

2006

Wesley A. Matheson and Lois Matheson v. Marbec Investments, LLC d/b/a/ Elmwood Apartments, LLC : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

WESLEY A. MATHESON and
LOIS MATHESON,

Plaintiff/Appellants,

vs.

MARBEC INVESTMENTS, LLC
d/b/a/ ELMWOOD APARTMENTS,
LLC,

Defendants/Appellees.

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Case No. 20060543-CA

BRIEF OF APPELLANTS

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT,
SALT LAKE COUNTY, STATE OF UTAH
JUDGE J. DENNIS FREDERICK

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ORAL ARGUMENT/PUBLISHED OPINION REQUESTED

FILED
UTAH APPELLATE COURTS

DEC 18 2006

WESLEY A. MATHESON and)
LOIS MATHESON,)
)
Plaintiff/Appellants,)
)
vs.)
)
)
MARBEC INVESTMENTS, LLC)
d/b/a/ ELMWOOD APARTMENTS,)
LLC,)
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Defendants/Appellees.)

VS.

MARBEC INVESTMENTS, LLC)
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WESLEY A. MATHESON and
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d/b/a/ ELMWOOD APARTMENTS,)
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)
Defendants/Appellees.)

First, did the trial court commit error in granting the Defendants-Appellees' motion for summary judgment and in so ruling, deciding as a matter of law, that there was not a justiciable issue of material fact as to whether the Defendants had constructive knowledge of the defect that proximately caused the Plaintiff's injuries. The issue was

preserved at the trial court level by Plaintiffs' extensive briefing and argument related to the Defendants' motion for summary judgment. (R. 186-221, Addendum, Exhibit "1")

Summary judgment is appropriate only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Utah R.Civ.P. 56(c). See, e.g., *Ingram v. Salt Lake City*, 733 P.2d 126, 126 (Utah 1987) (per curiam); *Barber v. Farmers Ins. Exch.*, 751 P.2d 248, 251 (Utah App.1988); *Briggs v. Holcomb*, 740 P.2d 281, 283 (Utah Ct.App.1987).

The court considers the evidence in the light most favorable to the party opposing summary judgment, and grants summary judgment only where it appears there is no genuine dispute as to any material issues of fact, or where, even according to the facts as contended by the party opposing summary judgment, the moving party is entitled to judgment as a matter of law. *Themy v. Seagull Enters., Inc.*, 595 P.2d 526, 528-29 (Utah 1979). See also, e.g., *Barber*, 751 P.2d at 251; *Briggs*, 740 P.2d at 283.

When the subject of an action is one that is based upon negligence, the appellate courts of Utah have clearly stated that the test for granting summary judgment has to be set exceptionally high. Therefore, the appellate courts review the district court's decision granting summary judgment for correctness, giving no deference to the trial court's determination, and review 'the facts and inferences to be drawn therefrom in the light most favorable to the nonmoving party.' " *J.R. Simplot Co. v. Sales King Int'l, Inc.*, 17

P.3d 1100 (Utah 2000) (citation omitted). “As we analyze the issues, we are mindful that, ‘because negligence cases often require the drawing of inferences from the facts, which is properly done by juries rather than judges, “summary judgment is appropriate in negligence cases only in the clearest instances.” ’ ” *Trujillo v. Utah Dep't of Transp.*, 986 P.2d 752 (Utah 1999) (quoting *Nelson v. Salt Lake City*, 919 P.2d 568, 571 (Utah 1996)) (other citation omitted); *Sandberg v. Lehman, Jensen & Donahue, L.C.*, 76 P.3d 699 (Utah App. 2003); *Ingram*, 733 P.2d at 126. *See also*, *Apache Tank Lines, Inc. v. Cheney*, 706 P.2d 614, 615 (Utah 1985) (per curiam); *Williams v. Melby*, 699 P.2d 723, 725 (Utah 1985); *Anderson v. Toone*, 671 P.2d 170, 172 (Utah 1983); *Bowen v. Riverton City*, 656 P.2d 434, 436 (Utah 1982).

Of particular concern to the courts, is the precept that “[o]rdinarily, whether a defendant has breached the required standard of care is a question of fact for the jury.” *Jackson v. Dabney*, 645 P.2d 613, 615 (Utah 1982). *See also Ingram*, 733 P.2d at 127; *Bowen*, 656 P.2d at 437; *FMA Acceptance Co. v. Leatherby Ins. Co.*, 594 P.2d 1332, 1334-35 (Utah 1979); *Robison v. Robison*, 16 Utah 2d 2, 394 P.2d 876, 877 (1964). Accordingly, summary judgment is inappropriate unless the applicable standard of care is “fixed by law,” *Elmer v. Vanderford*, 74 Wash.2d 546, 445 P.2d 612, 614 (1968); *see also Chicago, Rock Island and Pac. R.R. v. Hawes*, 424 P.2d 6, 10 (Okla.1967), and reasonable minds could reach but one conclusion as to the defendant's negligence under the circumstances. *See Jackson*, 645 P.2d at 615; *Singleton v. Alexander*, 19 Utah 2d 292,

431 P.2d 126, 129 (1967); *English v. Kienke*, 774 P.2d 1154, 1156 (Utah Ct.App.1989).

Furthermore, the Utah Supreme Court has held that since summary disposition denies the losing party “the privilege of a trial,” art. I, § 11 of the Utah Constitution suggests that “doubt or uncertainty as to the questions of negligence . . . should be resolved in favor of granting. . . a trial.” *Butler v. Sports Haven Int'l*, 563 P.2d 1245, 1246 (Utah 1977); *See also, Anderson*, 671 P.2d at 172; *Rees v. Albertson's, Inc.*, 587 P.2d 130, 133 (Utah 1978).

Second, did the trial court commit error in failing to allow the Plaintiffs to employ the doctrine of *res ipsa loquitur* to supply the required showing of actual or constructive notice of the alleged defect in the stairs. Plaintiffs preserved the issue in their presentation to the trial court on Defendants’ motion for summary judgment. (R. 257, Addendum, Exhibit 1 at pp. 23-28)

In *State v. Levin*, 144 P.3d 1096 (Utah 2006), the appellate court considers three factors to determine whether we should give some deference to a district court's application of a specific legal doctrine to the facts: (1) the degree of variety and complexity in the facts to which the legal rule is to be applied; (2) the degree to which a trial court's application of the legal rule relies on “facts” observed by the trial judge, “such as a witness's appearance and demeanor, relevant to the application of the law that cannot be adequately reflected in the record available to appellate courts;” and (3) other “policy reasons that weigh for or against granting discretion to trial courts.” *Id.* (citation omitted).

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND RULES

The Appellants do not contend that there are any determinative constitutional provisions, statutes, ordinances or rules. However, the Appellants believe that the legal standard established by *Gregory v. Fourtwest Investments, Ltd.*, 754 P.2d 89 (Utah App. 1988), is controlling and that as applied to the facts of this case, is dispositive in requiring the reversal of the trial court's grant of summary judgment in this matter.

STATEMENT OF THE CASE

Plaintiffs commenced this action against Defendants, to recover for serious injury and damage suffered as a result of a fall down a stairway at an apartment complex owned and operated by the Defendants. Specifically, the Plaintiff, Wesley A. Matheson, was at the Elmwood Apartments (located at 4320 South 700 East in Salt Lake City, Utah), on February 24, 2001, in order to help his son and daughter-in-law move. (R. 1-5) While trying to navigate a stairway on the premises, one of the stairs collapsed out from under the Plaintiff, causing him to fall. *Id.* As a result, the Plaintiff suffered injury and damage consisting of medical specials of over \$60,000.00 and lost wages exceeding \$30,000. The Plaintiff, Lois Matheson, the wife of Wesley Matheson, suffered a loss of consortium due to her husband's severe and ongoing injuries. *Id.*

At the conclusion of discovery on April 6, 2006, the Defendants filed a motion for summary judgment with supporting memoranda. (R. 110-185) The Plaintiffs responded to the motion (R. 186-221) and the Defendants submitted a reply memorandum. (R.

222-234).

The trial court set the matter for oral argument on May 8, 2006 and, after the matter was argued, took the Defendants' motion under advisement. (R. 235, the Transcript of the May 8, 2006 Hearing is attached as Exhibit "1" to the Addendum) On May 17, 2006, Judge Frederick entered a Minute Entry granting the Defendants' motion. (R. 237-40). The Minute Entry was incorporated into an Order which was signed and then entered in the record in this matter on May 31, 2006. (R. 241-242, Addendum, Exhibit "2") Plaintiffs filed a Notice of Appeal on June 7, 2006. (R. 243-44)

STATEMENT OF FACTS

A. General Background of the Apartment Complex

The Elmwood Apartment complex, where the Plaintiff, Wesley Matheson, was injured, is located at 4320 South 700 East in Salt Lake City, Utah. The complex, comprised of thirty-six (36) units, was constructed in 1985. (R. 116). The Defendant Marbec Investments, LLC purchased the complex on or about May 1, 2000 for a price in excess of Two Million Dollars (\$2,000,000.00). (R. 117, Transcript of May 8, 2006 Hearing, hereinafter referred to as "Tr." at 4)

B. Defendants' Constructive Notice of a Defect in the External Stairs

There is no dispute that prior to Plaintiff's fall on February 4, 2001, neither the agents and representatives of the Defendants nor the Plaintiffs had any actual notice of any problems or defects with the stairs in question. (R. 114, 116-118, 188) There is

likewise no question that the Plaintiffs and their son, who was residing at the complex at the time of the fall, had used the stairway where the accident had occurred numerous times and had detected no abnormality. *Id.*

However, as to the Defendants' constructive knowledge, the following facts are central.

1. Mr. Herbert Trayner, the principal representative of the Defendant Marbec Investments, who inspected the complex prior to purchase and participated in the management of Elmwood, has been a general contractor in Utah since 1952, and thus had forty-four (44) years of experience at the time of the Plaintiffs' injuries. (R. 188)
2. During his work life as a general contractor, Mr. Trayner had built residential homes, a copper mill, a leaching plant and five apartment complexes. Each of the five apartment complexes constructed by Mr. Trayner, had stairs. (R. 189)
3. Mr. Trayner knew prior to the purchase of Elmwood that the complex had been built in 1985 and that there had been no structural changes made to the apartment complex, including the exterior stairs where the Plaintiff fell, since Elmwood had been constructed in 1985. *Id.*
4. Mr. Trayner knew that the stairs, where the Plaintiff fell, were

exterior stairs, meaning that the stairs were located outside of a structure and located in a non-heated area. *Id.* He knew that the stairs where the Plaintiff fell were constructed of wood and that the wood stairs had been wrapped in carpeting. *Id.*

5. In his inspections of the Elmwood Apartment complex, Mr. Trayner failed to verify whether or not the stair tread fit into the pocket on the stair stringers and failed to inspect the general condition of the wood. *Id.*

C. The Circumstances Surrounding the Fall of the Plaintiff

Shawn and Angela Jo Matheson, the son and daughter-in-law of the Plaintiffs, moved into Unit # 16 of the Elmwood Apartments in early 2000. Their unit was located on the second floor of a three-story building, and it was accessed by a flight of stairs running up from the ground-level sidewalk. (R. 117) Photographs of the stairway in question and the failed step are attached as Exhibit “3” to the Addendum. (Addendum, Exhibit “3,” R. 170-75, 258)

On February 24, 2001, the Plaintiffs, Wesley and Lois Matheson, went to Shawn and Angela’s apartment to help them move out. In aiding their son and daughter-in-law, the Plaintiffs had traversed the stairs in question a number of times. (R. 118) Later in the day, the Plaintiff, Wesley Matheson, Shawn, Shawn’s father-in-law, Clay and a neighbor, Doug, carried a couch out of the apartment and proceeded to carry it down the stairs.

Clay and Doug went down the stairs first holding one end of the couch while the Plaintiff, Wesley and Shawn carried the other end from the top of the stairs. (R. 119)

As the group proceeded down the stairway in question (Addendum, Exhibit "3"), the fourth stair down gave way and the Plaintiff fell to the ground. (R. 119). As the Plaintiff fell, his left leg hit the cement retaining wall very hard and he landed on his back, slamming his head on the cement. As a result, the Plaintiff sustained serious and permanent injuries and damage consisting of a concussion, bone bruise and multiple injuries to other parts of his body. The same required medical treatment and complications therefrom required hospitalization and a skin graft. The Plaintiff has resulting permanent injury to multiple parts of his body. The medical specials are over \$60,000.00 and the Plaintiff has lost wages exceeding \$30,000. The Plaintiff, Lois Matheson, the wife of Wesley Matheson, suffered a loss of consortium due to her husband's severe and ongoing injuries. (R. 1-5)

D. Plaintiffs' Expert Testimony Regarding the Constructive Knowledge of the Defendants of the Defect in the Stairs in Question

The deposition testimony, expert report and affidavit of Dennis L. Brunetti was made part of the Record in this matter. (R. 258, 257 at pp. 16-17). Mr. Brunetti is a property inspector, who does work for lenders, HUD, real estate companies and private persons. He is a certified ICBO Building Inspector and has been so since 1979. He has over twenty-five years of construction and construction management experience which

included twelve years of field experience and thirteen years of construction management. He has been involved and directly or indirectly responsible for the construction of approximately 350 residential and light commercial properties. (Mr. Brunetti's curriculum vitae, expert report and affidavit in this case are attached as Exhibit "4" to the Addendum)

1. As controlling authority, Mr. Brunetti cited the Uniform Building Code, 1985 Edition and the International Building Code 2003 edition that requires all structures, both existing and new to be maintained in a safe condition and requires owners to be "vigilant by performing regular premise checks. . . . especially where tenants. . . walk to and from the property.
2. He cited Chapter 25 of the Uniform Building Code, 1985 edition and Section 2504(c), 4 to address the situation where a stair tread is fully stressed for more than 10 years and found that **"the way these stair treads are cut into the stair stringers is not consistent with adequate bearing of the tread on the stringer."** (Emphasis added)
3. Citing a myriad of Code sections, Mr. Brunetti stated that the causative factors leading to the Plaintiff's fall included a lack of vigilance on behalf of the owners in the maintenance of the wood stairways. He cited the fact that some of the stair treads were not bearing inside the pocket cut into the stair stringer. He noted that

some wood treads had shrunk thus causing minimal or no bearing inside and onto some of the stringers. Because of the shrinkage, the only support for the treads were the nails that rusted over time.

4. From his examination of the stair in question, he stated that the stair tread in question had split parallel to the grain and because of the lack of any supplemental support, the tread and stair failed.
5. Mr. Brunetti stated that “[a] thorough inspection of all of the stairs at the Elmwood Apartments . . . would have [revealed] the gaps where the stair treads intersect the pockets on the stair stringers and a [noticeable] cracking of an existing stir tread coming from Unit # 16 [that was] clearly visible. . . .
6. As it relates to this case, he stated in his affidavit, **“that in reviewing the information. . . it is my opinion that a thorough inspection of the stairs at the Elmwood Apartments would have put an inspector with Herbert Trayner’s experience on notice that there were gaps where the stair treads intersect with the pockets on the stair stringers and that such an inspector would have noticed cracking of an existing stair tread on the stairs leading from Apartment 16. . . .That given my understanding of Mr. Herbert Trayner’s experience as a general contractor a**

reasonable inspection performed by him would have alerted him to the fact that the wood stairs on which Wesley Matheson was injured, having been built some 20 years prior to the accident and being wrapped with indoor outdoor carpeting and designed the way they were designed, lacked sufficient integrity and the condition of the stairs posed an unsafe condition for tenants and other persons visiting Elmwood Apartments.” (Emphasis added)

7. Recognizing the need of an inspection given the age and condition of the complex, Mr. Trayner stated that he personally inspected the apartment complex on at least five different occasions and that he looked at the various staircases at the property. (R. 115)

SUMMARY OF ARGUMENT

Judge Frederick, in his Order granting the Defendants’ motion for summary judgment, acknowledged that evidence of constructive notice of the defect in the stairs would have been sufficient for the Plaintiffs to survive the Defendants’ motion for summary judgment. Plaintiffs contend that this appeal can be resolved on that issue; specifically, whether the Plaintiffs submitted sufficient evidence to demonstrate that the Defendants had constructive notice of the defect in the stairs before the Plaintiff’s fall.

As detailed in the Statement of Facts, the Plaintiffs submitted evidence that the Defendants’ principle representative, Mr. Trayner acknowledged given the age of the

building and other conditions of the acquisition, that an inspection was necessary which inspection included the outdoor stairways. Plaintiffs submitted expert testimony that indeed, an inspection was required and crucially, if an inspection had been done correctly, the defects in the stairway in question would have been seen. Plaintiffs submit that this evidence constitutes constructive knowledge that the Defendants and the trial court acknowledged would have precluded summary judgment.

If for any reason this Court finds that the Plaintiffs have not established the required showing of “constructive notice,” Plaintiffs submit that the trial court committed error in failing to allow the Plaintiffs to rely upon the doctrine of *res ipsa loquitur* to establish the required actual or constructive notice of the alleged defects in the stairs at the Elmwood apartment complex. The facts identified by the Plaintiffs, in support of their showing of “constructive notice” establish the three prongs of *res ipsa*. Specifically, that steps normally do not normally fail absent negligence; the Defendants maintained sole access to the aged and weather worn wood steps that were wrapped in carpet; and that the Plaintiffs did not do anything unreasonable to cause their own injuries. In that the trial court cannot weigh evidence or witness credibility at the summary judgment level, there was no justification for the trial court to refuse to allow its application.

ARGUMENT

POINT I: PLAINTIFFS DEMONSTRATED SUFFICIENT EVIDENCE RELATING TO THE DEFENDANTS' CONSTRUCTIVE KNOWLEDGE OF THE DEFECTS IN THE STAIRWAY TO WARRANT DENIAL OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT.

A. The Standard for Granting Summary Judgment.

Summary judgment is appropriate only when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Utah R.Civ.P. 56(c). *See, e.g., Ingram v. Salt Lake City*, 733 P.2d 126, 126 (Utah 1987) (per curiam); *Barber v. Farmers Ins. Exch.*, 751 P.2d 248, 251 (Utah App.1988); *Briggs v. Holcomb*, 740 P.2d 281, 283 (Utah Ct.App.1987).

The court considers the evidence in the light most favorable to the party opposing summary judgment, and grants summary judgment only where it appears there is no genuine dispute as to any material issues of fact, or where, even according to the facts as contended by the party opposing summary judgment, the moving party is entitled to judgment as a matter of law. *Themy v. Seagull Enters., Inc.*, 595 P.2d 526, 528-29 (Utah 1979). *See also, e.g., Barber*, 751 P.2d at 251; *Briggs*, 740 P.2d at 283.

When the subject of an action is one that is based upon negligence, the appellate courts of Utah have clearly stated that the test for granting summary judgment has to be set exceptionally high. Therefore, the appellate courts review the district court's decision

granting summary judgment for correctness, giving no deference to the trial court's determination, and review 'the facts and inferences to be drawn therefrom in the light most favorable to the nonmoving party.' ” *J.R. Simplot Co. v. Sales King Int'l, Inc.*, 17 P.3d 1100 (Utah 2000) (citation omitted). “As we analyze the issues, we are mindful that, ‘because negligence cases often require the drawing of inferences from the facts, which is properly done by juries rather than judges, “summary judgment is appropriate in negligence cases only in the clearest instances.” ’ ” *Trujillo v. Utah Dep't of Transp.*, 986 P.2d 752 (Utah 1999) (quoting *Nelson v. Salt Lake City*, 919 P.2d 568, 571 (Utah 1996)) (other citation omitted); *Sandberg v. Lehman, Jensen & Donahue, L.C.*, 76 P.3d 699 (Utah App. 2003); *Ingram*, 733 P.2d at 126. *See also*, *Apache Tank Lines, Inc. v. Cheney*, 706 P.2d 614, 615 (Utah 1985) (per curiam); *Williams v. Melby*, 699 P.2d 723, 725 (Utah 1985); *Anderson v. Toone*, 671 P.2d 170, 172 (Utah 1983); *Bowen v. Riverton City*, 656 P.2d 434, 436 (Utah 1982).

Of particular concern to the courts, is the precept that “[o]rdinarily, whether a defendant has breached the required standard of care is a question of fact for the jury.” *Jackson v. Dabney*, 645 P.2d 613, 615 (Utah 1982). *See also* *Ingram*, 733 P.2d at 127; *Bowen*, 656 P.2d at 437; *FMA Acceptance Co. v. Leatherby Ins. Co.*, 594 P.2d 1332, 1334-35 (Utah 1979); *Robison v. Robison*, 16 Utah 2d 2, 394 P.2d 876, 877 (1964). Accordingly, summary judgment is inappropriate unless the applicable standard of care is “fixed by law,” *Elmer v. Vanderford*, 74 Wash.2d 546, 445 P.2d 612, 614 (1968); *see also*

Chicago, Rock Island and Pac. R.R. v. Hawes, 424 P.2d 6, 10 (Okla.1967), and reasonable minds could reach but one conclusion as to the defendant's negligence under the circumstances. *See Jackson*, 645 P.2d at 615; *Singleton v. Alexander*, 19 Utah 2d 292, 431 P.2d 126, 129 (1967); *English v. Kienke*, 774 P.2d 1154, 1156 (Utah Ct.App.1989).

Furthermore, the Utah Supreme Court has held that since summary disposition denies the losing party “the privilege of a trial,” art. I, § 11 of the Utah Constitution suggests that “doubt or uncertainty as to the questions of negligence. . . should be resolved in favor of granting. . . a trial.” *Butler v. Sports Haven Int'l*, 563 P.2d 1245, 1246 (Utah 1977); *See also, Anderson*, 671 P.2d at 172; *Rees v. Albertson's, Inc.*, 587 P.2d 130, 133 (Utah 1978).

B. Plaintiffs Submitted Sufficient Evidence to Withstand Defendants’ Motion for Summary Judgment.

A review of the trial court’s Order granting summary judgment reveals that there was considerable dispute between the parties as to whether the defect in the stairway was a permanent unsafe condition, for which no notice on the part of the Defendants was required for liability; or, that the defect in the stairway was a temporary unsafe condition, requiring actual or constructive notice of the defect to affect liability. (R. 237-40, Addendum, Exhibit “2”) Judge Frederick explicitly conditioned the granting of summary judgment on his finding that there were no justiciable issues of fact that demonstrated that the Defendants had actual or constructive notice of the defect.

While at first blush, this appears to be a “permanent” unsafe condition case. Goebel makes clear that matters such as this (where Defendant did not create the unsafe condition and is responsible for it only in the context of maintenance, not for its existence in the first place) are to be treated as “temporary” unsafe conditions. Indeed, similar to the *Goebel* case, the proximate cause of Mr. Matheson’s injuries is the breakdown or degradation of something (the stairs) that was not alleged to have been negligently created or installed. **This said, the undisputed evidence clearly establishes that Defendant had no notice of the problem with the stairs, actual or constructive. Consequently, summary judgment, as requested, is appropriate and granted.** (Emphasis added)

Addendum, Exhibit “2”

Without waiving the arguments advanced hereafter, Plaintiffs submit that this appeal can be disposed of, using the standard applied by Judge Frederick. Plaintiff submits that it submitted sufficient evidence of constructive notice on the part of the Defendants to meet the legal standard.

In *Gregory v. Fourthwest Investments, Ltd.*, 754 P.2d 89 (Utah App.,1988), the tenant’s invitee sued the landlord for personal injuries and property damage he sustained when the roof of storage shed collapsed as alleged result of weight of snow and ice which had been allowed to accumulate upon it. In disposing of the issue, the Court

established the general duty of the landlord:

To impose a common law duty on a property owner for one who has been injured on his property, the injured person would have to be classified as an invitee, a licensee or a trespasser. *Tjas v. Proctor*, 591 P.2d 438, 441 (Utah 1979); *see* Restatement (Second) of Torts §§ 329-343 (1965). However, the landlord's common law duty has been expanded in almost every jurisdiction, including Utah. *Williams*, 699 P.2d at 726. The Utah Supreme Court no longer limits a landlord's liability by the artificial common law categories, **but now imposes upon landlords “a duty to exercise reasonable care toward their tenants in all circumstances.”** *Id.* (Emphasis added)

Id. at 91.

The Court, then proclaimed that while the landlord is not an insurer of the safety of his tenants, **liability can be attached if the plaintiff demonstrates that defendant knew, or in the exercise of ordinary care should have known, that a dangerous condition existed and that sufficient time had elapsed to take corrective action.** *Martin v. Safeway Stores, Inc.*, 565 P.2d 1139, 1140-41 (Utah 1977). The Court in *Kleinert v. Kimball Elevator Co.*, 854 P.2d 1025 (Utah App.,1993), restated the exact same principles and noted:

When a plaintiff's claim is based on the owner's failure to repair rather

than on affirmative negligence, the plaintiff has the burden of showing the owner knew, or in the exercise of ordinary care should have known, a dangerous condition existed and the owner had sufficient time to take corrective action. *Id.* The appellant need not prove his or her case before the case may be submitted to the jury. *Salt Lake City Corp. v. James Constructors, Inc.*, 761 P.2d 42, 47 (Utah App.1988). The appellant need only submit evidence sufficient to raise a genuine issue of fact. *Id.* (Emphasis added)

Id. at 1028.

Utah has a clear legal standard as to the extent of expert testimony required to defeat a directed verdict or summary judgment. In *Butterfield v. Okubo*, 831 P.2d 97 (Utah 1992), the Utah Supreme Court held that an expert witness can defeat summary judgment by expressing conclusions as to the dispositive issues before the finder of fact and by identifying the specific grounds upon which his or her conclusions are based. *Id.* at 104. Only when the expert states a conclusion without identifying supporting facts will summary judgment be appropriate. *See also, Nay v. General Motors Corp., GMC Truck Div.*, 850 P.2d 1260 (Utah,1993).

This doctrine that relates to experts fits hand in hand with the general notion that trial courts are not to weigh evidence in determining a party's right to summary judgment. The case law is clear that summary judgment cannot be granted based on the credibility

and weight of the parties' respective evidence. *See Lamb v. B & B Amusements Corp.*, 869 P.2d 926, 928 (Utah 1993) (stating that the evidence presented on summary judgment “may be used only to determine whether a material issue of fact exists, not to determine whether one party's case is less persuasive than another's or is not likely to succeed in a trial on the merits”) On the contrary, “[t]rial courts must avoid weighing evidence and assessing credibility when ruling on motions for summary judgment.” *Trujillo v. Utah Dep't of Transp.*, 986 P.2d 752 (Utah App. 1999). As noted above, to oppose a motion for summary judgment a party “is required only to show that there is a material issue of fact,” and not to show that “one party's case is less persuasive than another's or is not likely to succeed in a trial on the merits.” *Lamb*, 869 P.2d at 928.

Having now identified the legal standard applicable to the facts and the quantum of evidence required, it is important to establish a clear meaning of “constructive notice.” In Utah two types of constructive notice that are generally recognized. One kind of constructive notice is notice which results from a record or which is imputed by the recording statutes; **and the other is notice which is presumed because of the fact that a person has knowledge of certain facts which should impart to him, or lead him to, knowledge of the ultimate fact.** *First American Title Ins. Co. v. J.B. Ranch, Inc.*, 966 P.2d 834 (Utah, 1998); 66 C.J.S. Notice § 6 (1950) (footnotes omitted). The first type is evidenced in the Utah Recording Statute, Utah Code Ann. § 57-3-102 (2000 as Amended), which provides that documents and instruments filed with the county recorder

pursuant to this statute “impart notice to all persons of their contents.” Utah’s case law has long recognized the second type of constructive notice-inquiry notice. *See County Bd. of Equalization v. State Tax Comm’n*, 789 P.2d 291, 294 (Utah 1990) (stating in dictum that purchaser had inquiry notice of unassessed property taxes); *Meyer v. General American Corp.*, 569 P.2d 1094, 1097 (Utah 1977) (stating that “[c]onstructive notice can occur when circumstances arise that should put a reasonable person on guard so as to require further inquiry on his part”); *Universal C.I.T. Corp. v. Courtesy Motors*, 8 Utah 2d 275, 277-78, 333 P.2d 628, 629 (1959) (holding that the buyer was on inquiry notice that title to motor vehicle was defective); *Salt Lake, Garfield & W. Ry. v. Allied Materials Co.*, 4 Utah 2d 218, 291 P.2d 883 (1955) (explaining and applying the doctrine of inquiry notice). As stated above, inquiry notice “occur[s] when circumstances arise that should put a reasonable person on guard so as to require further inquiry on his part.” *Meyer*, 569 P.2d at 1097. In *Allied Materials*, the Utah Supreme Court stated the rule of inquiry notice as follows:

Whatever is notice enough to excite attention and put the party on his guard and call for inquiry is notice of everything to which such inquiry might have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant of it. 291 P.2d at 885 (quoting *O’Reilly v. McLean*, 84 Utah 551, 564, 37 P.2d 770, 775 (1934) (other citations omitted)).

Id.

Plaintiffs submit that the evidence presented to the trial court to establish constructive notice of the defective condition of the stairs was sufficient. Mr. Herbert Trayner, the principal representative of the Defendant Marbec Investments, who inspected the complex prior to purchase and participated in the management of Elmwood, had been a general contractor in Utah since 1952, and thus had forty-four (44) years of experience at the time of the Plaintiffs' fall. (R. 188) By virtue of his licensing as a general contractor, he had knowledge of and access to the controlling building codes. Mr. Trayner had built residential homes, a copper mill, a leaching plant and five apartment complexes. Each of the five apartment complexes constructed by Mr. Trayner, had stairs. (R. 189) Mr. Trayner knew prior to the purchase of Elmwood that the complex had been built in 1985 and that there had been no structural changes made to the apartment complex, including the exterior stairs where the Plaintiff fell, since Elmwood's construction. *Id.* Mr. Trayner knew that the stairs, where the Plaintiff fell, were exterior stairs, meaning that the stairs were located outside of a structure and located in a non-heated area. *Id.* He knew that the stairs where the Plaintiff fell were constructed of wood and that the wood stairs had been wrapped in carpeting. *Id.* In his inspections of the Elmwood Apartment complex, Mr. Trayner failed to verify whether or not the stair tread fit into the pock on the stair stringers and failed to inspect the general condition of the wood.

Id.

Most compelling is the fact that the Defendants' representative, Mr. Trayner, knew that based upon the age of the complex, the construction of the stairs and the other factors cited above, an inspection of the stairs was necessary. Therefore, there can be no dispute that "reasonableness" under the circumstances of this case entailed an inspection of the stairways and stairs. Mr. Trayner inspected the complex five times before the purchase was completed and Mr. Trayner acknowledged the need to inspect the staircase and stairs. In fact, Mr. Trayner stated that he inspected the stairs and stair cases and even went so far as jumping on various stairs. (R. 115)

The Plaintiffs' expert, Dennis L. Brunetti, by way of deposition and affidavit testified based upon his examination of the actual collapsed stair, a field examination at the complex of the stairways and stairs, a review of the applicable industry standards and the facts relating to the Plaintiff's fall. (R. 258, Addendum, Exhibit "4") He testified that special care had to be taken by a landlord in the areas where tenants walk and that special care included regular inspections. He testified as to the special problem created by wood that is used in the elements for more than 10 years and the importance of checking the alignment of the stair tread into the stair stringers. He testified that a reasonable inspection revealed that the treads at the complex violated the requirements. He cited the fact that some of the stair treads were not bearing inside the pocket cut into the stair stringer. He noted that some wood treads had shrunk thus causing minimal or no bearing inside and onto some of the stringers. Because of the shrinkage, the only support for the

treads were the nails that rusted over time.

Importantly, Mr. Brunetti stated that a reasonable inspection of all of the stairs at the Elmwood Apartments would have revealed the gaps where the stair treads intersect the pockets on the stair stringers and a noticeable cracking of an existing stair tread coming from Unit # 16 that was clearly visible. In his affidavit, he stated “that in reviewing the information. . . it is my opinion that a thorough inspection of the stairs at the Elmwood Apartments would have put an inspector with Herbert Trayner’s experience on notice that there were gaps where the stair treads intersect with the pockets on the stair stringers and that such an inspector would have noticed cracking of an existing stair tread on the stairs leading from ApartmentThat given my understanding of Mr. Herbert Trayner’s experience as a general contractor a reasonable inspection performed by him would have alerted him to the fact that the wood stairs on which Wesley Matheson was injured, having been built some 20 years prior to the accident and being wrapped with indoor outdoor carpeting and designed the way they were designed, lacked sufficient integrity and the condition of the stairs posed an unsafe condition for tenants and other persons visiting Elmwood Apartments.” (Emphasis added) (R. 258, addendum Exhibit “4”)

The question is therefore, did the Defendants, acting through Mr. Trayner, have constructive notice (notice which is presumed because of the fact that a person has

knowledge of certain facts which should impart to him, or lead him to, knowledge of the ultimate fact) of the defective condition? The Plaintiffs need only prove that the owner knew, or in the exercise of ordinary care should have known, a dangerous condition existed. *Gregory v. Fourthrow Investments, Ltd.*, 754 P.2d 89 (Utah App.1988).

Plaintiffs' expert testimony, based on facts and clearly established industry standards, has carried that burden by concluding that a reasonable inspection would have revealed the defects. Other facts cited above, detailing the age of the complex, the composition of the stairs and other factors cited carry the burden of establishing that Mr. Trayner knew everything he needed to know to lead him to the ultimate fact that the stairs were defective.

It is therefore respectfully submitted that the evidence, without the expert, was sufficient to carry the burden in this case by establishing an agreement that an inspection of the stairs was necessary and that Mr. Trayner attempted to do numerous inspections and missed what was there to be seen. Secondly, as required by the Utah Supreme Court, Plaintiffs' expert has submitted sufficient conclusions and a more than adequate foundation to defeat summary judgment based alone on his affidavit and report.

Plaintiffs submit that using the standard of constructive notice urged by the Defendants and accepted by Judge Frederick, the Plaintiffs have met their burden of proving the existence of justiciable issues of fact.

POINT II: CASE LAW FROM OTHER JURISDICTIONS SUPPORT PLAINTIFFS' USE OF CONSTRUCTIVE NOTICE TO AVOID THE GRANTING OF SUMMARY JUDGMENT.

A review of the case law from other jurisdictions confirms that the Defendants had the requisite constructive notice of the defect in the carpet-wrapped, aged wood stairs to warrant reversal of the grant of summary judgment in favor of the Defendants in this matter. In *Solomon v. Loszynski*, 21 A.D.3d 366, 800 N.Y.S.2d 46 (N.Y.A.D. 2 Dept.,2005), the appellate court reversed the trial court grant of summary judgment in favor of the defendants and reinstated the plaintiff's complaint. The plaintiff had brought a premises liability action against the property owners to recover for injuries sustained when staircase collapsed. The court stated that,

In premises liability cases alleging an injury caused by a defective condition, the plaintiff must show that the landowner either created the defective condition, or had actual or constructive notice thereof for such a period of time that, in the exercise of reasonable care, it should have corrected it (*see McKeon v. Town of Oyster Bay*, 292 A.D.2d 574, 739 N.Y.S.2d 739; *Austin v. Lambert*, 275 A.D.2d 333, 334, 712 N.Y.S.2d 153). On their motion for summary judgment, the defendants Joseph Loszynski and Deborah Loszynski established their prima facie entitlement to judgment as a matter of law (*see Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 508 N.Y.S.2d 923, 501 N.E.2d 572). However, contrary to the Supreme

Court's determination, in opposition, the plaintiff raised triable issues of fact as to whether the staircase was in a dangerous or defective condition and whether the Loszynskis had actual or constructive notice thereof prior to its collapse (*see Alvarez v. Prospect Hosp., supra*; *see Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595, 404 N.E.2d 718).

The point that an owner of a premises has a duty to inspect important structures over time was also a key in the court's decision in *Kamp v. Preis*, 332 Ill.App.3d 1115, 266 Ill.Dec. 426 Ill.App. 5 Dist., 2002. Michael Meehan was a student and rented an apartment from William J. Preis. The apartment was owned by Preis and his wife through Preis Home Construction, Inc. The apartment building was a quadplex--a building containing four residential units. Preis's construction company was responsible for building the particular quadplex occupied by Michael Meehan. **However, based upon the court's ruling on the statute of limitations, the appellate court reviewed only Preis's liability based upon his status as the landlord. *Id.***

Michael Meehan's apartment was one of two upstairs apartments. The two upstairs apartments share a deck that is 20 feet long and 10 feet wide and separated in the middle by a wooden divider. The ledger boards were attached to the buildings at the joists by 30 pole-barn nails. The nails utilized in the deck constructed at Michael Meehan's apartment were ungalvanized. Ungalvanized nails can rust. On May 15, 1998, Audra Kamp attended a party hosted by Michael Meehan at his apartment. The partygoers were also on the deck.

About 11 p.m., Kamp and an estimated 35 to 40 other people were standing on this deck, when the deck suddenly collapsed. Kamp and the others fell 15 feet to the ground below. Kamp's right leg was severely injured in the accident. Her leg was three-fifths severed, with a fractured tibia and fibula. *Id.* at 1130.

The plaintiff alleged negligent construction, negligent maintenance, and failure to warn of the maximum number of people who should be allowed on the deck. **The trial court determined that the statute of limitations barred the suit against Preis Home Construction, Inc., for negligent construction but that the corporation maintained a possessory interest in the property and could be sued as a landlord. *Id.***

Following deliberation, the jury returned a verdict for Kamp in the total amount of \$1,300,319. On appeal, one of the central issues revolved around the landlord's duty with regard to the deck. The plaintiff, Kamp alleged that the defendant was negligent in one or more of the following respects:

- A. Permitt[ed] the deck to become in such a disrepaired condition as to be unsafe for use;
- B. Allowed the deck to be used when there were insufficient supports to hold the deck in place and upright;
- C. Allowed the deck to be used when it was not properly attached to the structure;
- D. Failed to forewarn his tenants of the maximum number of individuals

allowed on said deck.

The appellate court held that the allegations involved the notice that Preis had, as landlord, relative to the safety of the deck at issue. The following paragraph of Kamp's complaint explains her theory: "[T]he above[-]referenced latent conditions were, or in the exercise of reasonable care would have been and should have been[,] known to * * * [the defendant]"*Id.* Based thereon, the appellate court found no error in the evidence that was presented regarding the construction of the deck, the need for inspection and care and affirmed the jury's verdict. *Id.*

Similar interpretations of constructive knowledge have been used by other courts. Constructive notice has been defined as " 'information or knowledge of a fact imputed by law to a person (although he may not actually have it), because he could have discovered the fact by proper diligence, and his situation was such as to cast upon him the duty of inquiring into it.' " *Kirby v. Macon Co.*, 892 S.W.2d 403, 409 (Tenn.1994). "[i]f there are circumstances sufficient to put a party upon the inquiry, he is held to have notice of everything which that inquiry, properly conducted would certainly disclose; but constructive notice goes no further." *McGee v. French*, 49 S.C. 454, 27 S.E. 487 (1897) (holding where facts were sufficient to be put on inquiry, then it was equivalent to notice); *Huestess v. South Atl. Life Ins. Co.*, 88 S.C. 31, 39, 70 S.E. 403, 406 (1911) (finding inquiry equivalent to actual notice); *Norris v. Greenville, S. & A. Ry.*, 111 S.C. 322, 330, 97 S.E. 848, 850 (1919) (holding if notice sufficient to be put on inquiry, then

knowledge is presumed); *City of Greenville v. Washington Am. League Baseball Club*, 205 S.C. 495, 509, 32 S.E.2d 777, 782 (1945) (inquiry is notice); *Government Employees Ins. Co. v. Chavis*, 254 S.C. 507, 176 S.E.2d 131 (1970) (Brailsford, J., dissenting) (knowledge sufficient to put on inquiry is equivalent to actual notice); *Multimedia Pub. of S.C., Inc. v. Mullins*, 314 S.C. 551, 431 S.E.2d 569 (1993) (if notice sufficient to be put on inquiry, then knowledge is presumed); *Fuller-Ahrens Partnership v. South Carolina Dep't of Highways & Pub. Transp.*, 311 S.C. 177, 185, 427 S.E.2d 920, 924 (Ct.App.1993), cert. denied, (October 7, 1993) (Cureton, J., concurring and dissenting) ("Actual notice may be inferred from circumstances. That which puts a party on inquiry is the equivalent of actual notice.") (quoting *Patellis v. Tanner*, 197 Ga. 471, 29 S.E.2d 419, 424 (App.1944)).

Plaintiffs respectfully submit that, under the standard adopted by the Utah courts and that used by courts considering cases involving structures similar to the steps in this case, the Defendants had constructive knowledge of the defect and failed to act reasonably to eliminate the same.

POINT III: PLAINTIFFS SHOULD BE ALLOWED TO USE THE DOCTRINE OF RES IPSA LOQUITUR TO IMPUTE LIABILITY TO THE DEFENDANTS UNDER THE FACTS OF THIS CASE.

In addition, the Plaintiffs submit that this is an appropriate case to incorporate the doctrine of res ipsa loquitur to establish the negligence of the Defendants.

Res ipsa loquitur "is not a theory of liability; rather, it is an evidentiary rule that

governs the adequacy of evidence in some negligence cases.” *Myrlak v. Port Auth. of N.Y. and N.J.*, 157 N.J. 84, 95, 723 A.2d 45 (1999). The doctrine “is a method of circumstantially proving the existence of negligence.” *Id.* It permits an inference of negligence without direct evidence where three elements are established: (1) the event does not normally happen in the absence of negligence, (2) the instrument of harm was exclusively within the defendant's control, and (3) there is no indication that the plaintiff caused her own injury. *Id.* Where applicable, *res ipsa* allows a plaintiff to establish a *prima facie* case and to withstand a motion to dismiss or for summary judgment, for lack of direct proof of negligence. *Id.* The integration of the doctrine relieves the plaintiff from establishing actual or constructive notice to the landlord who did not, by affirmative act, create the dangerous condition. If the three elements of the doctrine are established, a *prima facie* case of negligence is proven. As demonstrated below, all of the factors are present in a case involving an external staircase made of wood that is wrapped in carpet. The landlord clearly has the duty to maintain outside structures and would be the only one who would have the right to remove the carpet to perform the inspection and repair. Therefore the facts, as submitted by the parties present justiciable issues of material fact relating to *res ipsa*, which if established, prove the Defendants’ negligence.

In *Torres v. Cordice*, 11 Misc.3d 23, --- N.Y.S.2d ----, 2006 WL176941 (N.Y.Sup.App.Term,2006), the injured plaintiff was a meter reader for Consolidated Edison who fell while descending a wooden staircase leading to the basement of

residential premises owned by defendant. Plaintiff's testimony tended to indicate that a recurring leak in the area had rotted the steps and handrail, causing them to collapse. Defendant offered no evidence at trial with respect to liability.

This case turned on the denial, by the trial court, of the plaintiff request for a jury charge on *res ipsa loquitur* on the ground that the doctrine is inapplicable where "the plaintiff's witnesses gave a complete explanation of why this accident happened." The appellate court held that a plaintiff who elicits proof of specific acts of negligence can also seek to use the inference of *res ipsa loquitur*, unless the two alternate modes of proof are fundamentally or inherently inconsistent (*see Abbott v. Page Airways*, 23 N.Y.2d 502, 511-514, 297 N.Y.S.2d 713, 245 N.E.2d 388 [1969]). The court found, on appeal, that the evidence of specific acts of negligence did not contradict or overcome the inference of *res ipsa* (cf. *Duncan v. Corbetta*, 178 A.D.2d 459, 577 N.Y.S.2d 129 [1991]). Moreover, the court held, that even though some of the circumstances of the accident are undisputed, the actual and specific causes of the collapse were not firmly established (*see Bonura v. KWK Assoc.*, 2 A.D.3d 207, 770 N.Y.S.2d 5 [2003]).

The appellate court held that to invoke the doctrine of *res ipsa loquitur*, the plaintiff must establish that the accident was not of a kind ordinarily occurring in the absence of negligence, that the instrumentality or agency causing the accident was within the defendant's exclusive control, and that the accident was not due to any voluntary action or contribution by the plaintiff (*Kambat v. St. Francis Hosp.*, 89 N.Y.2d 489, 494,

655 N.Y.S.2d 844, 678 N.E.2d 456 [1997]).

The first and third elements of plaintiffs' res ipsa claim were clearly established and, indeed, are not now challenged on appeal. Stairs and protective hand railings do not generally collapse and fall apart in the absence of negligence, i.e., due to faulty installation, maintenance or repair, and the mere act of walking down stairs while holding onto the railing does not make the accident plaintiff's fault or put the stairs and railing under his control (*Brisbon v. Mount Sinai Hosp.*, 8 Misc.3d 47, 48, 798 N.Y.S.2d 648 [2005], citing *Pavon v. Rudin*, 254 A.D.2d 143, 145, 679 N.Y.S.2d 27 [1998]). With respect to the element of exclusive control, trial testimony that this basement staircase was "infrequently" used by a single tenant was of "sufficient exclusivity to fairly rule out the chance that the defect ... was caused by some agency other than defendant's negligence" (*Dermatossian v. New York City Tr. Auth.*, 67 N.Y.2d 219, 228, 501 N.Y.S.2d 784, 492 N.E.2d 1200 [1986]). . . .

Id.

In *Katz v. Goldring*, 237 A.D. 824, 260 N.Y.S. 796 (N.Y.A.D. 2 Dept., Dec 02, 1932), the plaintiff, who was a plumber's helper, was assisting his employer in replacing washtubs in defendant's tenement house with sinks. While he and his employer were carrying out one of washtubs from an upper apartment, the plaintiff was injured when

landing of stairway on which they momentarily rested with such washtub collapsed, allowing washtub and plaintiff to fall through the opening to the floor below. The trial court charged the jury, in part, as follows:

The premises involved in this case are admittedly a tenement house, and the duty devolved upon the defendant, who is the owner, to keep the stairway and its landings in good repair, and not to permit it to be in unsafe and dangerous condition at any time prior to the accident, and the defendant is not liable unless you find from all the evidence in this case that the defendant had notice or knowledge of the existence of the unsafe and dangerous condition; in other words, gentlemen, the mere existence of a negligent condition without notice of its existence, either as a matter of personal knowledge or for the reason that it obtained for such a period of time that in the exercise of ordinary care the landlord could or should have known of its existence, does not create a liability. The negligent condition must exist and the landlord must have actual notice of its existence or constructive notice; that is, that the situation existed for such a period of time that in the exercise of reasonable care the defendant could have known or should have known of its existence and remedied it.'

The trial court refused the request of plaintiff's counsel to charge that, if the jury **'finds and believes that this accident happened because the landing on which the plaintiff was walking down fell, with the plaintiff on it and that no act of negligence on his part contributed thereto, and that there is no satisfactory explanation of the cause of the falling by the defendant, then and in that event the plaintiff may recover.'** *Id.*

The appellate court reversed holding that the doctrine of *res ipsa loquitur* applies, that actual or constructive notice need not be proved because the defect was **apparently structural in its nature.** *Id.*

In *McConaughhead v. Horaitis*, Slip Copy, 2005 WL 121656 (Ohio App. 5 Dist., 2005), the plaintiff was descending an interior staircase in his daughter's home, when the staircase ruptured beneath him, causing him to fall into the staircase. As a result of the fall, McConaughhead suffered severe injuries to his groin, right leg, right knee, back and his right testicle was amputated. At the time of the accident, the stairs were covered with carpet. McConaughhead's daughter leased the premises from appellee, Nick Horaitis. In this case, there was testimony that the plaintiff and his daughter had notice of some irregularity with regard to the interior steps but that notice and the subsequent communication of the irregularity to the defendant, did not affect the court's ruling on *res ipsa loquitur*.

The doctrine of *res ipsa loquitur* creates an inference of negligence upon proof appellee had exclusive control of the instrument causing injury and

the accident was one that would not ordinarily happen in the absence of negligence. *Waite v. Thomas Emery's Sons* (Hamilton 1940), 32 N.E.2d 764, 32 Ohio Law Abs. 521 (where plaintiff fell through a loose board in an attic used by joint tenants). "To warrant application of the rule a plaintiff must adduce evidence in support of two conclusions: (1) That the instrumentality causing the injury was, at the time of the injury, or at the time of the creation of the condition causing the injury, under the exclusive management and control of the defendant; and (2) that the injury occurred under such circumstances that in the ordinary course of events it would not have occurred if ordinary care had been observed." *Glowacki v. North Western Ohio Ry. & Power Co.* (1927), 116 Ohio St. 451, 157 N.E. 21; *Fink v. New York Central Rd. Co.*, *supra*; *Rennekar v. Canton Terminal Restaurant* (1947), 148 Ohio St. 119, 73 N.E.2d 498; *Soltz v. Colony Recreation Center*, *supra*; *Krupar v. Procter & Gamble Co.* (1954), 160 Ohio St. 489, 117 N.E.2d 7; *Schafer v. Wells* (1961), 171 Ohio St. 506, 172 N.E.2d 708. (Emphasis added). Whether sufficient evidence has been adduced at trial to warrant application of the rule is a question of law to be determined initially by the trial court, subject to review upon appeal. *See, Hake v. George Wiedemann Brewing Co.* (1970), 23 Ohio St.2d 65, 262 N.E.2d 703. Appellants argue appellee did in fact have exclusive control

over the staircase; therefore, the res ipsa doctrine applies. We agree. A tenant's possession of the premises is not equivalent to control; nor does possession negate a landlord's "exclusive" management and control. . . . Further, the alleged defect sub judice was covered by carpeting on the stairs. To inspect the alleged defect would have required removal of the carpeting by the tenant. We find the authority to remove the carpet and make any necessary repairs discovered rests with the landlord, and would require approval of the landlord. Based upon the foregoing, we find appellee landlord maintained exclusive maintenance and control over the alleged defect, despite the tenant's possession of the premises. . . .

Id.

In this case, all three of the elements of the doctrine apply. Stairways and stairs do not normally collapse unless there is negligence. Although the tenants used the stairs frequently, the aged and weather worn wood steps that were wrapped in carpet were the exclusive province of the landlord and certainly, the Plaintiffs did nothing unreasonable that led to their injuries. Accordingly, this is an appropriate case to adopt the doctrine that plaintiffs, in this and similar defective condition actions has the right to rely on the doctrine of res ipsa, if a prima facie case for the same can be made, to overcome the requirement of actual or constructive notice on the part of the owner or landlord of a defect.

Because the trial court does not have a right to weigh evidence or judge credibility at the summary judgment level, the Court should give no deference to the trial court's decision to refuse to allow the Plaintiffs to apply the doctrine. In fact, although the issue was argued to Judge Frederick, he failed to even mention the same in his ruling and order and therefore, this Court has no ruling by judge Frederick on the issue with which to contend.

The application of the doctrine, based upon the facts presented in this matter, would warrant reversal of the grant of summary judgment in this case.

CONCLUSION

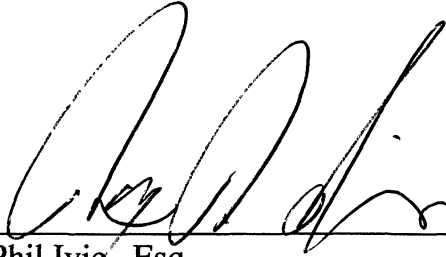
Based either upon the submission of clear evidence relating to the Defendants' knowledge of the defect in the stairs or the opinions of Plaintiffs' expert, that were based upon an extensive investigation and application of industry standards, this Court should reverse the grant of summary judgment and rule that either the evidence relating to the knowledge of the Defendants or the opinions and findings of the Plaintiffs' expert, established significant material issues of fact precluding summary judgment.

Alternatively, the Court should determine that the trial court erred in failing to allow the Plaintiffs to employ the doctrine of *res ipsa loquitur* to meet the burden of demonstrating

actual or constructive knowledge on the part of the Defendants of the alleged defects,
which also would preclude summary judgment.

Dated this 13th day of December, 2006.

IVIE & YOUNG

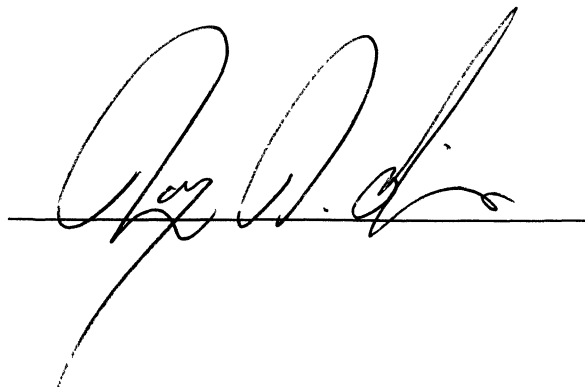


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Attorney for Plaintiffs/Appellants

CERTIFICATE OF MAILING

I certify that on the 18th day of December, 2006, copies of the Appellant's Brief
were mailed, postage prepaid, to the following:

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ADDENDUM

EXHIBIT 1

Transcript of May 8, 2006 Hearing on Defendant's
Motion for Summary Judgment

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

WESLEY MATHESON,

Plaintiff,

vs.

MARBEC INVESTMENTS, LLC,

Defendant.

ORIGINAL

Case No. 050901427

FILED DISTRICT COURT
Third Judicial District

Hearing
Electronically Recorded on
May 8, 2006

JUL 19 2006

SALT LAKE COUNTY

By *BN*

Deputy Clerk

BEFORE: THE HONORABLE J. DENNIS FREDERICK
Third District Court Judge

APPEARANCES

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P R O C E E D I N G S

(Electronically recorded on May 8, 2006)

THE COURT: We are convened in the matter of Matheson vs. Marbec, case No. 051427. I would appreciate it, Counsel, if you would state your appearances for the record, please.

MR. IVIE: Phil Ivie for the plaintiff, your Honor.

THE COURT: Very well.

MR. PLANT: Terry Plant for the defendant.

THE COURT: All right. Thank you, gentlemen. Let me indicate I have reviewed the memoranda, both in support of the motion for summary judgment and the memorandum in opposition.

You may proceed at this time, if you would, Mr. Plant.

MR. PLANT: Thank you, your Honor. Your Honor, I appreciate the fact and know you very well in terms of your preparation. I appreciate that. I don't mean to go over stuff that you know, but I want to emphasize the things that I think are important for the Court's consideration of our motion.

Just very briefly to review, this is an accident that occurred back on February 24th of 2001 when a gentlemen was helping his son -- the gentlemen being the plaintiff was helping his son move, and they were carrying a couch down some stairs that were at the Elmwood Apartments. For some reason, and very suddenly and without any notice whatsoever the stair gave way.

It's interesting in that they had been moving stuff down before this, there was a group of two men on the front of the

1 couch that had walked over the same step right before the two
2 gentlemen that were in the back, and for some reason at that
3 moment the stair gave way. That fact is pretty simple and pretty
4 easy. I don't think anyone has any problem with that.

5 Other facts that I think are undisputed are the fact
6 that no one had any notice of any problem with this stair. No
7 one. We went and we deposed the plaintiff who had been to this
8 facility several times. He had no problems. We deposed the
9 children, the kids of plaintiff that lived there -- who had lived
10 there for 14 months prior to this accident, by their estimation
11 had used this step between 1,000 to 1600 times. They had no
12 indication whatsoever that there was an issue of any kind with
13 this stair. None. Zero. I was very thorough in asking them
14 about wobbling, it was creaking, any movement, any indication or
15 problem. There was none.

16 My guy, a guy by the name of Herb Treanor who is the
17 principal of what is now the Elmwood Apartments. It used to be
18 Marbec. They changed the name simply because it was confusing.
19 Same entity. He went out and purchased this, and this is
20 important. He became interested in buying the Elmwood Apartments
21 about a year or so before the accident occurred.

22 The actual sale was consummated on May 1st of 2000, which
23 is about nine months before this accident occurred, something
24 like that. Was the owner only for that short period of time.
25 The Elmwoods were built in 1985. By all accounts, particularly

1 the plaintiff's children, it was very well taken care of. They
2 had no complaints whatsoever regarding the maintenance or the
3 condition of the property. Everything was well done. If there
4 was an issue -- and there were really none during their tenure
5 there -- that were taken care of immediately.

6 My guy, Herb Treanor in anticipation of buying the
7 facility, as the Court knows as you've read, went out and
8 inspected this facility himself. By that he went around, looked
9 at the apartments, jumped on some of the stairs and was certain
10 himself that the facility was in good shape.

11 However, as you might appreciate and as you know, this
12 was a situation where there was a loan taken out for \$2,000,000.
13 I don't think you know that, but I'll tell you that -- \$2,000,000
14 to buy this property. As a result of that, there were more
15 people interested in the integrity of this place than just him.
16 The financial people, all of those folks who have an interest in
17 knowing what kind of a property that they're getting involved in.

18 He therefore retains an MIA appraiser by the name of
19 Jeff Neves. I'm told, your Honor -- I don't really know a whole
20 lot about this, but MIA means Master Appraiser's Institute, and
21 it's the highest level of appraisers that one gets. Mr. Treanor
22 indicated that he was told and he believed in the report that
23 Mr. Neves indicated -- suggested that there were no problems
24 whatsoever with the structure of the facility.

25 All this goes to every -- him doing whatever due

1 diligence was required of him as a purchaser. He reviewed it
2 himself. He hired a qualified inspector to go out and review the
3 facility. All of that yielded no evidence whatsoever of any
4 problem with any stairway, but particularly this one. So I think
5 the record is abundantly clear, and I don't think it's going to
6 be contested that there was no actual notice of any problem
7 associated with this stair or any stairs.

8 So we're left in the situation of the plaintiff walking
9 down the stairs, presumably non-negligent himself, and the stair
10 giving way without notice and falling down and injuring himself.
11 Those facts are conceded at this point.

12 So we look to the law. The law is very interesting and
13 very helpful in this regard to the Court. We've attached, and I
14 hope the Court -- and I need to know if the Court did have a
15 chance to take a look at the case of Goble vs. Southern Pacific
16 Railroad -- Southern Railroad. If not, I would like to take a
17 moment and go through some of the portions of that case with the
18 Court, because I think that is the most helpful thing I can do to
19 assist you.

20 THE COURT: If you -- yes, you may distribute a copy of
21 that to make it --

22 MR. PLANT: Okay. Let me have it marked.

23 THE COURT: -- more readily available (inaudible).

24 MR. PLANT: (Inaudible) want to --

25 THE COURT: That seems to be the pivotal case that both

1 (inaudible).

2 MR. PLANT: I'll (inaudible).

3 THE COURT: All right.

4 MR. PLANT: That's the Westlaw version of the case.

5 Very simply stated, your Honor, this case involved a case that
6 involved a railroad crossing over here not too far on 7th West and
7 14th South, or something like that. The claim was claimed that
8 there was a protuberance -- that's the word -- that existed on
9 this railroad crossing, and somehow as the plaintiff in that
10 case was driving his bicycle over this railroad crossing, his --
11 this protuberance got in the way and caused the bicycle tire to
12 go into a gap that existed in the railroad crossing and allegedly
13 caused this guy to crash.

14 The Court took the opportunity to review the obligation
15 of the land owner, the obligation of someone that was in
16 possession of the property, and the first thing that they did --
17 and I think this is important -- they went through the statutory
18 scheme to determine whether or not Southern Railroad had an
19 obligation to maintain and be responsible for this railroad
20 crossing. That was through the entire -- you know, the statute.

21 If you look on page 3 of the decision, that is primarily
22 the Court's -- especially the second column -- Court's
23 explanation of why it is that Southern had a duty for this
24 railroad crossing. That's important because the plaintiffs are
25 going to argue that we had responsibility for this building. We

1 don't deny that. We had some responsibility, but I think this
2 case will tell you that our responsibility under the
3 circumstances was maintenance.

4 The Court goes on in this Goble case to talk about the
5 duty of care, so to speak, of the landowner or someone who had
6 possession of premises, and they go back to this old Schoonerpase
7 (phonetic) vs. Storehouse Market case, which is an '86 case which
8 involves some ice cream on the floor. They talk about and try
9 and establish the difference between cases -- or excuse me,
10 defects and property that were temporary and permanent, and they
11 talk about notice.

12 One of the things they talk about and make very clear,
13 and I think the Court is already aware of this, but there is no
14 such thing as strict liability when it comes to this sort of an
15 issue. There needs to be negligence. They remove strict
16 liability as a means of holding a landowner responsible.

17 So they talk about some things, your Honor, and they
18 talk about first off, if you go with me to page 5 of that
19 opinion, they quote a case by the name of Allen, and they talk
20 about the duty of care that you have under certain circumstances.
21 It used to be under Allen they'd say if you look under that quote
22 about, oh, a fourth of the way up it says, "Involve the second
23 classes of cases, which are permanent defects involve" -- and in
24 the reading it says, "Involve some unsafe condition of a
25 permanent nature such as," and then it talks about a stairway.

1 At the bottom of that quote it says, "In such circumstances where
2 the defendant either created a condition or is responsible for
3 it, is deemed to know the condition and for no further proof of
4 notice is necessary."

5 Plaintiffs in their response talk about that responsible
6 for it, but as you read on, you'll realize what the Court is
7 saying, responsible for the defect, not responsible for the
8 condition. They talk about that if you didn't create the problem
9 then notice needs to be established. If you created the problem
10 or are responsible for the problem, i.e. a design person or
11 something like that, then in that circumstance no notice is
12 necessary because you created it or are responsible for it being
13 created.

14 If you read with me at the top of the next column they
15 explain -- starting at the very bottom of the first column on
16 page 5 it says, "We conclude, however, that the instant case
17 which was a" -- again a railroad crossing with this protuberance,
18 a defect of sorts, or at least that was the claim -- "we conclude
19 that the instant case does not fall within the no notice category
20 of cases that we articulated in Allen and Schoonerpase, because
21 here the defendant did not create the unsafe condition and is
22 responsible for it only in the context of maintenance, not for
23 its existence in the first place."

24 That's precisely what we have here. The allegation is
25 going to be somehow by an expert, which I'll talk about in just a

1 moment, that perhaps there was a code violation. The stair fell,
2 and there are some photos of this, your Honor, in the material.
3 There is a stringer that goes along the side of each side of the
4 stairway, and then the treads go -- actually, they're supported
5 by -- relying on a cutout on either side. It's like a support on
6 either side of the tread or the stair itself into that stringer
7 that gives it support.

8 They maintain there are code violations. That may well
9 be. The point is, your Honor, my client -- and there are no
10 facts that establish this -- had anything to do with creating the
11 problem.

12 So the Court tells us that when that's the case, if you
13 go back to the very bottom of that second column on page 5
14 starting -- it says, "If a plaintiff alleges that a defendant
15 negligently failed to remedy a dangerous condition that the
16 defendant did not create, negligently failed to repair a
17 dangerous malfunction in an otherwise safe system, or negligently
18 allowed an otherwise safe condition to degrade over time into a
19 dangerous condition, then the evidence of -- then evidence of
20 notice and reasonable time to remedy are required to survive a
21 motion for summary judgment."

22 Then again, "These requirements do not apply where the
23 negligent claim requires the plaintiff to establish that the
24 defendant actually created the dangerous condition or purposely
25 built the dangerous condition into the system for which the

1 defendant is responsible. The rational behind these distinct
2 rules is that a -- is that it is reasonable to presume that a
3 party has notice of condition that that party himself -- or party
4 itself creates, but it is not reasonable to presume notice of a
5 condition that someone else creates."

6 So I think it's very, very clear here under the facts
7 that since my guy did not buy -- did not create it, was not
8 responsible for creating it, came in nine months before and
9 purchased it, inspected it, had it inspected for him and then had
10 no notice of any problems whatsoever, even by the user -- daily
11 users of this step, that this case applies. There must be
12 absolute notice established, and there is none.

13 Plaintiffs attempt to get around this by attempting to
14 establish constructive notice, and they do it rather curiously in
15 a way that I quite honestly don't understand. If you'll look at
16 their responsive memorandum they talk about some factors that
17 they believe -- or that they attempt to establish constructive
18 notice under. .

19 For example -- and I'm reading from page 8 of their
20 brief. It's here that they make the argument that this
21 constructive notice existed. They say Herb Treanor, my guy, knew
22 that it had been built in 1985. Okay. True. That that was his
23 primary -- the egressing and to and from the apartment. That's
24 true. It had been there for 20 years. That's true. That there
25 had been no structural changes made. That's true.

1 That Mr. Treanor failed to verify whether the tread
2 properly fit into the pocket into the stair stringer. Well,
3 that's not true. He did what was reasonable, and I'll discuss
4 that in just a moment.

5 They then rely upon an expert, Mr. Brunetti, to support
6 their contention that a reasonable inspection would have revealed
7 that the integrity of the stair was in question. Well, first,
8 the factors they attempt to state create constructive notice do
9 not apply here. You've got to understand, your Honor, these
10 stairs are stairs that are -- they're not truly outside, they are
11 covered, but they are wrapped in a carpet. On the edge they have
12 a metal edge, and they go into a wall and you cannot see the
13 stair or the stringer that holds them in place.

14 Initially in his deposition -- I took Mr. Brunetti's
15 deposition and I asked him, I said -- and we cite and quote from
16 his deposition and we say what could he have done? In essence he
17 said he could have done nothing; there's nothing he could have
18 done to find this. I said, "Well, is it reasonable for him to
19 have this MIA adjustor go out and do an inspection?" He said,
20 "Absolutely."

21 The plaintiffs then come back with an affidavit that
22 attempts to support their contention that a reasonable inspection
23 would have revealed this problem. However, in doing so they
24 attempt to rely partly on the fact that my client has some
25 construction experience, and they attempt to establish a

1 different duty based upon his background.

2 What we did, your Honor, we went to the law and in our
3 responsive memorandum we cited to a case by the name of Mitchell
4 vs. Christensen. This case arises in a little different context.
5 There's a whole lot of law out there regarding buyers and sellers
6 when defects occur when somebody buys a house, as you might
7 imagine. The law there is very clear that the duty to inspect is
8 the proper standard for the discoverability of defects is of an
9 ordinary person. In other words, they can't slide the scale
10 based upon my guy's background.

11 In fact, when Mr. Brunetti had to have done his
12 homework, I would argue, he had no idea that my client had any
13 construction experience. He said there was nothing he could have
14 done to discover this alleged defect. It was only after he went
15 back and -- after I took his deposition and read some stuff,
16 found out that he was a contractor for a number of years that he
17 said, "Oh, yeah, he could have done something."

18 Well, it would be like, in my mind, creating a different
19 standard of care for people who drive a vehicle. They're all
20 held to the same standard of care whether they're 16 or 60, and
21 the Court sets the duty, not Mr. Brunetti. The law has
22 established that duty. So we believe that there is no issue of
23 fact at all pertaining to any of the inspection, and we believe
24 this is just what it was, it was an unknown condition that was
25 unknowable to anyone until this unfortunate accident happened.

1 As a result under the law which we've cited, and we rely
2 heavily on our briefs, your Honor. I don't mean to suggest
3 otherwise that my client is -- that there are no issues of fact
4 which would -- genuine issues of fact which would in any way
5 prevent (inaudible) and we'd ask the Court to do so.

6 THE COURT: All right. Thank you, Mr. Plant.

7 MR. PLANT: Thank you.

8 THE COURT: Mr. Ivie, you may respond.

9 MR. IVIE: Thank you, your Honor. Your Honor, I think
10 just perhaps an overview as you've definitely discerned the Goble
11 case which appears to be (inaudible). The Goble case discusses
12 the two classes of situations that I think if we go to the
13 obvious extremes where there's no grey areas we can see the
14 situation.

15 If it's one of those cases, for instance, in a
16 supermarket where a grape falls on the floor, the owner of that
17 property cannot really be held accountable in strict liability
18 fashion to be able to correct that defect without some sort of
19 notice. The store owner has to be able to clean that up. Some
20 of the cases that have been cited deal with ice cream on the
21 floor or deal with cottage cheese on the floor. Those are cases
22 that have gone up where the store owner or the property owner
23 requires notice.

24 On the other end of the spectrum are the cases where
25 it's quite clear that defective property conditions are the

1 responsibility of the owner, and that their duty should be to --
2 first of all, the original owner should design it properly, build
3 it properly, and we contend that it would also include subsequent
4 owners such as Mr. Plant's client in the present case. We
5 believe that that is discussed in the distinction between the two
6 classes of cases that Justice Durham cites to in the Goble case.

7 Now what Durham indicates is that first of all, the
8 classes in the first instance where notice is required as well as
9 an opportunity to correct, he states, "It is quite universally
10 held that" --

11 THE COURT: Refer me to your page, Mr. Ivie.

12 MR. IVIE: On my page which is Lexis, it's page 8. I
13 believe (inaudible) we have, your Honor.

14 THE COURT: Yeah. Yeah.

15 MR. IVIE: Page 8 right hand column very bottom.

16 THE COURT: Okay.

17 MR. IVIE: Okay. She states, "It is quite universally
18 held that fault cannot be imputed to the defendant so that
19 liability results therefrom unless two conditions are met. A)
20 that he have knowledge of the condition, that is either actual
21 knowledge or constructive knowledge." Now that constructive
22 knowledge is critical because it is plaintiff's position in the
23 case, first of all, that we think this is a no notice case; but
24 if it is a notice case, summary judgment would be inappropriate
25 because there's sufficient facts to establish constructive

1 knowledge.

2 The quote goes on to say, "Because the condition had
3 existed long enough that he should have discovered it, and that
4 after such knowledge sufficient time elapsed that in the exercise
5 of reasonable care he should have remedied it."

6 Now at that point Durham addresses the no notice class
7 of cases. "The second class of cases, however, involve some
8 unsafe condition of a permanent nature, such as in the structure
9 of the building or of a stairway, et cetera, or in equipment or
10 machinery or in the manner of use which was created or chosen by
11 the defendant or his agents, or for which he is responsible. In
12 such circumstances where the defendant either created the
13 condition or is responsible for it, he is deemed to know of the
14 condition, and no further proof of notice is necessary."

15 So the two classes of cases, if we look to the extremes,
16 the stairway or some design defect is clearly considered in that
17 second class of cases.

18 Now we apply that to the facts in Goble with the
19 railroad crossing, and they indicate that in that case where if
20 you look to the facts that are cited in Goble, there were many
21 parties that had potential liability. As a matter of fact, Union
22 Pacific had settled out. The designer of the rubber mats that
23 created the condition had settled out. UTA was a party to it.
24 There were all sorts of multiple parties, and it is explained
25 early on in the Goble decision that Southern's responsibility was

1 to maintain the property.

2 They look to that in placing this in the grey area of
3 the notice being required portion that they only had a duty to
4 maintain it. Now apply that to the facts of the current case,
5 and we suggest that there is no reason for saying that stairways,
6 which are specifically enumerated by the Court as one of the
7 second class or no notice cases, should fall within that fact
8 situation where many parties are responsible for this crossing,
9 and where Southern's responsibility was simply to maintain the
10 crossing. They didn't create it. They simply had a duty to
11 maintain.

12 We submit, then, that this is a no notice case, but if
13 the Court finds that it does fall within the class of cases that
14 require notice and an opportunity to repair, we would also submit
15 that sufficient facts are there to go to the jury.

16 As we have set forth -- and the original deposition of
17 our expert, Mr. Brunetti, we would like to become part of the
18 record. I believe the original is in Mr. Plant's possession but
19 he probably didn't bring it here today. I have a condensed
20 transcript that I wonder if we could stipulate to have the Court
21 consider that as the original.

22 MR. PLANT: That's fine.

23 MR. IVIE: Okay.

24 (Counsel confer with one other)

25 THE COURT: He has signed?

1 MR. IVIE: Yes. May I approach?

2 THE COURT: Yes, you may.

3 MR. IVIE: Mr. Brunetti's report is contained in the
4 back of that as an exhibit, and it also was produced and should
5 be part of the Court's file as part of our supplemental
6 disclosures of expert opinions. He indicates a number of ways
7 that this stairway was allowed to cause this terrible accident.

8 To let the Court know, because I'm not certain that it's
9 really clear in the memorandum how this is designed; Mr. Plant
10 explained it fairly well. The attachments to Mr. Plant's
11 original motion indicate his client had built a number of
12 apartment complexes, and had always used steel stringers and
13 treads. That is what typically we see in Utah in apartment
14 complexes or commercial buildings is steel stairways with steel
15 treads that are usually built of concrete.

16 In this case it was designed so that one-and-one-half
17 inch stringers had a pocket cut into them, and inside that pocket
18 the edges of the wood treads was set to fit. Now nails were then
19 driven into that and the photographs of the failed tread in this
20 case indicate that those nails had been exposed long enough to be
21 rusted.

22 This is not a type of construction that the
23 plaintiff had ever used in his buildings, and it is according to
24 Mr. Brunetti in his report, a negligent type of design. He
25 indicates on page 2 of his report that the way the stair treads

1 are cut into the stair stringers is not consistent with adequate
2 bearing of the tread onto the stringer. That's in the note about
3 a third of the way down.

4 He also indicates that the wood material used to build
5 the stairs is not of the size required by the 1985 code. At the
6 beginning of his report he indicates that it is the duty of the
7 land owner to continue to maintain the property consistent with
8 the 1985 code. So that would become a duty of Mr. Plant's client
9 in this case to continue to maintain it in that condition. So
10 from the time that he took possession, they would have a duty to
11 bring it up to code.

12 He indicates that -- about a fourth of the way up from
13 the bottom on page 2 that the wood members used to build the
14 staircase measure one-and-one-half inches of S-4-S material. He
15 goes on to indicate on page 3 towards the top that wood stairways
16 in multiple family dwellings have a higher need for best
17 management practices, and that wood has a tendency to shrink,
18 therefore competent building maintenance personnel need to be
19 aware of these high use areas containing wood supporting members.
20 Then he quotes, "As wood loses or gains moisture it will shrink
21 or swell. Because of its cell structure, wood shrinks primarily
22 in width and thickness and very little in length."

23 Well, what we indicates in the next paragraph is that
24 the wood had actually shrunk, which is something that will happen
25 in a desert climate, and it had actually come loose at the pocket

1 and was being held only by those rusty nails.

2 He goes on further to indicate that the wood itself had
3 cracked. We have stair tread in our possession, and it will be
4 available for trial still with the carpet covering on it, and
5 that's the next thing is the carpet covering makes it hard to
6 detect the condition.

7 Now I think that will be critical, and I have located a
8 couple of new cases in preparing for oral argument today that
9 indicate what only is rational, and that is a user of that
10 stairway, whether it be his -- the plaintiff's children, who were
11 tenants in the apartment complex, or the plaintiff himself
12 certainly, have no ability to remove that carpet and check for
13 defects in the stairway. The only one that can do that is the
14 building owner. Because of that the building owner has the duty
15 to make certain that when there is a stairway like the one in
16 this case, which is not designed the way that he put in stairways
17 into the buildings that he had, that he designed and built.

18 Also, as he indicated that he was concerned enough about them
19 that he would jump up and down on them when he was considering
20 the purchase of it because of this rather odd construction, that
21 there should be some heightened duty on behalf of the landlord.

22 Now Mr. Plant indicates -- and I received a reply brief
23 on Friday, and he makes the argument again here today. He says,
24 "Under Utah law with respect to the purchase of real property,
25 the proper standard for the discoverability of a defect is that

1 of an ordinary prudent person." Well, a couple of points can be
2 made there, your Honor.

3 First of all, the standard is not merely an mythical
4 ordinary and prudent person. It's an ordinary and prudent person
5 under the circumstances that face the defendant or anyone else
6 who's negligence is weighed by the jury.

7 To that extent, the skill, experience, training of
8 Mr. Treanor, the owner of this property, is critical evidence.
9 Now this was specifically discussed in his deposition -- or
10 excuse me, in the deposition of Mr. Brunetti. So to the extent
11 that Mr. Plant makes it seem that perhaps this is some surprise
12 that Mr. Treanor -- his client's experience may play an important
13 part in determining whether or not he noticed this defect,
14 whether he had constructive notice of it, and whether he remedied
15 the defect, Mr. Plant was aware that this was not an opinion that
16 he had reached that he's contradicting in a subsequent affidavit.

17 If I may, on page 77 of Mr. Brunetti's deposition, line
18 19 he's asked on 19:

19 Q. There have been three additional
20 depositions taken in this case that you
21 apparently haven't seen.

22 He says:

23 A. Okay.

24 And we discuss who they were. On page 78, line 4
25 the other deposition is Mr. Treanor's.

1 Q. What would you be looking at in these
2 depositions?

3 A. Well, I would be looking at Mr. Treanor's
4 background in terms of how many properties he owns.
5 I'm sure it's been asked and answered in the depos,
6 I would think.

7 Q. BY MR. PLANT: It was.

8 A. Obviously all depositions --
9 Skipping down to 16 or 17.

10 A. Secondly, I -- and that's important to
11 me because if he's a professional property owner,
12 I would expect his knowledge and understanding of
13 maintenance to be higher than the average person's.
14 Okay, that was one thing I would be looking for.
15 Then on page 79, line 2.

16 A. I would be looking for his credibility as
17 a land owner. Not just his financial credibility, but
18 his background, which I'm going backwards again to what
19 I was talking about earlier and what people he relies on
20 to render opinions on his behalf. Who is an extension
21 of himself and what is the person's qualifications.
22 Those are the things I would be looking for.
23 So then on line 12:

24 Q. Here's the way I'm going to leave this.
25 This is Mr. Plant.

1 Q. I'm not going to do anything further today.

2 I'm going to term -- or to not terminate the
3 deposition, but continue the deposition subject
4 only to your providing us a supplemental report.

5 And he says:

6 A. I understand.

7 Quite simply, your Honor, this isn't surprise and
8 it's not contradiction. It was specifically discussed there.
9 Mr. Plant specifically indicated to the witness that yes, he had
10 been questioned about his skill and experience, and basically as
11 the supplemental pages (inaudible) original motion indicate his
12 client has 40 years of experience in the construction business.
13 It wasn't a full time job, but for 40 years he's maintained a
14 license and built numerous single family homes, commercial
15 project, and I believe currently owns approximately five
16 apartment complexes.

17 This all falls within reasonableness under his
18 circumstances. No, it's not a professional type of -- as it
19 would be in a malpractice action. It's just a landowner in his
20 circumstances as -- obviously public policy would suggest should
21 be held to reasonableness with his degree of care as opposed to
22 mom and pop who own their home and perhaps have never owned a
23 house before, don't know what things should be checked on a
24 regular basis. Clearly we think those are facts that the jury
25 should apply in determining whether or not there was actual

1 notice here, whether or not there was negligence.

2 Now finally, your Honor, I would indicate as I said
3 earlier that this weekend while I was working on jury
4 instructions and also preparing for this, I was finally able to
5 locate a couple of stairway cases from other jurisdictions that I
6 think are instructive.

7 One of those cases was just handed down within the last
8 few weeks out of New York, and is probably the closest on point
9 to the current case. In that case the Court with facts that were
10 nearly identical to those here did not apply strict liability as
11 Mr. Plant correctly points out that Justice Durham rejected in
12 the Goble decision, but did apply the theory of res ipsa loquitur
13 to a stairway case.

14 The case in question, and I can provide the Court with
15 either copies of the cases or a supplemental brief, but it's
16 Toraz vs. Hordice (phonetic) and this is a 2006 case. It's out
17 of New York, 11 Miscellaneous 3rd 23, the Westlaw cite. It's
18 2006, Westlaw, 176941.

19 In that case the plaintiff was a meter reader from
20 Consolidated Edison. While she was descending a wooden staircase
21 leading to the basement of residential premises owned by the
22 defendant, it was her testimony that as presented in trial that a
23 recurring leak in the area had rotted the steps and handrail
24 causing them to collapse on her.

25 Now in that case, the thing that was considered by the

1 Appellate Court was the trial Court denied plaintiff's request
2 for a jury charge on res ipsa loquitur on the ground that the
3 doctrine is inapplicable where the plaintiff's witnesses gave a
4 complete explanation of what happened.

5 The Appellate Court in that case held that to invoke the
6 doctrine of res ipsa the plaintiff must establish three things,
7 and I think that these are the critical considerations here.
8 That the accident was not of a kind ordinarily occurring in the
9 absence of negligence. Second, that the instrumentality or
10 agency causing the accident was within the defendant's exclusive
11 control. Three, that the accident was not due to any voluntary
12 action or contribution by the plaintiff.

13 Direct quote from the Court. "The first and third
14 elements of plaintiff's res ipsa claim were clearly established,
15 and indeed are not now challenged on appeal. Stairs and
16 protective hand railings do not generally collapse and fall
17 apart" -- excuse me -- "apart in the absence of negligence, i.e.,
18 due to faulty installation, maintenance or repair. The mere act
19 of walking down stairs while holding on to the railing does not
20 make the accident plaintiff's fault or put the stairs and railing
21 under his control."

22 The Court cites some cases in support of that. The
23 Court then says, "With respect to the element of exclusive
24 control, trial testimony that the basement staircase was
25 infrequently used by a single tenant was of sufficient

1 exclusivity to fairly rule out the chance that the defect was
2 caused by some agency other than defendant's negligence."

3 Well, in this case we've got the same aspects of the
4 first two elements as was present in this New York case. As to
5 the third, as Mr. Plant conceded, there's no real dispute as to
6 how this accident occurred. It was very clearly this one stair
7 tread giving way, and we would submit that that brings it within
8 the clear purview of res ipsa as considered by that Court.

9 Now there are two other cases that I located in
10 following up on this, and the other one is an old 1932 New York
11 case, Caps vs. Goldring, which is 260 New York 2nd, 796, 1932.
12 This case in an old tenement building a plumber and his helper
13 replacing wash tubs with sinks, a new modern convenience.

14 They were on the landing of the stairway, and that gave
15 way. The trial Court charged the jury that they would need to
16 have actual notice. Here's the jury instruction. "The premises
17 involved in this case are admittedly a tenement house and the
18 duty defaults upon the defendant who is the owner to keep the
19 stairway and its landings in good repair, and not to permit it to
20 be an unsafe and dangerous condition at any time prior to the
21 accident. The defendant is not liable unless you find from all
22 of the evidence in this case that the defendant had notice or
23 knowledge of the existence of the unsafe and dangerous condition.

24 "In other words, gentlemen, the mere existence of an
25 negligent condition without notice of its existence either as a

1 matter of personal knowledge or for the reason that it obtained
2 for such period of time that in the exercise of ordinary care the
3 landlord could or should have known of its existence does not
4 create a liability."

5 The Court refused the request of plaintiff's Counsel to
6 charge this -- to give this as an instruction. "If the jury
7 finds and believes that this accident happened because the
8 landing on which the plaintiff was walking down fell with the
9 plaintiff on it, and that no act of negligence on his part
10 contributed to it, and that there is no satisfactory explanation
11 of the cause of the falling by the defendant, then in (inaudible)
12 plaintiff may recover."

13 So in that case the Appellate Court reversed holding
14 that the doctrine of res ipsa loquitur applies, that actual or
15 constructive notice need not be proved because the defect was
16 apparently structural in nature.

17 It takes us back to Goble. The structural part of it
18 is what turns it into a no notice case. That's the critical
19 distinction. It's not ice cream, cottage cheese or grapes. It's
20 the structural link that says it's a no notice case. However,
21 here they applied res ipsa.

22 One final case, and that's one out of Ohio that I
23 discovered, McConohead vs. Hortious (phonetic) and this was a
24 Westlaw cite from 2005. So once again since this case was filed
25 in this Court. It's 2005 Westlaw 121656. Now in this case it's

1 interesting because a father, as in this case, was descending a
2 staircase in his daughter's home which she was leasing, and it
3 ruptured beneath him causing him to fall into the staircase. So
4 almost the same facts here, only it's interior to the home.

5 Now the Court made a critical comment on the fact that
6 the stair was covered with carpet. In that case the Court held
7 that where the daughter leased the present -- well, let me just
8 quote from the Court. "The doctrine of res ipsa loquitur creates
9 an inference of negligence upon proof. Appellant had exclusive
10 control of the instrument causing injury and the accident was one
11 that would not ordinarily happen in the absence of negligence."

12 They then have some cites, and then it says, "Appellants
13 argue appellees did in fact have exclusive control over the
14 staircase; therefore, the res ipsa doctrine applies. We agree a
15 tenant's possession of the premises is not equivalent to control,
16 nor does possession in the case of a landlord's exclusive
17 management end control.

18 "Further, the alleged defects sub (inaudible) was
19 covered by carpeting on the stairs. To inspect the alleged
20 defect would require removal of the carpeting by the tenant. We
21 find the authority to remove the carpet and make any necessary
22 repairs discovered rests with the landlord, and would require
23 approval of the landlord. Based upon the foregoing we find the
24 appellee/landlord maintained exclusive maintenance and control
25 over the alleged defect despite tenant's possession of the

1 premises."

2 Quite simply, your Honor, I think that it comes down to
3 this. Summary judgment is not appropriate here because depending
4 how the evidence comes in at trial, it's going to be clearly a no
5 notice case -- well, it may not be so clearly. I think we're
6 falling within the grey area because of some of the language in
7 Goble and trying to fit this -- fit the Goble facts in between
8 the no notice and notice cases. I think depending on the
9 evidence at trial it's going to have to come down to then on
10 whether or not this is considered a no notice case or a notice
11 case. If it is a notice case we've cited the argument that
12 constructive notice is present, and it is clearly an issue that
13 should be submitted to the jury if notice is required.

14 Finally, the recently discovered case law and res ipsa
15 loquitur would appear to be the soundest reasoning that a
16 commercial landlord such as this has this type of defect as close
17 to the mom and pop situation. That is the standard of care that
18 should be applied.

19 THE COURT: All right. Thank you, Mr. Ivie.

20 I'll grant you a few minutes response (inaudible).

21 MR. PLANT: And I'm (inaudible) because I have another
22 matter (inaudible) your Honor.

23 What Mr. Ivie, bless his heart, attempts to do in this
24 Court has not read the Goble case. The Goble case is very
25 straightforward in that it addresses a situation such as here

1 where the owner of the premises, the person responsible for it,
2 did not create the problem. It couldn't be more clear when they
3 say, however -- "We conclude, however, that the instant case
4 does not fall within the no notice category of cases that we
5 articulated in Allen and Schoonerpase, because here the defendant
6 did not create the unsafe condition and is responsible for it
7 only in the context of maintenance, not for its existence in the
8 first place."

9 They go on to say and give this Court incredible
10 guidance. Normally we don't get this, and this is a 2004
11 decision. The Court should remember that. The most recent
12 pronouncement of our Courts, not the New York Supreme Court.

13 They go on to say, "If a plaintiff alleges that a
14 defendant negligently failed to remedy a dangerous condition that
15 that defendant did not create, they must come forth with notice."
16 That's on the bottom of page 5 and top of page 6.

17 So I invite the Court to read this case. Mr. Ivie has
18 done what he should have done and tried to convince the Court
19 that it doesn't say what it says, but it does say what it says.
20 Under our facts the Allen case dealt with a defendant that
21 created the problem. I have no problem if you're going to create
22 this problem, you should be charged with notice of it. Here my
23 guy owned this thing for eight months. He did not -- nobody has
24 said he had anything to do with creating the problem. So that
25 is -- it is a notice case. To do otherwise, your Honor, would be

1 to mandate and hold my client absolutely responsible for this
2 case -- or for this matter on a strict liability basis.

3 I want to read the Court some of what Brunetti, their
4 expert said, in the deposition that Mr. Ivie has published. He
5 talks about some things on page 74 at the top, line 2. He says:

6 Q. Well, after it was built, tell me every
7 criticism you have of him in regards to him being
8 the purchaser, my client, irregardless of the code
9 or otherwise. Stated another way, what should he
10 have picked up on these code violations.

11 A. Mr. Treanor himself?

12 Q. Yes.

13 A. I don't know how he could have.

14 Well -- and then he goes on on the next page and he
15 talks about the fact that Mr. -- on the top of page 75 how
16 Mr. Treanor retained an MIA appraiser. He testifies that that's
17 exactly what he should have done; that's fulfillment of his
18 obligation in that regard.

19 So my guy -- here's what Phil has to have this Court
20 believe. There are thousands of stairs in this complex. That we
21 were supposed to rip the carpet off of every one to do a quote,
22 "reasonable inspection," unquote to see if there's someone we
23 could see into the tread, into -- excuse me, into the stringer
24 and see if it goes in there far enough. That's what they're
25 asking us to do.

1 Yet he also said, "I don't know how he could have done
2 that." That's precisely what their own expert said. That's the
3 notice, this constructive notice that they would want this Court
4 to believe that there's some sort of an issue about. There
5 simply is no issue.

6 This was a latent hidden defect that could not have been
7 discovered by anyone. They attempt to say -- my -- Herb Treanor,
8 82-years-old, should know that, your Honor. He did get involved
9 with the construction industry, but we (inaudible) Utah case
10 (inaudible). It's cited in my brief, and it talks about this
11 duty of inspection. That case dealt with a leaking swimming
12 pool. It talked about the fact that the defendant there was a
13 construction guy. The Court specifically rejected that an owner
14 has an obligation based upon his background, but rather it's the
15 ordinary prudent person. It's everybody is the same in regards
16 to that obligation.

17 More importantly than that, what is it that my guy knew
18 that was going to give him greater insight? Mr. Ivie said he
19 never built one of these staircases, never seen one built. So
20 what does that give him? The fact that he's in the construction
21 industry, he looks at them, he jumps on them. No notice. No
22 actual notice of any problems, and that's not been alleged here.
23 Let's not forget, there's nothing that's been alleged that even
24 gave him any notion to do anything more than walk on the stairs.
25 If it had wobbled, if it had creaked, if it had moved, I'll give

1 you it's a different case. It did none of that up until the very
2 moment that it failed.

3 So to make -- to come in and make my guy do something
4 different under these circumstances is just opposed to everything
5 I've quoted to the Court.

6 Now talk about res ipsa. Res ipsa doesn't apply here
7 for two reasons. Number one, my client didn't have exclusive
8 control over this -- over these stairs. They were out there.
9 They were built by someone else. Mr. Ivie made an interesting
10 point in Goble. Those folks settled out in Goble, the people
11 that built the railway crossing, the manufacturer of the rubber
12 mat.

13 The designer, the builder, the prior owners are not even
14 named here, but that doesn't mean they are not the responsible
15 parties. They didn't settle out because they were never named.
16 My guy's here just like Southern Railroad was there as the last
17 guy who has this place, but that doesn't give him any greater
18 responsibility.

19 I would ask and I would appreciate if the Court, if you
20 haven't done so, just take a minute before you rule to read
21 Goble. I am so confident that you will realize that this case
22 comes squarely into this that you won't have to worry about a New
23 York case (inaudible) New York, that our Court has given us the
24 guidance that it wants our Courts to have, and under Goble we
25 win. We have to win because as the Court says, in order to

1 defeat a motion for summary judgment the plaintiff must show
2 evidence of notice under these circumstances.

3 They tell you that in this case. That's rare. They
4 didn't. They can't. We have -- the Court, therefore, is
5 obligated to grant our motion, and we would ask you to do so.
6 Thank you.

7 THE COURT: All right. Gentlemen, thank you for your
8 presentation. I'll take the motion under advisement and notify
9 you of my decision by minute entry ruling, assuming I'm able. I
10 realize we have a trial date that's been set in this matter, so
11 I'll (inaudible) get it out shortly. Thank you.

12 (Hearing concluded)

REPORTER'S CERTIFICATE

STATE OF UTAH)
) ss.
COUNTY OF UTAH)

I, Beverly Lowe, a Notary Public in and for the State of Utah, do hereby certify:

That this proceeding was transcribed under my direction from the transmitter records made of these meetings.

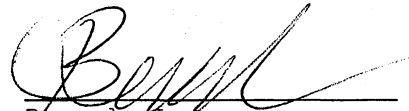
That this transcript is full, true, correct, and contains all of the evidence and all matters to which the same related which were audible through said recording.

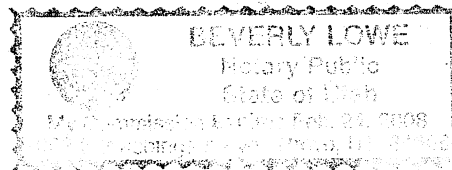
I further certify that I am not interested in the outcome thereof.

That certain parties were not identified in the record, and therefore, the name associated with the statement may not be the correct name as to the speaker.

WITNESS MY HAND AND SEAL this 17th day of July 2006.

My commission expires:
February 24, 2008


Beverly Lowe
NOTARY PUBLIC
Residing in Utah County



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EXHIBIT 2

Trial Court's Minute Entry and Order Granting
Summary Judgment

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

FILED DISTRICT COURT
Third Judicial District

WESLEY A. MATHESON and LOIS
MATHESON,

Plaintiffs,

vs.

MARBEC INVESTMENTS, LLC, dba
ELMWOOD APARTMENTS, LLC.,

Defendants.

MAY 17 2006
SALT LAKE COUNTY
By DLB
Deputy Clerk

MINUTE ENTRY

Case No. 050901427

Hon. J. DENNIS FREDERICK

May 15, 2006

The above-entitled matter comes before the Court pursuant to Defendant Marbec Investments, d.b.a. Elmwood Apartments, LLC's Motion for Summary Judgment. The Court heard oral argument with respect to the motion on May 8, 2006. Following the hearing, the matter was taken under advisement.

The Court having considered the motion, memoranda, exhibits attached thereto and for the good cause shown, hereby enters the following ruling.

This personal injury case comes before the Court the result of injuries sustained by Plaintiff Wesley Matheson due to a fall occurring as he assisted his son in moving furniture down some stairs at the Elmwood Apartments.

With this motion, Defendant argues the undisputed evidence establishes that it did not breach any duty owed to Mr. Matheson and was not negligent. Specifically, Defendant asserts there is

no dispute that prior to the accident Defendant had no notice of any problems with the stairway at issue. Under Utah law, contends Defendant, it must have notice of the problem and then fail to remedy it within a reasonable time. *See Goebel v. Salt Lake City S.R.R. Co*, 104 P.3d 1185 (Utah 2004). Because Plaintiffs cannot meet this standard, asserts Defendant, summary judgment should be entered dismissing this matter.

Plaintiffs oppose the motion arguing the condition of the stairs on which Plaintiff Wesley Matheson was standing when the stair failed was a permanent unsafe condition for which Defendants were responsible. Therefore, contend Plaintiffs, under the applicable Utah law they were not required to have notice of the condition and liability should attach.

In the alternative, assert Plaintiffs, if the condition of the stairs was a temporary unsafe condition, Defendant had constructive notice of the condition of the stairs as Herbert Trayner (a licensed contractor and principal of Defendant who inspected the Elmwood Apartments prior to their purchase in May 2000) should have known the stairs were unsafe given that they were constructed of wood in 1985, exposed to the elements for 20 years, and that Mr. Trayner failed to verify that the stair tread fit adequately into the pocket contained on the stair stringer prior to his purchase of the Elmwood Apartments. As such, argue

Plaintiffs, liability should attach to Defendants for their failure to remedy the condition prior to Mr. Matheson's fall.

While at first blush, this appears to be a "permanent" unsafe condition case, *Goebel* makes clear that matters such as this (where Defendant did not create the unsafe condition and is responsible for it only in the context of maintenance, not for its existence in the first place) are to be treated as "temporary" unsafe conditions. Indeed, similar to the *Goebel* case, the proximate cause of Mr. Matheson's injuries is the breakdown or degradation of something (the stairs) that was not alleged to have been negligently created or installed. This said, the undisputed evidence clearly establishes that Defendant had no notice of the problem with the stairs, actual or constructive. Consequently, summary judgment, as requested, is appropriate and granted.

DATED this 17th day of May, 2006.

J. DENNIS FREDERICK
DISTRICT COURT JUDGE



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 050901427 by the method and on the date specified.

METHOD	NAME
--------	------

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------	--

Mail	TERRY M PLANT ATTORNEY DEF 136 EAST SOUTH TEMPLE SUITE 1700 SALT LAKE CITY UT 84111
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Dated this 17th day of May, 2006.

C. Beverley
Deputy Court Clerk

FILED DISTRICT COURT
Third Judicial District

MAY 31 2006

SALT LAKE COUNTY

By Deputy Clerk

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IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

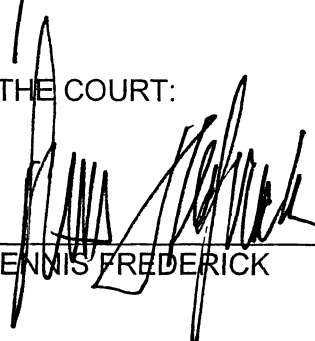
WESLEY A. MATHESON and LOIS)	
MATHESON,)	
)	ORDER GRANTING DEFENDANT
Plaintiffs,)	MARBEC INVESTMENTS, LLC., DBA
)	ELMWOOD APARTMENTS, LLC.'S
v.)	MOTION FOR SUMMARY JUDGMENT
)	AND DISMISSAL WITH PREJUDICE
MARBEC INVESTMENTS, LLC., dba)	
ELMWOOD APARTMENTS, LLC.)	Civil No. 050901427
)	Judge: Frederick
Defendants)	

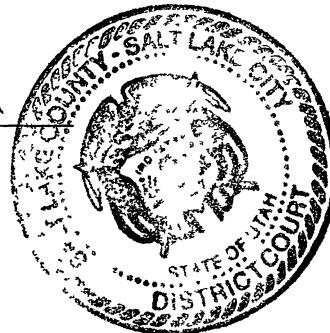
The Motion for Summary Judgment of the Defendant Marbec Investments, LLC., dba Elmwood Apartments, LLC having come before the Court for oral argument on May, 8, 2006, R. Phil Ivie having appeared for and on behalf of the Plaintiffs, and Terry M. Plant, having appeared for and on behalf of the Defendant, and having considered the argument of counsel as well as written briefs submitted by the parties hereto and good cause appearing therefor, the Court hereby grants the motion of the Defendant and in doing so dismisses all claims of the Plaintiffs Wesley A. Matheson and Lois Matheson against the Defendant Marbec Investments, LLC., dba Elmwood Apartments, LLC with prejudice and on the merits.

The Court hereby adopts its reasoning as set forth in its Minute Entry dated May 15, 2006, and signed on May 17, 2006, which is hereby incorporated by this reference.

Dated this 30th day of May, 2006.

BY THE COURT:


J. DENNIS FREDERICK



Approved as to form:


R. Phil Ivie 5-22-06

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing document was mailed, postage prepaid, this 26th day of May, 2006 to the following:

R. Phil Ivie
IVIE & YOUNG
2260 West 2230 North, Suite 110
PO Box 657
Provo, UT 84603
Attorneys for the Plaintiffs

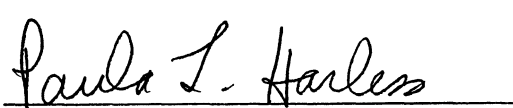
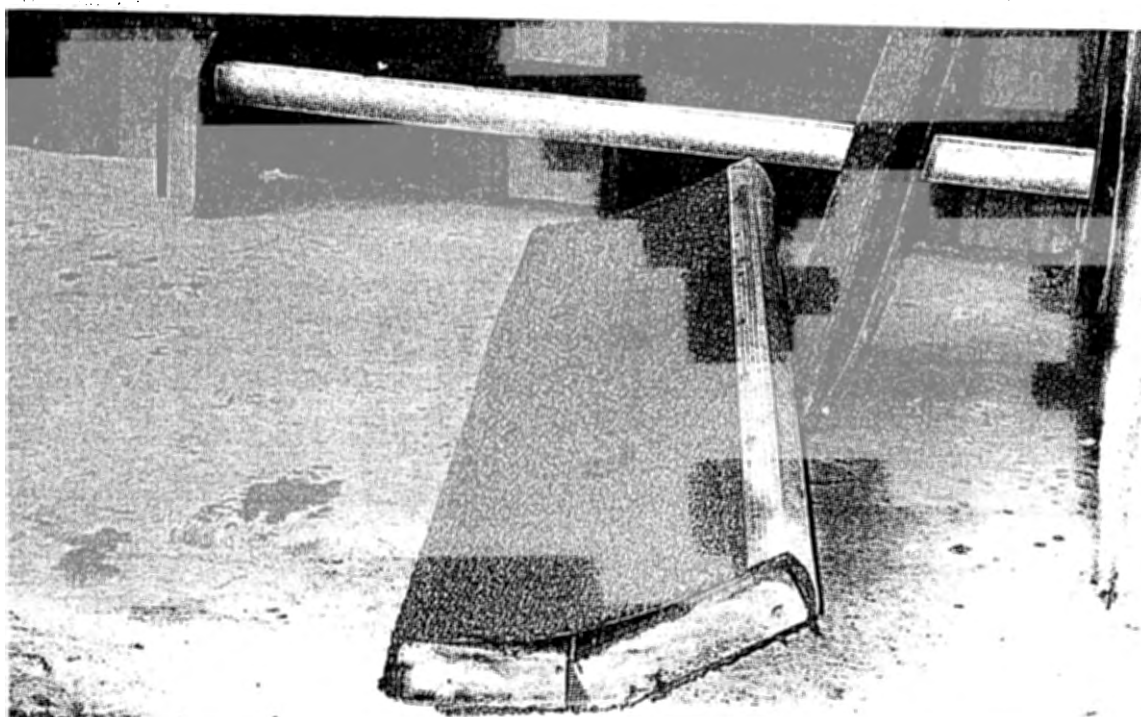
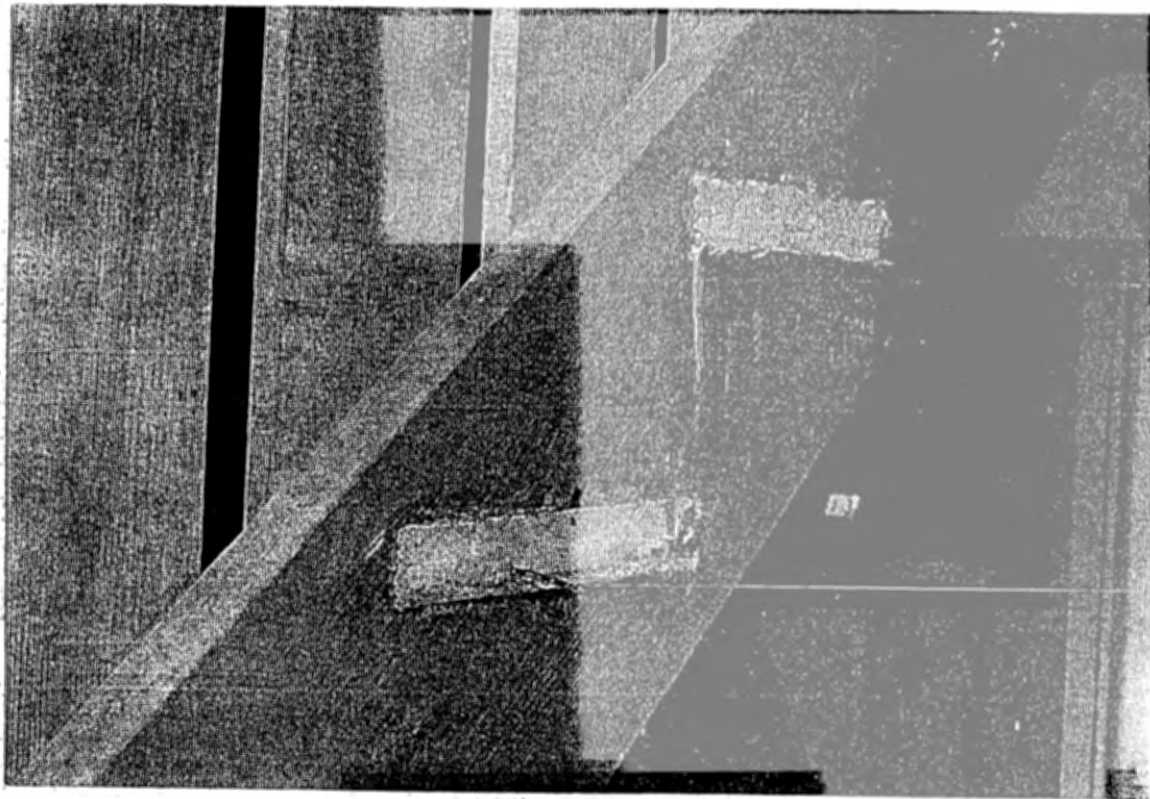
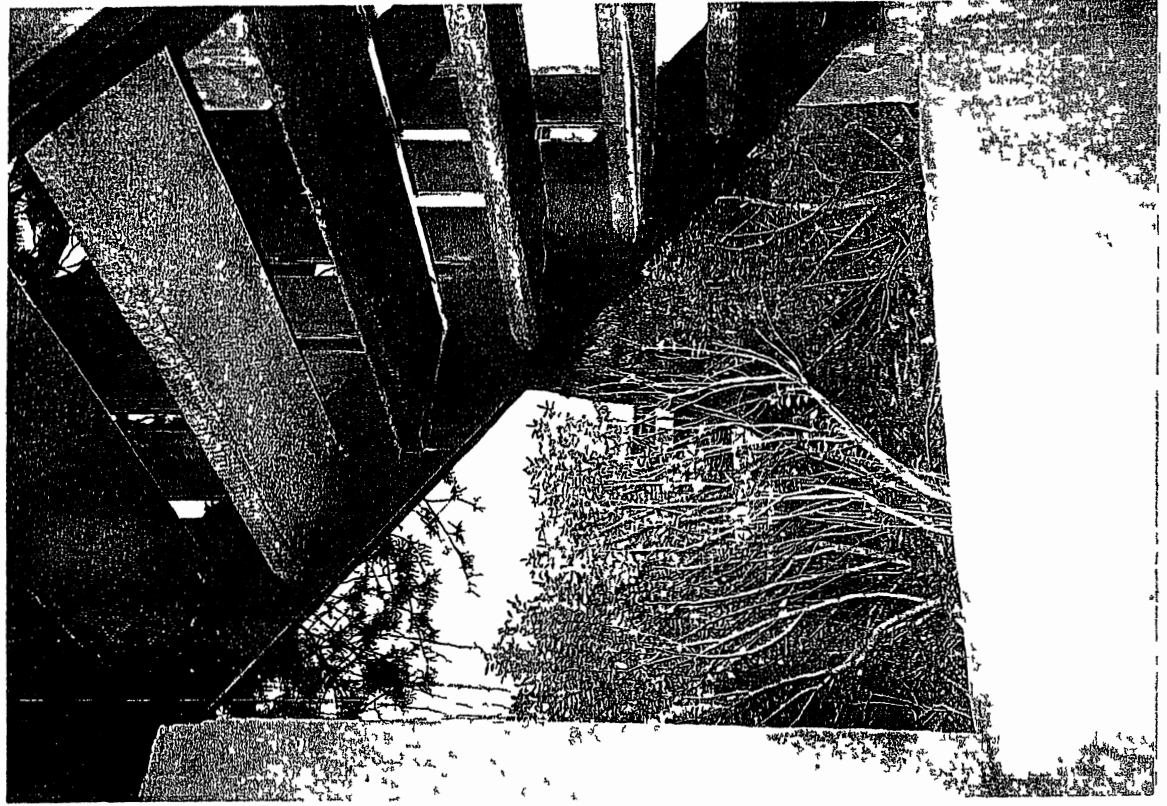
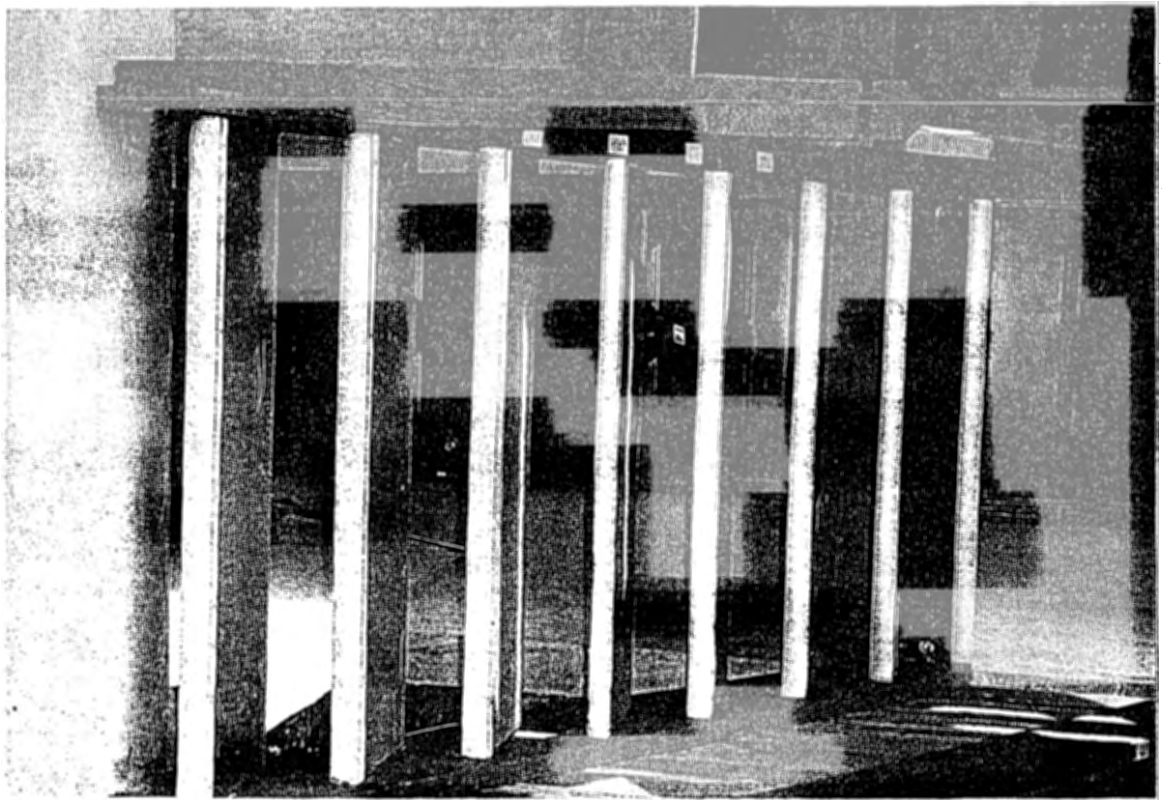
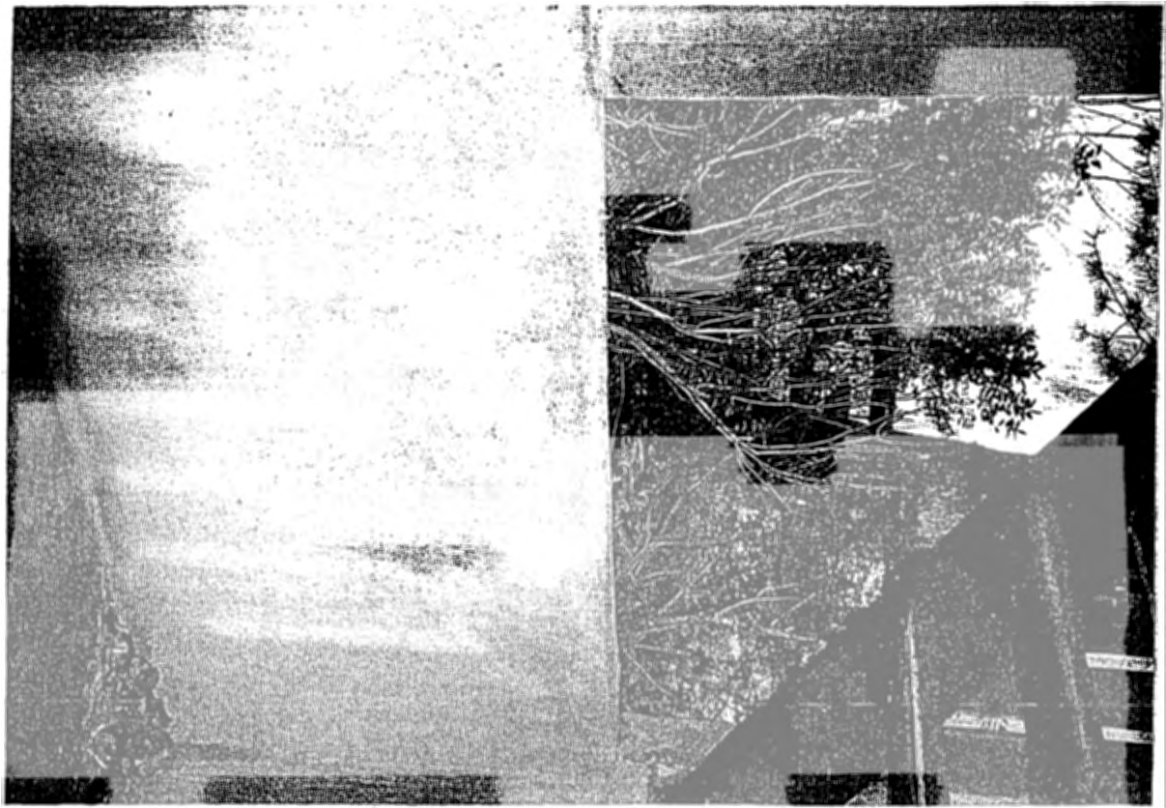

Paula L. Harless

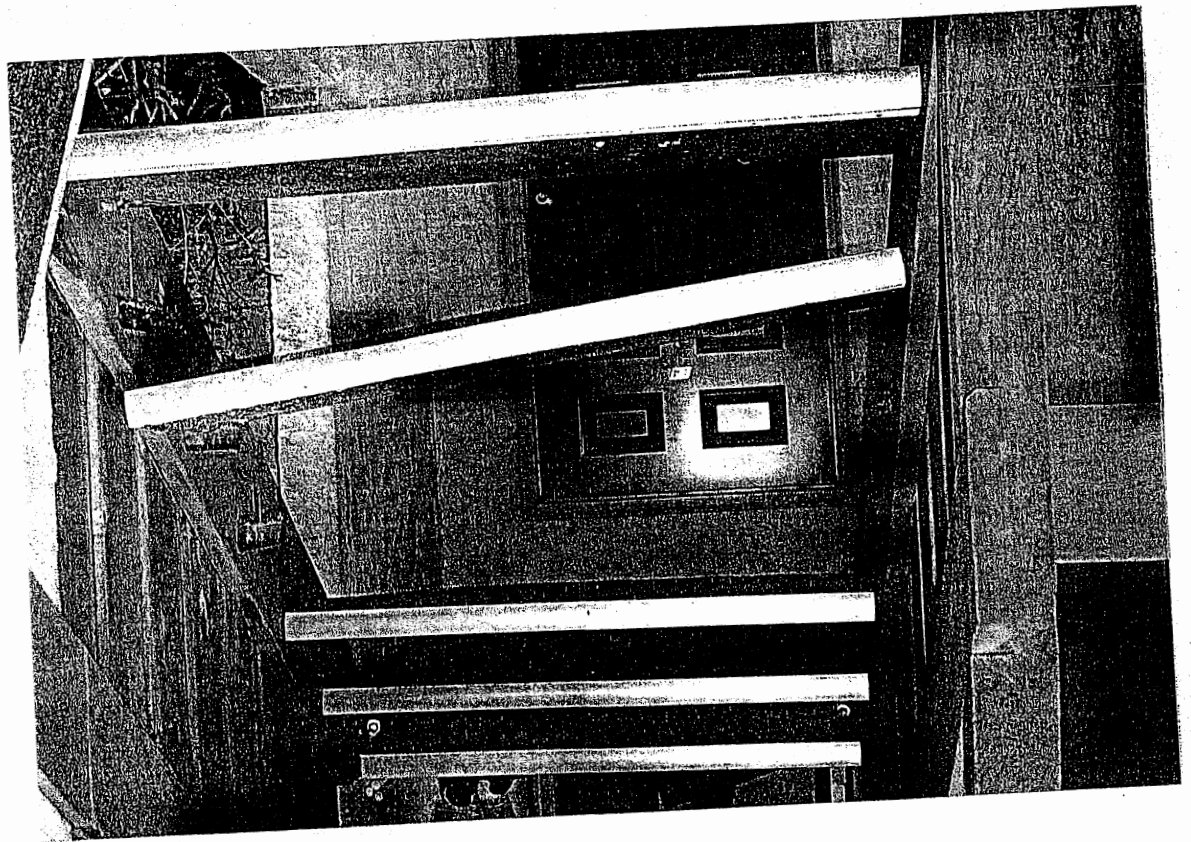
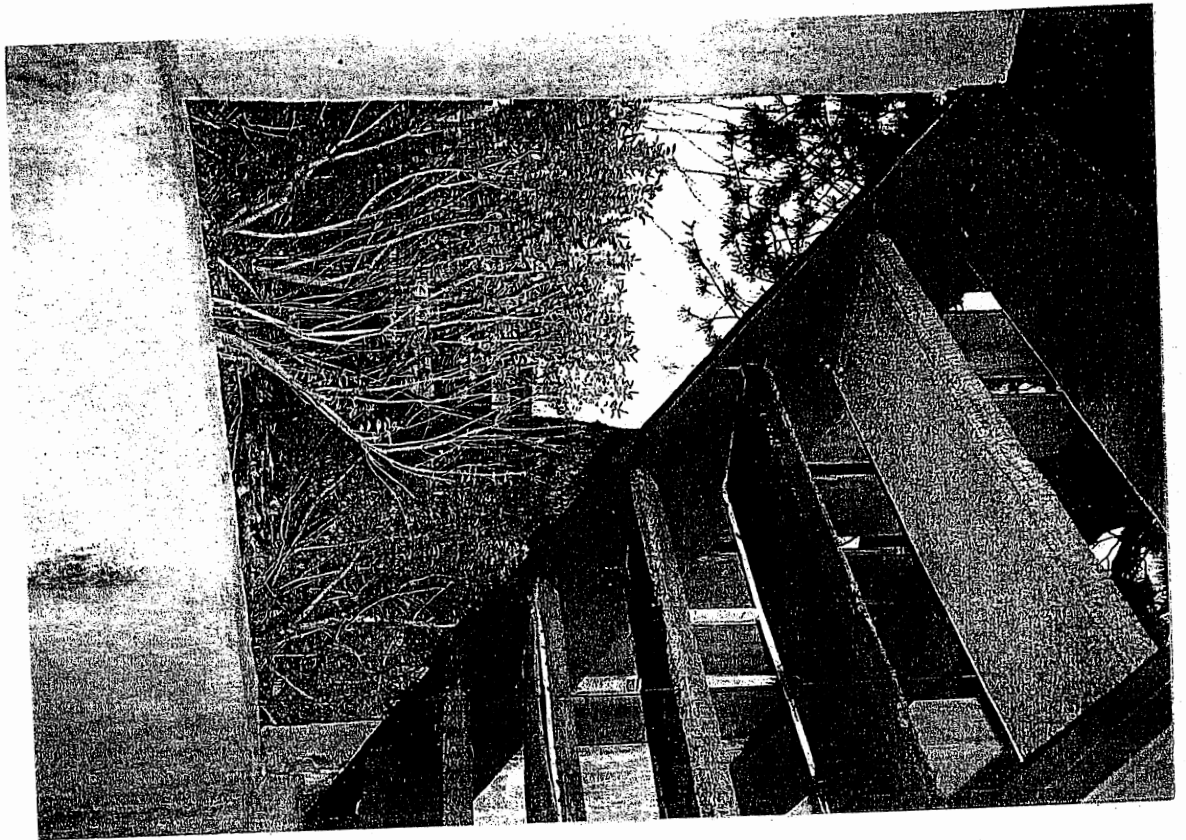
EXHIBIT 3

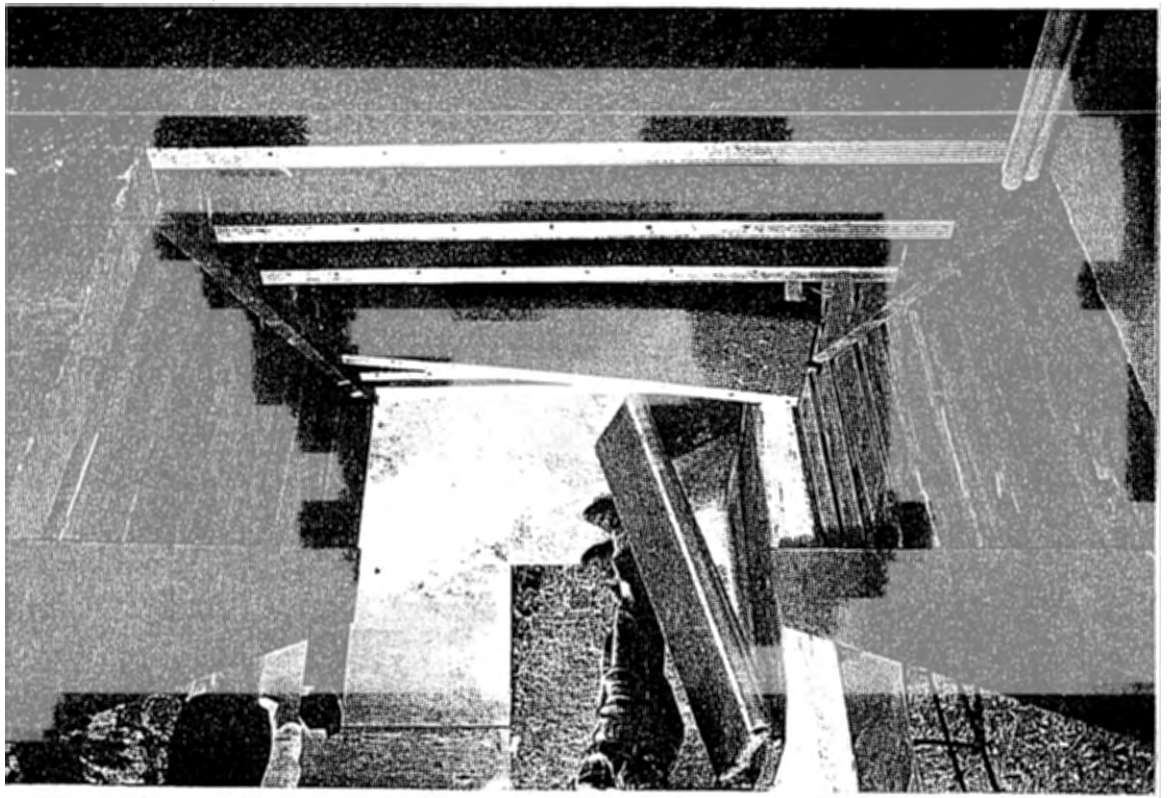
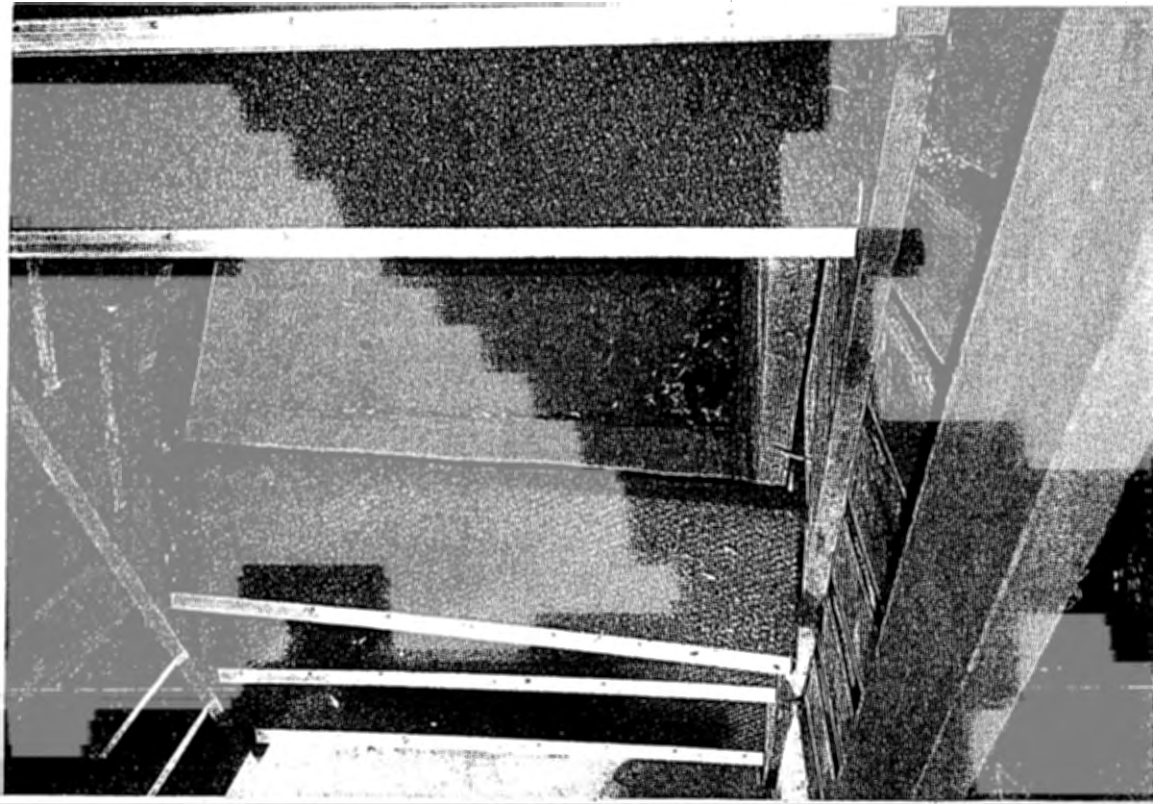
Photographs of the Stairway and Collapsed Stair

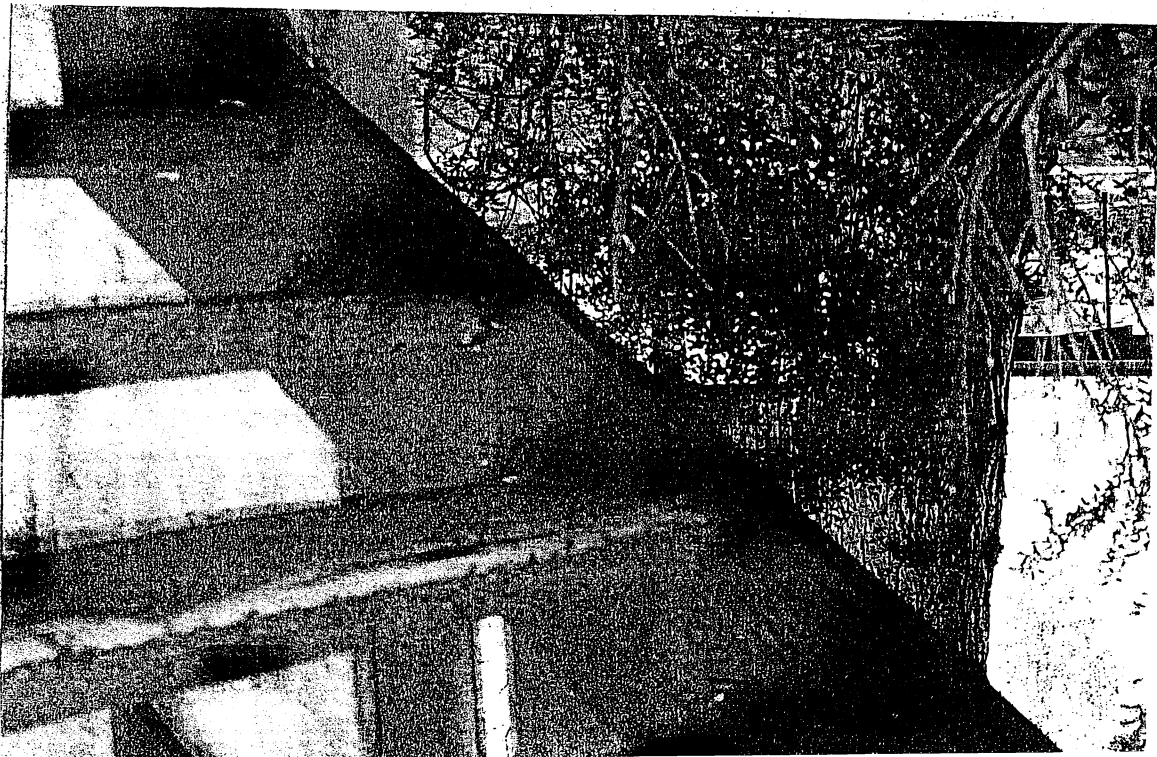
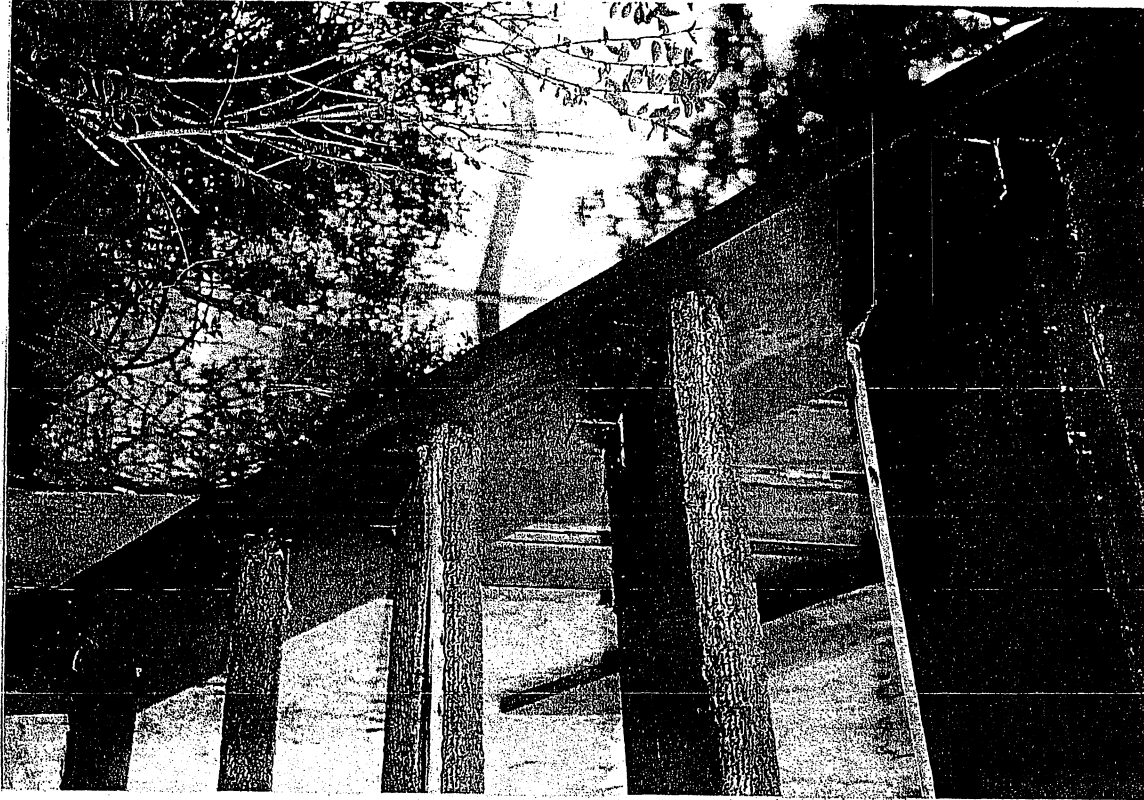


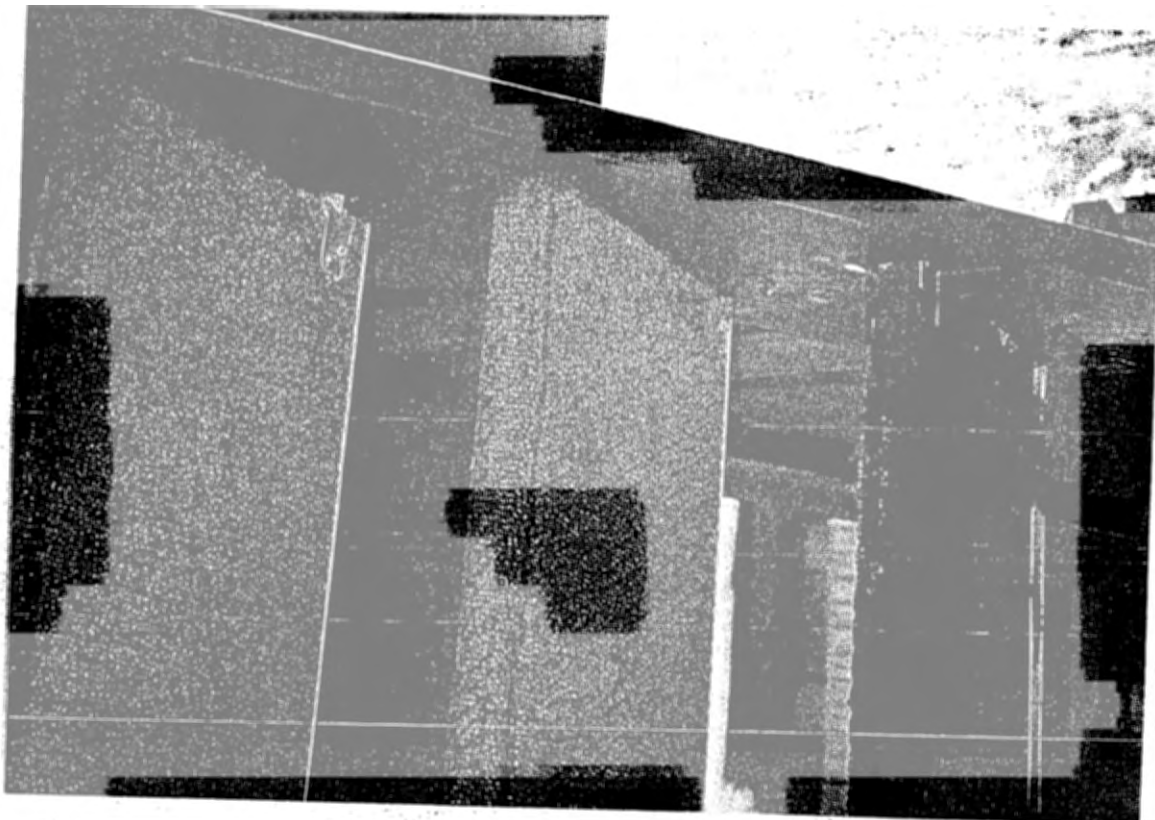


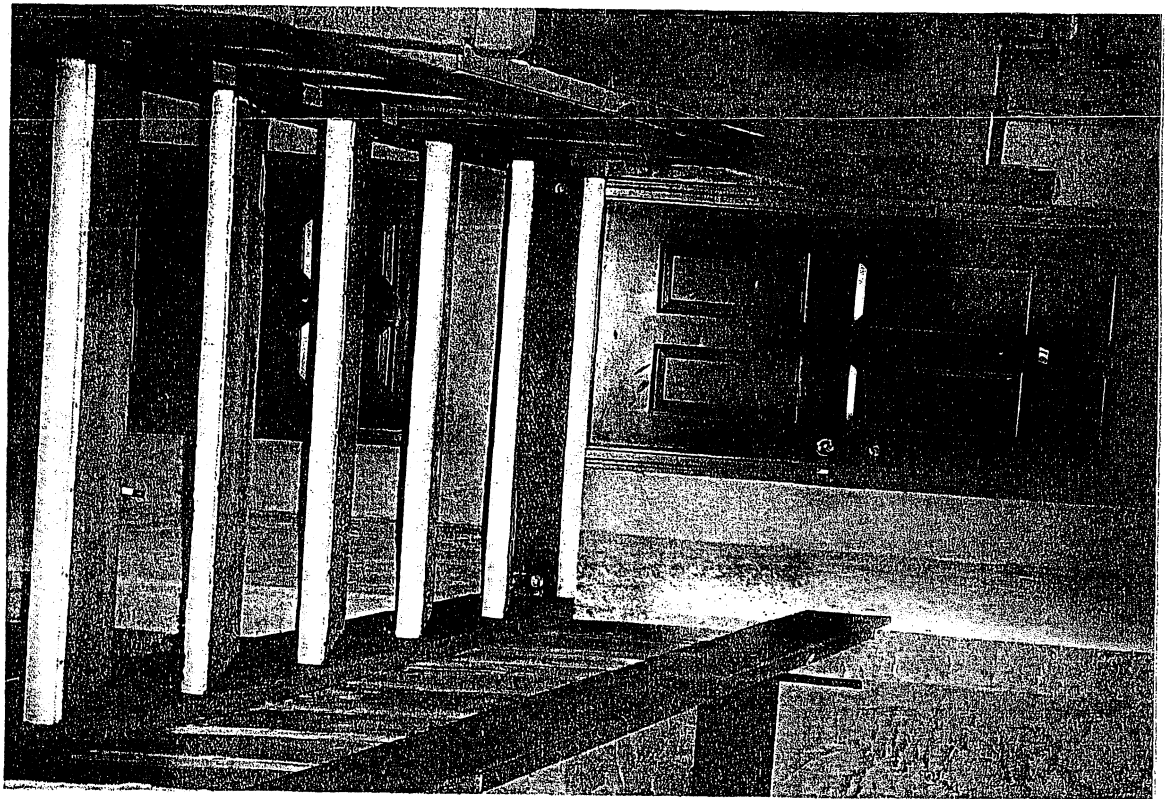
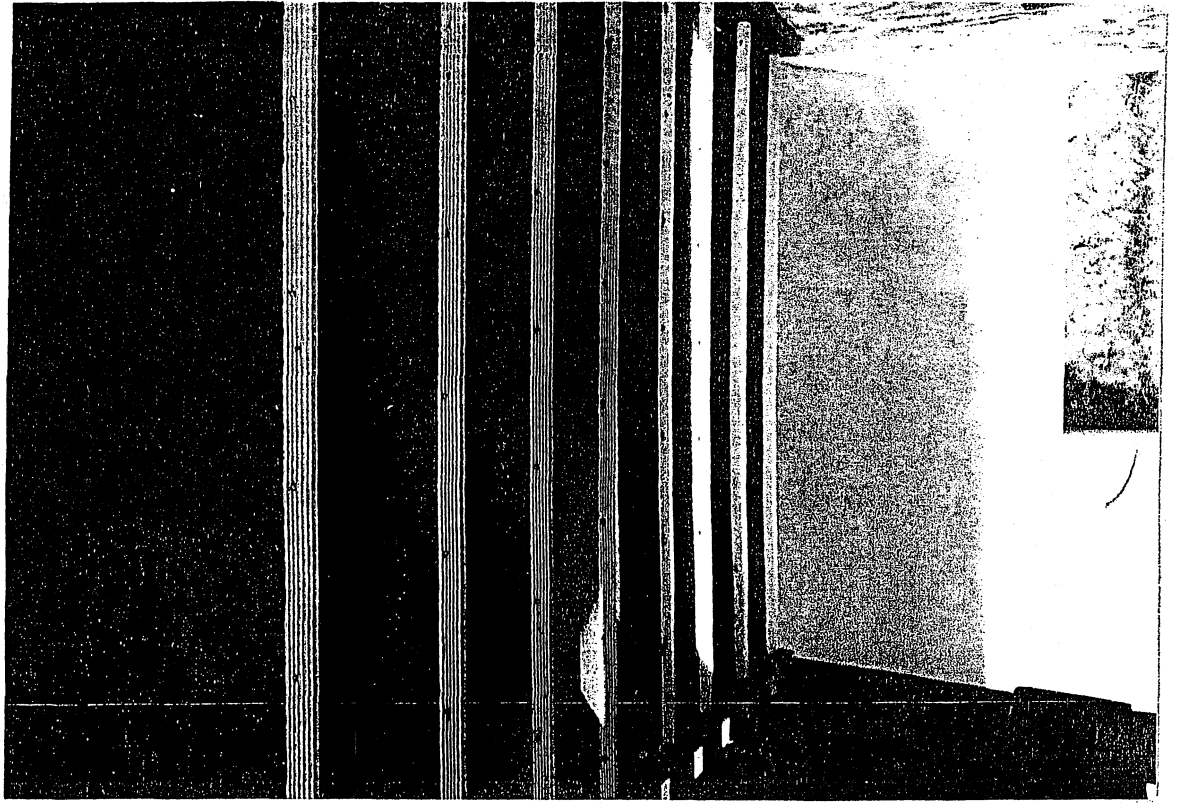


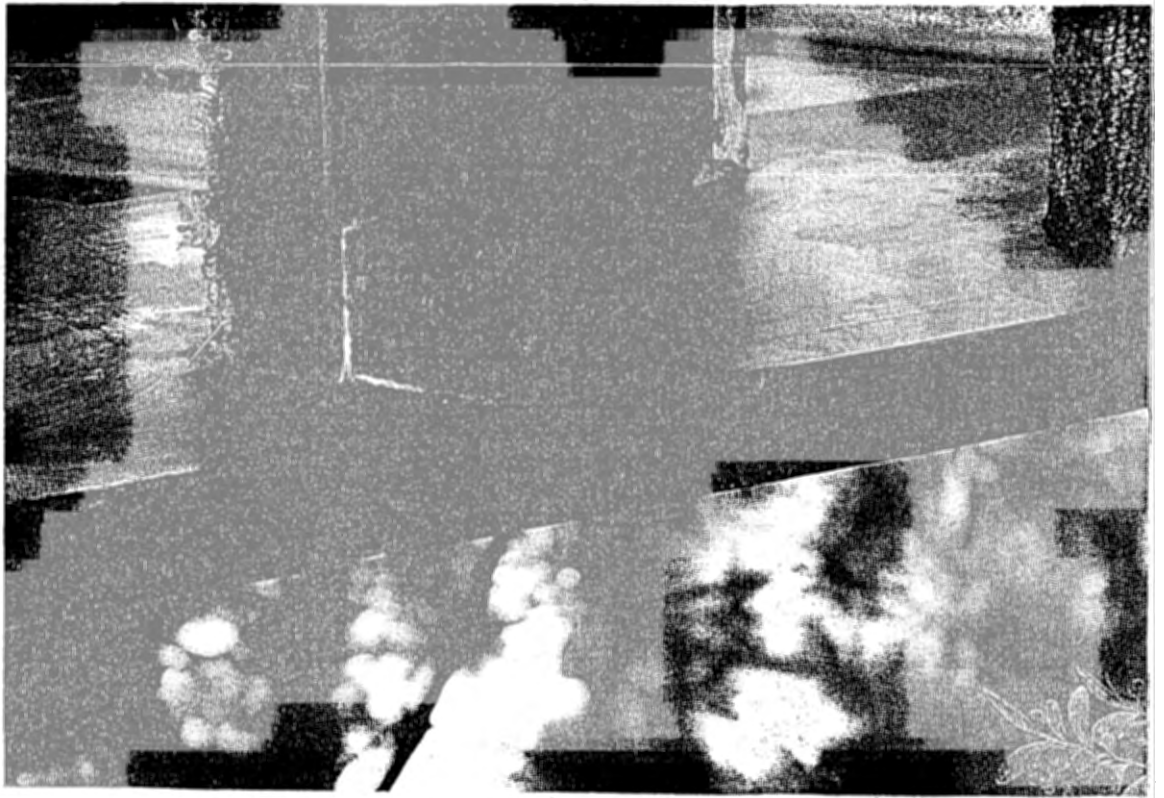
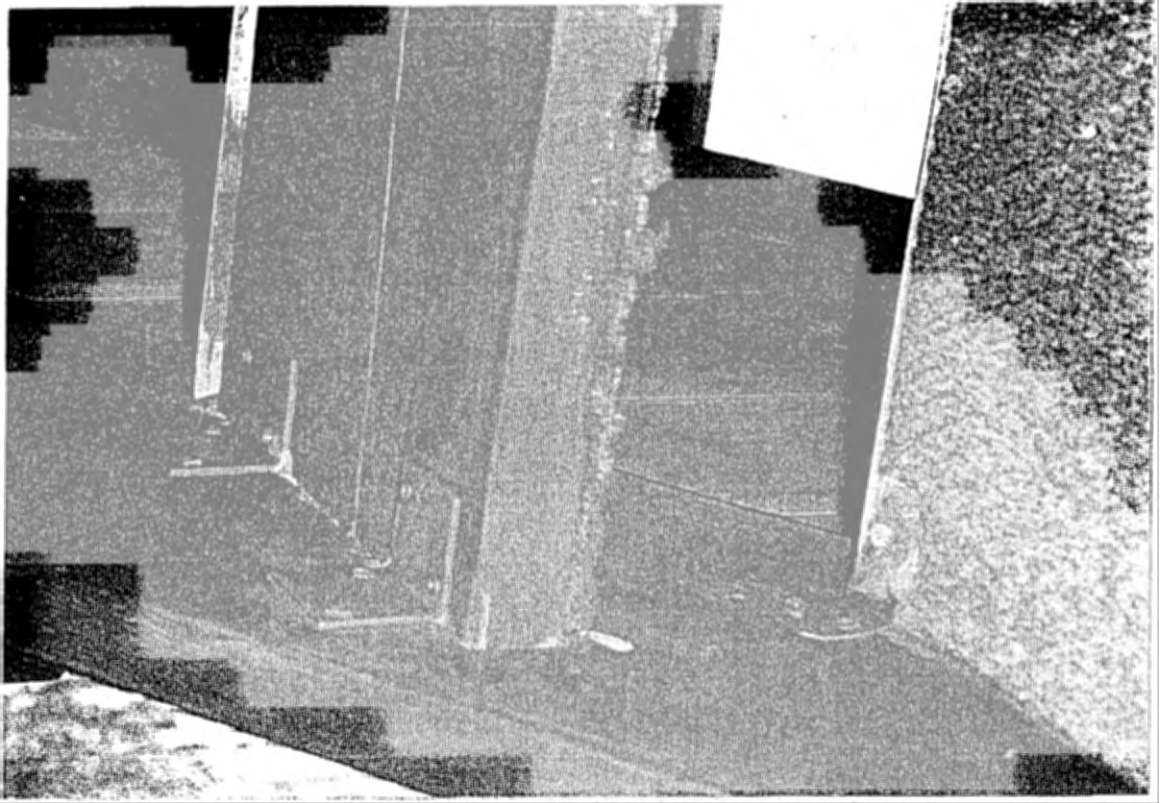


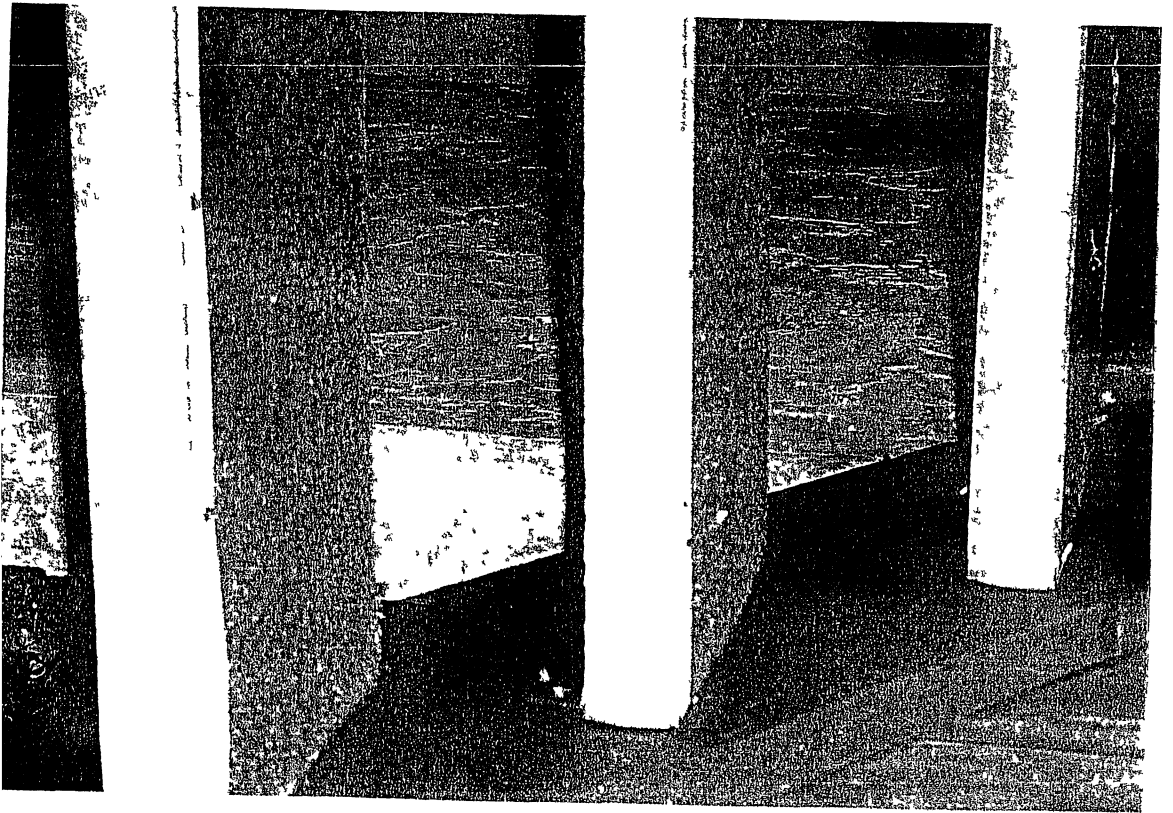


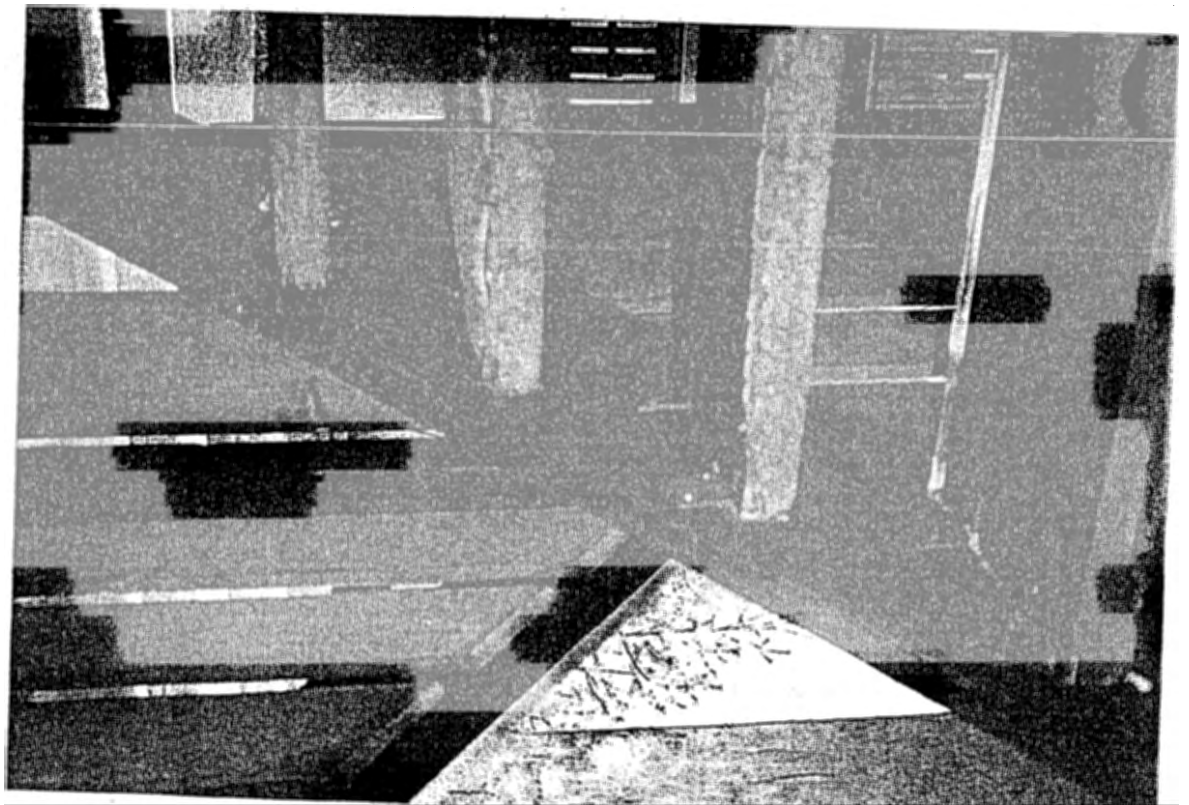
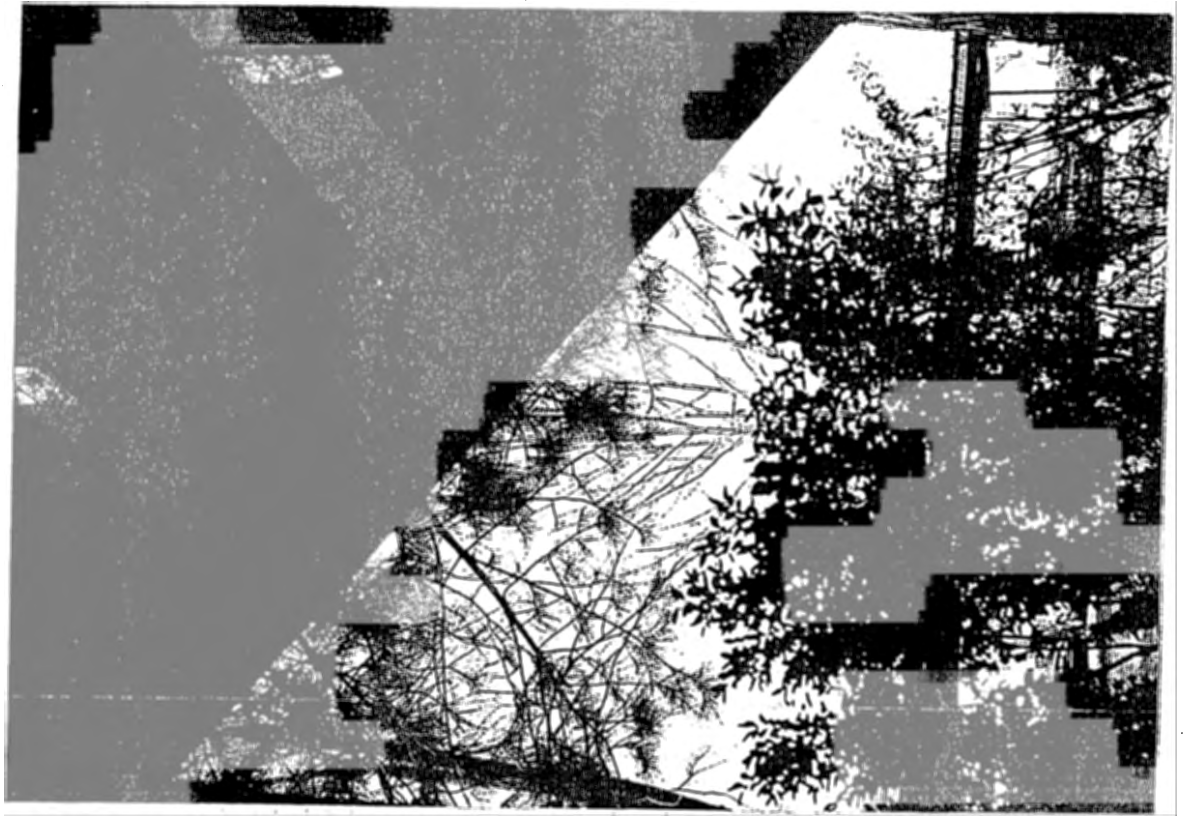


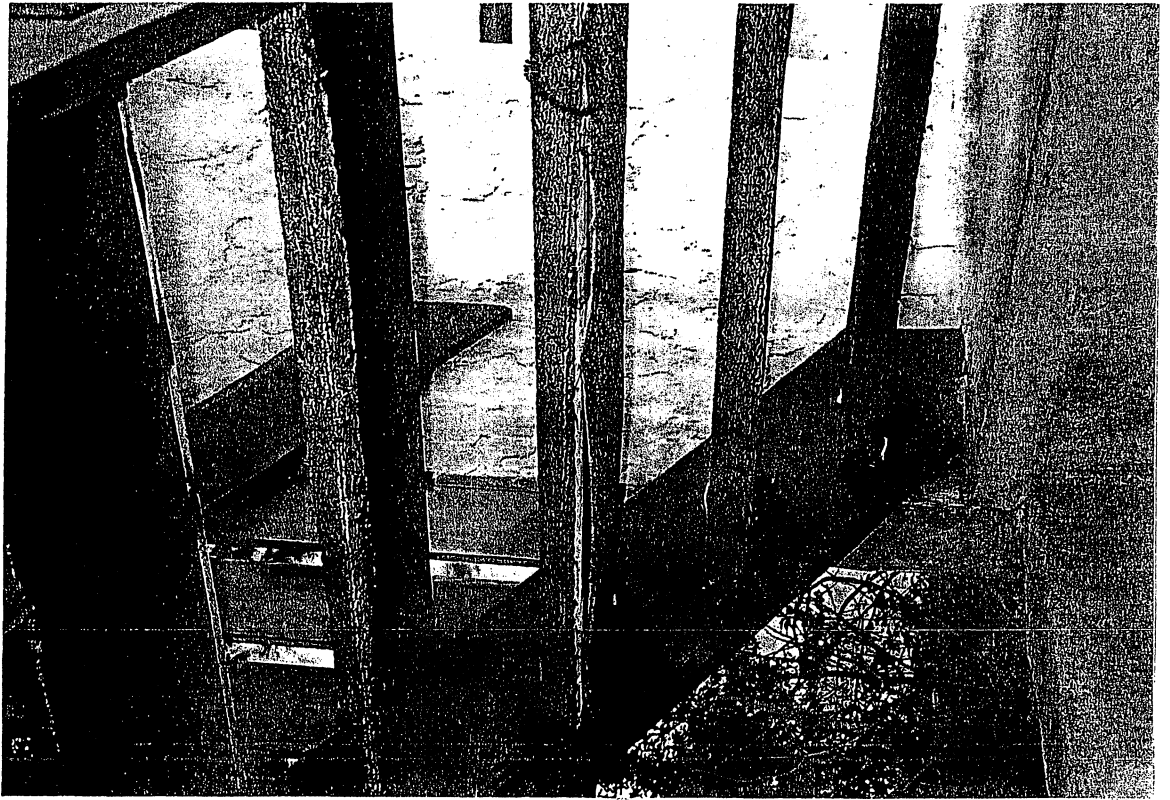


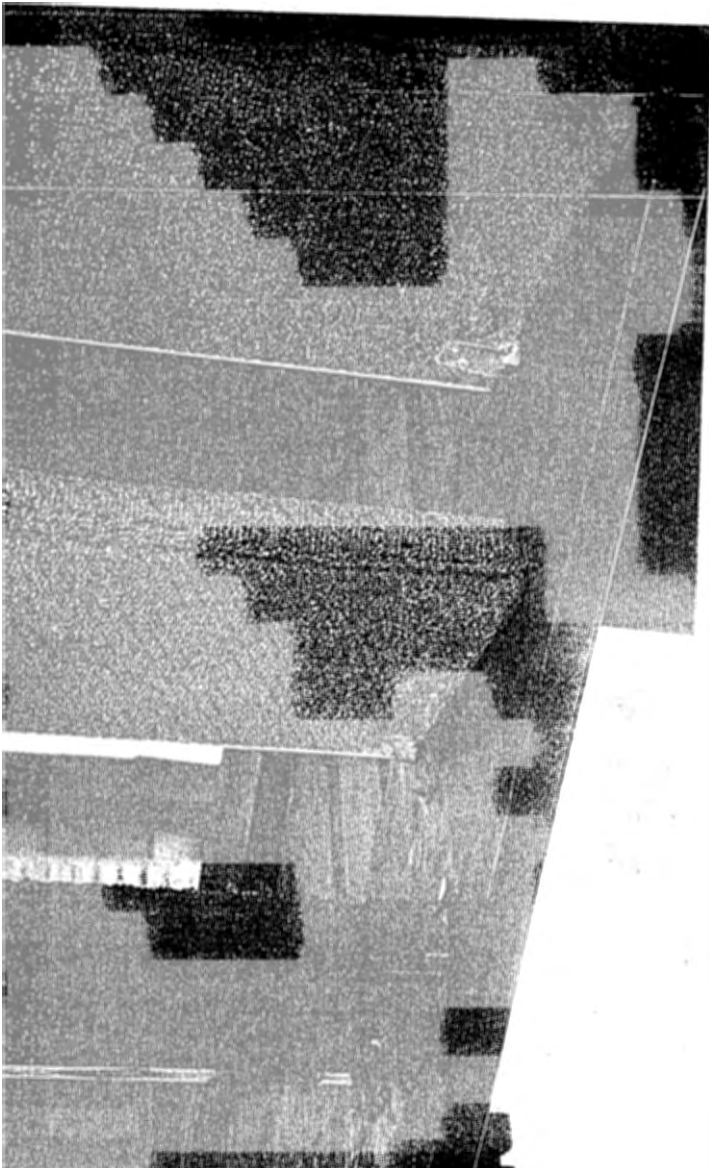
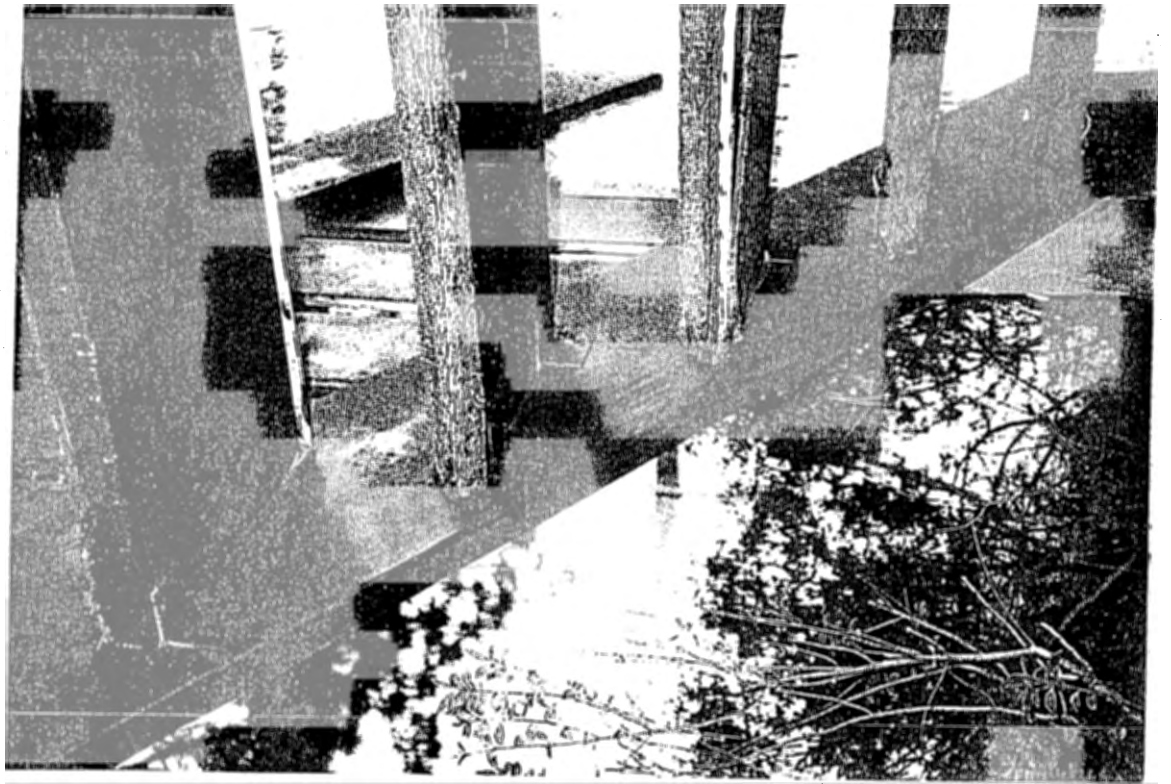


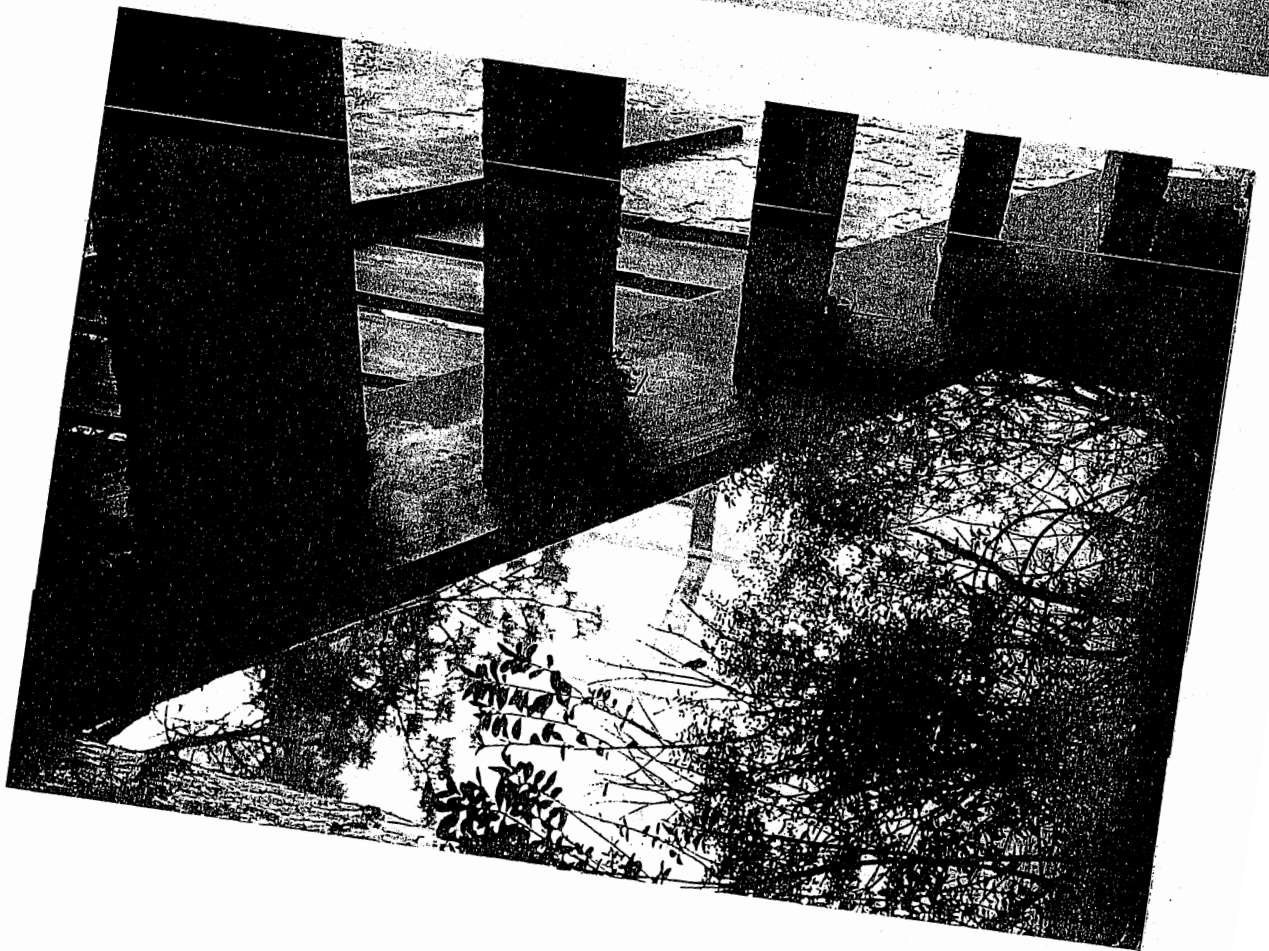
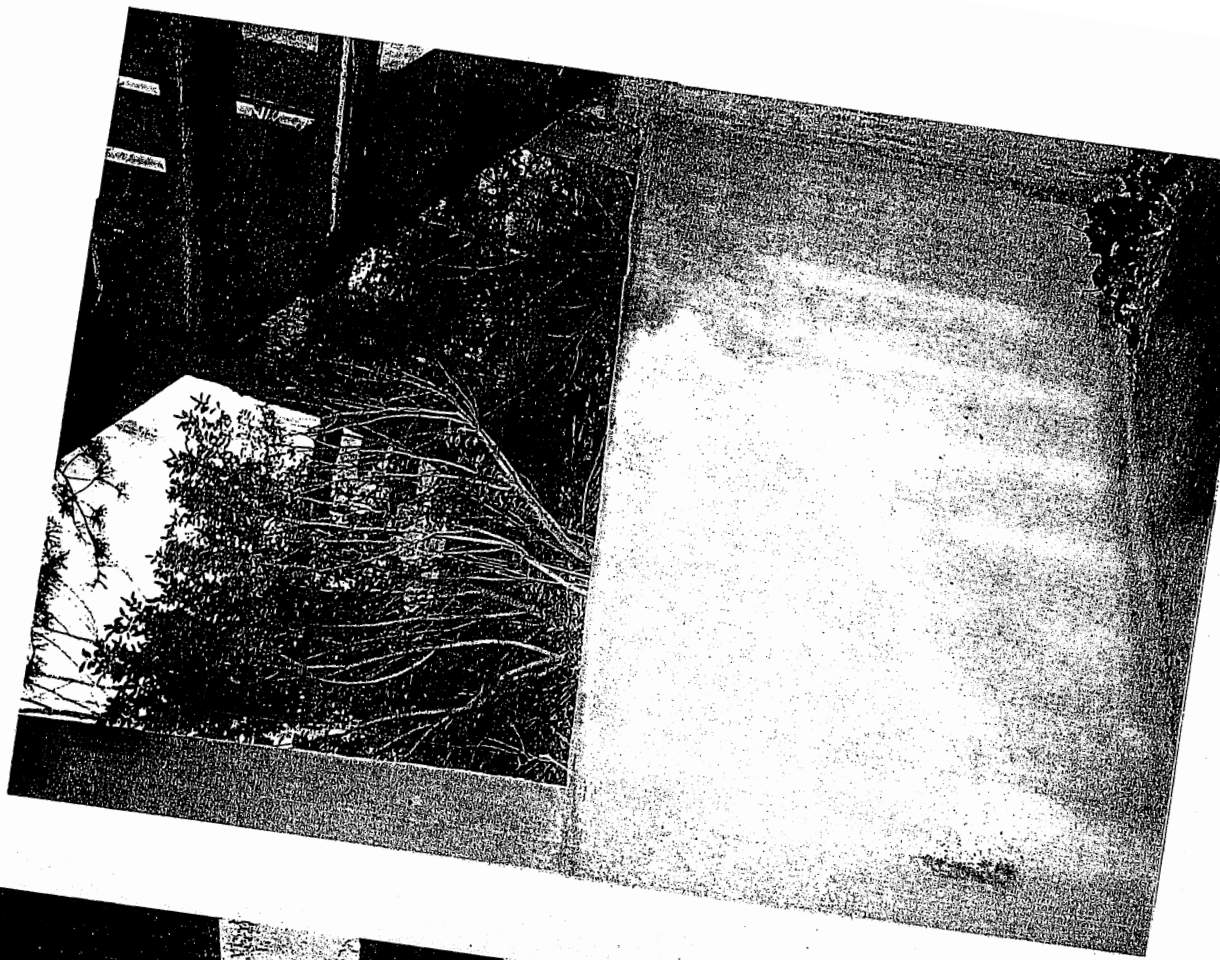


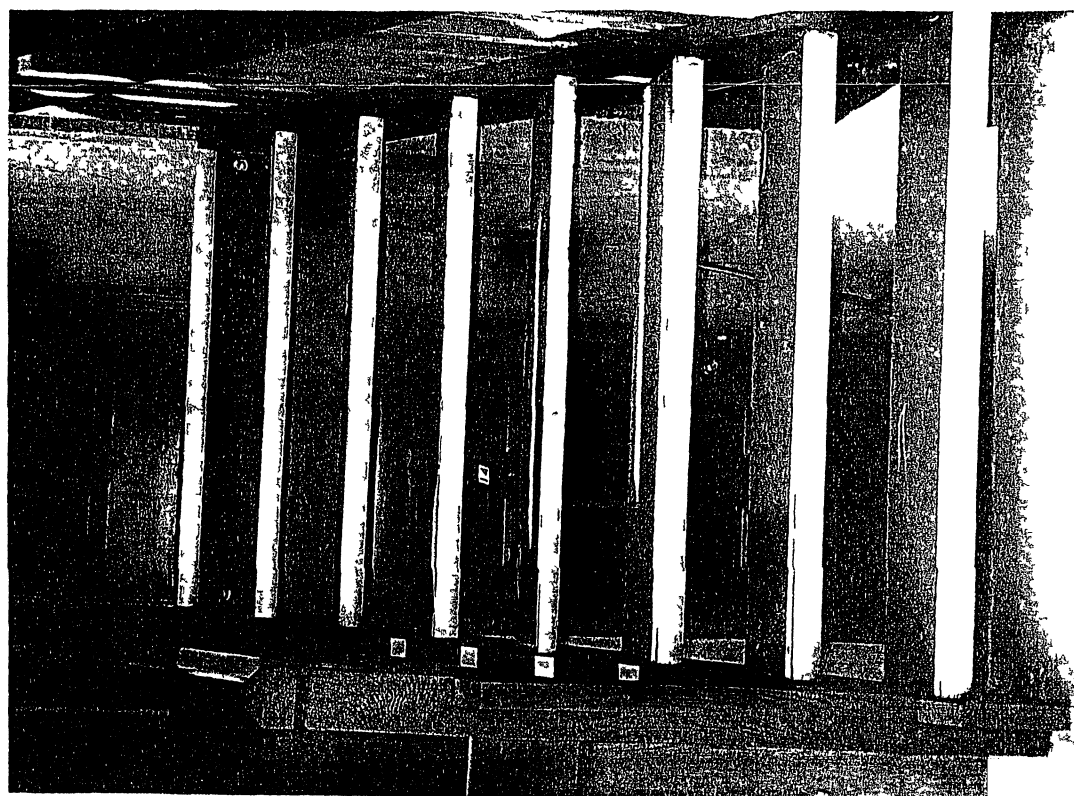
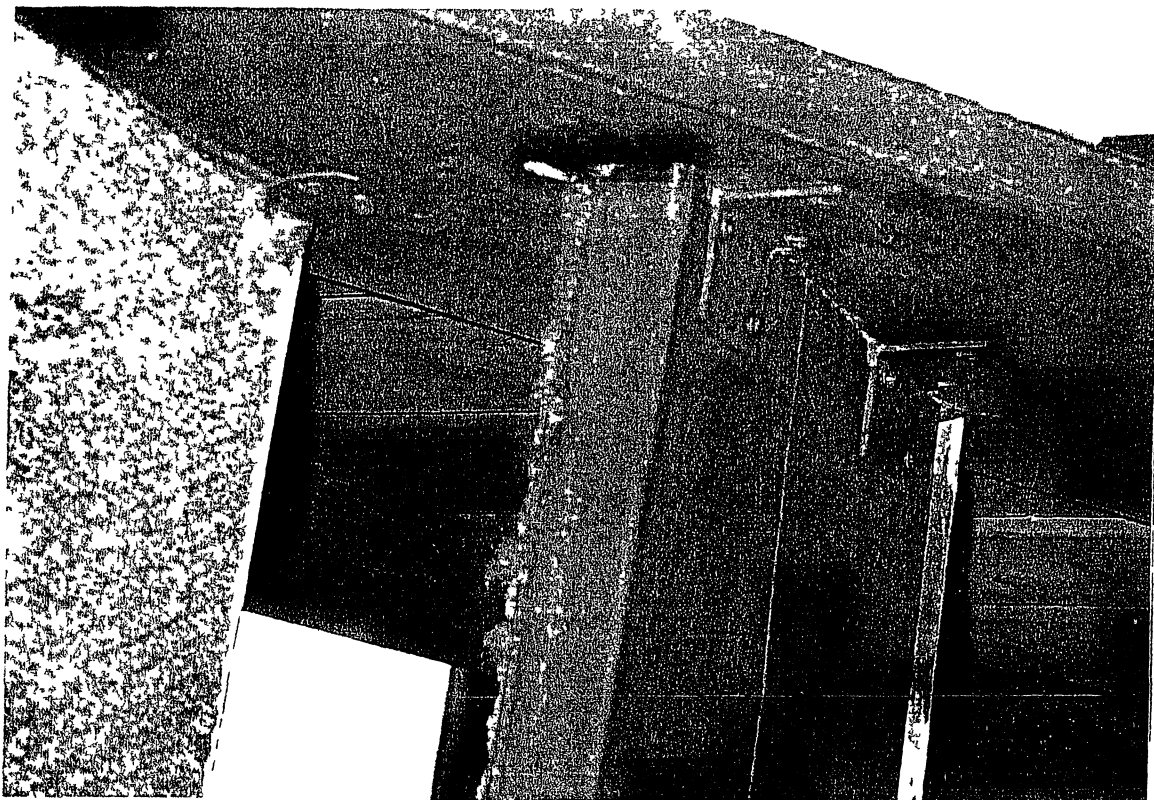












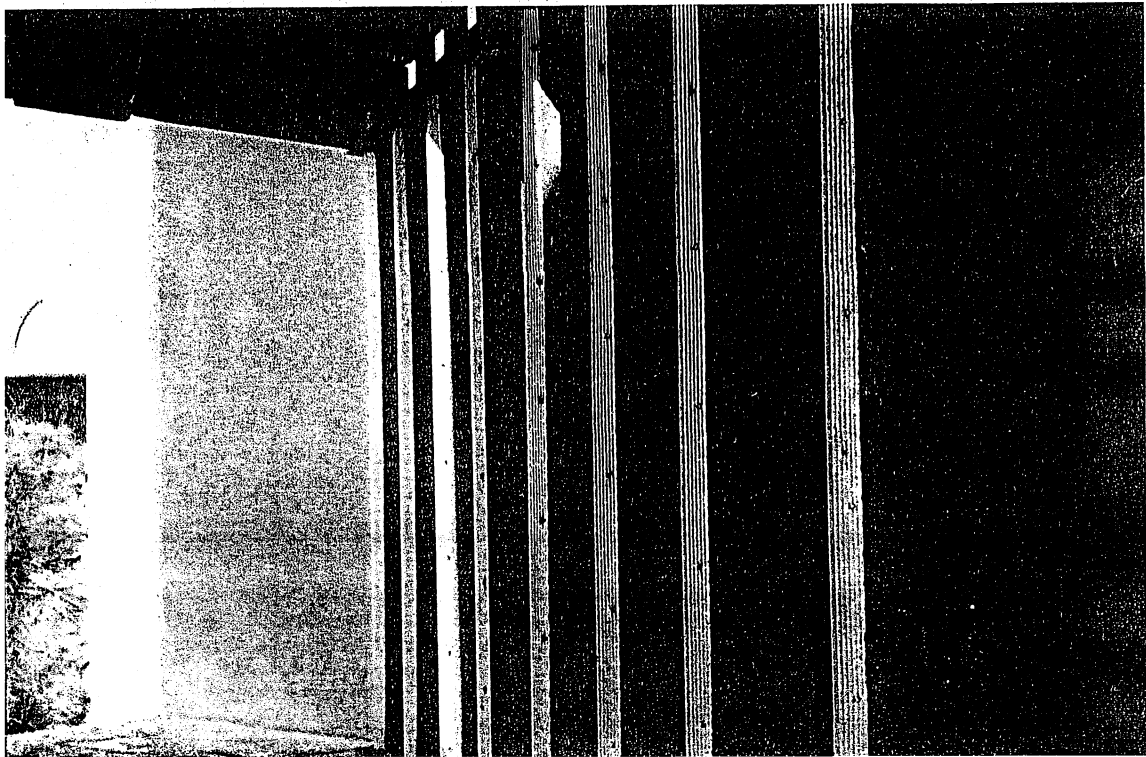




EXHIBIT 4

Dennis L. Brunnetti Curriculum Vitae, Expert Report
and Affidavit

JARED R. CASPER, # 8160
IVIE & YOUNG
Attorneys for Plaintiff
226 West 2230 North, Suite 120
Provo, Utah 84603
801-375-3000

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

WESLEY MATHESON AND LOIS, MATHESON,	:	AFFIDAVIT OF DENNIS BRUNETTI
	:	
Plaintiff,	:	
	:	
vs.	:	
	:	
MARBEC INVESTMENTS, LLC, dba ELMWOOD APARTMENTS, LLC	:	
	:	Civil No.: 050901427
	:	
Defendant.	:	Judge Frederick

I, Dennis Brunetti being the over the age of majority hereby deposes and states on my oath as follows.

1. I am over the age of 18, and a resident of Salt Lake County, State of Utah and familiar with the facts of the above-captioned matter.
2. My services were engaged by the law firm of Ivie & Young to provide an opinion regarding the condition and integrity of the stairs at the Elmwood Apartments.
3. In formulating my opinion I reviewed photographs of the stairs in

question, completed a field inspection on December 15 and December 22, 2005, respectively, and reviewed the depositions of Wesley Matheson, Shawn Matheson, Angie Matheson and Herbert O. Trayner.

4. That my qualifications for rendering an opinion in this matter are more fully set forth in my curriculum vitae which has previously been provided to defense counsel.

5. That I received training from the United States Army in Construction Management in 1977 and 1978, that I attended the Salt Lake Community College for classes on Building Codes and Field Applications and I am a certified ICBO Building Inspector and have been a ICBO Building Inspector since 1979.

6. That from 1975 through 1986 I held an active general contractors license.

7. That I have over 25 years of construction and construction management experience which includes 12 years of field experience in framing, finish carpentry, concrete flat work, footing installation, roof shingling, site staking, site preparation, excavation, and finish grading and 13 years of experience in construction management, field supervision, and inspecting of field installations of sub-contractors.

8. That I have been directly or indirectly responsible for the construction of approximately 350 residential and light commercial properties.

9. That in reviewing the information in the above captioned it is my opinion that a thorough inspection of the stairs at the Elmwood Apartments would have put an inspector with Herbert Trayner's experience on notice that there were gaps where the stair treads intersect

with the pockets on the stair stringers and that such an inspector would have noticed cracking of an existing stair tread on the stairs leading from Apartment 16.

10. That given my understanding of Mr. Herbert Trayner's experience as a general contractor a reasonable inspection performed by him would have alerted him to the fact that the wood stairs on which Wesley Matheson was injured, having been built some 20 years prior to the accident and being wrapped with indoor outdoor carpeting and designed the way they were designed, lacked sufficient integrity and the condition of the stairs posed an unsafe condition for tenants and other persons visiting the Elmwood Apartments.

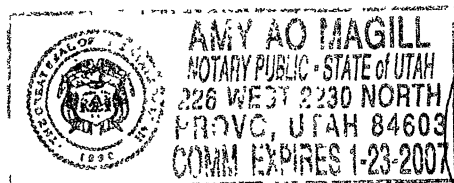
Further affiant sayeth not.

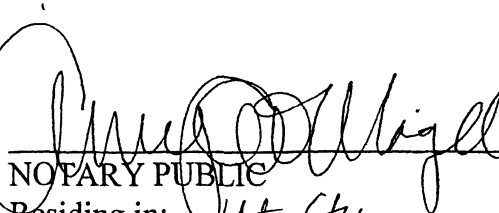
DATED AND SIGNED this 20th day of April, 2002


DENNIS BRUNETTI

STATE OF UTAH)
 ss:
County of Utah)

On the 20th day of April, 2006, personally appeared before me Dennis Brunetti, the signer of the above Affidavit, who acknowledged to me that she executed the same.




NOTARY PUBLIC
Residing in: Utah City

My Commission Expires:

1-23-07

<p>Cirriculum Vitae for Dennis L. Brunetti Information Consultants, LLC.</p>

Education: 1965-1967; United States Army COE,AD; Construction Management. 1977, 1978; Community College of Salt Lake, Building Codes and Field Applications; Certified ICBO Building Inspection since 1979.

1975 to 1977: Lundell Homes of Utah: Pleasant Grove, Utah

Responsible for all framing construction, and the supervision of framing crews. Scheduled and supervised rough-in trades including electrical, HVAC, plumbing and insulation. This work was then inspected by the local building inspector and reviewed on site by myself. Worked regularly and closely with HUD/FHA/VA architectural fee inspectors to insure that the building materials used and the installations complied with the Uniform Building Code and the Minimum Property Standards, (MPS).

1977 to 1979: Rindlesbach Construction Company, Salt Lake City, Utah

Responsible for all framing construction; made certain that building materials meet UBC standards: Scheduled and supervised framing construction crews and insured that their field applications complied with the requirements of the Uniform Building Code. Scheduled rough framing inspections with the City, County and FHA/VA Building Inspectors and met with these field inspectors to insure that the structure complied with the building code requirements. Scheduled and supervised the remainder of all building rough ins: Electrical, HVAC, and plumbing; along with accompanying local building officials to insure compliance.

1979: Became certified as an ICC (International Code Council building inspector by taking the required course work at Salt Lake Community College and passing the required written examinations and being able to clearly articulate the requirements of the building codes in a field type of application. Became a licensed general building contractor by meeting the State of Utah requirements on behalf of education and field experience. My license classification is Residential and Light Commercial.

1979 to 1988: Kappa Construction Corporation

Was instrumental in forming Kappa Construction Corporation along with two business partners. Responsible for all fieldwork: Development of the property, which is now the Roxborough Subdivision. Responsible for permits and excavation, framing, roof installation, and all rough ins: Electrical, plumbing, HVAC, and inspections of these areas to insure compliance with the Uniform Building Code, NEC (National Electrical Code), UBC (Uniform Building Code), and the UMC (Uniform Mechanical Code). Responsible for having all on site personal, including sub-contractors submit documentation for their liability insurance.

1986 to present: Building Inspection Service, LLC & Information Consultants, LLC.

Independently began a consulting company called Building Inspection Service designed to help lenders, realtors, homeowners, FHA/VA with construction processes, building code inquiries, and field inspections for the primary and secondary market. Dovetailed expert witness work into this business and have represented such law firms as; Robert J. DeBry & Associates, Williams & Hunt, Richards, Brandt, Miller & Nelson, Fabian & Clendenin, Dewsnup, King & Olsen, Smith & Glauser, Gridley, Ward, and Shaw, and Randal L. Meeks, P. C. In addition to expert witness work regarding building codes specific to slip and fall/trip and fall cases, my forensic history also includes providing depositions, and court testimony.

Information Consultants, LLC. Bio

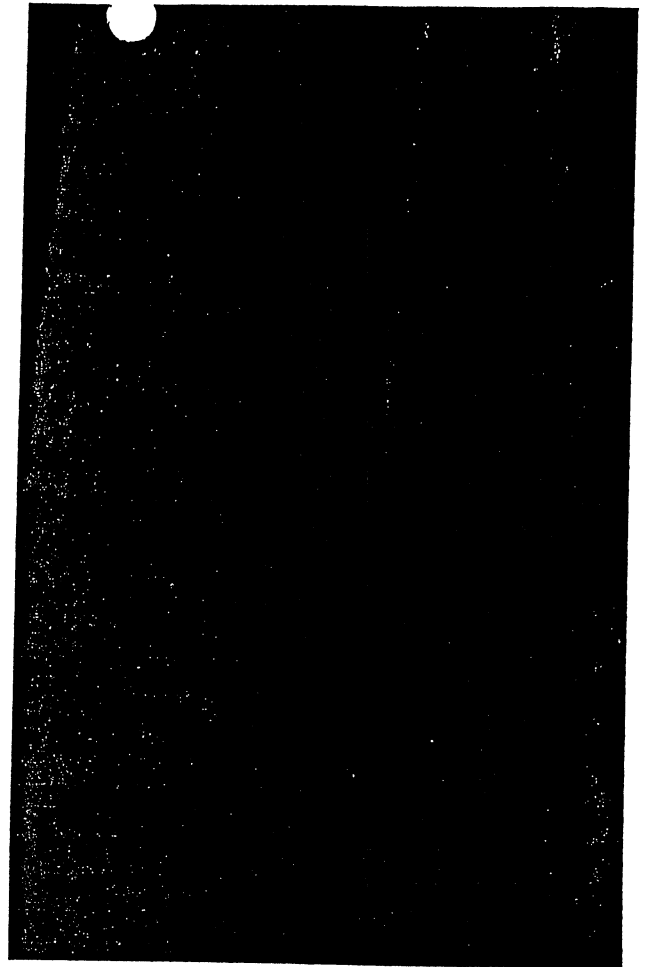
Started Information Consultants as an independent research company specific to the legal and medical professions, providing verbal and literature support for clients needing information. Currently providing legal research for Robert J. DeBry & Associates, and Renegade Oil Corporation.

25 plus years of construction and construction management experience: 12 years of field experience in framing, finish carpentry, concrete flatwork, footing installation, roof shingling, site staking, site preparation, excavation and finish grading. 13 years of experience in construction management, field supervision, and inspecting the field installations of subcontractors. Responsible directly or indirectly for the construction of approximately 350 residential and light commercial properties.

Slope of Grain

When the grain direction in a wood member is parallel to the two edges of the piece the wood is said to have straight grain. However, if the grain direction in a piece is not precisely parallel to the board edges, strength will be lower than if edges and fiber direction are parallel.

This 2 × 10 split along the grain direction revealing a slope of grain of about 1 in 20.



An indication of the degree to which slope of grain affects strength is provided by the table to the right. Even a slope of grain of 1 in 20 results in a 7 percent loss of strength. A slope of grain of 1 in 1 (a 45° angle) results in a 91 percent loss of strength as compared to straight grain!

Slope of Grain	% of Retained Strength
0	100%
1 in 20	93%
1 in 10	81%
1 in 5	55%

A slope of grain of almost 1 in 3 contributed to failure of the side rail of this ladder, and in severe injury to the person who was using it when it failed.

(Photo: John Haygreen)

Dennis Brunetti
Information Consultants, LLC.
3521 Suniland Drive
Salt Lake City, Utah 84109-3234
801-272-8999 Office 801-272-1829 FAX
801-589-8894 Mobile dbrunett@comcast.net

November 30, 2005

Forensic Work Completed beginning November 1993 to present

January 6, 1993: Render expert opinion on behalf of Joe Sattiewhite
June 4, 1993: Render expert opinion on behalf of Kay Sannella
September 10, 1993: Render expert opinion on behalf of Kenneth Frett
October 5, 1993: Steve Young v. Big D Construction
November 13, 1993: Carol O'Vey v. Mountain American Credit Union
November 14, 1993: Vera Soles v. Three Link towers
November 15, 1993: Olyve Christianson v. Shadow Ridge Apartments
December 15, 1993: Brad Bolton v. Shilo Inn, Elko, Nevada

January 5, 1994: Bertha Martin v. Amoco Oil Company
March 7, 1994: Render expert opinion on behalf of Irene Woodside
March 17, 1994: Field Investigation @ 415 South Medical Drive, Bountiful, Utah on behalf of Alean S. Foster.
May 4, 1994: Johnson v. Miles, et al.
June 14, 1994: Render expert opinion on behalf of Rashell Quast
July 8, 1994: Render expert opinion on behalf of Deborah Nichols
August 2, 1994: Render expert opinion on behalf of Darrell Higbee

September 4, 1995: Render expert opinion on behalf of Sandra Burn

January 3, 2000: Render expert opinion on behalf of Jason Moore
January 20, 2000: Render expert opinion on behalf of Nancy Krueger
May 17, 2000: Gonzalo Garcia v. BK Enterprises
July 31, 2000: Barcia v. Brian and Trelva Schuck, DBA Casa Dea Apartments
July 31, 2000: Render expert opinion on behalf of Andra Dunkley
August 2, 2000: Render expert opinion on behalf of William Thompson
August 18, 2000: Toni Marie Foster v. Landmark Hotel, Park City, Utah
September 25, 2000: Leslie Epperson v. Coachman's Dinner & Pancake House

Page #2: Forensic work completed by Dennis Brunetti, Information Consultants, LLC.

January 13, 2001: Render expert opinion on behalf of Donna Sommer
January 29, 2001: Render expert opinion on behalf of Ariane Borg
February 13, 2001: Render expert opinion on behalf of Connie Kirkpatrick
March 16, 2001: Jacqui Harris v. Park City Corp. & The Morning Ray Restaurant
March 25, 2001: Render expert opinion on behalf of La Voe Baker
May 9, 2001: Render expert opinion on behalf of Mark Lopez
May 11, 2001: Render expert opinion on behalf of Barbara Fullmer
June 18, 2001: Render expert opinion on behalf of Colby Holmes
August 27, 2001: Render expert opinion on behalf of Randall Davis
September 4, 2001: Rebecca Bradley v. Summer Garden Apartments
September 21, 2001: Davis v. Kim Davis Construction, et al

February 4, 2002: Render expert opinion for Kevin and Stacey Easter
February 12, 2002: Render expert opinion for Jesse Moorhouse
February 27, 2002: Render expert opinion for Peter Waite
March 11, 2002: Render expert opinion for Franklin Woodward
April 15, 2002: Merrill Cook v. Albertson's Food Stores for Dwight Epperson, Esq.
June 18, 2002: Provide literature research and render expert opinion on behalf of Brett Weaver for Robert J. DeBry & Associates.
June 21, 2002: Provide literature research and render expert opinion on behalf of Maxine McKinley, for Robert J. DeBry & Associates.
June 21, 2002: Provide literature research and render expert opinion on behalf of Bo Christensen.
August 7, 2002: Render expert opinion on behalf of Paul Porter
August 14, 2002: Render expert opinion on behalf of Steve Nielsen
August 30, 2002: Provide literature research and render expert opinion on behalf of Robert German
October 7, 2002: Render expert opinion on behalf of Brandi Morgan
October 14, 2002: Nicole Beeman v. Club Axis
November 5, 2002: Provide literature research and render expert opinion on behalf of Kevin Clark
November 14, 2002: Evans v. Speck Construction, & Todd Lloyd Construction; Dewsnap, King and Olsen, for the plaintiff.

December 9, 2003: Sonny Stewart v. Regnarg: for Charles Gruber of Larsen & Gruber: **(Case is on hold as of this date).**

January 20, 2003: Kathleen Ebeling v. Lincoln Center Assn., AKA Lincoln Community center.

January 22, 2003: Pamela Gentry v. Timber Wolf Condominium Lodges, Park City, UT.

February 13, 2003: Render expert opinion on behalf of Brody Douglass: Gridley, Ward & Shaw, Ogden, Utah.

February 18, 2003: Render expert opinion on behalf of Zeldine Graham: DeBry

Page #3: Forensic work completed by Dennis Brunetti, Information Consultants, LLC.

February 18, 2003: Render expert opinion on behalf of Ken Lipsey: DeBry
March 3, 2003: Provide literature research on behalf of Teri Nave; Eisenberg & Gilchrist.
March 14, 2003: Carol Murray for Ryan J. Bushell, Esq. Ogden, Utah
March 28, 2003: Afton Clontz, v. R.C. Willey, for Gridley, Ward & Shaw, Ogden, Ut.
April 1, 2003: Angel Villegas for field inspection, literature research and render expert witness report: Steve Sullivan, Robert J. DeBry & Associates.
April 10, 2003: Brandon Kunz; field inspection, photos, etc. for Robert J. DeBry; G. Steven Sullivan, Esq.
April 11, 2003: Tay-Jon Chamberlain for field inspection, literature research and render an expert witness opinion: Steve Sullivan, Robert J. DeBry & Associates.
June 2, 2003: Follow up investigation on behalf of Angel Gallegos at the request of Robert J. DeBry; G. Steven Sullivan, Esq.

January 23, 2004: Allison Driggs, plaintiff injured on construction site.
Robert J. DeBry & Associated, Warren Driggs, Esq.
February 5, 2004: David Hopkins. Provide literature research for plaintiff Hopkins.
Robert J. DeBry & Associates.
March 1, 2004: Mason Schick plaintiff, Robert J. DeBry & Associates, Warren Driggs, Esq. for the plaintiff.
March 19, 2004: Muriel Penant, plaintiff construction site accident; Robert J. DeBry & Associates.
March 22, 2004: Kelly Ludington, plainfiff, slip and fall; Robert J. DeBry & Associates,
May 26, 2004: Jeff Spaulding, plaintiff: trip and fall for Robert J. DeBry & Associates, Brad Harr, esq. for the plaintiff.
June 8, 2004: Tim Loncasty, plaintiff, slip and fall for Robert J. DeBry & Associates,
August 23, 2004: Cliff May v Peppermill Casino in Wendover, NV. for Driggs, Bills, & Day, PC.
October 13, 2004: Herdi Thamert, plaintiff, slip and fall for Robert J. DeBry & Associates
October 28, 2004: Kammerth V Reid; Smith & Glauser; Albert Gray, Esq. for the defendant.
November 10, 2004: Nelson v Jennings; Don Russo, Esq. Gridley, Ward & Shaw and Eisenberg & Gilchrist: Carbon monoxide poisoning.
December 21, 2004: Follow up to Kevin Clark v Kane County School District; Respond to Interrogatories.

March 16, 2005: Tracey Hanson, plaintiff, handicapped ramp accident: Robert J. DeBry and Associates.
March 17, 2005: Calder, et al v Big D Construction; carbon monoxide poisoning for Robert J. DeBry & Associates, Geri Kelly, Esq.

Page #4: Forensic work completed by Dennis Brunetti, Information Consultants, LLC.

April 15, 2005: Follow up Nelson v Jennings: review depositions: inspect jobsite and inspect furnace on behalf of carbon monoxide poisoning

May 4, 2005: Deposition on behalf of Terry Nave v Hires Enterprises: Eisenberg & Gilchrist. Deposed by Barbara Maw, Esq.

May 109, 2005:

May 11, 2005: Follow up meeting with attorneys on behalf of Nelson v Jennings at the Law Office of Gridley, Ward & Shaw, Layton, Utah.

June 15, 2005: Personal injury accident at the Wells Fargo Bank in Brigham City, Utah. Visited jobsite and provided a legal investigation on behalf of building code violations inside and outside the premise. Represented the Law Firm of Gridley, Ward & Shaw for the plaintiff Kathryn Sjoberg.

June 30th, 2005: OSHA violations during construction of a motel in St. George, Utah. Plaintiff fell down steel panned stairs that were not in compliance with the IBC and OSHA requirements: Robert J. DeBry & Associates on behalf of Derek Andreason, plaintiff.

August 4, 2005: Trip & Fall/Slip & Fall investigation for Robert J. DeBry FBO of Derek Andreason. Location: Commercial construction site in St. George, UT.

September 6, 2005: Trip & Fall investigation for Robert J. DeBry FBO Lydia Hansen at the Hale Center Theater.

October 5, 2005: Trip & Fall investigation for Robert J. DeBry FBO Shari Larsen, American First Credit Union, Provo, Utah.

November 11, 2005: Slip & Fall, Trip & Fall for Robert J. DeBry, FBO Bernice Abeyta at a residence in Rose Park, UT.

November 18, 2005: Trip & Fall for Robert J. DeBry FBO Sheryl Bramble at the Amber Restaurant in SLC, UT.

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December 31, 2005

Mr. Jared R. Casper, Esq.
C/O Ivie & Young & Associates
2260 West 2230 North, Ste. 110
Provo, Utah 84603

RE: Wesley A. Matheson and Lois Matheson, v. Marbec Investments, LLC. dba Elmwood Apartments, LLC.

Dear Mr. Casper,

In accordance with your request for my services and subsequent to my meeting with Mr. Ivie at the law office of Ivie & Young I am submitting the following expert witness opinion on behalf of the above referenced cliental.

My understanding of this case and this opinion rendered is derived from photos given to me by your office, our phone conversation on Friday December 9, 2005, a meeting with Mr. Phil Ivie, Esq. on Wednesday December 14, 2005 and my field inspection completed on December 15th & December 22nd. 2005 at the site in question described as the; Elmwood Apartments, 4320 South 700 East, Salt Lake City, Utah, 84107, Unit #16.

The following primary authorities I have used to create this opinion are: The Uniform Building Code, 1985 edition and The International Building Code, 2003 edition. Secondary authorities used to craft this opinion are the Western Wood Products Association and the Forest Products Association.

The Uniform Building Code, 1985 edition and the International Building Code 2003 edition regulates maintenance of properties as follows:

Applications to Existing Buildings and Structures; Section # 104(d): All buildings and structures, both existing and new, and all parts thereof, shall be maintained in a safe and sanitary condition. All devices or safeguards which are required by this code shall be maintained in conformance with the code edition under which installed. The owner or his designated agent shall be responsible for the maintenance of buildings and structures. To determine compliance with this subsection, the building official may cause any structure to be reinspected.

This maintenance section establishes the owner's responsibility to keep the building/buildings and its appurtenances maintained. This section also requires property owners to be vigilant by performing regular premise checks on behalf of safety, especially in areas where tenants, service people, and others walk to and from the property.

Chapter 25 of the Uniform Building Code, 1985 edition is specific to wood and Section 2504(c), 4 Duration of load states:

Values for wood and mechanical fastenings are subject to the following adjustments for the various durations of loading (i); where a member (stair tread) is fully stressed to the maximum allowable stress, either continuously or cumulatively, for more than 10 years under the condition of maximum design load, the values shall not exceed 90 percent of those in the tables¹.

(Note: This section is needed so that floor joists (stair treads) have adequate bearing surface on their supports. The way these stair treads are cut into the stair stringers is not consistent with adequate bearing of the tread onto the stringer).

Chapter 25 also provides conventional construction provisions in Section 2517(d) (2), Bearing as follows:

Except where supported on a 1 inch by 4 inch ribbon strip and nailed to the adjoining stud (stair stringer), the ends of each joist (stair tread) shall have not less than 1 ½ inches of bearing on wood or metal, nor less than 3 inches on masonry.

Additionally the Uniform Building Code, 1985 edition in Section 3306(n) regulates exterior stairway construction as follows:

Exterior stairways shall be of noncombustible material except that on Types III, and IV buildings not exceeding two stories in height, and on Type V buildings, they may be of wood not less than 2 inches in nominal thickness. (Note: The Elmwood Apartments are a Type V building. The wood members used to build this stair cases measure 1 ½ inches S4S material).

The UBC defines Exit facilities as:

Corridors serving an occupant load of 10 or more persons, exterior exit balconies, stairways, fire escapes and similar uses. Individual stair treads shall be designed to support a 300-pound concentrated load.

¹ Table NO. 25-G: Safe lateral strength and required penetration of box and common nails driven perpendicular to the grain of wood. In this application the safe lateral strength for a 16d box nail is 82 lbs. for each nail and for a 16d common nail the safe lateral strength is 108 lbs. for each nail. The safe lateral strength may be increased 25 percent where metal side plates are used.

Mr. Casper, it seems that there are several factors that caused this fall for your client the first being the lack of vigilance on behalf of whomever had control of the property and more specifically maintenance in the areas of highest use such as stairways. Wood stairways in multiple family dwellings have a higher need for best management practices in that wood has a tendency to shrink therefore competent building maintenance personnel need to be aware of these high use areas containing wood supporting members.

As wood loses or gains moisture, it will shrink or swell. Because of its cell structure, wood shrinks primarily in width and thickness and very little in length²

Secondly during my field inspection at the site known as the Elmwood Apartments I noticed that some of the stair treads are not bearing inside the pocket cut into the stair stringer by the builder or the framing contractor. This lack of positive bearing will cause a stair tread to rotate when exposed to a live load; the weight of occupants walking on them, etc. Since the property was built in 1985 some wood stair treads have shrunk thus causing minimal or no bearing inside and onto some of the stair stringers. Thus the only lateral supports are the nails, which have rusted over time in accordance with the photos I've reviewed along with the cracked stair tread your office has allowed me to review. (Note: See the photo enclosed showing that when the grain direction in a wood member is parallel to the two edges of the piece the wood is said to have straight grain.³

My belief is the stair tread in question had split parallel to the grain during or before the moving process, hence the cracking noise heard before Mr. Matheson's fall as noted in Lois and Wesley Matheson's depositions. Because of this lack of bearing and because of the lack of any supplemental support such as a wood ribbon placed under the tread or metal seismic plates nailed under the stair treads the stair tread/treads in question failed.

A thorough inspection of all of the stairs at the Elmwood Apartments by whomever has or had control of the property would have noticed the gaps where the stair treads intersect the pockets on the stair stringers, and they would have noticed cracking of an existing stair tread coming from Unit # 16 clearly visible when I made my field inspection of the stairs in their current condition.

Finally chapter # 23 of the Uniform Building Code 1985 edition regulates the design construction of exit facilities as follows:

Exit facilities are required to be designed to support a uniform load of 100lbs. per square foot in accordance with Table # 23-A Uniform and Concentrated Loads, as described in footnotes 4 & 5 of this table as follows: Footnote #4 states: Exit facilities shall include such uses as

² Western Wood Products Association; Douglas Fir & Western Larch species facts, published January 1996.

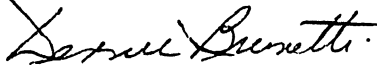
³ Forest Products Publication; factors which affect the strength of lumber

corridors serving an occupant load of 10 or more persons, exterior exit balconies, stairways, fire escapes and similar uses.⁴ Footnote #5 states: Interior stair treads shall be designed to support a 300 lb. concentrated load placed in a position which would cause maximum stress.⁵

It seems that since your clients fall metal seismic anchors have been applied under all of the stair treads at the Elmwood Apartments and connected using grabber screws. My understanding is that this was accomplished after your client's accident. The application has strengthened the stairs and the gaps where the treads meet the stringers have been tightened and the bearing increased, however some treads in the complex still have no bearing inside the pocket and the bearing on all treads remains minimal at no more than ½ inch. Also, my concern about the property now is that I've noticed another cracked stair tread; and cracked in a similar way as the stair tread that caused Mr. Matheson's fall. My advice is to contact the management company or whoever has control of this property to remedy this situation before another incident similar to this occurs.

Please call me if you have any further questions regarding this matter as I look forward to talking with you again soon.

With best regards,



Dennis Brunetti
International Code Council
Building Inspector

⁴ Uniform Building Code, 1985 ed. Table No. 23-A page #161.

⁵ Uniform Building Code, 1985 ed. Table No. 23-A page #161.