not exceeding an area of 5000 square feet, the Building Official may authorize the omission of such ventilating equipment where, in his opinion, the building is supplied with unobstructed openings to the outer air which are sufficient to provide the necessary ventilation.

Every building or portion thereof where persons are employed shall be provided with at least one water closet. Separate facilities shall be provided for each sex when the number of employees exceeds four and both sexes are employed. Such toilet facilities shall be located either in such building or conveniently in a building adjacent thereto on the same property.

Such water closet rooms in connection with food establishments where food is prepared, stored, or served, shall have a nonabsorbent interior finish on floors, walls, and ceilings, shall be separated from such food establishments with close-fitting, tight doors and shall have hand washing facilities therein or adjacent thereto.

All water closet rooms shall be provided with an exterior window at least 3 square feet in area, fully openable; or a vertical duct not less than 100 square inches in area for the first toilet facility with an additional 50 square inches for each additional toilet facility; or a mechanically operated exhaust system, which is connected to the light switch, capable of providing a complete change of air every 15 minutes. Such systems shall be vented to the outside air and at the point of discharge shall be at least 5 feet from any openable window.

For other requirements on water closets, see Section 1711.

Shaft  
Enclosures

**Sec. 1106.** Exits shall be enclosed as specified in Chapter 33.

Elevator shafts, vent shafts, and other vertical openings shall be enclosed, and the enclosure shall be as specified in Section 1706.

Fire-  
Extinguishing  
Systems

**Sec. 1107.** When required by other provisions of this Code, automatic fire-extinguishing systems and standpipes shall be installed as specified in Chapter 38.

Special  
Hazards



**Sec. 1108.** Chimneys and heating apparatus shall conform to the requirements of Chapter 37 of this Code and Uniform Building Code, Volume II, Mechanical.

No storage of volatile flammable liquids shall be allowed in Group F Occupancies and the handling and use of gasoline, fuel oil and other flammable liquids shall not be permitted in any Group F Occupancy unless such use and handling comply with U.B.C. Standard No. 9-1.

Devices generating a glow or flame capable of igniting gasoline vapor shall not be installed or used within 18 inches

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Buildings or portions of buildings having rooms used for educational purposes, beyond the 12th grade with less than 50 occupants in any room.

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Open parking garages.

Heliports.

For occupancy separations see Table No. 5-B.

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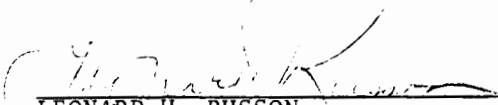
### CONCLUSION

It is respectfully submitted that the Trial Court did not err in granting Respondent Greenwood's motion for a directed verdict.

Dated this 4<sup>th</sup> day of January, 1978.

Respectfully submitted,

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Since the supply room floor was 6 inches above the floor of the rest of the station, where flammables and oils were used, and the flame of the water heater was 16 inches above the supply room floor, the said water heater, even after Warner altered the premises prior to the fire, more than met the requirements of the Uniform Building Code.

The evidence is clear, without question of fact, that at the time Greenwood leased the station to Warner, there was no violation of the Nephi City Ordinances or the 1964 Uniform Building Code relied upon by Appellant. The heater in question was housed in a separate room from the rest of the station. Greenwood had no knowledge of what Warner used or stored in the supply room which housed the heater. If there was any violation of Nephi City Ordinances or the 1964 Uniform Building Code, it was created when Warner, with the help of Appellant Stephenson, tore down the wall separating the supply room from the rest of the station where flammables were used.

a fuel shall be separated from the rest of the building by not less than a 1 hour fire-resistive occupancy separation as defined in chapter 5.

The 1964 Building Code relied upon by the Appellant states that devices generating a flame are not to be used or installed within 24 inches of the floor "in any room in which volatile flammable liquids are used or stored." It was the obligation of the lessee not to store or use flammable liquids in the supply room where the heater was unless the heater was more than 24 inches above the floor. Warner testified during the trial that Greenwood was never in his supply room, and had no knowledge of what he stored or used in that room. (T. 65-67)

Furthermore, when Warner leased the station, the said supply room was separated from the rest of the station by a wall. Warner and Appellant Stephenson, themselves, removed that wall. If, by the removal of the wall, a defective or dangerous condition was created, it was the obligation of Warner, the lessee, to correct the same.

Furthermore, the 1970 Edition of the Uniform Building Code and the 1973 Edition of the Uniform Building Code changed the requirement from 24 inches to 18 inches. (See Appendix A) That requirement now reads:

Devices generating a glow or flame capable of igniting gasoline vapors shall not be installed or used within 18 inches of the floor in any room in which volatile flammable liquids or gas are used or stored.

Appellant, on page 8 of his brief, claims that Greenwood "was a principal actor" and "by affirmative conduct" removed the separation wall in question, therein creating a nuisance. This is contrary to the evidence. The evidence is clear, without question of fact, that Warner and Stephenson removed the wall in question. (T. 63-65, 85-86)

Appellant quotes from the 1964 Uniform Building Code, but leaves out language which alters the meaning of the said section. Section 1108 states:

Sec. 1108. Chimneys and heating apparatus shall conform to the requirements of Chapter 1 of the 1964 edition of Volume I of the Uniform Building Code and Chapter 23 of this Code.

No storage of volatile flammable liquids shall be allowed in Group F occupancies and the handling and use of gasoline, fuel oil and other flammable liquid shall not be permitted in any Group F occupancy unless such use and handling comply with U.B.C. Standard No. 9-1-64.

Devices generating a glow or flame capable of igniting gasoline vapor shall not be installed or used within 24 inches of the floor in any room in which volatile flammable liquids are used or stored.

Every boiler room or room containing a central heating plant using solid or liquid fuel shall be separated from the rest of the building by a 2 hour fire-resistive occupancy separation as defined in chapter 5. Every boiler room or room containing a central heating plant which burns gas as

Respondent Greenwood submits that neither the 1951 City Ordinances of Nephi or the 1964 Uniform Building Code, relied upon by Appellant, are in evidence or properly before the Court. Furthermore, Respondent submits that even if the said ordinances and building codes were in evidence, such have no applicability here, since the building, when leased to Warner, was not in violation of the same.

B. Contrary to Claims of Appellant, Respondent Greenwood Did Not Create A Nuisance, Nor Did He Violate Ordinances of Nephi City.

Appellant makes several inaccurate statements under Point II of his brief. He alleges on page 7 that Greenwood "determined" and "caused" the wall separating the supply room from the lubrication bays to be removed. The evidence is clear that during the tenure of the lease, the lessee, Warner, asked Greenwood if he could remove the wall, and Greenwood said that he could, but left it completely up to Warner. (T. 63-64, 85-86) Warner, and Stephenson, the Appellant, physically removed the wall in question. (T. 63-65, 86)

On page 1 of his brief, Appellant claims that Greenwood was the owner of the car washing equipment and water heater. However, the evidence is clear that Warner was the owner of the same. (T. 80-81, 53, 40)

(b) \* \* \*

(c) Other Proof. This rule does not prevent the proof of official records or of entry or lack of entry therein by any method authorized by any applicable statute or by the rules of evidence at common law.

(d) Certified Copy of Record Read in Evidence. A copy of any official record, or entry therein, in the custody of a public officer of this state, or of the United States, certified by the officer having custody thereof, to be a full, true and correct copy of the original in his custody, may be read in evidence in an action or proceeding in the courts of this state, in like manner and with like effect as the original could be if produced.

At no time, during the trial or after, was the official publication of the ordinances, or a copy attested to by the official having custody, or his deputy, offered into evidence as required by Rule 44(a).

At no time, during the trial or after, was a copy of the official record, certified by the custodian to be a full and true and correct copy of the same, read into evidence as required by Rule 44(d).

At no time, during the evidentiary portion of the trial or thereafter, was any testimony or evidence offered as to amendments, or lack thereof, to the 1951 Nephi Ordinances, or as to the foundation of the 1951 ordinances, or as to the adoption of the 1964 Uniform Building Code relied upon by Appellant, or of subsequent Uniform Building Codes.

The Utah Rules of Evidence further declare that the determination as to whether or not judicial notice be granted "shall be a matter for the judge and not for the jury." (Rule 10(4) Utah Rules of Evidence.)

Rule 44, Utah Rules of Civil Procedure, as well as Rule 68 of the Rules of Evidence, set forth the requirements of proof of official records. Official record is defined by the said rules to mean "all public writings, including laws, judicial records, all official documents, and public records of private writings." The said rule provides:

44. (a) Authentication of Copy. An official record or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the official having legal custody of the record, or by his deputy, and in the absence of judicial knowledge or competent evidence, accompanied with a certificate that such officer has the custody. If the office in which the record is kept is within the United States or within a territory or insular possession subject to the dominion of the United States, the certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of his office. If the office in which the record is kept is in a foreign state or country, the certificate may be made by a secretary of embassy or legation, counsul general, consul, vice consul, or consular agent or by any officer in the foreign service of the United States stationed in the foreign state or country in which the record is kept, and authenticated by the seal of his office.



At no time during the evidenciary portion of the trial did Appellant Stephenson offer into evidence the Ordinance of Nephi City or Building Codes adopted by Nephi City. Only after Respondent Greenwood moved for a directed verdict did Appellant refer to the Nephi City Ordinances and ask the Trial Court to take judicial notice of the same. Appellant offered no foundation or testimony for such ordinances, nor did he offer to place the published ordinance book into evidence. Appellant's attorney merely read from an old book in his hands, which he identified as a 1951 volume of ordinances, and a 1964 Uniform Building Code, and claimed that such were applicable in 1973. (T. 169)

The Utah Rules of Evidence provide that the Trial Judge shall take judicial notice of duly enacted ordinances if the requesting party "furnishes the judge sufficient information to enable him to comply with the request," and if the requesting party "has given each adverse party such notice as the judge may require to enable the adverse party to prepare to meet the request." Rule 9(3), Utah Rules of Evidence, states:

Judicial notice shall be taken of each matter specified in paragraph (2) of this rule if a party requests it, and (a) furnishes the judge sufficient information to enable him properly to comply with the request and (b) has given each adverse party such notice as the judge may require to enable the adverse party to prepare to meet the request.

Uniform Building Code was adopted by Nephi City, and required such heating element to be 24 inches above the floor of any room where flammables are used or stored. The Appellant refers to Nephi City Ordinances dated 1951, which adopted the 1949 Edition of the Uniform Building Code. However, for some strange reason, the Appellant then refers to the 1964 Short Form Edition of the Uniform Building Code, and claims, without evidence or foundation, that the same was used by Nephi City and is applicable in this case. (Appellant's Brief P. 6)

[It should be noted that the 1970 and 1973 Uniform Building Codes changed the earlier requirement, and require the heating element to be 18 inches above the floor of any room in which flammables are stored or used. (See Appendix A) If such codes are applicable, the water heater was not in violation of such codes even after the wall was removed by Warner, since the supply room floor was 6 inches higher than the rest of the service station, which would give a total height of 22 inches, well above the 18 inch requirement. Of course, if Warner stored or used flammables in the storeroom area, then there could be a violation, but this does not concern the landlord, Greenwood, who had no knowledge of what Warner used the storeroom are for or what was stored there.] (See Appendix A)

POINT II. THERE IS NO EVIDENCE OF NEPHI CITY ORDINANCES BEFORE THE COURT; NOR IS THERE ANY EVIDENCE THAT RESPONDENT GREENWOOD VIOLATED ANY NEPHI CITY ORDINANCES.

Since the station was not defective when leased to Warner, and since the only alleged violation of city ordinances was created by Warner, the lessee, the Nephi City Ordinances and Uniform Building Code are immaterial and irrelevant in this appeal. However, Respondent is compelled to respond to Appellant's claims in this regard.

The Appellant, is Point II of his brief, and contrary to the record and transcript, alleges that the landlord, Greenwood remodeled his building and "installed" the car washing equipment contrary to the applicable building code of Nephi City and is, therefore, "guilty of affirmative wrongful conduct" and "creates a nuisance." The Appellant also alleges, contrary to all evidence, that Greenwood removed the separating wall, thereby exposing the water heater to the lubrication bay, thus constituting a nuisance. The allegations made by the Appellant are incorrect, and in some instances, totally false, as evidenced by the testimony contained within the transcript.

A. There is No Evidence of the Nephi City Ordinances Before the Court.

The water heater heating element was 16 inches above the supply room floor. (T. 71-72) Appellant claims that the

represents an exception to the general principles governing liability of a lessor to his tenant's patrons, considering the element of control, and this is quite obvious, since the decision itself cited many cases enunciating the general rule and then indicated clearly that this shooting gallery situation was an exception thereto--almost in the same category as a spring gun, so to speak. We think that case, relied upon almost entirely by plaintiff, is inapropos under the facts of the instant case. We prefer to refer the reader to cases of our court which more nearly fit the circumstances of the case here, which we believe to be controlling.

(The Supreme Court cited Wilson v. Woodruff, 65 Ut. 118, 235 P. 368, and Reams v. Taylor, 31 Ut. 288, 87 P. 1089.)

It is clear from the evidence, and without any question of fact, that when Greenwood leased the station to Warner, the same was free from defect or nuisance. If a defect or nuisance existed at the time of the accident, such was created by Warner and Appellant Stephenson when they tore down the wall that separated the storage room from the rest of the station.

It is submitted that even if the alleged defect had existed at the time of the lease, the landlord could not be held liable. But the alleged defect having come into existence by the actions of the lessee, Warner, it is even more certain that the Trial Court did not err in granting Respondent Greenwood motion for a directed verdict.

building collapsed, injuring one lessee and killing another, and the Utah Supreme Court affirmed a non-suit in favor of the landlord-lessor. The Court stated:

The general proposition is well settled that in the absence of warranty, deceit, or fraud on the part of the landlord, the lessee takes the risk of the quality of the premises, and cannot make the landlord answerable for any injury sustained by him during his occupancy by reason of the defective condition of the premises or their faulty construction. . .

In Montoya v. Berthana Investment Corp., supra, an action was brought against the lessor, as well as the lessee, of a skating rink, to recover for the death of a minor child. It was alleged that the lessor was negligent in leasing premises which contained a dangerous condition, wherein an armrest of a chair protruded out into the skating rink floor, creating a danger for patrons, and also in allowing the lessee to operate the rink in that condition. The appellant in that case relied upon Larson v. Calder, supra, but the Utah Supreme Court held that that case did not apply, and reaffirmed the principles set forth in Wilson v. Woodruff, supra. The Court stated:

The facts in Larson v. Calder and the decisions therein, are so far afield from the instant case as to preclude that case from being any authority here. There, a lessor leased a shooting gallery to a tenant. The shooting gallery's backstop had holes and cracks through which anyone with common sense would know presented a highly dangerous hazard to those who might be using a walk on the other side of a wooden backstop, oblivious to the danger which a lessor reasonably should have known to exist. Larson v. Calder

storage garages and aircraft hangars not exceeding an area of 5000 square feet, the Building Official may authorize the omission of such ventilating equipment where, in his opinion, the building is supplied with unobstructed openings to the outer air which are sufficient to provide the necessary ventilation.

Every building or portion thereof where persons are employed shall be provided with at least one water closet. Separate facilities shall be provided for each sex when the number of employees exceeds four and both sexes are employed. Such toilet facilities shall be located either in such building or conveniently in a building adjacent thereto on the same property.

Such water closet rooms in connection with food establishments where food is prepared, stored, or served, shall have a nonabsorbent interior finish on floors, walls, and ceilings and shall have hand washing facilities therein or adjacent thereto.

All water closet rooms shall be provided with an exterior window at least 3 square feet in area, fully openable; or a vertical duct not less than 100 square inches in area for the first toilet facility with an additional 50 square inches for each additional toilet facility; or a mechanically operated exhaust system, which is connected to the light switch, capable of providing a complete change of air every 15 minutes. Such systems shall be vented to the outside air and at the point of discharge shall be at least 5 feet from any openable window.

For other requirements on water closets, see Section 1711.

### Shaft Enclosures

Sec. 1106. Exits shall be enclosed as specified in Chapter 33.

Elevator shafts, vent shafts, and other vertical openings shall be enclosed, and the enclosure shall be as specified in Section 1706.

### Fire-extinguishing Systems

Sec. 1107. When required by other provisions of this Code, automatic fire-extinguishing systems and standpipes shall be installed as specified in Chapter 38.

### Special Hazards

Sec. 1108. Chimneys and heating apparatus shall conform to the requirements of Chapter 37 of this Code and the Mechanical Code.

No storage of volatile flammable liquids shall be allowed in Group F Occupancies and the handling and use of gasoline, fuel oil and other flammable liquids shall not be permitted in any Group F Occupancy unless such use and handling comply with U.B.C. Standard No. 10-1.

Devices generating a glow or flame capable of igniting gasoline vapor shall not be installed or used within 18 inches of the floor in any room in which volatile flammable liquids or gas are used or stored.

Every room containing a boiler or central heating plant shall be separated from the rest of the building by not less than a One-Hour Fire-Resistive Occupancy Separation.

I hereby certify that I mailed two (2) copies of the foregoing Respondent's Brief to Milton T. Harmon, Attorney for Plaintiff-Appellant, 36 South Main Street, Nephi, Utah 84648, this 5th day of January, 1978.

Dee Ann Cole