

1988

Kathy Garcia v. David Warren and Don Wortley : Brief of Respondent

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Stanley M. Smedley; Bean & Smedley; attorneys for respondents.

Lee C. Henning, Karra J. Porter; Christensen, Jensen & Powell; attorneys for appellant.

Recommended Citation

Brief of Respondent, *Garcia v. Warren*, No. 880659 (Utah Court of Appeals, 1988).
https://digitalcommons.law.byu.edu/byu_ca1/1445

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UTAH COURT OF APPEALS
BRIEF

UTAH
DOCUMENT
KFU

50

.A10

DOCKET NO.

IN THE COURT OF APPEALS

OF THE STATE OF UTAH

KATHY GARCIA,

Plaintiff and
Appellant,

vs.

DAVID WARREN and DON WORTLEY,

Defendants and
Respondents.

:
:
:
:
:
:
:
:
:
:
:
:

Case Number 880659-CA

BRIEF OF RESPONDENT

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

Stanley M. Smedley
BEAN & SMEDLEY
190 South Fort Lane, Suite 2
Layton, Utah 84041
Attorneys for Defendant/
Respondent

Lee C. Henning
Karra J. Porter
CHRISTENSEN, JENSEN & POWELL, P.C.
175 South West Temple, Suite 510
Salt Lake City, Utah 84111
Attorneys for Plaintiff/
Appellant

FILED

15 1990

OF APPEALS

IN THE COURT OF APPEALS
OF THE STATE OF UTAH

KATHY GARCIA,	:	
	:	
Plaintiff and	:	
Appellant,	:	Case Number 880659-CA
	:	
vs.	:	
	:	
DAVID WARREN and DON WORTLEY,	:	
	:	
Defendants and	:	
Respondents.	:	

BRIEF OF RESPONDENT

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

Stanley M. Smedley
BEAN & SMEDLEY
190 South Fort Lane, Suite 2
Layton, Utah 84041
Attorneys for Defendant/
Respondent

Lee C. Henning
Karra J. Porter
CHRISTENSEN, JENSEN & POWELL, P.C.
175 South West Temple, Suite 510
Salt Lake City, Utah 84111
Attorneys for Plaintiff/
Appellant

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.	ii
JURISDICTION.	1
RELIEF SOUGHT	1
STATEMENT OF FACTS.	2
STATEMENT OF MATERIAL FACTS	3
SUMMARY OF ARGUMENT	5
ARGUMENT.	6
POINT I	
THE TERMS OF A LEASE AGREEMENT DO NOT DEFINE A LESSOR'S MAINTENANCE RESPONSIBILITIES WHEN THE LESSOR, IN FACT, CONTINUES TO EXERCISE CONTROL OVER BUILDING MAINTENANCE	6
POINT II	
AN ISSUE OF MATERIAL FACT EXISTS REGARDING THE LESSOR'S CONTROL OVER MAINTENANCE OF THE BUILDING	8
POINT III	
AN ISSUE OF MATERIAL FACT EXISTS AS TO WHETHER LESSORS BREACHED THEIR DUTY OF REASONABLE CARE	10
CONCLUSION.	12
ADDENDUM	
Affidavit of Melba Lynette Ross	
Affidavit of Bobby Merkey	
Affidavit of Marshall Kay	
Affidavit of Don W. Wortley	
Affidavit of David B. Warren	

TABLE OF AUTHORITIES

Cases Cited:

<u>Eaton v. Savage</u> , 502 P.2d 564 (Utah 1972)	11
<u>Gregory v. Fourthwest Investment, Ltd.</u> , 754 P.2d 89, 91 (Utah App. 1988)	11
<u>Ogden v. McChesney</u> , 584 P.2d 636, (Colo. App. A 1978) . .	7
<u>Stevenson v. Warren</u> , 581 P.2d 567 (Utah 1978)	8
<u>Williams v. Melby</u> , 699 P.2d 723, 725, 727 (Utah 1985) . .	10, 11

Other Authorities Cited:

49 Am. Jur. <u>Landlord and Tenant</u> , §774	11
---	----

IN THE COURT OF APPEALS OF THE STATE OF UTAH

KATHY GARCIA,	:	
	:	
Plaintiff and	:	
Appellant,	:	Case Number 880659-CA
	:	
vs.	:	
	:	
DAVID WARREN and DON WORTLEY,	:	
	:	
Defendants and	:	
Respondents.	:	

BRIEF OF RESPONDENTS

JURISDICTION

Jurisdiction to hear this appeal is conferred upon the Court of Appeals by Utah Code Annotated §§ 78-2-2(f) and 78-2a-3(2)(a)(i) (Supp. 1988), Rule 4A, Rules of the Utah Supreme Court and Rule 4A, Rules of the Utah Court of Appeals.

RELIEF SOUGHT

Defendants, David Warren and Don Wortley, seek affirmance of the Order of Dismissal granted on defendants' Motion for Summary Judgment by the trial court.

STATEMENT OF FACTS

Appellant, Kathy Garcia, ("Garcia"), was injured December 10, 1984, on the job as an employee of ServiCar of Utah, Inc., ("ServiCar"). ServiCar was a corporation providing transportation for the elderly and handicapped to therapy centers, primarily within the Salt Lake Valley.

The premises where Garcia's injury occurred was leased to ServiCar. Respondents, David Warren ("Warren") and Don Wortley ("Wortley"), were the lessors of the premises under a joint venture agreement, W & W Investments.

The lease between ServiCar and W & W Investments specifically provided that ServiCar, as lessee, had control of the premises and was solely responsible for all of maintenance, repair, and upkeep of the premises, both prior to and following appellant's accident.

Appellant brought an action before the Industrial Commission of the State of Utah, Case Number 85000722, against ServiCar and/or Workman's Compensation Fund of Utah, a second injury fund, to recover for injuries received. On January 9, 1986, the Commission ruled in favor of appellant and awarded compensation.

In August, 1986, Garcia filed the above action against Respondents alleging respondents were owners of the building and lessors to ServiCar, appellant's employer, and that respondents had actual knowledge of the condition causing appellant's injury and failed to correct the same.

On September 1, 1988, the District Court signed an order granting respondents' motion for summary judgment. [R. 184]

STATEMENT OF MATERIAL FACTS

Respondent Wortley, is a licenses physical therapist and a shareholder of a corporation, Rehab Management ("Rehab"), providing physical therapy services to the elderly and handicapped. [R. 200, p. 9] In approximately 1978, Rehab purchased ServiCar to provide transportation for the elderly and handicapped to therapy centers. [R. 200, p. 12] During the first part of 1984, Rehab sold ServiCar to Intermountain Health Care. ("IHC") [R. 200, pp. 15, 17] Wortley assumed a position with IHC as an employee without decision-making authority. [R. 200, p. 17] Appellant was injured as an employee of ServiCar on December 10, 1984. [R. p. 2]

Contrary to appellant's assertion (Appellant's Brief, page 4) respondents Warren and Wortley, as lessors, never at any time put their personal money into ServiCar, nor were they requested or expected to be responsible for "a substantial portion of the funding for ServiCar's operations...." (Appellant's Brief p. 4)

In approximately August of 1983, Warren and Wortley formed the joint venture, W & W Investments, and purchased the premises at 930 Jewel Avenue, Salt Lake County, for the purpose of leasing the building to ServiCar. [R. 200, pp. 10-11] Warren had been

an employee of a company called THE VAN, a company also providing transportation for the elderly and handicapped. The Manager of ServiCar terminated his employment and Warren was employed by ServiCar as General Manager. [R. 200, p. 11] ServiCar, as lessee, entered into a written lease with W & W Investments.¹

The lease provided that ServiCar exercise control of the premises and responsibility for the care, maintenance, and upkeep of the building prior to and following the date of appellant's accident. Melba Lynette Ross, General Manager of ServiCar, Inc., attested to the terms of the written lease, the sole responsibility of ServiCar as lessee to be responsible for all of the care, maintenance and upkeep of the premises and the fact that ServiCar indeed fulfilled that role and responsibility. [R. pp. 93-95] This fact was further attested to by Marshall Kay, a former employee of ServiCar. [R. pp. 91-92], Bobby Merkey [R. pp. 86-87], Don Wortley [R. pp. 81-83] and David Warren [R. pp. 96-97]. Appellant in her Complaint acknowledged the existence of a lease. [R. p. 2] The District Court ruled: "It is undisputed in the evidence submitted by the parties that the lease agreement between defendants and their tenant, ServiCar of Utah, provided that ServiCar of Utah was responsible for

¹ A copy of the lease could not be located, however, the Manager of ServiCar, Lynette Ross, acknowledged the written document and the responsibility of ServiCar to provide sole care, maintenance and upkeep of the premises pursuant to the written agreement.

maintenance of the building where the plaintiff was injured.

[R. p. 185]

SUMMARY OF ARGUMENT

The trial court ruled correctly on the evidence in holding the lease agreement between lessor and their tenant was conclusive of the issues between the parties.

The evidence clearly shows and the fact is admitted by appellant's Complaint that a lease existed between ServiCar and W & W Investments. The record clearly indicates that the lease assigned to the lessor, ServiCar, sole responsibility for the control, care, maintenance, and upkeep of the premises, both before and after appellant's accident. In addition, the record clearly reflects that the appellant was an employee of ServiCar. [R. p. 2] ServiCar was owned by IHC. [R. 200, p. 15] Warren was General Manager of ServiCar and not associated with IHC. Wortley was an employee of IHC without independant decision-making authority. [R. 200, p. 17] Neither respondent, Warren or Wortley, individually or collectively, put any money into the operation of ServiCar nor exercised control over ServiCar by control of its purse strings as alleged in Appellant's Brief. Appellant selected her remedy by pursuing her cause of action through the Industrial Commission of the State of Utah.

[R. p. 75]

There is no basis in law or in fact to overturn the decision of the trial court.

ARGUMENT

POINT I

THE TERMS OF A LEASE AGREEMENT DO NOT DEFINE
A LESSOR'S MAINTENANCE RESPONSIBILITIES WHEN
THE LESSOR, IN FACT, CONTINUES TO EXERCISE
CONTROL OVER BUILDING MAINTENANCE.

All the evidence before the Court clearly demonstrated two points. There was a written lease agreement between W & W Investments, and that lease places sole responsibility upon ServiCar for the control, care, maintenance, and upkeep of the premises, both prior to and following appellant's accident. These facts are set forth in the Affidavits supporting defendants' Motion for Summary Judgment of Lynette Ross, former General Manager of ServiCar [R. pp. 93-95]; Bobby Merkey, ServiCar employee [R. pp. 86-87]; and Marshall Kay, ServiCar employee, [R. pp. 91-92]. Copies of the foregoing Affidavits are attached as addendums to Respondent's Brief, together with supporting exhibits. The point is further attested to by the Affidavit of Wortley [R. pp. 81-83] and as a part of his deposition. [R. 200, p. 22] Warren, as General Manager, also testified that there was a written lease and that ServiCar had sole responsibility for the control, care, and maintenance. [See Warren Deposition, pp. 15, 20, 23-24, 32]. The record is well documented with check receipts of ServiCar for repair and maintenance performed on the premises by ServiCar. [R. pp. 114-143]

Warren testified at his deposition:

A. Our...lease was with ServiCar and ServiCar maintained the building. I had two hats. I was Manager of ServiCar. And as Manager of ServiCar, it was my responsibility to maintain the building. And I did that and we paid the bills, all except major improvements, major capital improvements.

Q. Who paid for the major capital improvements?

A. We had secured a loan on the building.

Q. So you and Don paid for that personally?

A. Well, the bank paid for it.

Q. Well, it was--you were wearing your hat as an individual?

A. With the parking lot and the roof and the heater and those kind--incidental day-to-day repairs were ServiCars.

There is no conduct demonstrated by the record that would raise an issue on this point. The respondents, as lessors, exercised no control over the building maintenance. The decision of the District Court in this case is consistent with the prevailing law, not only in Utah, but surrounding states.

The Colorado Appellate Court ruled in Ogden v. McChesney, 584 P.2d 636 (Colo. App. A 1978) that if parties agree either orally or in writing upon whom the responsibility for repairs would rest, that argument is binding. The Court further stated:

Absent retention of control or an agreement to maintain, a landlord is not obligated to make repairs on leased premises, even if the premises are in a dangerous condition and repairs are necessary to render it safe and suitable for tenants use and occupancy.... Thus, since [the landlord] had relinquished control of the leased premises, and had made no direct covenant to repair,

he is not liable for personal injuries to his tenant's employees caused by the defect which occurred on the premises.

The Utah Supreme Court has also held:

[A] Landlord is not deemed to be the principal of his tenant merely because of the landlord-tenant relationship; and he is not responsible for the tenant's torts, nor for the tenant's failure to keep the premises reasonably safe and in good repair.... (I)t is the tenant who is liable for any dangerous condition on the premises which he creates or permits to come into existence after he has taken possession. Stevenson v. Warren, 581 P.2d 567 (Utah 1978).

This rule of law is clearly what appellant had in mind when she selected her remedy, choosing to bring her action before the Industrial Commission following her injury.

POINT II

AN ISSUE OF MATERIAL FACT EXISTS REGARDING THE LESSOR'S CONTROL OVER MAINTENANCE OF THE BUILDING.

Respondent disagrees with this statement.

There is no evidence in the record that the lessors personally funded ServiCar. On the contrary, the record is explicitly clear that the lessors did not personally fund ServiCar at all. Appellant's entire argument on this point is taken from the deposition of respondent Wortley. A review of the record, however, shows that ServiCar was not owned or "underwritten" by lessor Wortley. Wortley, a registered physical therapist, formed a corporation called Rehab Management, Inc. ("Rehab"). [R. 200, p. 9] Subsequently, Rehab acquired ServiCar

to facilitate the transporting of the elderly and handicapped to Rehab's therapy centers. [R. 200, p. 12] ServiCar was acquired by Rehab because ServiCar had state "authorization" [R. 200, p. 13]. Rehab was unable to get the needy to therapy without state authorized transportation. It is true the profit was not the motivation behind the acquisition of ServiCar by Rehab. Wortley testified that it was acquired to facilitate the other aspects of their business, namely, therapy for the needy and handicapped. [R. p. 13]

In the fall of 1983, Wortley negotiated a joint venture with Intermountain Health Care. One of the businesses formed through the joint venture was Intermountain Health Care Rehab, IHC Rehab. Part of the designated purpose of the venture was to continue the operation of ServiCar. [R. 200, p. 14] IHC Rehab took over ServiCar from Rehab Management, Inc. ("Rehab") [R. 200, p. 15]. ServiCar continued to be an expense to Intermountain Health Care but it was continuing to serve a community need and Intermountain Health Care continued its operation. [R. 200, p. 15] Lessor Wortley, continued to be an employee of IHC Rehab. [R. p. 17] There is no testimony or evidence that lessor Wortley or Warren ever participated in the personal funding of ServiCar nor is there any record of evidence that either lessor exerted control over building maintenance through control of ServiCar's purse strings. Warren testified that while ServiCar did not operate in the black, it did have periods of "fat" along with its periods of "lean" times. See Warren Deposition, p. 31.

There is absolutly no evidence to the allegation of appellant that lessor's plainly knew that their tenant, ServiCar, could not afford to make repairs without a constant infusion of funds from lessor nor that the premises were leased to a nearly insolvent entity. There is no evidence in the entire record that ServiCar did not have necessary funds to meet their leasehold obligations and to repair the premises. Neither is there any evidence other than the self-serving and unsupported statement by the Affidavit of Garcia that ServiCar or their premises were allowed to fall into a state of disrepair by the actions of the respondents. [R. p. 145] The Utah Supreme Court has said that:

An Affidavit which merely reflects an affiant's unsubstantiated conclusions and which fails to state evidentiary facts is insufficient to create an issue of fact. Williams v. Melby, 699 P.2d 723 (Utah 1985) p. 725.

The trial court correctly concluded from the record that there was no justiciable issue of fact on this point.

POINT III

AN ISSUE OF MATERIAL FACT EXISTS AS TO WHETHER LESSORS BREACHED THEIR DUTY OF REASONABLE CARE.

There is no material fact in the entire court record which would suggest that the lessors breached a duty of reasonable care.

The general principal of law in this regard is concisely stated as:

In the absence of statute or of an agreement to the contrary, the landlord is not obligated to make repairs upon the demised premises during the term, either to put the premises in repair or to keep them in such condition. 49 Am. Jur., Landlord and Tenant, §774.

Utah courts have followed this principal and the Utah Supreme Court has held:

....(A) Landlord is not an insurer of the safety of his tenants, and an injury caused by a defect in the premises does not automatically result in landlord liability. Eaton v. Savage, 502 P.2d, 564 (Utah 1972); Williams v. Melby, 699 P.2d 723, 727 (Utah 1985); Gregory v. Fourthwest Investment, Ltd., 754 P.2d 89, 91 (Utah App. 1988)

While a landlord has a responsibility to exercise reasonable care, there is no evidence in the record to reflect that the landlord or lessor did not act reasonably in this case. ServiCar had agreed to make all repairs to the premises and, in fact, made all repairs to the exclusion of the lessor during the entire term of the lease.

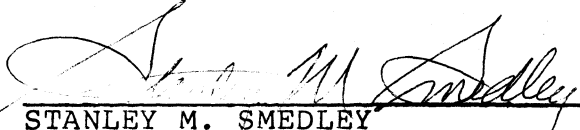
This is not a case of a lease with an exclupatory clause. This is a case of a lease which assigns responsibility for maintenance of the premises to the lessee, ServiCar. The lessee assumed that responsibility to the exclusion of the lessor and an employee is injured on a interior stairway over which the lessee had exclusive control and responsibility. There is no basis for a material issue of fact to show a breach of duty on the part of the lessor or a failure to exercise reasonable care.

CONCLUSION

The decision of the District Court granting the defendants, respondents, summary judgment in the above-entitled case should be affirmed.

DATED this 15 day of March, 1989.

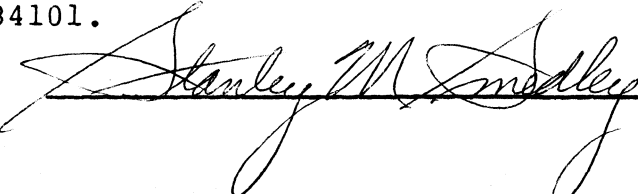
BEAN & SMEDLEY



STANLEY M. SMEDLEY
Attorney for Defendant/Respondent

CERTIFICATE OF SERVICE

I hereby certify that on this 15 day of March, 1989, I personally served a copy of the foregoing BRIEF OF RESPONDENT to Lee C. Henning and Karra J. Porter, Attorneys at Law, Christensen, Jensen & Powell, P.C., 175 South West Temple, Suite 510, Salt Lake City, Utah 84101.



A D D E N D U M

FILED IN CLERKS OFFICE
MAY UTAH

JUL 29 4 25 PM '88

BEAN & SMEDLEY
Stanley M. Smedley (1993)
Attorney for Defendants
190 South Fort Lane, Suite #2
Layton, Utah 84041
Telephone: (801) 544-4221

Earlene Matheson

IN THE THIRD JUDICIAL DISTRICT COURT, COUNTY OF SALT LAKE
STATE OF UTAH

KATHY GARCIA,	:	<u>AFFIDAVIT OF MELBA LYNETTE</u>
	:	<u>ROSS IN SUPPORT OF DEFENDANTS'</u>
Plaintiff,	:	<u>MOTION FOR SUMMARY JUDGMENT</u>
	:	
vs.	:	
	:	
DAVID WARREN and DON WORTLEY,	:	
	:	Civil No. C86-6709
Defendant.	:	Judge Raymond S. Uno

STATE OF TEXAS)
) ss.
County of Harris)

MELBA LYNETTE ROSS, being first duly sworn and upon her oath
deposes and says:

1. I am a resident of Houston, Texas.
2. During the period of time from February 5, 1985 through
June 3, 1988, I served as general manager of ServiCar, Inc., a
Utah corporation, and during the initial period of my employment
in that capacity, ServiCar, Inc. was operated at a building
located at 930 Jewel Avenue, Salt Lake County, State of Utah.
3. As general manager of ServiCar, I am aware that during
that period of time, all of 1984 and throughout 1985, that
ServiCar, Inc. occupied said premises under a written Lease

Agreement from W & W Investments, and that it was the sole responsibility of ServiCar as the lessee to be responsible for all of the care, maintenance and upkeep of the premises.

4. I am further aware and testify that I personally paid for and directed payment for the repair, maintenance and upkeep of said premises by ServiCar, and directed the work either through the employees of ServiCar or other outside companies as needed, but the expense thereof was borne by and the sole responsibility of ServiCar, Inc.

5. I testify that as manager I have personally on numerous occasions reviewed and studied the Lease Agreement entered into between W & W Investments as lessor and ServiCar, Inc. as lessee and I recall specifically the provisions of maintenance and upkeep as stated hereinabove. I did discuss and review those provisions of the Lease on a number of occasions.

6. I further recall that during my tenure with ServiCar, the decision on the part of ServiCar to renovate the office spaces within the premises and discussions which took place regarding the responsibility for the costs of such renovation and the provisions within the Lease which required all such expenses to be borne by the lessee. ServiCar subsequently paid for those renovations.

7. In my conversations with employees of ServiCar, it is my understanding and representation to the Court based upon those discussions and the review of ServiCar records and vouchers during the time of my employment, that it was always the sole responsibility of ServiCar to maintain the premises and be responsible for its care, upkeep and maintenance even prior to

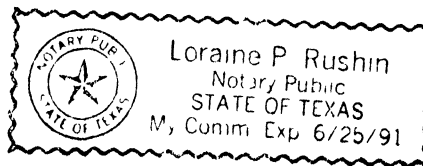
the time of my employment which commenced in February of 1985, and that those responsibilities and obligations had not changed since ServiCar occupied the premises on Jewel Avenue, and that that was the nature and the condition of the agreement of the Lease and the agreement of the lessor and lessee as of the date of the plaintiff's injury on December 10, 1984.

DATED this 19th day of July, 1988.

Melba Lynette Ross
MELBA LYNETTE ROSS

On this 19th day of July, 1988, personally appeared before me MELBA LYNETTE ROSS, the signer of the foregoing Affidavit, who duly acknowledged to me that she executed the same.

Loraine P. Rushin
NOTARY PUBLIC
Residing at Houston TX Country Lakes
My Commission Expires 6-25-91



BEAN & SMEDLEY
Stanley M. Smedley (1993)
Attorney for Defendants
190 South Fort Lane, Suite #2
Layton, Utah 84041
Telephone: (801) 544-4221

FILED IN CLERKS OFFICE
SALT LAKE COUNTY UTAH

JUL 29 4 25 PM '88

H. D. CLERK
Earlene Matheson

IN THE THIRD JUDICIAL DISTRICT COURT, COUNTY OF SALT LAKE
STATE OF UTAH

KATHY GARCIA,	:	<u>AFFIDAVIT OF BOBBY MERKEY</u>
	:	<u>IN SUPPORT OF DEFENDANTS'</u>
Plaintiff,	:	<u>MOTION FOR SUMMARY JUDGMENT</u>
	:	
vs.	:	
	:	
DAVID WARREN and DON WORTLEY,	:	
	:	Civil No. C86-6709
Defendant.	:	Judge Raymond S. Uno

STATE OF UTAH)
) ss.
County of Salt Lake)

BOBBY MERKEY, being first duly sworn and upon his oath
deposes and says:

1. I am a resident of Salt Lake County, State of Utah.
2. I am a former employee of ServiCar, Inc., and was so
employed before and following the day of December 10, 1984,
the date of the alleged injuries of the plaintiff in the
above-entitled law suit.
3. It is my testimony under oath that all of the repairs,
maintenance and upkeep of the building located at 930 Jewel
Avenue, Salt Lake County, State of Utah, during this period of
time was the sole responsibility of ServiCar, Inc.

4. It is further my testimony that as an employee of ServiCar it was my responsibility to perform care, maintenance and upkeep of the premises during this period of time, and I know of no responsibility for care, maintenance or upkeep of said premises that was assumed by any parties other than ServiCar during this period of time

DATED this 7th day of July, 1988.

Robert J. Merkey
ROBERT MERKEY

SUBSCRIBED AND SWORN to before me this 7th day of July, 1988.

Stanley W. Lindley
NOTARY PUBLIC
Residing at 12345 Main St., Springfield, MA
My Commission Expires 10/17/91

FILED IN CLERKS OFFICE
SALT LAKE COUNTY UTAH

JUL 23 25 PM '88

BEAN & SMEDLEY
Stanley M. Smedley (1993)
Attorney for Defendants
190 South Fort Lane, Suite #2
Layton, Utah 84041
Telephone: (801) 544-4221

CLERK

Earlene Matheson
CLERK

IN THE THIRD JUDICIAL DISTRICT COURT, COUNTY OF SALT LAKE
STATE OF UTAH

KATHY GARCIA,	:	<u>AFFIDAVIT OF MARSHALL KAY</u>
	:	<u>IN SUPPORT OF DEFENDANTS'</u>
Plaintiff,	:	<u>MOTION FOR SUMMARY JUDGMENT</u>
	:	
vs.	:	
	:	
DAVID WARREN and DON WORTLEY,	:	
	:	Civil No. C86-6709
Defendant.	:	Judge Raymond S. Uno

STATE OF UTAH)
) ss.
County of Salt Lake)

MARSHALL KAY, being first duly sworn and upon his oath
deposes and says:

1. I am an independent businessman and a resident of Salt
Lake County, State of Utah.

2. I am a former employee of ServiCar, Inc., and was so
employed before and following the day of December 10, 1984,
the date of the alleged injuries of the plaintiff in the
above-entitled law suit.

3. It is my testimony under oath that all of the repairs,
maintenance and upkeep of the building located at 930 Jewel
Avenue, Salt Lake County, State of Utah, during this period of

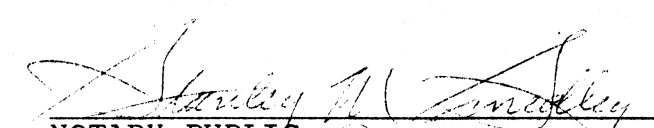
time was the sole responsibility of ServiCar, Inc.

4. It is further my testimony that as an employee of ServiCar it was my responsibility to perform care, maintenance and upkeep of the premises during this period of time, and I know of no responsibility for care, maintenance or upkeep of said premises that was assumed by any parties other than ServiCar during this period of time

DATED this 22 day of July, 1988.


MARSHALL KAY

SUBSCRIBED AND SWORN to before me this 22nd day of July, 1988.


NOTARY PUBLIC

Residing at Brownsville, Texas

My Commission Expires 10/17/91

BEAN & SMEDLEY
Stanley M. Smedley (1993)
Attorney for Defendants
190 South Fort Lane, Suite #2
Layton, Utah 84041
Telephone: (801) 544-4221

Earline Matheson

IN THE THIRD JUDICIAL DISTRICT COURT, COUNTY OF SALT LAKE
STATE OF UTAH

KATHY GARCIA,	:	<u>AFFIDAVIT OF DON W. WORTLEY</u>
	:	<u>IN SUPPORT OF DEFENDANTS'</u>
Plaintiff,	:	<u>MOTION FOR SUMMARY JUDGMENT</u>
	:	
vs.	:	
	:	
DAVID WARREN and DON WORTLEY,	:	
	:	Civil No. C86-6709
Defendant.	:	Judge Raymond S. Uno

STATE OF UTAH)
) ss.
County of Davis)

DON W. WORTLEY, being first duly sworn and upon his oath
deposes and says:

1. I am a resident of Bountiful, Davis County, State of Utah, and one of the defendants in the above-entitled action.
2. I am personally familiar with the entity of W & W Investments and the Lease Agreement between W & W Investments and ServiCar, which was in existence during all of 1984 and all of 1985.
3. I have endeavored to locate a copy of that Lease Agreement, but have been unable to do so. All corporate records

of ServiCar were transferred to that entity when it was sold and inquiries as to the Lease Agreement have failed to locate the document.

4. I have reviewed and discussed the terms and the provisions of the Lease Agreement on numerous occasions and have a working knowledge of the terms and provisions thereto.

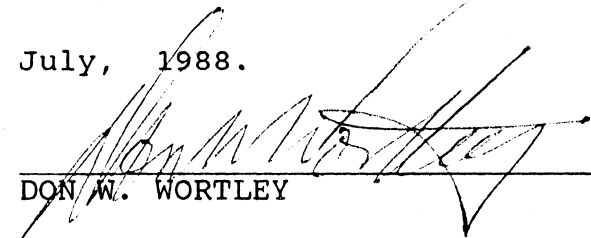
5. I attest that during the period of the Lease Agreement between W & W Investments and ServiCar, Inc. in which ServiCar occupied the premises at 930 West Jewel Avenue, that it was the sole and exclusive responsibility of ServiCar, Inc. to provide the care, upkeep and maintenance of the premises solely at the expense of ServiCar. W & W Investments never at any time assumed the responsibility for the care, maintenance and upkeep of the premises nor did W & W Investments at any time expend money for the care, maintenance and upkeep of the premises, with the exception that at the time the building was purchased and as part of the money borrowed for the purchase, W & W Investments made repairs to the roof and the parking area. Once the structural repairs were made and ServiCar assumed occupancy of the premises, ServiCar took over the sole control and upkeep of the premises.

6. Attached to this Affidavit are a series of vouchers on the account of ServiCar covering the period of time of the year 1984, the year of the plaintiff's injury. Those check vouchers reflect the payment by ServiCar for various business related expenses, including but not necessarily limited to expenses for the care, maintenance and upkeep of the premises located at

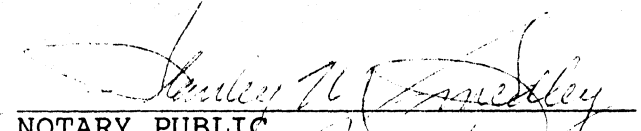
930 West Jewel Avenue, Salt Lake City. Said vouchers are collectively marked as Exhibit "A" and attached hereto and made a part of this Affidavit.

7. I further state that I have personally reviewed the files and records of W & W Investments, IHC Rehabilitation Services, and I know of no time that any care, maintenance or repair of 930 West Jewel Avenue was performed by anyone other than ServiCar during the period of time which is incidental to these proceedings.

DATED this 28 day of July, 1988.


DON W. WORTLEY

On this 28th day of July, 1988, personally appeared DON W. WORTLEY, the signer of the foregoing Affidavit who duly acknowledged to me that he executed the same.


NOTARY PUBLIC

Residing at Brandyfield Hotel

My Commission Expires 10/17/91

BEAN & SMEDLEY
Stanley M. Smedley (1993)
Attorney for Defendants
190 South Fort Lane, Suite #2
Layton, Utah 84041
Telephone: (801) 544-4221

FILED IN CLERK'S OFFICE

JUL 29 4 25 PM '89

Earlene Matheson ^{EAK}

IN THE THIRD JUDICIAL DISTRICT COURT, COUNTY OF SALT LAKE
STATE OF UTAH

KATHY GARCIA,	:	<u>AFFIDAVIT OF DAVID B. WARREN</u>
	:	<u>IN SUPPORT OF DEFENDANTS'</u>
Plaintiff,	:	<u>MOTION FOR SUMMARY JUDGMENT</u>
	:	
vs.	:	
	:	
DAVID WARREN and DON WORTLEY,	:	
	:	Civil No. C86-6709
Defendant.	:	Judge Raymond S. Uno

STATE OF TENNESSEE)
) ss.
County of Davidson)

DAVID B. WARREN, being first duly sworn and upon his oath
deposes and says:

1. I am a resident of Nashville, Tennessee, and one of the
defendants in the above-entitled action.

2. I am acquainted with the operations of ServiCar, Inc.
during a portion of the time that it was located at 930 Jewel
Avenue, Salt Lake City, Salt Lake County, Utah.

3. I served as manager of ServiCar during most of 1984 and
was acting manager of ServiCar at the time of the plaintiff's
injury on December 10, 1984.


4. During the period of time of the plaintiff's injury,

ServiCar was leasing the premises located at 930 Jewel Avenue from W & W Investments. The Lease Agreement provided that ServiCar as the lessee would be solely responsible for all care, maintenance and upkeep of the premises.

5. During the time that I acted as manager, ServiCar did assume the sole responsibility for the care, maintenance and upkeep of the premises and paid for all those expenses and/or had employees of ServiCar perform those services.

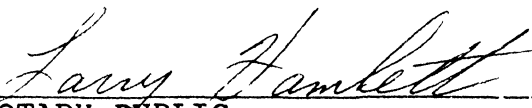
6. From the commencement of the Lease of the premises at 930 Jewel Avenue, it was always the intent and understanding of W & W Investments and ServiCar that ServiCar would have and retain control over the premises and be solely responsible for the care, maintenance and operation of the premises. W & W Investments never undertook any maintenance or control of the premises during this period of time.

DATED this 18 day of July, 1988.



DAVID B. WARREN

On this 18 day of July, 1988, personally appeared before me DAVID B. WARREN, the signer of the foregoing Affidavit, who duly acknowledge to me that he executed the same.



NOTARY PUBLIC
Residing at 910 M E Mahon Nashville
My Commission Expires 5-8-91