

1988

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

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 880659-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

BRIEF OF APPELLANT

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

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FILED

FEB 15 1988

COURT OF APPEALS

IN THE COURT OF APPEALS
OF THE STATE OF UTAH

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

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

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

BRIEF OF APPELLANT

JURISDICTION

Jurisdiction to hear this appeal is conferred upon the Court of Appeals by Utah Code Ann. §§ 78-2-2(4) 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.

ISSUES PRESENTED FOR REVIEW

1. Does an issue of material fact exist regarding the defendants' degree of control and responsibilities regarding maintenance of their building?

2. Does an issue of material fact exist regarding whether the defendants encouraged their lessee to maintain the premises poorly and in an unsafe manner?

3. Does an issue of material fact exist regarding whether the defendants exercised reasonable care under the circumstances toward their tenant's employees?

STATEMENT OF THE CASE

Appellant, Kathy Garcia ("Garcia"), was injured when a handrail she was using came loose while she was entering her place of employment. Garcia sued respondents David Warren and Don Wortley ("Lessors"), lessors of the building, alleging negligence in repairing, or failing to repair, the loose handrail. Lessors moved for summary judgment based on a lease provision purportedly assigning responsibility for building maintenance to their tenant, ServiCar, Inc.

On September 1, 1988, the district court signed an Order granting the lessors' Motion for Summary Judgment. (R. 184) The district court concluded that appellee Wortley's participation in the decision to allow the building to fall into disrepair was legally irrelevant in light of the contractual provisions of the lease. (R. 185) The court further held that the fact that Lessors were contributing to and encouraging the poor maintenance of the building also was irrelevant, because of the lease provision. (R.185). The court found that appellee Wortley's reluctance to contribute greater funds to the operation of ServiCar, resulting in poor maintenance of the building, was also

factually inadequate to defeat summary judgment in light of the lease provision. (R. 185). Finally, the court found that the affidavit of Kathy Garcia contained bare assertions and was legally insufficient to raise an issue of material fact with respect to those assertions. (R. 185-6). The court did not hold that the evidence was insufficient to create such factual inferences. Rather, the court assumed that such factual inferences did exist, but found them to be legally irrelevant. (R. 185).

STATEMENT OF MATERIAL FACTS

Respondent Don Wortley is a licensed physical therapist and is engaged in other health care service businesses. (R. 200, pp. 5-6). Sometime in 1978, he purchased a Utah corporation, ServiCar of Utah, which was engaged primarily in the business of transporting handicapped persons. (R. 200, p. 12). ServiCar was purchased by Mr. Wortley primarily to facilitate his other health care-related businesses. (R.200, p. 13). Subsequent to the purchase of the business, defendant David Warren became the manager of ServiCar. (R. 200, p. 11). A substantial portion of the funding for ServiCar's operations came from Lessors. (R. 200, pp. 13-14).

Prior to the date of Kathy Garcia's injury, David Warren and Don Wortley, acting as equal partners in a joint venture known as

W & W Investments, purchased a building at 930 West Jewel Avenue, intending to lease it to ServiCar. (R. 75, 202, p. 14). Approximately a year prior to the Garcia accident, Lessors began leasing their building to the ServiCar corporation. Throughout the course of this litigation, Lessors were unable to produce a copy of the lease agreement between Lessors and ServiCar. (R. 81-82). Lessors assert, however, that the lease expressly assigned maintenance responsibilities to ServiCar. (R. 75-76, 82).

On December 10, 1984, appellant, Kathy K. Garcia ("Garcia"), was an employee of ServiCar. On that date, as Garcia was climbing the stairs to get to her work station, a handrail she was using separated from the wall, causing her to fall. (R. 2, 88-89). As a result, Garcia received serious personal injuries and suffered economic loss. (R. 3, 89).

In the weeks prior to the date of Kathy's accident, David Warren had been warned of the dangerous condition of the railing. (R. 202, p. 19). Lessors also knew that Garcia, who was physically handicapped, sometimes went upstairs into the building by using the handrail to pull herself up. (R. 202, pp. 30-31).

SUMMARY OF ARGUMENT

The trial court erred in ruling that the lease agreement between Lessors and their tenant was dispositive. Even if the

written terms of the lease provision purported to assign maintenance responsibility to the tenant, the actual conduct of the parties more accurately reflects their intentions. Furthermore, conduct of the parties inconsistent with the terms of the lease creates an ambiguity in the lease agreement, which should be resolved by the jury. If, in reality, Lessors were also responsible for building maintenance, liability may be imposed upon Lessors for negligence in performing such maintenance.

The trial court also erred in disregarding Lessors' financial hold on their tenant. Factual inferences that Lessors exerted substantial control over building maintenance through control of the purse strings, are relevant in determining Lessors' liability for improper maintenance. Additionally, Lessors' knowing attempt to assign maintenance responsibilities to a nearly insolvent entity was in breach of their duty to exercise reasonable care. Moreover, the agreement between Lessors and their tenant cannot be allowed to impair the rights of a third party.

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.

Because "summary judgment deprives a party of its opportunity to present its case on the merits, [the court of appeals] review[s] the facts and inferences in the light most favorable to the party against whom the judgment was granted." Seftel v. Capital City Bank, 100 Utah Adv. Rep. 13, 16 (Ct. App. Jan. 12, 1989). In this case, the sole basis for the District Court's order granting Lessors' motion for summary judgment is the existence, assumed by both parties¹, of a lease agreement purportedly shifting responsibility for maintenance of the building in question to Lessors' tenant, ServiCar of Utah, Inc.²

The District Court did not find that the evidence was factually inadequate to establish that the Lessors were, in fact, exercising control over building maintenance. Rather, the court found the lease agreement to be dispositive, and ruled that the

¹ Lessors were unable to locate the alleged lease during the course of this litigation.

² ServiCar of Utah, Inc. was Garcia's employer. Following the accident Garcia sought and received Workers' Compensation benefits from ServiCar's worker's compensation insurer. ServiCar is not involved in this litigation.

fact that the lessors retained control over the maintenance of the building, and encouraged the poor maintenance of the building, were irrelevant in light of the lease agreement. (R. 185).

In so ruling, the court assigned undue significance to the claimed lease provision. Even if the lease agreement by its terms placed the responsibility for maintenance upon ServiCar, the fact that the parties' conduct contradicted that provision would establish a basis for imposing liability upon the landlord.

The Utah Supreme Court has noted on several occasions that parties' conduct may be more indicative of the actual terms of a contract than the contract itself. See, e.g., Eie v. St. Benedict's Hospital, 638 P.2d 1190, 1195 (Utah 1981) ("Though arguably clear on its face, where the parties demonstrate by their actions that to them the contract meant something quite different, the intent of the parties will be enforced."); Bullfrog Marina, Inc. v. Lentz, 28 Utah 2d 261, 501 P.2d 266, 271 (1972) ("[W]hen parties place their own construction on their agreement and so perform, the court may consider this as persuasive evidence of what their true intention was."); Lignell v. Berg, 593 P.2d 800 (Utah 1979) (formal contract designating parties joint venturers was not determinative of parties' status, where designation was known to be convenient fiction); Harry L. Young & Sons, Inc. v. Ashton, 538 P.2d 316 (Utah 1975)

(employment status depends on facts and circumstances, not necessarily terms of parties' agreement); Centurian Corp. v. Cripps, 624 P.2d 706 (Utah 1981) (whether transaction purporting to be a lease is actually a sale depends on facts of each case.)

The reasoning behind those decisions is that parties create ambiguity in a contract by engaging in conduct which contradicts the written language of the contract. In this case, where the lease agreement is not available for inspection by the parties or the court, the lease can hardly be considered unambiguous on its face. Consequently, the jury should be entitled to consider contradictory conduct of Lessors and their tenant when deciding whether any assignment of responsibilities actually took place.

That conclusion seems particularly appropriate when, as here, the rights of an innocent third party are impaired by the contract. If Lessors actually retained and exercised control over the premises leased to ServiCar, the lease provision cannot prevail against the reality of the situation. Furthermore, that reality is highly relevant to Garcia's claim in this case. Under Utah law, liability may be imposed upon a lessor for injuries caused by conditions for which the lessor is responsible. In Stephenson v. Warner, 581 P.2d 567, 568 (Utah 1978), the Utah Supreme Court noted:

It is not to be doubted that a landlord is bound by the usual standard of exercising ordinary prudence

and care to see that premises he leases are reasonably safe and suitable for intended uses, nor that under appropriate circumstances he may be held liable for injuries caused by any defects or dangerous conditions which he created, or of which he was aware, and which he should reasonably have foreseen would expose others to an unreasonable risk of harm.³

The fact that Lessors retained control of, and responsibility for, building maintenance, could lead a jury to conclude that Lessors were responsible for the loose handrail which caused Garcia's injuries. Under applicable Utah case law, therefore, a material issue of fact exists in this matter, rendering improper the trial court's order granting summary judgment.

POINT II.

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

The District Court held that the Lessors' personal funding of ServiCar and encouragement of ServiCar to maintain the building poorly were factually inadequate to raise an inference

³ In Stephenson, unlike the instant case, the cause of the explosion and fire which injured plaintiff could not be determined. The court held that liability could not be imposed upon the landlord, because there was "no reasonable basis in the evidence to support the plaintiff's claims: either that it was the water heater that actually caused the fire; . . . or that the gas water heater necessarily constituted a dangerous condition; or more importantly, that the defendant landlord, Mr. Greenwood, was responsible for any such condition." Id. at 569.

that building maintenance was in fact the responsibility of Lessors as well as their tenant. The court's finding erroneously disregards the effect of that funding arrangement.

In this case, Lessors -- and lessor Wortley in particular -- essentially underwrote ServiCar's operations. From Lessors' own testimony, it is clear that ServiCar was never intended, or expected, to be financially independent. According to lessor Wortley, "there was never an economic interest, or business interest on ServiCar. We did that [purchased the business] so that we could facilitate the other aspects of our business." (R. 200, p. 13). Wortley further admitted that "we never have made a profit with ServiCar, but we have always tried. That is really a tongue-in-cheek 'try'." (R. 200, p. 13).

As Wortley testified, "ServiCar is ostensibly a business, it's really a disease. Once you get it, you get infected with it, you can't let it alone. Anybody that has ever touched it, that I know, just keeps putting -- it's a hole in the world through which you pour money." (R. 200, p. 14).

The significance of ServiCar's financial dependence on lessors becomes apparent in light of the fact that Lessors purchased the building with the sole intent of leasing it to ServiCar. (R. 202, p. 14). Lessors plainly knew that their tenant, ServiCar, could not afford to make repairs without a constant infusion of funds by lessors. Aware of this fact,

Lessors nonetheless leased the premises to ServiCar, and drafted a lease agreement assigning ServiCar responsibility for maintenance of the building. A jury could reasonably infer that Lessors breached their duty of reasonable care not only by knowingly leasing a building to a nearly insolvent entity, but also by shifting responsibility for repairs to a tenant who Lessors knew did not have the necessary funds. Consequently, the trial court erred in concluding that ServiCar's financial dependence on Lessors was irrelevant.

The trial court also erred in failing to recognize the impact of the funding arrangement between Lessors and ServiCar on the performance of maintenance responsibilities. The simplest means of illustrating the effect of ServiCar's financial dependence on Lessors might be through the following hypothetical scenario:

Suppose L recognizes that T, a stranger, needs to move to a different facility in the near future. L purchases a building with the sole intent of renting it to T, and suggests to T that T lease the building. To limit his exposure, L tells T that T will have to assume responsibility for maintenance of the building. T explains to L that T is struggling financially, and simply could not afford to pay rent and make repairs. L, faced with losing his tenant and the tenant's rental payments, tells T not to worry, that L will give T a break on the rent, if necessary, to

enable T to afford repairs.

On numerous occasions during the next year, T consults with L about necessary repairs. On certain occasions T makes repairs and is allowed an offset against his rent. On other occasions L advises T that no repair is "really needed" and T decides not to make the repair. Later, T approaches L about the need to repair a loose handrail. L, tired of "pouring" money into maintenance of the building, advises T that the handrail does not really need repaired, and that L will not allow T to offset from his rent the expense of repairing the handrail. T, financially unsound, does not repair the handrail, and one of his employees is injured as a result.

In this scenario, L clearly exercised real control over maintenance of the building, regardless of the terms of the lease provision. At the very least, the two entities maintained the building as a joint enterprise, and thus became jointly liable for negligence in the performance of that enterprise.⁴

⁴ Under that scenario, and under the similar facts of the instant case, the elements of a joint enterprise would appear to be present:

(1) An agreement, express or implied, among the members of the group; (2) a common purpose to be carried out by the group; (3) a community of pecuniary interest in that purpose, among the members; and (4) an equal right to a voice in the direction of the enterprise, which gives an equal right of control.

Utah Farm Bureau Mutual Insurance Co. v. Johnson, 738 P.2d 652,

The same conclusion is dictated by the circumstances of the instant case. Lessors admittedly "poured" money into ServiCar to enable ServiCar to perform its essential operations, including repairs, and were aware that inadequate funding limited ServiCar's ability to repair. Lessor Wortley testified:

Q. . . . Did David [Warren] do a pretty good job of taking care of the building in general?

A. I thought so, as good as he could do with the money he had, that was always a problem.

(R. 200, p. 24 (emphasis added)).

Despite that knowledge, Lessors knowingly refused to provide sufficient funds for repairs, exemplified by lessor Wortley's testimony that the vans used by ServiCar to transport handicapped persons were "held together with bailing wire and chewing gum." (R. 200, p. 16). A jury could reasonably infer that Lessors knowingly attempted to shift responsibility for repairs to a financially insolvent entity, which constituted a breach of duty toward appellant Garcia and others. A jury could also infer that the funding arrangement between Lessors and ServiCar gave Lessors control in fact over maintenance, rendering the parties jointly responsible for the improper maintenance of the building. Such inferences are clearly relevant to issues of liability, and thus

655 (Utah App. 1987), quoting Mukasey v. Aaron, 20 Utah 2d 383, 438 P.2d 702, 704 (Utah 1968).

summary judgment was improper.

POINT III.

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

The Utah Supreme Court recently recognized that

[t]he common law duty of a landlord has been expanded in virtually every state, either judicially or by statute, beyond the narrow common law categories . . . [T]his court has charged landlords with a duty to exercise reasonable care toward their tenants in all circumstances.

Williams v. Melby, 699 P.2d 723, 726 (Utah 1985); see also Gregory v. Fourthwest Investments, Ltd., 754 P.2d 89, 91 (Utah App. 1988). Any attempt by Lessors to avoid that duty by contract with their tenant cannot be binding on an innocent third party.

In Tanguay v. Marston, 127 N.H. 572, 503 A.2d 834 (1986), the New Hampshire Supreme Court was faced with virtually identical circumstances. Noting that a landlord has a duty to exercise reasonable care under all circumstances, the court held that a lease provision assigning maintenance responsibilities and liability for damages did not bar the tenant's employee from suing the landlord:

[W]e note that, as between themselves, a lessor and lessee in a lease of commercial real estate may agree on which party will maintain the leased premises and which party will be liable for injuries caused by improper failure to maintain. . . . While exculpatory clauses in leases of commercial real estate are binding on the parties

to the lease, they have no effect on non-signers,
such as the plaintiff.

503 A.2d at 838 (emphasis added).

In this case, Lessors contend that the lease provision automatically absolves them of liability arising from improper maintenance of the building. In that respect, the maintenance agreement is indistinguishable in effect from a typical exculpatory provision purporting to shield a lessor from liability. The majority of courts considering exculpatory provisions in a lease have held that such provisions do not bar a third party's recovery from the lessor for injuries received on the premises. See, e.g., Annotation, "Effect, on nonsigner, of provision of lease exempting landlord from liability on account of condition of property," 12 A.L.R. 3d 958 (1988 Supp.), and cases cited therein.

The reasoning underlying those holdings was explained by the court in Kirkland v. Western Electric Company, Inc., 296 So.2d 350 (La. App. 1974). Holding that two parties could not fix the employment status of an individual "with respect to rights belonging to and obligations owed by third parties who are not in any way parties to the contract," the court in Kirkland illustrated the principle in the lessor-tenant context:

The owner of a building and a tenant storekeeper may enter into a contract for ultimate responsibility to business invitees of the parties to the agreement but they cannot deprive such a business invitee of any legal right he may have to

proceed against either of the parties to the contract. . . . If company A, financially strong, contracted with company B, hopelessly insolvent, and they agreed that B's employees would at all times be considered B's employees, and if an employee of B, while a true borrowed servant of A, negligently injured a plaintiff, it could hardly be said that plaintiff's right to proceed against A was precluded because of the contract between A and B.

Id. at 353-354.

The concerns stated by the Kirkland court are present in this case. From lessor Wortley's own testimony, a jury could infer that the lease agreement regarding maintenance was merely an attempt to shield a financially strong entity from liability, using a financially weak entity with related interests to perform that function.

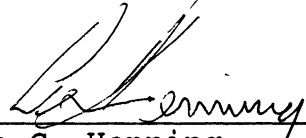
In this case, the District Court placed undue significance on the terms of the alleged lease agreement. In so holding, the court improperly allowed the agreement between Lessors and ServiCar to impair the rights of a third party.

CONCLUSION

For the foregoing reasons, justice requires that this Court reverse the summary judgment granted by the District Court in the instant case.

DATED this 15th day of February, 1989.


CHRISTENSEN, JENSEN & POWELL, P.C.

By 
Lee C. Henning
Karra J. Porter
Attorneys for Plaintiff/Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of February, 1989, a true and correct copy of the foregoing was mailed, postage prepaid thereon, to the following:

Stanley M. Smedley
Bean & Smedley
190 South Fort Lane, Suite #2
Layton, Utah 84041



ADDENDUM

Complaint	A-1
Transcript of Hearing on Plaintiff's Objection to Defendants' Proposed Order, September 1, 1988. .	A-4
Order of Dismissal	A-15

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FILED
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BY LEE

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

KATHY K. GARCIA,
Plaintiff,

vs.

DAVID WARREN and DON WORTLEY,
Defendants.

COMPLAINT

Civil No. CSG-6709
Judge

Plaintiff, Kathy K. Garcia, hereby complains against the
Defendants, David Warren and Don Wortley and alleges as follows:

1. The Plaintiff, at the present and at the time of the
incident complained of, is a resident of Salt Lake County, Utah.

2. At the time of the incident complained of, the
Defendants were owners of a building located at 930 Jewel Avenue,
Salt Lake County, State of Utah.

3. At the time of the incident complained of, the
Plaintiff's employer, ServiCar of Utah, was a lessor of the
building owned by Defendants.

4. On or about December 10, 1984, Kathy was climbing the
stairs at work, using the railing to support her weight when the
railing separated from the wall causing Kathy to twist and fall,
making severe pains shoot up and down her legs.

5. The Defendants had actual knowledge of the dangerous condition of the railing which broke free from the wall.

6. As a result of the twisting and falling the Plaintiff suffered severe personal injuries including a permanent disability, and severe pain and suffering.

7. Also as a result of the fall the Plaintiff has suffered lost wages, incurred medical expenses, and has suffered a diminished earning capacity.

SECOND CAUSE OF ACTION

8. The Plaintiff incorporates by reference herein the allegations contained in paragraphs 1 through 7 of her complaint.

9. The Defendants acted knowingly, wilfully, and recklessly, in refusing to correct the deficiency in the railing entitling the plaintiff to an award of punitive damages.

WHEREFORE, Plaintiff prays for judgment against Defendants, David Warren and Don Wortley as follows:

1. Reimbursement of all medical expenses in an amount to be proved at trial.

2. Reimbursement for all present and future lost wages in an amount to be proved at trial.

3. An award for diminished earning capacity in an amount of \$100,000.00.

4. An award for pain and suffering in the amount of \$250,000.00.

5. An award for punitive damages in the amount of \$250,000.00.

6. Interest, costs, attorney's fees, and such further relief as this Court deems just and equitable.

DATED this 3 day of August, 1986.

CHRISTENSEN, JENSEN & POWELL

By Lee C. Henning
Lee C. Henning
Attorneys for Plaintiff

Plaintiff's Address:

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Salt Lake City, Utah

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

* * * * *

KATHY GARCIA,)
PLAINTIFF/APPELLANT,)
VS.) CIVIL NO. C86-6709
DAVID WARREN AND DON WORTLEY,)
DEFENDANTS/RESPONDENTS.)

* * * * *

BEFORE THE HONORABLE RAYMOND S. UNO
PLAINTIFF'S OBJECTION TO DEFENDANTS' PROPOSED ORDER
SALT LAKE CITY, UTAH
SEPTEMBER 1, 1988



1 APPEARANCES:

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ASSOCIATED PROFESSIONAL REPORTERS

420 KEARNS BUILDING
SALT LAKE CITY UTAH 84101

1 SALT LAKE CITY, UTAH; THURSDAY, SEPTEMBER 1, 1988; 9:00 A.M.

2
3 THE COURT: THIS IS THE CASE OF KATHY GARCIA --

4 MR. HENNING: YES, YOUR HONOR.

5 THE COURT: -- VS. DAVID WARREN AND DON WORTLEY,
6 CIVIL NO. C86-6709. CAN WE HAVE THE PARTIES IDENTIFY THEMSELVES
7 FOR THE RECORD?

8 MR. HENNING: LEE HENNING FOR THE PLAINTIFF.

9 MR. SMEDLEY: STAN SMEDLEY FOR THE DEFENDANTS.

10 MR. HENNING: HAS THE COURT HAD AN OPPORTUNITY TO REVIEW
11 THE TWO PROPOSED ORDERS, YOUR HONOR?

12 THE COURT: I WAS JUST GOING OVER THOSE AND I'M NOT QUITE
13 SURE IF I HAVE BOTH OF THEM HERE.

14 MR. HENNING: LET ME HAND YOU THE ORIGINAL OF MY PROPOSED
15 ORDER, YOUR HONOR.

16 THE COURT: OKAY.

17 MR. SMEDLEY: DOES THE COURT HAVE DEFENDANTS' ORDER THAT WAS
18 SUBMITTED? IF NOT, I'LL --

19 THE COURT: I DON'T THINK SO.

20 MR. SMEDLEY: I CAN SUBMIT MY FILE COPY.

21 THE COURT: ALL RIGHT.

22 MR. HENNING: YOUR HONOR, I OBJECTED TO COUNSEL'S PROPOSED
23 ORDER FOR TWO REASONS REALLY. FIRST OF ALL, IF THE COURT WILL
24 RECALL THE ORAL ARGUMENT ON THIS MATTER, THERE WERE ONLY TWO
25 ARGUMENTS I WAS TRYING TO MAKE WHEN THE COURT GRANTED THE

1 DEFENDANTS' MOTION FOR SUMMARY JUDGMENT. YOU RECALL THERE WAS
2 A WRITTEN LEASE PROVISION BETWEEN SERVICAR OF UTAH, THE
3 PLAINTIFF'S EMPLOYER, AND THE LANDLORDS, DAVID WARREN AND
4 DON WORTLEY, THE DEFENDANTS IN THIS ACTION. AND THE WRITTEN
5 LEASE PROVISION BETWEEN THE EMPLOYER/TENANT AND THE LANDLORDS
6 MADE THE TENANT RESPONSIBLE FOR MAINTENANCE OF THE BUILDING.
7 AND IN MY MOTION OR IN MY AFFIDAVIT AND IN MY ARGUMENT, I
8 ARGUED INFERENTIALLY THAT REGARDLESS OF THE LEASE PROVISION,
9 IN REALITY THE LANDLORDS SHARED IN THE RESPONSIBILITY FOR
10 MAINTENANCE OF THE BUILDING.

11 AND A SECOND AND VERY CLOSELY-RELATED ARGUMENT WAS
12 THAT EVEN IF THE LANDLORDS WERE NOT RESPONSIBLE FOR MAINTENANCE
13 OF THE BUILDING, THAT THEY HAD ENCOURAGED THE TENANTS AND
14 IN EFFECT INSISTED THAT THE TENANT MAINTAINED THE BUILDING
15 IMPROPERLY. AND I JUST WANT THE COURT ORDER TO DEAL WITH BOTH
16 OF THOSE ISSUES THAT I RAISED TO CLARIFY THE COURT'S POSITION
17 FOR POTENTIAL APPEAL.

18 THE COURT: OKAY.

19 MR. HENNING: AND I DON'T FEEL COUNSEL DEALT WITH BOTH
20 ISSUES.

21 MR. SMEDLEY: YOUR HONOR, MR. HENNING. I FEEL, YOUR
22 HONOR, THAT REALLY THE EFFORT OF THE PLAINTIFF IN THIS REGARD
23 IN OBJECTION TO THE ORDER THAT WE HAVE SUBMITTED IS REALLY
24 A VEILED ATTEMPT UPON HER PART TO SET THIS CORE UP FOR THE
25 BASIS OF THE REVERSAL OF THE COURT'S RULING IN THE EVENT OF AN

1 APPEAL. THE ITEMS THAT ARE SET FORTH IN THE ORDER WHICH
2 PLAINTIFF HAS SUBMITTED TO THE COURT FOR CONSIDERATION ARE
3 CLEARLY NOT CONSISTENT WITH WHAT THE FACTS OF THIS CASE ARE OR
4 WHAT THE EVIDENCE THAT HAS BEEN PRESENTED BEFORE THE COURT TO
5 BE IS.

6 AND SPECIFICALLY IN THAT REGARD, YOUR HONOR, I WOULD
7 CALL THE COURT'S ATTENTION TO PLAINTIFF'S ORDER ON PAGE 2,
8 PARAGRAPHS B, C, AND D. I WOULD SUBMIT TO THE COURT THAT
9 PLAINTIFF SAYS THAT THE FACT THAT DON WORTLEY WAS CONSTANTLY
10 FUNDING SERVICAR'S OPERATION WITH HIS OWN FUNDS AND THAT THE
11 DECISION TO ALLOW THE BUILDING TO FALL INTO DISREPAIR WAS A
12 DECISION BASED IN BY DON WORTLEY, AND THE INFERENCE RAISED FROM
13 THOSE FACTS THAT THE LANDLORDS, DAVID WARREN AND DON WORTLEY, WERE
14 CONTRIBUTING AND ENCOURAGING THE POOR MAINTENANCE OF THE
15 BUILDING, HE THEN SAYS, ARE IRRELEVANT.

16 I WOULD SUBMIT TO THE COURT THAT THERE IS ABSOLUTELY NO
17 EVIDENCE BEFORE THE COURT AT THIS TIME THAT THAT ASSERTION OF
18 FACT IS TRUE. THERE IS JUST NOTHING THERE. IN FACT, COUNSEL
19 IN THEIR MEMORANDUM TO THE COURT QUOTED A NUMBER OF ITEMS FROM
20 THE DEPOSITION OF DON WORTLEY THAT WAS TAKEN IN FEBRUARY OF '87.
21 AND IN FACT, THE DEPOSITION OF MR. WORTLEY ON PAGE 15, LINES 1
22 THROUGH 10 SHOW THAT APPROXIMATELY 12 MONTHS BEFORE THE PLAINTIFF
23 WAS INJURED THAT THERE WAS BROUGHT INTO THE OWNERSHIP OF
24 SERVICAR, FOR WHOM SHE WAS EMPLOYED, INTERMOUNTAIN HEALTH CARE.
25 AND THAT PRIOR TO THIS TIME, PRIOR TO THE TIME THAT INTERMOUNTAIN

1 HEALTH CARE WAS BROUGHT INTO THIS, THAT THERAPY MANAGEMENT
2 INCORPORATED WAS THE OWNER OF SERVICAR. IT WAS NEVER AND HAS
3 NOT BEEN A SITUATION WHERE DON WORTLEY OR DAVID WARREN,
4 EITHER TOGETHER OR SEPARATELY, WERE OWNERS OF SERVICAR, AND THAT
5 THEY THEN MADE A CONSCIENTIOUS DECISION AS COUNSEL WOULD
6 REPRESENT IN THE PROPOSED ORDER TO ALLOW THE BUILDING TO FALL
7 INTO DISREPAIR. IT'S SIMPLY NOT THE CASE. THERE IS NOTHING
8 THAT WOULD SUGGEST THAT OR SHOW THAT NOR HAS THERE BEEN ANY
9 EVIDENCE PRESENTED.

10 NOW, IN SUBPARAGRAPH B OF THEIR PROPOSED ORDER, THEY
11 SAY THE FACT THAT DON WORTLEY WAS CONTRIBUTING HIS OWN FUNDS
12 ON A MONTHLY BASIS TO UNDERWRITE THE OPERATION OF THE TENANT
13 AND THAT IT WAS HIS RELUCTANCE TO CONTRIBUTE GREATER FUNDS THAT
14 RESULTED IN THE POOR MAINTENANCE OF THE BUILDING ARE ALSO
15 FACTUALLY INADEQUATE TO RAISE THE INFERENCE THAT THE BUILDING
16 MAINTAINED WAS REALLY THE RESPONSIBILITY OF THE LANDLORDS.
17 THE EVIDENCE AGAIN, YOUR HONOR, IS THE SAME IN BOTH CASES.
18 THERE JUST IS NOTHING TO SHOW THAT IT WAS DON WORTLEY'S OR
19 DAVID WARREN'S RESPONSIBILITY TO DO THAT.

20 SERVICAR, WHO RAN THE BUSINESS AND WHO OPERATED IT,
21 WAS A CORPORATION. IT WAS A CORPORATION THAT WAS OWNED AND
22 HELD BY ANOTHER CORPORATION, THIS INTERMOUNTAIN HEALTH
23 CARE, FOR AT LEAST A YEAR OR APPROXIMATELY A YEAR PRIOR TO THE
24 TIME THAT THE PLAINTIFF WAS INJURED. MR. WORTLEY AND MR. WARREN
25 SIMPLY WERE NOT THE ONES IN THE POSITION TO DO THAT.

1 NOW, THE LAST PARAGRAPH IS SIMPLY A STATEMENT BY
2 KATHY GARCIA WHICH SAYS IT WAS THE DEFENDANTS' LANDLORD WHO
3 MADE THE DECISION NOT TO PROPERLY MAINTAIN THE BUILDING, IS A
4 BARE ASSERTION OF LEGALLY IRRELEVANT TO BASE OR TO RAISE A
5 FACTUAL ISSUE TO PRECLUDE GRANTING A SUMMARY JUDGMENT.
6 KATHY GARCIA MAKES THAT STATEMENT, YOUR HONOR, IN THE AFFIDAVIT
7 THAT COUNSEL FILED IN OPPOSITION TO OUR MOTION FOR SUMMARY
8 JUDGMENT, BUT THE UTAH SUPREME COURT IN THE CASE OF MELBY VS.
9 WILLIAMS, AND THIS WAS A CASE THAT WAS SUBMITTED BY PLAINTIFF'S
10 COUNSEL IN SUPPORT OF THEIR MOTION IN OPPOSITION TO SUMMARY
11 JUDGMENT. THAT CASE OF MELBY VS. WILLIAMS, WHICH IS A 1985
12 CASE, TALKS ABOUT THE QUESTION OF SUMMARY JUDGMENT. AND
13 THE COURT SPECIFICALLY SAID THE FOLLOWING. THEY SAID THE
14 DEFENDANTS ATTACK THE SUFFICIENCY OF THE AFFIDAVIT TO RAISE A
15 QUESTION OF FACT ASSERTING THAT THE AFFIDAVIT MERELY STATES
16 A CONCLUSION WHICH IS INSUFFICIENT TO PRECLUDE THE GRANTING OF
17 SUMMARY JUDGMENT OF THE MOTION.

18 THEN THE COURT HELD THIS. AN AFFIDAVIT WHICH MERELY
19 REFLECTS THE AFFIANTS' UNSUBSTANTIATED CONCLUSIONS IN WHICH
20 SALES TO STATE EVIDENTIARY FACTS IS INSUFFICIENT TO CREATE AN
21 ISSUE OF FACT. AND THAT'S REALLY ABSOLUTELY THE SITUATION
22 WITH THE STATEMENTS OF KATHY GARCIA AND THE STATEMENTS THAT WERE
23 PRESENTED BY COUNSEL IN CONNECTION WITH THEIR AFFIDAVIT
24 OPPOSING SUMMARY JUDGMENT. THERE IS NO EVIDENCE IN THE FILE
25 TO SUBSTANTIATE THAT OR TO SHOW.

1 BY CONTRAST, THE DEFENDANTS SHOWED THE PAYMENTS;
2 WHO PAID THEM; WHO HAD THE RESPONSIBILITY OF KEEPING THE
3 BUILDING. I REALLY THINK THAT THE ORDER WE SUBMITTED IS
4 FAIR AND ACCURATE BASED UPON THE COURT'S DECISION. WE THINK
5 THE ORDER SHOULD BE APPROVED.

6 THANK YOU.

7 MR. HENNING: YOUR HONOR, THE CONCERN I HAVE WITH COUNSEL'S
8 PROPOSED ORDERS, IT DOESN'T DEAL WITH WHAT I FEEL WERE THE
9 EVIDENTIARY FACTS RAISED. AND I FEEL THE COURT'S DECISION MUST
10 BE BASED, AS I STATED IN MY ORDER, THAT REGARDLESS OF THE INFERENCE
11 THAT CAN BE DRAWN FROM THE ALLEGATIONS AND THE DEPOSITION
12 TESTIMONY OF MR. WORTLEY THAT HE WAS FUNDING THE OPERATION OF
13 SERVICAR, I FEEL THE COURT'S DECISION MUST HAVE BEEN BASED
14 ON THE LEASE PROVISION AND REGARDLESS OF ALL THESE ISSUES
15 WE RAISE, THE COURT MUST HAVE FELT THOSE ISSUES ARE IRRELEVANT
16 AND THE LEASE CONTROLLED. AND THAT'S WHY I WORDED THE ORDER
17 THE WAY I DID.

18 I RECITED THE FACTUAL ALLEGATIONS, BOTH IN KATHY
19 GARCIA'S AFFIDAVIT AND THE DEPOSITION TESTIMONY OF THE DEFENDANT
20 WHERE HE ADMITTED HE WAS FUNDING THE OPERATION OF SERVICAR.
21 AND I SAID REGARDLESS OF THESE MATTERS, THE COURT FEELS THAT
22 BASED ON THE LEASE PROVISION, THAT THE OBLIGATION TO MAINTAIN
23 THE BUILDING WAS A RESPONSIBILITY OF THE PLAINTIFF'S EMPLOYERS
24 OF SERVICAR OF UTAH, AND THEREFORE THE DEFENDANT LANDLORDS HAD
25 NO RESPONSIBILITY. AND IF I'M MISTAKEN ABOUT THE COURT'S RULING,

1 THAT'S FINE, BUT I WOULD LIKE A CLARIFICATION ON THAT. I THOUGHT
2 THERE WERE FACTUAL ISSUES, INFERENCES THAT RAISE A FACTUAL ISSUE.
3 AND I WOULD LIKE THE COURT'S ORDER TO REFLECT HOW THE COURT DEALS
4 WITH THOSE FACTUAL ISSUES OR WHY THE COURT FEELS THEY AREN'T
5 TO BE SUBMITTED TO A JURY.

6 THE COURT: IN REVIEWING THE ORDERS AND LISTENING TO ARGUMENT,
7 I'M OF THE OPINION THAT THE ORDER OF MR. HENNING SHOULD PROBABLY
8 BE ACCEPTED, EXCEPT FOR NO. D. I THINK MR. SMEDLEY'S ARGUMENT
9 WITH REGARDS OF THE BARE ASSERTION OF KATHY GARCIA IS NOT
10 SUFFICIENT TO FACTUALLY ESTABLISH ANY DISPUTED ISSUE BECAUSE
11 THERE IS NO EVIDENCE OTHER THAN HER BARE ASSERTIONS, AND I
12 THINK THE SUPREME COURT RULING THAT YOU INDICATED IS CORRECT
13 AS FAR AS THE CASE I READ.

14 MR. HENNING: YOUR HONOR, PARAGRAPH D WAS INTENDED TO
15 REFLECT THE AFFIDAVIT STATEMENT BY KATHY GARCIA THAT IT WAS
16 THE DEFENDANTS, AS LANDLORDS, WHO MADE THE DECISION NOT TO
17 PROPERLY MAINTAIN THE BUILDING IS A BARE ASSERTION AND LEGALLY
18 IRRELEVANT TO RAISE A FACTUAL ISSUE TO PRECLUDE SUMMARY
19 JUDGMENT. THAT WAS AN ATTEMPT TO REFLECT MR. SMEDLEY'S
20 ARGUMENT ON THAT. I WOULD BE HAPPY TO MODIFY THAT AS THE COURT
21 DEEMS APPROPRIATE.

22 MR. SMEDLEY: WELL, YOUR HONOR, I DON'T THINK THE FACTS
23 SHOW THAT WORTLEY WAS CONTRIBUTING HIS OWN FUNDS. THAT'S THE
24 REASON WE OBJECT TO MR. HENNING'S PROPOSED ORDER.

25 THE COURT: UH-HUH.

1 MR. SMEDLEY: THERE ARE NO FACTS TO SHOW THAT INDEED THAT
2 WAS THE CASE, AND I THINK THAT FOR THAT TO BE THE ORDER IS
3 EXTREMELY PREJUDICIAL TO THE DEFENDANTS BECAUSE THE FACTS
4 SIMPLY DO NOT REFLECT THAT THAT WAS OCCURRING IN EITHER B OR
5 C.

6 MR. HENNING: YOUR HONOR, MR. SMEDLEY'S OWN CLIENT TESTIFIED
7 IN HIS OWN DEPOSITION THAT HE WAS CONTRIBUTING FUNDS. THAT'S
8 NOT EVEN AN ISSUE, AND I THINK THE COURT IN ITS RULING IN
9 SUMMARY JUDGMENT HAS TO GIVE MY CLIENT ALL INFERENCES, CERTAINLY
10 ALL STATEMENTS AND THAT'S THE APPROPRIATE STANDARD IN GRANTING
11 SUMMARY JUDGMENT.

12 THE EVIDENCE BEFORE THE COURT -- MR. SMEDLEY KEEPS
13 ARGUING FACTS. THE WHOLE CONCEPT BEHIND A SUMMARY JUDGMENT
14 IS THERE'S NO FACTUAL ISSUES --

15 THE COURT: JUST BASED ON WHAT'S BEEN ARGUED AND YOUR
16 INDICATION, IT WOULD APPEAR THAT YOUR ORDER IS PROBABLY THE
17 ONE THE COURT SHOULD ACCEPT AND EVEN D JUST BASED ON THE LAST
18 PART OF THE PARAGRAPH WHERE IT SAYS BARE ASSERTION LEAVES --
19 IRRELEVANT TO RAISE THE FACTUAL ISSUE PROVIDING GRANTING SUMMARY
20 JUDGMENT. I THINK THAT'S WHAT THE COURTS HAVE HELD.

21 MR. HENNING: THANK YOU, YOUR HONOR.

22 THE COURT: SO, I'LL SIGN MR. HENNING'S ORDER HERE.

23 MR. SMEDLEY: THANK YOU, YOUR HONOR.

24 (WHEREUPON THIS MATTER WAS CONCLUDED.)
25

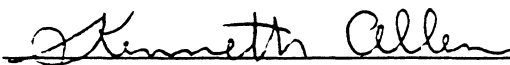
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REPORTER'S CERTIFICATE

STATE OF UTAH)
 : SS.
COUNTY OF SALT LAKE)

I, KENNETH ALLEN, AN OFFICIAL COURT REPORTER FOR THE
THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY,
STATE OF UTAH , DO HEREBY CERTIFY THAT I REPORTED STENOGRAPHICALLY
THE PROCEEDINGS IN THE MATTER OF KATHY GARCIA V. DAVID WARREN
AND DON WORTLEY, CIVIL NO. C86-6709, AND THAT THE ABOVE AND
FOREGOING IS A TRUE AND CORRECT TRANSCRIPT OF SAID PROCEEDINGS,
AS REPORTED BY ME AT THE TIME OF HEARING.

DATED THIS 6TH DAY OF OCTOBER, 1988.


KENNETH ALLEN, CSR

FILED IN CLERK'S OFFICE
Salt Lake County Utah

SEP 1 1988

Lee C. Henning, #4593
CHRISTENSEN, JENSEN & POWELL, P.C.
510 Clark Leaming Building
175 South West Temple
Salt Lake City, Utah 84101
Telephone: (801) 355-3431

H. Gordon Hindley, Clerk, 3rd Dist. Court
By: [Signature] Deputy Clerk

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

KATHY GARCIA,)	
)	
Plaintiff,)	ORDER OF DISMISSAL
)	
v.)	
)	
DAVID WARREN and DON WORTLEY)	Civil No. C86-6709
)	
Defendants.)	

The defendants' Motion for Summary Judgement was heard before the Honorable Raymond S. Uno during the regular Law and Motion calendar of the Court on August 9, 1988 at 9:00 a.m. The plaintiff was present and was represented by her counsel of record, Lee C. Henning. The defendant Don Wortley was also present and was represented by his counsel of record, Stanley M. Smedley. The court considered the affidavits on file herein, the parties' memorandums of points and authorities, and the deposition testimony of Don Wortley.

For good cause shown it is hereby ordered, adjudged and decreed that:

The Defendants' Motion for Summary Judgement is granted.

The grounds for granting the motion are as follows:

a. It is undisputed in the evidence submitted by the parties that the lease agreement between the defendants and their tenant, Servicar of Utah, provided that Servicar of Utah was responsible for maintenance of the building where the plaintiff was injured.

b. The facts that Don Wortley was constantly funding Servicar's operation with his own funds and that the decision to allow the building to fall into disrepair was a decision shared in by Don Wortley, and the inference raised from those facts that the landlords, David Warren and Don Wortley, were contributing and encouraging the poor maintenance of the building, are all legally irrelevant in light of the contractual provisions of the lease. Even assuming these facts did exist, the responsibility for maintenance of the building would not rest in the landlords and they would bear no liability for those actions.

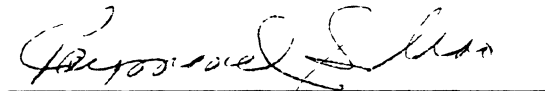
c. The facts that Don Wortley was contributing his own funds on a monthly basis to underwrite the operations of the tenant and that it was his reluctance to contribute greater funds that resulted in the poor maintenance of the building are also factually inadequate to raise an inference that the building maintenance was really the responsibility of the landlords as well as the tenant in light of the express lease provision between the landlords and tenant.

d. The affidavit statement by Kathy Garcia that it was the defendants, as landlords, who made the decision not to properly maintain the building is a bare assertion and legally

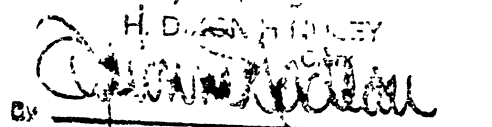
irrelevant to raise a factual issue to preclude granting summary judgement.

DATED this 1st day of SEPTEMBER 1988.

By the Court:



Honorable Raymond S. Uno

ATTEST
H. D. W. HINLEY

Clerk of Court