

1988

# Kathy Garcia v. David Warren and Don Wortley : Reply Brief

Utah Court of Appeals

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88065A-CA

IN THE COURT OF APPEALS  
OF THE STATE OF UTAH

KATHY GARCIA,

Plaintiff and  
Appellant

**v.**

DAVID WARREN and DON WORTLEY

## Defendants and Respondents.

Case No. 880659-CA

## REPLY BRIEF OF APPELLANT

APPEAL FROM THE SUMMARY JUDGMENT  
OF THE THIRD JUDICIAL DISTRICT COURT,  
THE HONORABLE RAYMOND S. UNO, PRESIDING

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IN THE COURT OF APPEALS  
OF THE STATE OF UTAH

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KATHY GARCIA,	)	
	)	
Plaintiff and	)	
Appellant	)	
	)	
v.	)	
	)	
DAVID WARREN and DON WORTLEY	)	Case No. 880659-CA
	)	
Defendants and	)	
Respondents.	)	

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REPLY BRIEF OF APPELLANT

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ARGUMENT

POINT I.

RESPONDENTS INAPPROPRIATELY  
ARGUE FACTUAL ISSUES IN THEIR  
BRIEF.

In the lower court's Order granting summary judgment from which this appeal is taken, the court ruled that certain facts, and inferences raised by those facts, were legally irrelevant to state a cause of action in light of the lease between respondents David Warren and Don Wortley ("Lessors") and their tenant, Servicar of Utah. The perceived preclusive effect of the lease was the only ground for the lower court's ruling. The plain language of the Court's order demonstrates that the Court did not weigh the evidence, or find inadequate factual support for

plaintiff's allegations. Instead, the court assumed the facts stated by plaintiffs and the factual inferences therefrom to be true, but found them legally irrelevant because of a lease provision purportedly assigning responsibility for maintenance of the premises to Servicar.

The basic argument of this appeal is that the Court's ruling was contrary to the law. Specifically, under Utah law, such a contractual provision is not controlling of the parties' obligations, particularly when the conduct of the contracting parties contradicts the alleged terms of the contract. In response, Lessors argue only that the facts do not support appellant's contention. Lessors' response overlooks the obvious, however: The Court did not rule that the evidence was insufficient for appellant's position, but ruled instead that the facts and inferences were legally irrelevant in light of the contractual provision. Therefore, Lessors' attempt to justify summary judgment based upon their interpretation of the evidence is inappropriate, and cannot form the basis for sustaining the judgment.

In fact, Lessors' brief itself reveals the error of granting summary judgment in this case. Lessors set forth certain excerpts from their own testimony and that of Servicar employees, while ignoring other evidence. Lessors then argue that the excerpts support summary judgment in their favor. The

fact that the excerpts cited by Lessors dispute other evidence is itself proof that issues of material fact exist which make summary judgment particularly inappropriate.

POINT II.

LESSORS IMPROPERLY ARGUE THAT THEY ACTED  
REASONABLY AS A MATTER OF LAW.

In Point III of their brief, Lessors (again arguing facts) maintain that the facts do not support a finding of unreasonableness on their part. (Brief of Respondent, pp. 10-11.) Lessors do not address the plain similarities of a lease assigning maintenance responsibilities to a third party (thus purportedly establishing Lessors' reasonableness as a matter of law) and a lease containing a so-called exculpatory clause. Lessors argue only that under general principles of landlord-tenant law, a landlord is not an insurer of the safety of his tenants. (Brief of Respondent, p. 11).

Appellant does not suggest that a premises defect automatically results in lessors' liability. On the contrary, appellant argues only that under certain limited circumstances, such as this case, Lessors may be liable for their actions regarding building maintenance even though they have purportedly assigned maintenance responsibility to their tenant. For example, assume a lessor hires an independent contractor to do maintenance on the lessors' building. The lessor, knowing the contractor is an incompetent electrician, also asks the

contractor to do electrical work. Due to defective electrical work by the contractor, a fire occurs and a guest of the tenant is injured. Clearly, the injured party would have a cause of action under Utah law against both the contractor and the lessor. The contractor would be liable for his negligence, and the lessor would be liable for knowingly hiring the incompetent contractor to do electrical work.

In the case at bar, the appellant's final point on appeal is similar to the above negligent-hiring hypothetical. If the lessor assigns his maintenance responsibility to a tenant who the lessor knows or should know is incapable of properly maintaining the building, the lessor should remain liable for those negligent actions. The factual disputes raised by lessors in their responsive brief do not address these legal issues, but merely argue some facts while ignoring others.

#### CONCLUSION

For the reasons set forth above, and in appellant Garcia's initial Brief, appellant respectfully requests the Court to reverse the order of summary judgment granted by the lower court.

DATED this 14<sup>th</sup> day of April, 1989.

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CERTIFICATE OF SERVICE

I hereby certify that on the 14<sup>th</sup> day of April, 1989, a true and correct copy of the foregoing was mailed, first class postage prepaid thereon, to the following:

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