

2000

Marvin W. Hansen v. Reuel S. Kohler : Brief of Respondent

Utah Supreme Court

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Recommended Citation

Brief of Respondent, *Marvin W. Hansen v. Reuel S. Kohler*, No. 14099.00 (Utah Supreme Court, 2000).
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17071

IN THE SUPREME COURT OF THE
STATE OF UTAH

04711-126

CLERK OF SUPREME COURT
SALT LAKE CITY, UTAH

MARVIN W. HANSEN and
BEVERLY M. HANSEN,

/

Plaintiffs and
Appellants,

/

vs.

/

REUEL S. KOHLER and
DOLORES M. KOHLER, his wife,

/

Case No. 14099

Defendants and
Respondents,

/

EARSEL G. PIERCE and
PATRICIA B. PIERCE, his wife,

/

Intervening Defendants
and Cross Claimants.

/

BRIEF OF INTERVENING DEFENDANTS AND RESPONDENTS

APPEAL FROM JUDGMENT OF DISTRICT COURT OF BOX ELDER COUNTY
HONORABLE VENYO CHRISTOFFERSON, JUDGE

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FILED

SEP 10 1971

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IN THE SUPREME COURT OF THE
STATE OF UTAH

MARVIN W. HANSEN and BEVERLY M. HANSEN,	/	
Plaintiffs and Appellants,	/	
vs.	/	
REUEL S. KOHLER and DOLORES M. KOHLER, his wife,	/	Case No. 14099
Defendants and Respondents,	/	
EARSEL G. PIERCE and PATRICIA B. PIERCE, his wife,	/	
Intervening Defendants and Cross Claimants.	/	

BRIEF OF INTERVENING DEFENDANTS AND RESPONDENTS

STATEMENT OF THE NATURE OF CASE

Identification of the parties to the action herein shall be made by referring to Marvin W. Hansen and Beverly M. Hansen, Plaintiffs and Appellants as "Hansens"; to Reuel S. Kohler and Dolores M. Kohler, Defendants and Respondents as "Kohlers"; and to Earsel G. Pierce and Patricia B. Pierce, Intervening Defendants, Cross Claimants and Counterclaimants and Respondents as "Pierces".

Hansens brought action in the Lower Court against Kohlers seeking an Order of the Court compelling the Kohlers to reconvey certain real property at Howell, Utah, to Hansens, or in the alternative, that the Kohlers pay the Hansens \$7,500.00, together with commission and interest, and that said amount be a lien upon the property recorded in the name of the Pierces. Hansens filed a Notice of Lis Pendens with the County Recorder wherein the property at Howell was situated at the time when the property had been conveyed by Kohlers to Pierces. Pierces entered the action as Intervening Defendants, Cross Claimants, and Counterclaimants alleging a loss of profits resulting from the loss of vendibility of the property purchased by Pierces from Kohlers because of the filing of the Lis Pendens of the Hansens; that the conduct of the Hansens was outrageous and intolerable under contemporaneous community standards, and that said acts were wilfully and maliciously done, thereby seeking damages for the distress, anxiety, and anguish inflicted upon the Pierces; the Pierces seeking to recover from Hansens punitive and exemplary damages, as well as attorney's fees proximately resulting from the conduct of the Hansens.

The Pierces sought to recover from the Kohlers Attorney

fees and Court costs for the defense of the title given by Warranty Deed by the Kohlers to the Pierces resulting from the cause of action alleged by the Hansens, and further, for any other damages as may result and imposed upon the Pierces as the consequence of the claim of the Hansens.

DISPOSITION OF THE CASE BY THE LOWER COURT

The cause of action by Hansens as against Kohlers was dismissed with prejudice and on its merits as no cause of action.

The Cross Claim of the Cross Claimants, Pierces, as against Kohlers was dismissed with prejudice and on the merits as no cause of action.

The cause of action as set forth in the Counterclaim of Pierces was granted allowing Judgment in favor of Pierces and against Hansens in the sum of \$4,166.05.

On Motion for New Trial by Hansens, the Court reaffirmed its previous Judgment but modified the Judgment as to money and damages allowed to Pierces with the reduction of the Judgment to the sum of \$2,596.75.

RELIEF SOUGHT ON APPEAL

Hansens seek reversal of the Judgment of the Lower Court granted in favor of Kohlers and against Hansens and

Hansens further seek reversal of the Judgment in favor of Pierces and against Hansens.

Pierces seek a modification of Judgment in favor of Pierces and against Hansens restoring the original Judgment of the Lower Court, wherein the Court awarded loss of profit on sale of home to Pierces and, on Judgment for New Trial, modified the Judgment by reducing same and disallowing \$1,500.00 previously awarded to Pierces for loss of profit on sale of home and Pierces further seek modified Judgment awarding punitive, exemplary and personal damages.

STATEMENT OF FACTS

Pierces will not make any statement of facts as pertains to the original action as between the Hansens and Kohlers, in that the statement of facts by Hansens and the statement of facts by Kohlers should be adequate to inform the Court.

Kohlers did convey to the Pierces the home and property in Howell, Utah, by a Warranty Deed, which was recorded with the County Recorder as of October 18, 1971, together with a Real Estate Mortgage given to the Farmers Home Administration (Exhibits 12, 14). On October 19, 1971, a Lis Pendens was recorded by Hansens as against the same property conveyed

previously by Kohlers' Warranty Deed to Pierces (Exhibit 16).

Mr. Pierce's employment was terminated at Thiokol in December of 1972 (R-161), at which time he went to Little Rock, Arkansas, for purposes of employment (R-161), having first entered into an Earnest Money Agreement for the sale of the Howell home and property to Mr. and Mrs. Nicholas (R-61 - R-63, Exhibit 17), and for a consideration in the sum of \$12,300.00, which Agreement was entered into March 28, 1972.

Pierces discovered for the first time that a Lis Pendens had been filed against their home and property as a result of an attempt to complete the sale of the property to the Nicholases when a title search resulted in the revealing of the Lis Pendens. (R-217)

The Farmers Home Administration refused to make a loan to the Nicholases for purchase of the property because of the filed Lis Pendens (R-217), even though the loan had previously been approved by the Federal Housing Administration to the Nicholases. Title insurance would not be issued by the title insurance company because of the Lis Pendens (R-51) and upon advice of Attorney Dale M. Dorius as counsel for the Nicholases, the Nicholases would not consummate the sale because of the Lis Pendens and the refusal of F.H.A. to approve the purchase

of the real property (R-217), and the Nicholases resided in the home for eight months without payment of rent while attempting to await clearance of title to property so that they could purchase the property from Pierces (R-161).

Subsequent to Nicholases moving from the property after an eight-month occupancy, a new buyer was obtained by the Realty Company on behalf of Pierces, but after three months occupancy, the new purchasers also could not buy the property because of the pending Lis Pendens. (R-208, -209)

ARGUMENT

POINT I

RECORDING OF LIS PENDENS CONSTITUTED SLANDER OF TITLE

The Supreme Court of Utah in Olsen vs. Kidman, 235 P.2d 510, (Sept., 1951), adopted the Rule set forth in Gudger vs. Mantan, 21 Cal.2d 537, 134 P.2d 217, as to what constituted an action of slander of title when the Court adopted the California ruling by restating:

Slander of title is effected by anyone, who, without privilege, publishes untrue and disparaging statements with respect to the property of another, under such circumstances as would lead a reasonable person to foresee that a prospective purchaser or lessee thereof might abandon his intentions. ***It is an invasion of the interest of the vendibility of property. In order to commit the tort, actual malice or ill will is unnecessary.

The Utah Court by its holding in the Olsen vs. Kidman case, supra, specifically clarified the previous ruling of the Court in Dowse vs. Doris Trust Company, 208 P.2d 956, and its holding in Sproul vs. Parks, 210 P.2d 436, wherein the wrongful action of filing a Lis Pendens therein were actuated by malice in fact, by denying the allegation of the Defendant and Appellant, Leslie Kidman, that the Utah cases and the law generally regarding slander of title require that before liability can be found, the Recorder of the slanderous document must have known that he asserted a false claim without any foundation or right, by specifically stating that in order to commit the tort, actual malice or ill will is unnecessary.

In the instant matter before the Court, there is no allegation that there was specific malice at the time of the filing of the Lis Pendens by the Hansens, but the record does show that as a matter of fact, that upon the Pierces advising the counsel for Hansens, that the filing of the Lis Pendens was preventing the sale of the property and injuring the vendibility of such property by reason of the Lis Pendens (R-109), and by further pointing out to the Hansens and their counsel, that at the time of the filing of the Lis Pendens by the Hansens, that the property had already been conveyed

to the Pierces by Kohlers with a Warranty Deed and without any knowledge on the part of the Pierces that there was any claim by Pierces as against said property (R-173) at the time of the purchase, that the continued refusal of the Hansens and their counsel to remove their Lis Pendens, and in fact not removing same until February 5, 1974, the day the actual trial commenced in the District Court (R-175), which is the action presently before this Court, that there, in fact, would not be difficulty to find malice in fact on the part of the Hansens and their counsel, in the guise of economic duress and coercion by their continued failure and refusal to remove a Lis Pendens against property, which at the time of the recording of the Lis Pendens was in the name of the Pierces, who were bona fide purchasers for value without any knowledge whatsoever of any claim by the Hansens to said property. (R-173)

This Court further pointed out in the Olsen vs. Kidman case, supra, the citation in Clause B of the Restatement of Torts, Section 6625, which states:

It is not necessary that the publisher of a disparaging statement know or believe it to be false nor is it necessary that as a reasonable man he should know or believe that it is untrue. Furthermore, it is immaterial that he has reasonable grounds for his belief in its truth. As in an action for defamation, if the other essentials to liability are present, the publisher of disparaging matter takes the risk, that it is untrue.

The action before this Court is not one brought for libel and slander through the use of words, which are slanderous per se, but is based upon the recording of a document which is false and untrue and is based upon the legal slander of title, which prevented the Pierces from effecting the sale of their property.

The Pierces purchased the property on October 18, 1971, (R-160, Exhibit 12) and the Lis Pendens was not removed until February 5, 1974, (R-175) the property had previously been conveyed by Hansens to Kohlers on April 2, 1969. (Pl.Ex.3)

Counsel for the Hansens voluntarily became a witness in the action at time of trial and stated for the record, that the Warranty Deed vesting ownership of the property in the Pierces was filed prior to Hansens' Lis Pendens (R-243), and that said counsel, together with his client, Mr. Hansen, visited the home of Pierces at Howell, Utah, and advised Mrs. Pierce, who was home alone, "We got a lawsuit filed", (R-243), and further admitted stating to Mrs. Pierce "If you're ahead of us," and he indicated that they were, "then, I said, I am behind you and you're ahead of me". (R-244)

Mrs. Pierce testified that Mr. Hansen and his counsel came to the Pierces' home in March, 1972, at which time Mrs. Pierce showed Mr. Hansen and his counsel a copy of the Warranty Deed

conveying the property from Kohlers to Pierces and their title insurance policy (R-97) (Int.Def. Ex. 12, 15), to which Mr. Robbins responded by saying:

Well, I can show you the Lis Pendens we have filed at the Courthouse. And proceeded to take it from his brief case.. (R-97)

It is submitted to the Court that the filing of a Lis Pendens against property recorded in the name of a bona fide purchaser for value who is not the Defendant of the Complaint to which the Lis Pendens has reference constitutes a slander of title.

POINT II

LIS PENDENS IS QUALIFIED PRIVILEGE

The Appellants, Hansens, have made a point in their Brief to this Court, that the filing of their Lis Pendens was privileged, in that it was part of a judicial procedure while, at the same time, setting forth the facts that the Complaint filed was against the Kohlers only and not against the Pierces, and that the Lis Pendens filed was against property already duly recorded and validly sold for a consideration to the Pierces. (Appellant's Brief, p. 29, 31)

Hansens quote from Albertson vs. Raboff, 295 P.2d 405, a California case, to state the premise that a Lis Pendens is a privileged judicial proceedings, but the California case

law and statutory law does not protect one who makes a false claim by filing a Lis Pendens against property other than the party entitled or alleging ownership of such real property as in the instant matter before the Court.

The State of Utah has ruled to the contrary in a matter such as the instant filing of Lis Pendens against Pierces as set forth in Birch vs. Fuller, 337 P.2d 964, 6 Ut.2d 79. The Birch case is an action wherein a Lis Pendens was filed, and as a result thereof, an action for slander of title was instituted by the Plaintiff, and the finding in favor of the Plaintiff in the Lower Court was affirmed by the Utah Supreme Court, wherein the Court awarded to the Plaintiff a money Judgment for slander of title, the Court stating:

Defendants say the evidence does not support a slander of title action, nor does it evince bad faith or malice. It is difficult to discern whatever motives Defendants had in filing the Lis Pendens, particularly in view of the transmission by one of the Defendants of a rather insulting letter to the Plaintiffs some two months earlier. We believe the Court's conclusion to have been justified. Also, there appears to be no basis for disturbing the Court's conclusion, that the Defendants had no legal or equitable title.

In the instant matter before the Court, we already have the judicial determination in the Lower Court, that there was absolutely no cause of action by Hansens as against Kohlers

which resulted in a forthwith dismissal of the cause of action set forth by Hansens in the Lower Court, but in addition thereto, there could be no question of the bad faith and malice of the Hansens, in that there was an absolute refusal to remove the Lis Pendens even with knowledge of the prior recording of the Deed of the Pierces to the Lis Pendens of Hansens, (R-243, -246), even though on three separate occasions the Pierces sought to have Hansens remove the Lis Pendens so that the property could be sold to an earnest money buyer. (R-175)

It is the contention of the Hansens, that they would have removed the Lis Pendens had they been asked to remove same, while ignoring the evidence set forth in the record wherein the Pierces testify that on three occasions they attempted to have counsel for the Hansens remove the Lis Pendens and the attitude of counsel is clearly evident in his direct testimony in this matter, wherein he stated as a witness, that he did not consider (R-103), that the filing of a Notice of Intervention by the Pierces gave counsel for the Hansens a clue that there might be desire on the part of the Pierces to remove the Lis Pendens, and that even the filing of the Complaint of the Pierces setting forth an action of slander of title and a plea for damages for the loss of

vendibility of property did not appear to counsel as a request for the removal of the Lis Pendens (R-103), and as a matter of record, it is a fact that the Lis Pendens was not removed until February 5, 1974, which was the day of the trial of this action in the Lower Court. (R-175)

The contention of the Hansens, that there is an absolute privilege to file a Lis Pendens, has been answered in the negative by the Utah Supreme Court in Olsen vs. Kidman, supra, which is consistent with the law of the great weight of authority as to such allegation of privilege.

In 39 A.L.R.2d 840, p. 843, there is an annotation of cases under the heading:

The wrongful filing for a record of a document which casts a cloud upon another's title to or interest in realty is clearly such an act of publication as to give rise to an action for slander of title, if provable damages result.

Under this heading, there are a large collection of cases from the States of Alabama, California, Florida, Illinois, Iowa, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, New Jersey, North Dakota, Oklahoma, Texas, Utah, Wyoming, Canada, and the Tenth Circuit Court of the United States.

It has been further held in a series of cases, that in an attempt to escape liability for slander of title on the

ground that the instrument alleged to have been wrongfully recorded did not in fact affect Plaintiffs' title, have been generally unsuccessful, with the Courts usually taking the view, that any wrongful recordation which would reasonably give pause to the ordinary purchaser may be actionable. This point of view has been expressed in Greenlake Investment Company vs. Swarthout, 161 S.W.2d 697; also in First National Bank vs. Moore, 7 S.W.2d 145, Texas Civil Appeal, 1928; Glimack Oil Company vs. Weiner, 150 Kan. 430, 94 P.2d 309, (1939).

It is the direct testimony of Ronald W. Robbins, who was County Supervisor for the Farmers Home Administration, United States Department of Agriculture, (R-211), who testified that Pierces had a buyer, a Mr. Nicholas, who filed application with F.H.A. on April 5, 1972, for the purchase of the property, and that the loan was approved and a check was issued in the amount of \$11,500.00, which was the balance due after downpayment for the purchase of the property from the Pierces (R-217), and that the sale did not go through because of the Lis Pendens and the failure of the Pierces to have it removed. (R-220, -221)

POINT III

PIERCES ARE ENTITLED TO ALL DAMAGES
OCCASIONED BY FILING OF WRONGFUL LIS PENDENS

The Restatement of the Law on Torts, Vol. 3, Sec. 624,

p. 325, states:

One who, without privilege to do so, publishes matter which is untrue and disparaging to another's property and land, chattels, or intangible things, under such circumstances as would lead a reasonable man to foresee the conduct of a third person as purchaser or lessee thereof might be determined, thereby is liable for pecuniary loss resulting to the other from the impairment of vendibility thus caused.

Blacks Law Dictionary, 4th Ed., defines the term of "vendibility" or to be "vendible" as being merchantable.

In the instant matter before this Court, the Pierces had entered into an actual real estate contract for the sale of their property (R-61, -63) (Def.Exh.17) and did not become aware of the Lis Pendens on said property until a title check was made by F.H.A. prior to delivering up of money in the sum of \$11,500.00 as and for the Purchase Money Agreement of Nicholas for the purchase of the property of the Pierces (R-68), and upon discovery of the Lis Pendens, F.H.A. upon the recommendation of its attorney, Mr. Hatfield (R-217), denied the loan and returned the check to be voided.

In Collins vs. Whitehead, 34 F. 121, the Court held, that where the Plaintiff was desirous of selling his land to obtain money for other undisclosed enterprises and was hindered from doing so by the Defendants' act, in filing a record of papers stating that the Defendant had entered

into a valid, enforceable contract for the purchase of property, was held sufficient to justify the allowance of substantial general damages, although there was no proof of specific damages, the Court saying that the injury to the Plaintiff was real, since he was compelled to bring suit to remove the cloud from his title, and in the interim, his property was useless to him and that it would be a reproach to the law to give him only nominal damages.

In the instant matter before this Court, there need be no speculation as to the damages suffered by the Pierces.

Coley vs. Hecker, 206 Cal. 22, 272 P. 1045, was an action wherein it was alleged that the Defendant maliciously filed an Abstract of Judgment, purporting to constitute a lien against Plaintiff's real estate at a time when the Defendant knew the Judgment had been suspended by an Appeal Bond. The Court held that the allegation, that the malicious recordation decreased the value of the real estate, had rendered it less marketable was true, and that it was not necessary that Plaintiff show that the wrongful act interfered with some special opportunity to sell or deal with the land as might be true if the acts complained were oral.

Davis vs. Wood, 61 Cal.App.2d 788, 143 P.2d 740, was an action wherein the Defendant wrongfully recorded a notice of

location of a mining claim on land upon which Plaintiff held a leasehold interest, thereby casting a cloud upon Plaintiff's title. It was alleged that the recording decreased the value of the leasehold interest and rendered it unmarketable.

The Court held that it was not necessary that the Plaintiff allege that a particular sale was lost because of the wrongful acts, although on special demurrer, the Trial Court might be justified in requiring the damages to be set forth with greater particularity.

Greenlake Investment Company vs. Swarthout, 161 S.W.2d 697, was an action wherein the Defendant allegedly, fraudulently, and in bad faith recorded a claim of lien on the Plaintiff's real estate, and that as a result, a cloud was cast upon the Plaintiff's title and sale of the property was prevented and hindered. The Plaintiff filed an action seeking actual and punitive damages. The Court held that the Complaint stated a good cause of action, even though there was no allegation that the Plaintiff suffered actual damages, and the Court stated that on proof of the charges, Plaintiff would be entitled to at least nominal actual damages, and that if such allowance were made, punitive damages would also be allowed.

Pierces in their Counterclaim alleged and proved the reasonable attorney's fees in this matter should have been

\$1,500.00 as to the Pierces, (R-319) and the record before this Court makes obvious that such a fee is a most moderate fee for the number of appearances, Motions, pleadings, and Legal Memorandums that have been filed in this matter, and that there is no need for apportionment of attorney's fees as between the services rendered by the counsel for Pierces as to the services necessitated by the action of Hansens, in that the Kohler defense required no Depositions, and that the great number of hearings on Motions and pleadings were compelled by Attorney for Hansens rather than Attorney for Kohlers.

Testimony given under oath by Attorney David J. Knowlton reasonably set his services in at \$650.00 for travel and for actual trial held in the matter (R-152), which would leave only \$850.00 as the amount claimed by Attorney Pete N. Vlahos, Esq., for the attending of the two Depositions, making new Interrogatories, answering of pleadings, appearances before the Lower Court on the various Motions made, research, and making of Legal Memorandums, and interviewing of clients and witnesses involved in the matter.

It is submitted to this Honorable Court, that recovering of attorney's fees was established in Dowse vs. Doris Trust Company, supra, wherein the Court stated:

Attorney's fees are certainly a reasonable expense for litigation. Plaintiff testified that he had some inquiries about the land, but had been unable to sell the property with the Defendant's instrument on record, and that was the reason he brought the suit to quiet title. Defendant did not deny that he had placed the instrument on record, knowing that he did not have an enforceable contract by the land for the purpose of preventing Plaintiff from mortgaging or selling it***.

In the Statement of Facts herein set forth and in the quotation and citation of the record as has been done hereinabove, there is ample evidence that Hansens did not have an enforceable contract against the land and have not at any time reasonably explained why they did not timely remove the Lis Pendens so that the damages would not have occurred to the Pierces.

In the case of Olsen vs. Kidman, supra, this Court affirmed the decision of the District Court of Box Elder County and this Court reinstated the prayer of the Plaintiff for attorney's fees when the Lower Court reduced the amount for attorney's fees prayed for by the Plaintiff. In Olsen vs. Kidman, supra, the attorney testified as to what was the reasonable fee for services which he performed against which there was no cross examination, and the Utah Supreme Court stated that what is a reasonable compensation for legal services as testified to by a party is not binding upon the Trial Court, but is advisory only. This Court further

found that the amount prayed for by the party-Plaintiff and testified to by the attorney was a reasonable sum and re-established the attorney's fees testified to in the Lower Court.

There can be no doubt that this Court has taken a stand as to whether or not the Petitioner is entitled to the loss of profit in the sale of the property, and the Court in Dowse vs. Doris Trust Company, supra, cited from the Restatement of the Law of Torts, Sec. 633, pp. 347-348, as follows:

The pecuniary loss for which a publisher of disparaging matter is liable under the rules as stated in Sections 624 and 626 - 627 is restricted to:

- (a) That pecuniary loss which directly and immediately results from the impairment of the vendibility of a thing in question caused by publication of a disparaging matter, and
- (b) The expense of litigation reasonably necessary to remove the doubt cast by the disparagement upon the other's property and a thing or upon the quality thereof.

The Court further stated its Rule of Law in the case as follows:

Attorney's fees are certainly a reasonable expense of litigation. Plaintiff testified that he had some inquiries about the land, but had been unable to sell the property with Defendant's instrument on record, and that was the reason he brought the suit to quiet title. Defendant did not deny that he placed the instrument on record, knowing that he did not have an enforceable contract by

the land, for the purpose of preventing Plaintiff from mortgaging or selling it. Under such circumstances, the Court did not err in directing a verdict in favor of Plaintiff as to the tspecial damages.

In the instant matter before this Court, the testimony before the Court revealed that there was a period of eight months, and during such period of time, no rent was paid by the Nicholases who were the prospective purchasers for the property while they were waiting for a valid title conveyance to them of the property. (R-206, -207) It was further testified by Mr. Robbins of the Farmers Home Administration, that there was an additional period of approximately five months wherein said premises were vacant, owing to the inability of the parties to sell the land. (R-220)

It was further testified to by a real estate expert (R-206) and by the Pierces (R-164), that the premises had a reasonable rental value of at least \$95.00 a month.

The Court in its Judgment as rendered on December 15, 1974, determined that a preponderance of the evidence showed that as a direct and proximate cause of unfounded and unwarranted filing of a Lis Pendens by Hansens and the refusal to remove same, the Pierces incurred damages as follows:

(a) Out-of-pocket special damages in the total amount of \$1,196.75.

(b) Damages for the loss of sale of the real property

in question in the amount of \$1,500.00.

(c) Damages for loss of rents concerning said real property for a period of eight months at the rate of \$50.00 per month for a total of \$400.00.

(d) Reasonable attorney's fees incurred in connection with this proceeding in the amount of \$1,000.00, for a total verdict of \$4,096.75, plus costs in the amount of \$69.30, for a total Judgment in the amount of \$4,166.05. (R-464)

Following the verdict of the Court for the Pierces and against Hansens, Hansens filed a Motion for a New Trial (R-467), which was denied by the Court (R-497).

The Court subsequently filed a modification of its Memorandum Decision and reduced the Judgment of the Pierces disallowing the \$1,500.00 that would have been realized by the Pierces as a profit from the sale of the premises had they been allowed to close the sale by removal of the Lis Pendens by the Hansens, and the Court did thereby reduce the Judgment to \$2,596.75. (R-479)

The reasoning of the Court in reducing and denying the \$1,500.00 was based upon the Court finding that the price paid for the property by Pierces was \$11,570.00 rather than \$10,000.00 and did find that the price to be received on the sale of the property would be \$12,300.00, but alleged that the

Pierces would have had to pay a sales commission and, therefore, they would not have realized any profit from the sale of the home. (R-479)

The testimony of the Pierces clearly show that the amount paid for the property was \$10,500.00 (R-224) (Def.Exh.14), and that the sale price for the property was \$12,300.00. (R-163) (Def.Exh.17) The record further shows that there was expenditure by the Pierces after the purchase of the home for improvements made thereon and the Court has added the improvement costs in and has then deducted a real estate commission of the sale of property six percent for a sale which did not occur but for which there could be liability to the Pierces by the deduction logically, that if the sale had occurred, that that would have reduced the profits.

It is submitted to the Court that the original Judgment of the Court allowing the \$1,500.00 profit of the sale of the home by the Pierces to the Nicholases had it been consummated was the damages suffered by the Pierces, and that there is nothing in the record showing that there is no liability upon the Pierces for payment to the realty agency of the sales commission, and in addition, the Hansens should not be able to benefit by their own wrong by being given the benefit of the bargain by a reduction in the loss of profits of the home to the Pierces in said amount of \$1,500.00.

It is further a matter of record, that the real value established for the rental value of the home was in a minimal sum of \$95.00 (R-164, -206), but that the Court in entering its Judgment allowed only \$50.00 a month rental for eight months, that the Nicholases lived in the home without any rental payments while waiting to obtain clear title by Pierces obtaining a removal of the Lis Pendens from the Hansens, and the Court should have awarded to the Pierces the reasonable rental value of the property which was in the minimal sum of \$95.00 per month, and further, that the home was in limbo for an additional five-month period (R-220), and that additional rental for that five-month period at \$95.00 a month should have been awarded to the Pierces.

POINT IV

THE LOWER COURT SHOULD HAVE AWARDED ADDITIONAL DAMAGES

The Pierces in their Counterclaim and prayer alleged that the conduct of the Hansens was outrageous and intolerable under contemporaneous community standards and that the acts of the Hansens in filing and failing to remove upon demand the Lis Pendens was done maliciously and wilfully and that as a direct and proximate result of the conduct, that the Pierces suffered mental stress, anxiety, and anguish and prayed for the sum of \$10,000.00. (R-323)

The Counterclaim and prayer of the Counterclaimants, Pierces, further alleged that as a result of the wilful, wanton, and malicious conduct of the Hansens, that the Pierces were entitled to punitive and exemplary damages in the sum of \$5,000.00.

The legal basis for the first claim of the Pierces is based upon the conduct of the Hansens as was exemplified in the findings of this Court in the case of Samms vs. Eccles, 358 P.2 344, wherein this Court found that the conduct by one that was outrageous and intolerable under contemporaneous community standards and which was done maliciously and wilfully, and wherein as a result thereof, the injured party suffered mental distress, anxiety, and anguish, that an award of damages should be made and so found in that action.

The claim of the Pierces as to the punitive and exemplary damages is based upon the traditional findings by this Court, that where one does a wrongful act which was wilful, wanton, and malicious, that the awarding of punitive damages is done to discourage future conduct of a like nature by such persons.

There was no finding whatsoever in the Lower Court as to either of these issues and it is the contention of the Pierces, that the conduct enumerated in the Statement of Facts above, and hereinbelow summarized, warranted such

a finding and Judgment.

Mr. Pierce's employment at Thiokol Chemical Corporation was terminated and in order to find additional employment (R-161), he was compelled to move to Little Rock, Arkansas, for the purpose of obtaining new employment (R-161).

The duty fell upon Mrs. Pierce to sell the home, which she did by listing the property for sale with a realtor. (Def.Exh.14)

There was no knowledge by either of the Pierces, that there was any Lis Pendens or encumbrance upon their property that would prevent resale of the property. (R-173, -188)

The episode hereinabove testified to by Mrs. Pierce (R-96) and admitted by counsel for Hansens as a witness (R-96) related the visitation by Mr. Hansen and his counsel to the home of the Pierces, where Mrs. Pierce was confronted in her home by Mr. Hansen and his attorney and advised that a Lis Pendens had been filed and that a claim had been made against the property of the Pierces (R-96), and that even after showing to Mr. Hansen and his counsel a copy of a Warranty Deed from Kohler, together with title insurance evidencing that there was no claim of any kind against the property as of the time of purchase of the property by Pierces from Kohlers, that Hansen and counsel continued to stand fast on their Lis

Pendens. (R-97), and that as a direct and proximate result of said visitation, Mrs. Pierce was greatly upset, suffering mental anguish and emotional distress and was left in tears (R-99), and that upon advising her husband of the claim (R-99), Mr. Pierce left his employment by quitting his job and coming home to attempt to straighten out the allegation of the claim by the Hansens. (R-168)

That the Pierces made a visitation to the office of the counsel for Hansens, after first having spoken to counsel for Kohler (R-169), and after advising counsel for Hansens, that Pierces were being forced to move from the State of Utah and had placed their home for sale and could not sell it with the Lis Pendens pending against said property, they were advised by counsel for Hansens, that they should talk to their title insurance carrier. (R-174), and were advised by the Pierces that they had already done that and were advised by the title insurance carrier that at the time of the issuing of the title policy, that the property was unencumbered and did not have a Lis Pendens filed against it and that, therefore, there was no liability on the title insurance carrier for a Lis Pendens filed subsequent to a policy of title insurance. (R-167) To which counsel for Hansens invited them to join in a suit, stating "the more the

merrier". (R-174)

Subsequent thereto, Mrs. Pierce joined her husband and moved to Texas, where he had employment (R-168), believing that some way the property could be sold regardless of the Lis Pendens. (R-168)

Subsequent thereto with the failure of the earnest money buyers who were residing in the Pierces' Howell home for eight months and not paying any rent, waiting for issuance of title to them (R-164, R-208), the Pierces made another trip to Salt Lake City to speak to counsel for Hansens in an additional attempt to have the Lis Pendens removed (R-168), and advised Hansens and counsel that they were unable to make the home payments and would lose the home without being able to make a sale of the property to the Nicholases, which was refused. (R-169)

This was in November, 1972, (R-168), the Pierces engaged the present counsel in an attempt to obtain a removal of the Lis Pendens and a Motion to File as Intervenor was filed (R-309), and with the consent of the Court, a Counterclaim and Cross Claim was filed by the Pierces in this matter. (R-319)

Counsel for the Hansens compelled the attendance of both the Pierces to come at their own expense from Texas to

Lake City for purposes of Deposition (R-186), and the Pierces attended at separate times in order to have one of the parents home with their four children, both compelled to attend Depositions requested and ordered by counsel for Hansens. (R-186) Both of the Pierces being employed in Texas. (R-178)

The Pierces, of course, were again compelled to attend trial in Brigham City, again leaving their jobs and this time their children with a babysitter for the purpose of being present at a two-day trial. (R-186)

It is to be noted that the Lis Pendens was not removed until the first day of the trial, which occurred on February 5, 1974, (R-1, R-175) and that a Warranty Deed conveyance of the title to the property had been made by the Hansens to Kohlers on April 2, 1969, with the Kohlers conveying by Warranty Deed to the Pierces on October 18, 1971, and the Lis Pendens being filed subsequent to that time (R-319).

It should further be noted by the Court, that a foreclosure of the property was made (R-207) by Farmers Home Administration for nonpayment and breach of Promissory Note and a Mortgage by the Pierces.

It is submitted to this Honorable Court, that there are adequate grounds to find that the conduct hereinabove set forth by the Hansens, even if excusable for the original filing

of a Lis Pendens by reason of a Complaint against the Kohlers, which the Lower Court has found to be totally unfounded and which not only destroyed the vendibility of the Pierces' property, but caused them such great physical and economic upheaval by the continued unreasoned, wilful, and wanton refusal to remove the Lis Pendens, did constitute such conduct as was outrageous and intolerable under contemporaneous community standards, and that the subsequent acts of the Hansens was maliciously and wilfully done, and that as a direct and proximate result of such conduct, that the Pierces did suffer mental distress, anxiety, and anguish, and should have been entitled to an award for such conduct, and further, that the Court should have given notice to the Hansens of such arrogant use of the Courts and of legal process which was totally unfounded should have been deterred by an award of punitive damages as well to the Pierces.

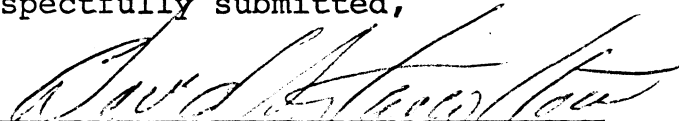
CONCLUSION

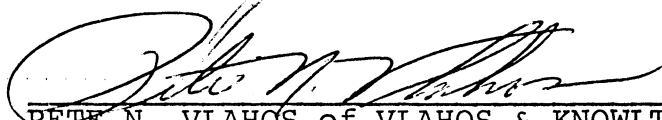
It is submitted to this Honorable Court, that the modified Judgment of the Court in awarding the bare bone but partial expenses and loss to the Pierces was at best a minimal Judgment and that the original Judgment of the Court would more reasonably have reflected the actual loss suffered by the

Pierces and the Pierces should have been awarded the additional \$1,500.00 for loss of profit on the home, and further, that this Court should give notice to the type of conduct herein set forth by modification of the Judgment make an award to the Pierces of the additional actual damages suffered by the Pierces, as well as an addition for punitive and exemplary damages, and that the Court should sustain the Judgment of the Lower Court and modify the Judgment to reflect the actual injury inflicted upon the Pierces.

DATED this 18 day of September, 1975.

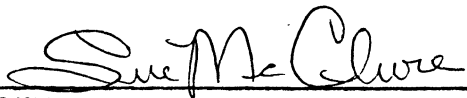
Respectfully submitted,


DAVID J. KNOWLTON of VLAHOS & KNOWLTON


PETE N. VLAHOS of VLAHOS & KNOWLTON
Attorneys for Intervening Defendants,
Cross Claimants and Respondents

CERTIFICATE OF MAILING

A copy of the above and foregoing Reply Brief of Intervening Defendants, Cross Claimants, and Respondents, Earsel G. Pierce and Patricia B. Pierce, was posted in the U.S. mail postage prepaid and addressed to the Attorney for Plaintiffs and Appellants, Golden W. Robbins, 455 East 400 South, Suite 50, Salt Lake City, Utah, and to the Attorney for the Defendants and Respondents, Bryce E. Roe, 340 East Fourth South, Salt Lake City, Utah, on this 17th day of September, 1975.



Secretary