

1986

Joseph M. Behunin and Ardella Behunin v. Mark Gallegos and Arlene Gallegos : Brief of Appellant

Utah Supreme Court

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BRIEF

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DOCKET NO. 860065

IN THE SUPREME COURT OF THE STATE OF UTAH

JOSEPH M. BEHUNIN and
ARDELLA BEHUNIN,

Plaintiffs/Respondents

vs

MARK GALLEGOS and
ARLENE GALLEGOS,

Defendants/Appellants.

860065-CA
Supreme Court
Appeal No. 20206

District Court
Civil No. 236640

BRIEF OF APPELLANT

Appeal from the Judgment of the Third Judicial District Court,
Salt Lake County, Honorable Peter F. Leary, District Judge.

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FILED

FEB 26 1985

Clerk, Supreme Court, Utah

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PARTIES TO THE PROCEEDING:

Plaintiffs:

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Defendants:

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TABLE OF CONTENTS

| | <u>Page</u> |
|--|-------------|
| PARTIES TO THE PROCEEDING | i |
| TABLE OF CONTENTS | ii |
| TABLE OF AUTHORITIES | iii |
| STATEMENT OF ISSUES PRESENTED ON APPEAL | 1 |
| NATURE OF THE CASE | 2 |
| STATEMENT OF FACTS | 4 |
| SUMMARY OF ARGUMENT | 8 |
| ARGUMENT | 11 |
| POINT I. THE COURT'S FAILURE TO INSTRUCT THE JURY THAT NO IMPLIED RIGHT TO LIGHT, AIR OR VIEW EXISTS WAS FATALLY PREJUDICIAL TO DEFENDANTS' DEFENSE. | 11 |
| POINT II. THE COURT'S INSTRUCTIONS ON NUISANCE AND THE SPITE FENCE DOCTRINE WERE CONFUSING AND MISLEADING AND WERE PREJUDICIAL TO DEFENDANTS' DEFENSE. | 14 |
| POINT III. THE COURT EFFECTIVELY IMPLIED A RIGHT TO LIGHT, AIR AND VIEW IN PLAINTIFFS, IN DEROGATION OF THE COMMON LAW, IN FINDING THE DEFENDANTS BREACHED THE SETTLEMENT STIPULATION | 17 |
| POINT IV. THE COURT IMPROPERLY EXCLUDED ADMISSIBLE EVIDENCE NECESSARY FOR DEFENDANTS TO ESTABLISH THEIR DEFENSE IN THIS MATTER, THEREBY COMMITTING CLEAR AND REVERSABLE ERROR | 20 |
| POINT V. THE INJUNCTIVE RELIEF AWARDED BY THE COURT VIOLATES DUE PROCESS OF LAW | 32 |
| CONCLUSION | 34 |
| ADDENDA | 38 |

TABLE OF AUTHORITIES

| | <u>Page</u> |
|--|-------------|
| A. CITATIONS TO CASES | |
| <u>Baillargeon v. Press</u> | |
| 11 Wash. App. 59 529 P.2d 746 (Wash. App. 1974) | 16, 33 |
| <u>Boyd v. McDonald</u> | |
| 408 P.2d 717 (Nevada 1965) | 11, 12 |
| <u>Camfield v. United States</u> | |
| 167 U.S. 518, 17 S. Ct. 864 | 15 |
| <u>City of McAlester v. King</u> | |
| 317 P.2d 265 (Oklahoma 1957) | 11 |
| <u>Fountainbleau H. Corp. v. Forty-Five Twenty-Five, Inc..</u> | |
| 114 So. 2d 357 (Florida 1957) | 11 |
| <u>Hornsby v. Smith</u> | |
| 191 Ga. 491, 13 S.E. 2d 20 (Georgia 1941) | 15 |
| <u>Kentucky Railroad Cases</u> | |
| 115 U.S. 321, 6 S. Ct. 57 (U.S. 1885) | 33 |
| <u>Rowley v. Marrcrest Homeowner's Assoc.</u> | |
| 656 P.2d 414 (Utah 1982) | 15, 16, |
| <u>Schulz v. Quintana</u> | |
| 576 P.2d 855 (Utah 1978) | 14, 16, 33 |
| <u>State Highway Dept. v. Branch</u> | |
| 22 Ga. 770, 152 S.E. 2d 372 (Ga. 1966) | 33 |

Sundowner, Inc. v. King

96 Idaho 367, 509 P.2d 785 (Idaho 1973) 15

Taliaferro v. Salyer

162 Cal. App. 2d 685, 328 P.2d 799 (Cal. App. 1958) 11

Untermeyer v. State Tax Comm.

102 U.214, 129 P.2d 881 33

Wingets, Inc. v. Bitters

28 U.2d 231, 500 P.2d 1007 (Utah 1972) 18

B. CITATIONS TO AUTHORITIES

133 ALR 697 15

Constitution of the United States, Fifth Amendment 32, 33

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Constitution of the United States,
Fourteenth Amendment, Section 1 32, 33

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of Utah, Article I, Section 7 32, 33

No person shall be deprived of life, liberty or property, without due process of law.

C. CITATIONS TO STATUTES

Utah Code Annotated, 1953 as amended, §57-13-2 12, 19

(1) Any property owner may grant a solar easement in the same manner and with the same effect as a conveyance of an interest in real property. The easement shall be created in writing and shall be filed, duly recorded and indexed in the office of the recorder of the county in which the easement is granted. Such easements shall run with the land or lands benefited and burdened and shall constitute a perpetual easement, except that a solar easement may terminate upon the conditions stated herein.

(2) Any deed, will, or other instrument that creates a solar easement shall include, but the contents need not be limited to:

a. A description of the real property subject to the solar easement and a description of the real property benefiting from the solar easement;

b. A description of the vertical and horizontal angles, expressed in degrees and measured from the sight of the solar energy system, at which the solar easement extends over the real property subject to the solar easement, or any other description which defines the three dimensional space, or the place and times of day in which an obstruction to direct sunlight is prohibited or limited;

c. Any terms or conditions under which the solar easement is granted or may be terminated;

d. Any provisions for compensation of the owner of the real property benefiting from the solar easement in the event of interference with the enjoyment of the solar easement, or compensation of the owner of the real property subject to the solar easement, or compensation of the owner of the real property subject to the solar easement for maintaining the solar easement; and

e. Any other provisions necessary or desirable to execute the instrument.

(3) A solar easement may be enforced by injunction or other proceedings in injunction or other civil action.

Zoning Ordinances of Salt Lake City, §51-25-3 4, 17

FRONT YARD, SIDE YARD AND REAR YARD
REGULATIONS. Front yard, side yard and rear yard
regulations are not required except when an "M-1" District
abuts residential districts as outlined in Chapter 6.

Zoning Ordinances of Salt Lake City, §51-25-4 4, 17

HEIGHT REGULATIONS. No building or structure shall be
erected to a height in excess of eighty (80) feet.

STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Does an implied right to light, air or view exist in the State of Utah?
2. Did the trial court err in failing to instruct the jury that there is no implied right to light, air or view in the State of Utah?
3. Did the trial court improperly instruct the jury on the question of nuisance as particularly affected by the spite fence doctrine?
4. Can a court award damages or order injunctive relief against a property owner on grounds of nuisance where the fence or improvement is fully upon the property of the defendant and complies with applicable zoning regulations, unless the fence or improvement was erected solely for spite or malice against a neighbor?
5. If a fence or other improvement is erected for the purpose of maintaining and protecting the privacy of a landowner, can damages be awarded for maintenance of the structure or can removal of the structure be compelled?
6. Did the court's failure to instruct the jury that no implied right to light, air or view exists improperly prejudice defendants' defense and right to a fair trial?
7. Were the court's instructions on nuisance adequate to inform the jury of the law regarding spite fences or were the instructions so confusing and misleading as to prejudice defendants?
8. Did the trial court improperly imply a right to light, air and view in plaintiffs in derogation of the common law, in determining that defendants breached the Settlement Stipulation between the parties?
9. Did the court improperly exclude admissible evidence relevant to defendants' defenses, prejudicing defendants?
10. Is the injunction granted by the trial court overbroad and does it violate due process of law by effectively establishing a light, air and view easement and thereby taking property from defendant without compensation?

NATURE OF THE CASE

Plaintiffs sought an injunction and relief in damages on theories of breach of contract and nuisance in connection with the erection by defendants of two eight foot high partitions erected upon defendants' property which arguably interfered with plaintiff's light, air and view. The action was originally filed in July, 1976 in connection with the erection by defendants of a cinder block wall dividing the adjacent properties of plaintiffs and defendants on Euclid Avenue. In their original Complaint, plaintiffs sought and obtained a temporary restraining order and preliminary injunction based upon their claims that the proposed wall would encroach upon their property, not leave proper and sufficient support for the soil of plaintiffs' land and residence and would interfere with plaintiffs' claimed right to light, air and view from the windows on the west side of their residence. (Record, pages 2 through 5, Complaint).

The original Complaint was resolved by a stipulation drafted by defendants' counsel and executed by the parties and their counsel, dated July 18, 1977. (Record, pages 124 through 128; Appendix A). The Stipulation resolved the boundary dispute between the parties and provided that defendants could erect the cinder block wall subject to certain restrictions as to its location and height. The action was to have been dismissed but appropriate papers were not filed to accomplish a dismissal.

The action was renewed by the filing of another Complaint by plaintiffs in the Fifth Circuit Court in and for Salt Lake County, Salt Lake Department, on or about November 24, 1981. (Record, pages 114 through 117). That Complaint was amended in the Circuit Court to allege the claims which were ultimately tried in this action. (Record, pages 96 through 100). The Circuit Court, Judge Larry R. Keller, ordered the Circuit Court action transferred to the District Court after it was determined that the plaintiffs were attempting to enforce the Settlement Stipulation entered into in the prior District Court action. The Circuit Court file was transferred to the District Court and the matter proceeded to trial premised upon the pleadings filed in the Circuit Court,

particularly the Amended Complaint referenced above.

Plaintiffs originally sought relief against defendants grounded in claims of breach of contract, infliction of severe emotional distress, defamation and nuisance. On the day of trial, plaintiffs voluntarily dismissed their claims for infliction of severe emotional distress and defamation. The matter proceeded to trial before the court and a jury on the issues of injunctive relief and damages for breach of contract and nuisance.

At trial, plaintiffs contended that the erection by defendants of eight foot partitions in the side yard between the residences of the two parties violated the terms of the Settlement Stipulation, justifying an award of compensatory damages and punitive damages. Plaintiffs additionally contended that the partitions erected by defendants constituted a nuisance, depriving them of their light, air and view. Defendants attempted to establish that the partitions were erected as a defensive measure to protect their privacy from unwarranted and repeated invasions thereof by the plaintiffs. Defendants resisted plaintiffs' claims, maintaining that the Settlement Stipulation granted no express right to light, air or view and that such a right could not be implied under the law.

The matter was tried commencing November 3, 1983, and continuing on November 7, 1983. At the conclusion of the evidence and instructions and after argument, the jury rendered its verdict in favor of plaintiffs and against defendants, awarding no damages for breach of contract but punitive damages for breach of contract in the amount of \$1,000.00. The jury additionally awarded \$1,000.00 compensatory damages on the theory of nuisance and \$5,000.00 punitive damages for maintenance of a nuisance. The court remitted the jury verdict with respect to punitive damages premised upon a contract theory where no actual damages were found. (Record, pages 221 through 222; 571, Appendix B).

The court additionally issued an injunction requiring the removal of the existing partitions between the residences other than the cinder block wall and further restraining

construction or erection between the residences of the parties of similar barriers to light, view and air in excess of the height of the cinder block wall. (Record, pp 249-250, Appendix C.)

The court entered its judgment on verdict and injunction on July 3, 1984. (Record, pages 249 through 252). Defendants subsequently brought a motion for a new trial filed July 13, 1984. The court denied plaintiff's motion for a new trial through its Order dated August 28, 1984 (Record, pages 312.) Defendants filed the instant appeal on or about September 19, 1984. (Record, pages 315-316, Appendix D).

STATEMENT OF FACTS

Plaintiffs and defendants are neighbors owning adjoining parcels of property on which their residences are constructed. Both properties front on Euclid Avenue in Salt Lake City. Euclid Avenue runs east and west. The property of the parties lies to the south side of Euclid Avenue and defendants' property lies to the west of that of the plaintiffs. The residences of the parties were constructed in close proximity such that plaintiffs' residence sits approximately two feet from their westerly border, the easterly border of defendants' property. (Record, pp 350-351, pp 427-429). The defendants' house is situated somewhat further from the common boundary, or approximately four to five feet from the common boundary at the closest point and farther away at other points. (Record, p. 398, defendants' exhibit 34D and plaintiffs' exhibit 58P).

The properties of the parties are situated in an area zoned "M-1" or light industrial (Record, p. 435). M-1 districts have no front yard, sideyard or rear yard regulations such that improvements may be built right to the property line to the height of 80 feet. (Zoning ordinances of Salt Lake City Sections 51-25-3 and 51-25-4). It was stipulated at the trial that the partitions erected by defendants which were the subject of the action did not violate zoning ordinances and were built pursuant to and in compliance with applicable zoning. (Record, page 436).

At or about the time the original Complaint in this action was filed in July, 1976,

defendants commenced construction of a cinder block wall separating the adjoining properties of plaintiffs and defendants. Plaintiffs obtained a temporary restraining order, enjoining further construction of the cinder block wall at a time when excavation and laying the footings for the wall was under way. The restraining order which was obtained upon sworn allegations that the wall was to encroach upon the property of the plaintiffs, held up construction of the cinder block wall for approximately one year. During that time, the building materials for the cinder block wall remained in the back yard of defendants and defendants were unable to proceed with construction of the wall. (Record, page 449-451). Plaintiffs and defendants attempted to resolve the controversy between them by entering into the Stipulation dated July 18, 1977, which is attached hereto as Appendix A. (Record, pages 124-128). In the Stipulation, the parties provided that the cinder block wall could be build at the location at which the footings had been laid. Both parties were to permit the wall to be constructed pursuant to the provisions of paragraph 4 of the Stipulation. The parties agreed to work in a cooperative and reasonable manner to perform the obligations of the Settlement Stipulation. (Paragraph 14). The cinder block wall was constructed pursuant to the specifications contained in the Stipulation, some time in the spring of 1978. (Record, page 361; pages 497-498). The partitions complained of by plaintiffs at trial were installed approximately one year before the trial or in 1982. (Record, page 366). Defendants contend that they found it necessary to install the additional partitions to protect their privacy from invasions of the same by the plaintiffs. Plaintiffs contended that defendants erected the additional partitions solely for spite.

The terms of the Settlement Stipulation entered into between the parties in July, 1977, govern the construction of a cinder block wall on the property line dividing the property of the parties. In paragraph 4, the Stipulation provides that the cinder block wall must be constructed in accordance with the dimensions set forth therein. The wall was to be constructed of standard size and quality cinder block by a licensed contractor

in accord with standard building specifications including proper footings and reinforcement bars. The wall was to be inspected by city building inspectors after issuance of necessary building permits. There was no evidence at trial to indicate that the cinder block wall was constructed other than in accordance with the July, 1977, Stipulation. The plaintiffs stipulated that the wall was properly inspected and was built in accordance with applicable zoning requirements. (Record, page 435; Appendix A, paragraphs 4, 5, 6, 7 and 9).

In their Complaint filed in Circuit Court, plaintiffs raised claims against defendants for breach of the Settlement Stipulation because of the erection of two partitions, including an eight-foot green fiberglass partition maintained on posts approximately four inches from and parallel to the cinder block wall, and an eight foot redwood partition erected on a diagonal across the front of defendants' property approximately three feet six inches from the wall at its nearest point near the frontage of the properties on Euclid Avenue, and approximately eight feet five inches from the cinder block wall at its farthest point from the same. Plaintiffs also raised claims for infliction of severe emotional distress and defamation. These claims were dismissed on the motion of plaintiffs on the day the trial commenced. Plaintiffs additionally sought relief from the partitions erected by defendants grounded on a theory of nuisance, claiming that the partitions were a "spite fence". (Record, page 96-100). The matter was tried to a jury before the Honorable Peter F. Leary on the 3rd and 7th days of November, 1983. The jury rendered its verdict in favor of plaintiffs and against defendants pursuant to the special verdict submitted by the court. (Record, pages 221-222, Appendix B). The jury found that the defendants had breached their Settlement Stipulation with defendants but awarded no actual damages in connection with any such breach. The jury awarded \$1,000.00 punitive damages with respect to breach of the Settlement Stipulation. The jury also found that the partitions erected by defendants constituted a nuisance and awarded compensatory damages in the amount of \$1,000.00

and punitive damages on the theory of nuisance in the amount of \$5,000.00. The court refused to permit the entry of judgment for punitive damages on the contract theory in the absence of a finding of actual damages. (Record, page 571). In a subsequent hearing held on December 21, 1983, the court indicated it would enter an injunction consistent with the prayer in the Complaint. Thereafter followed some confusion with respect to filing appropriate orders to implement the judgment and injunction and objections were interposed by defendants to the form of the proposed orders. The court's Injunction and Judgment on Verdict were finally entered on or about July 3, 1984. (Record, pages 249-252, Appendices C and D). The injunction ultimately required removal of the partitions including the green fiberglass partition and the eight foot redwood partition erected in defendants' yard. It further enjoined defendants from constructing, erecting or placing between the residences of the parties similar barriers to light, view and air in excess of the height of the existing wall between the residences. The reference was to the existing cinder block wall between the residences. (Record, pages 249-250, Appendix C). In the Amended Complaint, plaintiffs had sought an order requiring removal of the fences to comply with City ordinances. (Record, pages 99-100).

Defendants filed a Motion for New Trial and sought leave to file a Memorandum in excess of the five page limitation imposed by the Local Rules of the Third District Court. The court denied defendants' Motion to file a Memorandum in excess of the page limitation but did, at the time of hearing, indicate that defendants could file a shorter Memorandum. Defendants filed such a Memorandum but the trial court denied defendants' Motion for a New Trial. This appeal was then taken by defendants-appellants.

SUMMARY OF ARGUMENT

1. The court refused, over defendants' exception, to instruct the jury that at common law, no implied right to light, air or view exists. Defendants contend that American law refuses to recognize an implied right to light, air or view in the absence of some express agreement or easement for the same. Defendants contend that the court's failure to inform the jury of the lack of the existence of an implied right to light, air or view prejudiced them because it enabled the jury to infer such a right in plaintiffs. Had the jury been properly instructed, the result would have been different on both contract and nuisance theories. The Utah legislature has established requirements for solar easements which are not unlike rights for light, air and view. The statutory requirements expressly require a written instrument which describes the benefited and burdened property and describes the nature of the easement. The court's failure to instruct regarding implied rights to light, air and view was clear and prejudicial error and warrants the award to defendants of a new trial.

2. The court's instructions on nuisance, considering the spite fence doctrine, were confusing and misleading and prejudicial to defendants. The court gave a general instruction on nuisance but failed to also instruct the jury that generally property owners are free to use their property as they see fit, so long as their use does not injure others. A fence otherwise on a party's property cannot be a nuisance merely because it interferes with the light, air or view of an adjoining property owner. Such an interpretation would violate the common law rule that rights to light, air and view do not exist by implication. To create a duty to preserve the light, air and view of a neighbor, the breach of which is actionable nuisance, defeats and undermines the policy prohibiting implied rights to light, air and view. Modern courts have recognized that under some circumstances, fences can constitute a nuisance, but have required that a showing be made by clear and convincing evidence that the fence or improvement which otherwise obstructs light, air or view was erected and maintained solely for spite only then can an

award of damages for its maintenance or an order to compel its removal be made. The court's instructions were ambiguous and permitted the jury to believe, especially in the absence of an instruction regarding light, air and view, that the mere maintenance of a fence which was objectionable to plaintiffs and interfered with their light, air and view was a nuisance. The court's instructions were thus improper and prejudiced defendants.

3. In granting an injunction and finding that defendants breached the Settlement Stipulation, the court effectively implied a light, air and view easement burdening defendants' property. The Settlement Stipulation discusses the erection of a cinder block wall and does not indicate that the defendants are otherwise limited or restricted in the use of their property. A right to light, air or view respecting improvements other than the cinder block wall can only be implied or inferred into the Settlement Stipulation. The Settlement Stipulation was drafted by plaintiffs' counsel and under established doctrines of contractual interpretation, must be construed against the plaintiffs. The court, by implying a right to light, air or view and declaring a breach of the Settlement Stipulation by erection of partitions in excess of the height of the cinder block wall violated the law on implied rights to light, air and view and prejudiced the defendants.

4. The court excluded admissible and relevant evidence necessary for defendants to establish their defense to plaintiffs' claims of breach of contract and maintenance of a nuisance under the spite fence doctrine. The court refused to permit evidence of the reputation of the plaintiffs in the community for snoopiness and invasion of privacy, despite the fact that plaintiffs raised the issue of their reputation in the community for such traits in their case in chief. Such evidence was clearly relevant and admissible going to the credibility of the plaintiffs and going to establish an affirmative defense by defendants that the improvements complained of were constructed for protection of their privacy as opposed to solely for spite. Defendants were prejudiced by this error.

The court excluded evidence with respect to the plaintiffs' attempts to undermine the cinder block wall, which was the subject of the prior Settlement Stipulation of the parties. A prior breach by plaintiffs could justify defendants' nonperformance, even if it were established that defendants breached the Settlement Stipulation. The court's failure to admit testimony with respect to plaintiffs' efforts to undermine the wall was error and prejudiced the defendants in attempting to defend the claim of breach of contract.

The court restricted evidence offered to show that the plaintiffs repeatedly called governmental authorities, including police and building inspectors, to the residence of the defendants for the purpose of harassing them and invading their privacy. The court offered objections on its own motion and offered grounds for sustaining objections when plaintiffs' counsel did not offer them. The conduct of the court in disallowing this relevant evidence severely prejudiced defendants' ability to maintain a defense to plaintiff's claims.

5. The injunctive relief awarded by the court is overbroad in that it restricts defendants' right to use their entire side yard, without compensation. The court's injunction violates due process of law in that it extends the provisions of the Settlement agreement far beyond the terms of the instrument. On a theory grounded in nuisance, the injunction improperly restricts defendants' ability to erect improvements in their side yard, regardless of defendants' motive, unless the improvements do not exceed the height of the existing cinder block wall. The injunction constitutes state action which deprives defendants of the full use of their property. The injunction restricts uses otherwise permitted by local zoning ordinances and building codes without any compensation to defendants. As such, the injunction violates due process of law and should be dissolved.

ARGUMENT

POINT I.

THE COURT'S FAILURE TO INSTRUCT THE JURY THAT NO IMPLIED RIGHT TO LIGHT, AIR OR VIEW EXISTS WAS FATALLY PREJUDICIAL TO DEFENDANTS' DEFENSE.

At common law, a land owner has no easement over adjoining lands for light, air or view and he cannot recover damages from an adjoining land owner who constructs a structure, otherwise legal, which interferes with light, air or view. Taliaferro v. Salyer, 162 Cal. App. 2d 685, 328 P.2d 799 (Cal. App. 1958). As was discussed in the case of Fountainbleau H. Corp. v. Forty-Five Twenty-Five, Inc., 114 So. 2d 357 (Florida 1957):

No American decision has been cited, and independent research has revealed none, in which it has been held that - in the absence of some contractual or statutory obligation - a landowner has a legal right to the freeflow of light and air across the adjoining land of his neighbor. Even at common law, the landowner had no legal right, in the absence of an easement or uninterrupted use and enjoyment for a period of twenty (20) years, to unobstructed light and air from adjoining land . . . and the English doctrine of "ancient lights" has been unanimously repudiated in this country. Id. at 359.

The Supreme Court of Nevada, reversing a trial court decision recognizing a right to light and air, gave the rationale for the majority rule:

To imply the grant of such a right (to light and air) without express words, would greatly embarrass the improvement of estates, and, by reason of the very indefinite character of the right asserted, promote litigation. The simplest rule, and that best suited to a country like ours, in which changes are taking place in the ownership and use of lands, is that no right of this character can be acquired without express grant of an interest in, or covenant relating to, the lands over which the right is claimed. Boyd v. McDonald, 408 P.2d 717, 722 (Nevada 1965).

Unless a property owner can prove that he has an easement for light, air or view in or over adjoining property, he generally has no cause of action or cause for complaint if the light, air or view are interfered with or entirely shut off by erection of a structure otherwise lawful on adjoining property. City of McAlester v. King, 317 P.2d 265 (Oklahoma 1957). Additionally, whether or not the structure is appealing to the property

owner who objects to it, the property owner has no right to damages from the adjoining landowner. Id. at page 273. See also Boyd v. McDonald, 408 P.2d 717 (Nevada 1965).

Whether or not an implied right to light, air or view exists in Utah appears to be a matter of first impression. No direct statutory authority governing light, air or view easements in Utah has been found. However, the Utah legislature has spoken with regard to requirements for creation of solar easements. Solar easements are similar to easements for light and air, but differ in that they are specifically directed toward maintenance of clear land or solar sky space for the purpose of insuring adequate exposure of a solar energy system as defined in the statute. Section 57-13-2, Utah Code Annotated, 1953 as amended, governs the creation of solar easements and provides in pertinent part as follows:

(1) Any property owner may grant a solar easement in the same manner and with the same effect as a conveyance of an interest in real property. The easements shall be created in writing and shall be filed, duly recorded and indexed in the office of the recorder of the county in which the easement is granted. Such easements shall run with the land or lands benefited and burdened and shall constitute a perpetual easement, except that a solar easement may terminate upon the conditions stated herein.

The statute provides that the instrument which creates a solar easement must include a description of the real property subject to the solar easement and a description of the real property benefiting from the easement. The vertical and horizontal angles expressed in degrees and measured from the sight of the solar energy system must be described. In the statute creating the right to a solar easement in Utah, the Utah legislature requires performance of specified conditions before the creation of such an interest. In the absence of such conditions such an easement does not exist.

The requirement of meeting such formalities for creation of such an easement is logical considering the substantial interference with property rights such an easement creates. Like a solar easement, an easement for light, view or air deprives a property owner of the right to put his property to otherwise legitimate uses of his choice,

conceivably without any compensation for such limitations. The requirements of the Utah statute should provide guidance to this court with respect to the policy of the Utah legislature, which has apparently adopted the majority rule which denies the existence of such easements for light, air or view unless they are specifically reserved by grant or reservation in a deed or other recorded instrument.

The court failed, over defendant's exception (Record, page 556), to instruct the jury with respect to the law on implied easements for light, air or view. In the absence of an instruction indicating that such rights do not exist in Utah, the jury could well have believed and probably did believe that the Behunins had an implied right to light, air and view. Interference with light, air and view was the main damage claimed by the Behunins and, pursuant to the testimony of the plaintiffs, was their main concern in bringing the action. It was the reason the plaintiffs sought an Order compelling removal of defendants' partitions. The importance was not lost upon the trial court as the injunction specifically restricts defendants from interfering with the light, view and air of the plaintiffs between the residences of the parties. (Record, page 250, Appendix C). In arguing for the issuance of an injunction, Mr. Alder requested that the court issue an Order that there be no obstruction to light, view and air. (Record, page 571).

In the absence of an instruction limiting implied rights to light, view and air, the jury was free to impose such an implied burden upon defendants' property in rendering its judgment, regardless of the terms of the Settlement Stipulation. It was not necessary for the jury to imply the easement from the stipulation when from the instructions given by the court, there was no indication that such a right did not exist independently. Defendants were severely prejudiced by virtue of the court's failure to give an instruction limiting the jury's right to imply a right in plaintiffs to light, view and air. In finding a breach of the Settlement Stipulation, the court and the jury must have implied a right in plaintiffs to light, view and air, as there is no express grant of such a right in the Settlement Stipulation. The Stipulation expressly concerns only the height of the

cinder block wall. It does not in any respect restrict defendants from erecting any other improvements on their property, whether or not they exceed the height of the wall governed by the Stipulation. Only by implication can a right to light, air or view arise in plaintiffs pursuant to the Stipulation, and the law in virtually every jurisdiction condemns creation of such a right by implication. The court's failure to instruct the jury was so prejudicial to defendants that a new trial is warranted in this case.

POINT II.

THE COURT'S INSTRUCTIONS ON NUISANCE AND THE SPITE FENCE DOCTRINE WERE CONFUSING AND MISLEADING AND WERE PREJUDICIAL TO DEFENDANTS' DEFENSE.

In Schulz v. Quintana, 576 P.2d 855 (Utah 1978), it was observed that a landowner may generally take any action with regard to his own property which he desires, so long as it does not harm others. In the instant case it was claimed that the partitions maintained by defendants were a nuisance. The court instructed the jury that "anything which is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance and the subject of an action." (Jury Instruction No. 15, Record page 201). The court also instructed that "No one may make an unreasonable use of his own property to the material injury of his neighbors. The determination is whether the act or use is a reasonable exercise of the dominion which the property owner has by virtue of his ownership over his property having regard for all interests affected; his own and those of his neighbors and public policy." (Jury Instruction No. 16, Record page 202). These definitions of nuisance are better suited to traditional nuisance claims where, for example, a noxious odor or substance travels from the property of the defendant to the property of the plaintiff. In the case before the court, the claimed damage was that the partitions which constituted the "nuisance" deprived the plaintiffs of light, air and view. That interference with light, air or view by the maintenance of a

partition wholly upon the property of the defendant could constitute a nuisance is inconsistent with the law on implied light, air or view easements. If a party can compel removal of partitions upon a theory of nuisance under the general definitions embodied in the court's instructions, cited above, there would be no meaning to the doctrine that no implied right to light, air or view exists. Any party could enforce such an easement by claiming that the objectionable improvement constituted a nuisance.

Most early cases and some current decisions hold that a man can build a fence or structure upon his own land as high as he pleases, though he erects it solely out of spite and for the purpose of annoying his neighbor. Camfield v. United States, 167 U.S. 518, 17 S.Ct. 864, see annotation, 133 A.L.R. 697. These courts preclude the maintenance of any action to recover damages on account of erection of a fence or structure wholly upon the property of the defendant. Many courts, including the Utah Supreme Court, in dicta, have recognized an exception to the common law rule with respect to fences or partitions which are erected solely for spite. Rowley v. Marrcrest Homeowner's Assoc., 656 P.2d 414 (Utah 1982). The rule was discussed in Hornsby v. Smith, 191 Ga. 491, 13 S.E. 2d 20 (Georgia 1941). It was followed in the Idaho case of Sundowner, Inc. v. King, 96 Idaho 367, 509 P.2d 785 (Idaho 1973). The Idaho Sundowner case was cited by the Utah court in Rowley v. Marrcrest Homeowner's Assoc., cited above. The modern rule thus recognized is that a fence or other improvement can constitute a nuisance where it is erected solely for spite. However, where the structure serves some useful purpose to its owner it cannot be the subject of an award for damages nor can an injunction compel its removal. Plaintiff proceeded upon the theory that the green fiberglass partition and the redwood partition at the front of the property were spite fences, erected solely for spite.

Defendant took exception at trial to the instruction of the court, particularly with regard to the court's attempt to instruct the jury on the subject of nuisance in connection with the maintenance of fences. (Record p. 555-556, Appendix I). In Jury Instruction No. 18 the court instructed "a fence is not lawful if it serves some useful purpose, however

slight, when the underlying intent and result are to cause injury to the property of another." (Record p. 204). This is not consistent with the law that the motive must be solely spite. While the court did provide an instruction indicating that a spite fence must be maintained solely for the purpose of annoying his neighbor (Instruction 21, Record p. 207) the court refused to change the negative characterization of Instruction 18 and further refused to modify the impact of Instruction No. 18 by giving the proffered instruction based upon the case of Schulz v. Quintana, 576 P.2d 855 (Utah 1978) to the effect that generally, landowners may use their property as they see fit so long as they observe due regard for the safety and rights of others. The cumulative effect of the court's inconsistent instructions was to cause confusion among the members of the jury with respect to the rule on spite fences.

As there is no implied right to light, air or view, a fence cannot be a nuisance merely because it interferes with the enjoyment of adjoining property by interfering with light, air or view. The court's general instructions with regard to nuisance coupled with the court's failure to instruct on implied rights to light, air and view provide the basis for this confusion. The court's refusal to provide an instruction that generally property owners are free to use their property as they see fit combined with an instruction indicating that there is no implied right to light, air or view was necessary in order to give the jury a proper understanding of the law on spite fences. The fence cannot be a nuisance merely because it annoyed the plaintiffs or interfered with their light, air or view unless the jury found that the fence was maintained solely for a spiteful purpose and served no other useful and legitimate purpose for the defendants. Rowley v. Marrcrest Homeowner's Assoc., 656 P.2d 414, 419 (Utah 1982).

One court has indicated that a restriction of a property owner's rights regarding his property in the presence of any motive other than malice arises to a constitutional deprivation of property without due process of law. Baillargeon v. Press, 11 Wash. App. 59, 529 P.2d 746 (Wash. App. 1974). The court's failure to instruct with respect to a

property owner's right to use his property as he sees fit so long as he is not motivated solely by spite, and the failure to instruct that implied easements to light, air and view are not available caused the jury to misconstrue the requirements for nuisance under the spite fence doctrine and severely prejudiced the defendants, entitling them to a new trial.

POINT III.

THE COURT EFFECTIVELY IMPLIED A RIGHT TO LIGHT, AIR AND VIEW IN PLAINTIFFS, IN DEROGATION OF THE COMMON LAW, IN FINDING THE DEFENDANTS BREACHED THE SETTLEMENT STIPULATION.

As indicated above, it is nearly the universal American rule that no implied right to light, air or view exists. The property in the instant action was zoned M-1, light industrial. There are no sideyard requirements in a light industrial zoning area and improvements may be erected on the property to a height of eighty feet. The eight foot partitions erected by plaintiffs were well within the requirements of zoning as was stipulated at the time of trial. (Record, pages 435-436). See also Salt Lake City Zoning Ordinances, Section 51-25-3 and 51-25-4. The Settlement Stipulation executed to resolve the original complaint (Record, pages 124-128, Appendix A), provides in paragraph 4 as follows:

4. It is agreeable to the Plaintiffs that the Defendants be allowed to construct a cinder block wall in accord with the dimensions hereinafter set out along the Western boundary of Plaintiffs' property (the Eastern boundary of Defendants' property). This wall is to be placed upon the foundation which was constructed by Defendants prior to the institution of this action against Defendants. The wall will be constructed of standard size and quality cinder block. It shall commence on the Northwest corner of Plaintiffs' property and thence run in a southerly direction along the Western boundary line of Plaintiffs' property (the Eastern boundary line of Defendants' property) and shall be of a height not to exceed four feet including proper capping material. It shall continue at a height not exceeding four feet to the Northwest corner of Plaintiffs' residence. At the Northwest corner of Plaintiffs' residence, the wall shall be increased to a height not to exceed five feet including proper capping material, and shall continue at a height not exceeding five feet until it reaches the Southwest

corner of Plaintiffs' residence. At the Southwest corner of Plaintiffs' residence, the wall shall be increased to a height not exceeding seven feet including proper capping material and shall continue at a height not exceeding seven feet to its termination point at the Southwest corner of Plaintiffs' property (the Southeast corner of Defendants' property).

This paragraph was relied upon by plaintiffs and the court in determining that defendants had breached the Settlement Stipulation by erecting the eight foot partitions, including the green fiberglass partition and the redwood partition at the front of defendants' property. Nowhere in the Stipulation is there any restriction upon defendants with respect to improvements other than the cinder block wall. Nowhere in the Stipulation is there a grant of any right to light, air or view. The only restriction provides that the height of the cinder block wall is limited to the dimensions contained in the Stipulation.

Testimony adduced at trial established that the Settlement Stipulation was drafted by plaintiffs' counsel. (Testimony of Ardella Behunin, Record page 354). As a matter of law, agreements are construed against the parties who draft them and any ambiguities in the document are resolved in favor of the party that did not draft them. Wingets, Inc. v. Bitters, 28 U.2d 231, 500 P.2d 1007 (Utah 1972). Thus, if the Stipulation is ambiguous or fails to address a point, the ambiguity thereby created must be resolved in favor of defendants as a matter of law.

The Complaint filed by plaintiffs, which the Stipulation was designed to settle, made a variety of allegations as to why the cinder block wall should not be constructed and its construction enjoined. While the plaintiffs did complain of the loss of their light, air and view in the first count, the plaintiffs also claimed that the wall was being instructed on or about their property and that the construction of the wall was wrongfully and negligently adjacent to plaintiffs' land without leaving proper and sufficient support for the soil of plaintiffs' land and the buildings. The Complaint additionally sounded in trespass. (Record, pages 2-5). The Affidavit of Ardella Behunin filed in support of the Motion for a Temporary Restraining Order similarly concerns itself with encroachment, trespass and undermining plaintiffs' foundation as well as

interference with plaintiffs' light, air and view. (Record, pages 6-7).

In their testimony with respect to the reasons for entering into the Stipulation, the defendants indicated that they were concerned with the costs of the litigation and were further concerned that the building materials for the project had been stored on their property for approximately one year. Defendants wished to remedy their torn up yard, to build the wall and be finished with the hassle of the lawsuit. (Record, page 452). Nowhere did defendants testify that they intended to grant a light, air or view easement or otherwise make any concession to plaintiffs except with regard to the cinder block wall.

In its findings, the court found that the placement of the barriers or partitions between the residences of the parties, above the height of the existing wall and in front of plaintiffs' windows, was a breach of the prior Stipulation of the parties. (Record, page 250). The court could only find that the erection of the subsequent partitions constituted a breach of the Stipulation if it implied into the Stipulation a right to light, air and view. Such inference or implication is error as a matter of law, given the provisions of the contract under circumstances where ambiguities must be resolved in favor of defendants. The Settlement Stipulation does not meet the requirements of the solar easement statute found at Section 57-13-2, Utah Code Annotated, 1953 as amended, in that it does not describe the benefited or burdened properties, does not describe the angles or degrees or times during which light must be made available. It is conceded that the solar easement statute was enacted after the execution of the Stipulation. Still, the statute is illustrative of the requirements to establish an express light, air or view easement. Those requirements were clearly not met in the Settlement Stipulation. The court's finding is against the law and is error and should be reversed.

POINT IV

THE COURT IMPROPERLY EXCLUDED ADMISSIBLE EVIDENCE NECESSARY FOR DEFENDANTS TO ESTABLISH THEIR DEFENSE IN THIS MATTER, THEREBY COMMITTING CLEAR AND REVERSABLE ERROR.

Defendants attempted to defend this matter by demonstrating to the court and the jury that their actions in erecting the fiberglass partition and the redwood partition at the front of the property were but reactions to repeated invasions of their privacy by the plaintiffs. The defendants additionally attempted to demonstrate that the plaintiffs themselves breached the Settlement Stipulation by failing to comply with paragraph 14 thereof by undertaking various acts to undermine the cinder block wall. Defendants argued that the prior breach by plaintiffs acted to relieve defendants of the obligation to abide by the Stipulation to the extent, if any, it granted to plaintiffs the implied right to light, air and view which the jury and court inferred. (Record, pages 231 and 232). In addition to improperly sustaining repeated objections grounded on relevance respecting areas of inquiry going to the motive of defendants for erecting the partitions and going to the credibility of the plaintiffs and their witnesses, the court additionally assisted plaintiffs by offering grounds for objection in one instance and in objecting on its own motion to relevance on other occasions. (e.g., Record, page 402, lines 9 through 23 and pages 437-438). The court erred with respect to evidentiary rulings in the following respects:

(a) Defendants attempted to establish that the plaintiffs repeatedly harassed them and invaded their privacy by calling various governmental authorities including the police, the health department and the building inspector to their property to investigate complaints made by plaintiffs on repeated and numerous occasions. On direct testimony, plaintiff Ardella Behunin testified that she had called the police to the Gallegos' residence. (Record, page 377, lines 11 through 15). That Mrs. Behunin had repeatedly called the police to investigate defendants' property provided justification for

defendants' erection of privacy partitions to prevent her from prying into their business and further harassing them. Testimony established on direct examination at least two such occasions on which police were called. (Record, pages 376-377 and pages 420-421). However, in cross-examination of plaintiff Ardella Behunin, the court refused to permit any inquiry into occasions when Mrs. Behunin called the Salt Lake City Police to the Gallegos residence. On page 402 of the record, Ardella Behunin testified that she called the police to the Gallegos residence on quite a few occasions. (Record, page 402, lines 9-11). The court, without any objection from counsel, inquired as to the relevancy of the testimony. The testimony was proffered to show the reason why defendants desired privacy. The court offered grounds for the objection to assist plaintiffs' counsel, indicating that the court deemed the examination outside the scope of direct. The court then sustained the objection when counsel mimicked the court's grounds. (Record, page 402, Appendix J). This ruling was entirely improper. Plaintiff had raised the issue of calling police officers to the defendants' residence on direct examination. Additionally, the defendants' allegations that the police were repeatedly and unnecessarily called to their residence, justifying their need for increased privacy, was a critical point in defendants' defense. Defendants were entitled to have Mrs. Behunin testify with respect to the numerous occasions on which she called the police to defendants' residence as the testimony would have demonstrated the plaintiffs' inability to mind her own business and refrain from invading the privacy of defendants. Testimony in this area was necessary for defendants to establish that their motive for erection of the partitions complained of was not malice for the plaintiffs but protection of their privacy from the harassment of the plaintiffs, as they claimed. The refusal to permit inquiry into this area was clear and prejudicial error.

(b) The court, on two occasions, refused to permit neighbors of the Behunins to testify with respect to the Behunins' reputation in the community for snoopiness and for invasion of the privacy of others. Defendants called Angelina Heuser, who had

formerly resided in defendants' house and, after moving from the same, had resided in the same neighborhood, approximately one block away for the last ten years. (Record, page 335-336, pages 519-521). Plaintiffs objected to the testimony regarding reputation on grounds of relevancy and the court sustained the objection and would not permit introduction of Mrs. Heuser's opinion of the reputation of the Behunins in the neighborhood. Edwin Christensen was additionally prevented from testifying with respect to his opinion of the reputation of the Behunins in the neighborhood. Mr. Snow and Mr. Christensen lived across the street from the plaintiffs for approximately ten years. (Record, page 522). Mr. Snow testified that he had occasion to speak to the Behunins and to observe their conduct in relation to the defendants. When asked whether he had an opinion about the reputation of Mr. and Mrs. Behunin as neighbors the court sustained counsel's objection which presumably was grounded in relevancy. (Record, page 532).

The reputation of the Behunins in the neighborhood as snoop individuals was a crucial element of defendants' defense. The courts' refusal to permit defendants to introduce testimony of these neighbors with respect to the reputation of the Behunins was error because plaintiffs raised the issue of their reputation in the community regarding snoopiness on direct examination. On page 384 of the record, counsel asks Mrs. Behunin:

Q. I'm going to ask you, have you ever had any problems with any of the other neighbors in your neighborhood?

A. Not that I know of.

Q. Do you consider yourself a good neighbor?

A. I sure do. I try to be a good neighbor.

Q. Has anybody accused you of being a snoop?

A. No, not that I know of.

Additionally, prior to any attempt by defendants to introduce testimony regarding the reputation of the plaintiffs for snoopiness, plaintiffs, on direct examination produced

a character witness to support their contention that the plaintiffs were not snoop and were well liked in the neighborhood. At page 439 of the record, Hetti Vandongen was called as a witness on behalf of the plaintiffs. In direct examination Mr. Alder asked:

Q. Just like to ask you a few brief questions about your relationship with the Behunins and whether you are aware of any rumors or complaints about them. Let me be specific —

A. No.

Q. Have you ever had occasion to have other neighbors complain to you about the Behunins?

A. No. Never.

Q. Have you ever had any complaints about the Behunins as neighbors?

A. No.

Q. Have they ever threatened you?

A. Ardella?

Q. Yes.

A. And Joe?

Q. Yes.

A. There was a big help after my husband being sick and died. They had the car and done other little things and they're always there to help. They're wonderful. They be wonderful.

Q. They give you a ride?

A. Whenever I need it.

Q. Do you think that they're interfering with the Gallegos?

A. I don't know how.

Q. Have you ever observed them spying on the Gallegos?

A. No, not that I know of.

Q. Do you think that they would?

A. Ardella and Joe?

Q. Yes.

A. They have been wonderful.

The testimony with regard to opinion proffered by defendants from Mrs. Heuser and Mr. Snow was admissible to rebut the direct testimony of Ardella Behunin and Hetti Vandongen. The contrary opinions of two other neighbors who had resided in the neighborhood was relevant to challenge the credibility of Ardella Behunin and Hetti Van Dongen and to additionally support defendants' contentions that the Behunins were excessively snoop individuals, concerned with the business of others, with the effect of invading the privacy of the defendants. Defendants' entire claim in this litigation has been that it is the conduct of the plaintiffs in this action which motivated and justified the erection of the partitions. They erected these partitions to protect their privacy from the prying eyes of the Behunins. This testimony was relevant to show defendants' defense premised upon the spite fence doctrine which requires that the sole motive for the erection of the partitions be for spite and malice against the plaintiffs. If defendants could have shown that the partitions served a useful purpose to them by protecting their privacy, the court could not lawfully compel their removal and the jury could not properly award damages for nuisance or breach of the Settlement Stipulation.

(c) On pages 456-457 of the record (Appendix K), an objection was raised to the following question directed to defendant Arlene Gallegos: "What kind of privacy problems, if any, did you have with the Behunins after the erection of the concrete block wall?" Plaintiffs' objection was grounded in relevance. Counsel indicated at page 456, line 21 and 22: "So, I don't see what relevance privacy problems have to the wall." The question is critically relevant as it is an attempt to establish the motive for erecting the partitions which were erected after construction of the concrete block wall. Defendants claimed that they erected the partitions to protect their privacy after the cinder block wall was constructed. The court sustained the objection. Sustaining this objection was clearly error as the objection could not stand based in relevancy, which was the ground offered by plaintiffs' counsel. The privacy problems experienced by defendants after

erection of the concrete block wall are the very meat of the defendants' case. The court repeatedly prevented defendants from introducing evidence which would demonstrate and justify their motive for erecting the partitions i.e. protection of their privacy. Denying defendants the opportunity to introduce this evidence was prejudicial error.

(d) Defendants claimed that plaintiffs attempted to undermine and weaken or destroy the wall by soaking their property adjacent to the wall with water. Testimony with respect to this issue was offered by Arlene Gallegos, Kay Snow and Eugene Haddenham. Mr. Haddenham was a contractor retained to install a patio on the defendants' property. He testified beginning at page 479 of the record that while excavating to do concrete work for the patio he observed seepage of water coming from the fence line. Defendants were attempting to establish that the seepage was due to the saturated ground on the plaintiffs' side of the cinder block wall. Defendants alleged that plaintiffs repeatedly soaked the wall to attempt to undermine its foundations. This testimony was relevant to show the plaintiffs' own breach of the Settlement Stipulation upon which they relied to establish a right to light, air and view over defendants' property. A prior breach by plaintiffs would arguably relieve defendants from performance even should there be a covenant to preserve the light, air or view of the plaintiffs. The testimony was thus relevant and important to defendants' case. In addition, the testimony was relevant to the issue of the credibility of the plaintiffs who had denied attempts to undermine the wall by saturating their property adjacent to the wall with water.

In attempting to lay the foundation for Mr. Haddenham's testimony and in attempting to establish the area where the seepage was noted, the witness was asked to indicate on a diagram prepared by plaintiff, Exhibit 52P, the location of the 15 foot strip where the seepage was observed. (Record p. 480). An objection regarding relevance was sustained by the court without any opportunity to defend the relevance of the inquiry. The court additionally limited defendants' attempts to describe plaintiffs' efforts to

undermine the wall by trenching on pages 467 and 468 of the record. In this testimony, in attempting to lay a proper foundation with respect to the size and shape of the excavation undertaken by plaintiffs adjacent to the wall, the court, on its own motion objected, arguably on grounds of relevance, and denied counsel for defendant the opportunity to defend the relevance of the inquiry. The court concluded that "I know what you are trying to show, and I think what you are getting at right now is irrelevant and immaterial. It's a time waster. Let's get to the issues, not how deep the hole was. (Record, page 468). The court's attitude with respect to defendants' attempts to demonstrate that plaintiffs also breached the Settlement Stipulation by attempting to undermine the existing cinder block wall were error and prejudiced the defendants' defense in this matter, justifying a new trial.

(e) The court prevented defendants from eliciting testimony from Mrs. Behunin with respect to her repeated calls to the Salt Lake Building Inspectors with respect to improvements erected in defendants' yard. On pages 390-391 of the record defendants attempted to establish that Mrs. Behunin had repeatedly called building inspectors to inspect the cinder block wall while it was being constructed. On page 391, defendants attempted to establish the date Mrs. Behunin first recalled seeing a building inspection paper for the wall. This testimony was relevant to demonstrate that in spite of her knowledge that the wall had been approved and inspected she continued to call the building inspectors for the purpose of harassing defendants. Counsel objected to defendants' attempts to establish the date that Mrs. Behunin first was aware that there was a building inspection document for the wall. The court sustained the objection and did not permit testimony in this area. It was error to prevent the defendants from establishing the repeated calls to the building inspector by Mrs. Behunin. Such testimony would have established her proclivity for invading the privacy of defendants, justifying the erection of the partitions to protect the defendants' privacy.

(f) In attempting to challenge the credibility of Ardella Behunin, defendants

attempted to employ the allegation of paragraph 25 of the Amended Complaint which alleges "That the defendants further maintaining an eight foot high fence around the outer perimeter of their property along the street is in violation of the Salt Lake City ordinances." At trial, Ardella Behunin testified that the chain link fence was six feet tall. (Record, page 392). The question was asked "Do you know why it is alleged in the Complaint filed in this action that the fence is eight feet high?" Counsel objected and indicated that he did not think the allegations of the Complaint were relevant. The court sustained this objection. The matter was clearly relevant to demonstrate that the Complaint was filed for purposes of harassment and that its allegations were not credible. The allegations of the Complaint were relevant as they were the basis for the parties being in court. Sustaining the objection on grounds of relevancy was error.

Defendants were reluctant to proceed in this area given the court's ruling on grounds of relevancy. There is a point in any trial when parties are hesitant to incur the further ire of the court in the presence of the jury by proceeding in an area that the court has stifled. However, it should be noted that paragraph 13 of the Answer to defendants' Interrogatories, (Record, p. 93) states that the factual basis of the allegation that the defendants maintained an eight foot fence around the outer perimeter was that the fence was constructed without a proper building permit. All this goes to show the plaintiffs' inordinate concern and meddling in defendants' business with respect to improvements placed upon defendants' property. Ardella Behunin raised the matter of the chain link fence in her direct testimony. (Record, pages 379-380). After the matter was raised on direct examination it was clearly proper and relevant to broach the matter on cross-examination.

(g) On page 482-483 of the record, in attempting to rehabilitate Arlene Gallegos, defendants questioned whether there was anything in the Settlement Stipulation granting a right to light and air in the Behunins. (Record, page 482, line 23 and following, Appendix L). The court, without an objection from plaintiff, refused

further inquiry into the matter and refused to permit defendants' counsel to explain why the matter was proper redirect. Plaintiffs' counsel raised the intent behind the Settlement Stipulation in cross-examination of Arlene Gallegos at pages 471-473 of the record. He asked her:

Q. Even though the agreement was that there would be only a certain height of that barrier you don't think putting your barrier higher than that violated the agreement?

A. No, I don't because that's not touching the fence. That's on our property. . . .

Q. Is there any reason that they would care about the height except to be able to see over?

A. I don't know what they wanted to see over. It's right in our back yard.

Q. Answer my question.

A. I don't know what they think, but I don't —

Q. Why would they care about the height of the wall, is my question to you.

A. Because they want to see in our yard, I guess. There's nothing else over there.

Q. You agreed to keep it a set height.

A. The concrete wall is still —

Q. Didn't you understand their concerns about height because of light and air?

A. There is quite a bit of light in there.

Q. Answer the question.

A. I answered the question. The fiberglass is not on the wall.

Q. Didn't you understand at the time the Stipulation was signed that their concern was with the height for the purpose of being able to see over it?

A. They said several things.

Q. Did you —

A. No. They did not. They said several things. (Record, pp 472-473).

On redirect counsel for defendant asked:

Q. Is there anything in that document granting a right in the Behunins to light or air?

A. No sir.

The court: This is not proper redirect. You have been over that before on your direct examination.

Mr. Silvestrini: Your Honor, I believe this —

The court: I have ruled, counsel.

Mr. Silvestrini: Your Honor, I believe —

The court: Counsel, I have ruled on it. (Record, pages 482-483).

Questioning Arlene Gallegos on redirect examination with respect to the intention of the parties in executing the Settlement Stipulation was clearly relevant and proper redirect examination given counsel's cross-examination questioning the motivation of the parties for entering into the Stipulation. Counsel attempted to have defendant testify that the intent was to create an implied right to light, air and view. The court's interference with redirect, without any objection from plaintiffs' counsel, clearly prejudiced defendants and hindered their ability to present their defenses.

(h) At page 491 of the record, defendants attempted to question Ardella Behunin on direct examination with respect to the wall watering incidents which defendants contended were designed to saturate the ground under the cinder block wall for the purpose of undermining and weakening it. As mentioned before, such testimony was relevant to show both an invasion of the privacy of the defendants and a prior breach of the Settlement Stipulation by plaintiffs which relieved defendants of any obligation for performance of the agreement. At page 491, Ardella Behunin attempted to explain why she was watering the wall. After her explanation she was asked how long she had to water the wall on each such occasion. An objection was made regarding relevance and

the court sustained the objection. The testimony was relevant for the reasons stated above. The court's refusal to permit defendants to inquire into this conduct by defendants and other conduct which invaded the privacy of the Gallegos and demonstrated that the Behunins were not observing the provisions of the Settlement Stipulation was prejudicial to the defense of the defendants and justifies the granting of a new trial on this matter.

(i) During direct testimony of defendant Mark Gallegos he was asked at page 498 of the record what kind of conduct the Behunins demonstrated after the building of the cinder block wall that the defendants found objectionable. This question area was relevant to the inquiry before the court, as the defendants claimed it was the actions of the plaintiffs which required them to protect their privacy by erecting the additional partitions. The objections on page 498, which were sustained by the court, were made at a time when the subject matter was barely broached with the witness. That the court sustained the objection demonstrates the court's impatience with the defendants. These rulings prejudiced defendants before the jury and limited their right to maintain a lawful defense to plaintiffs' claims.

(j) On page 527 of the record (Appendix M) defendants attempted through another witness to introduce testimony with respect to the plaintiff's attempts to soak the ground on their side of the wall for the purpose of undermining it. While no question was pending, counsel for plaintiff raised an objection on the general ground of relevance to the testimony regarding flooding the wall. The court sustained the objection and would not permit defendants' counsel to explain or justify the relevance of the matter. The court refused to permit further inquiry into the matter by sustaining a second objection to a pending question on page 528. Again on page 528 the court sustained an objection to a question with respect to whether or not the witness, Mr. Kay Snow, observed Mr. or Mrs. Behunin to have an interest in the comings and goings in his property. (Page 528, line 11 and following). The court sustained the objection denying

the inquiry. The inquiry was relevant going to the credibility of the plaintiff Ardella Behunin who had testified that she had no problems with her neighbors and was not snoop and to the credibility of Hetti Van Dongen and additionally relevant to support the testimony of the defendants that the plaintiffs were snoop individuals who repeatedly invaded the privacy of their neighbors, necessitating the erection of the partitions. The court's refusal to permit defendants to inquire into this matter prejudiced defendants' interests and denied them the opportunity to present legitimate defenses.

In order to prevail against defendants on the theory of breach of contract, plaintiffs needed to demonstrate that the Settlement Stipulation entered into between the parties granted them a right of light, air and view over the defendants' property. In order to prevail on the theory of nuisance, under the spite fence doctrine, plaintiffs needed to show that defendants' sole motive for erecting the eight foot partitions was spite and malice directed against the plaintiffs. Defendants attempted to defend against plaintiffs' claim for nuisance by demonstrating that their motive was protection of their privacy against plaintiffs, who demonstrated an unusual disregard for the privacy of their neighbors, including the Gallegos. The cumulative effect of the court's evidentiary rulings in limiting the testimony of defendants and their witnesses with respect to the reputation of the plaintiffs in the neighborhood for snoopiness, denied defendants the opportunity to present their defense to plaintiffs' claims to the jury. The court demonstrated impatience with the defendants, almost as if the court had determined from the outset of the case that the partitions were a nuisance and the defendants were wasting the court's time in attempting to defend them.

Disputes between neighbors are never pleasant. Such disputes frequently tend to degenerate into base name calling and mud slinging. However, such problems are rarely the fault of one party alone and a party attempting to defend its property rights against plaintiffs such as these is entitled to a fair and impartial hearing of all claims and

defenses of the parties. Defendants were denied such an opportunity in the trial of this matter. Defendants did not choose to air their dirty laundry in the forum of this court but were forced to do so in defense of the action filed by the plaintiffs. In addition to misapplying the law governing the facts of this case, the court, through its evidentiary rulings, denied the defendants the ability and right to present their defense and to set forth the basis for their claim that these partitions were properly erected to protect their privacy and not for spite. Under the spite fence rule, if the partitions were erected for a motive other than spite, even if spite is also present, the court could not compel their removal nor could the court award damages against defendants for maintaining them. The evidentiary rulings of the court, together with its failure to instruct the jury with regard to the lack of existence of an implied right to light, air or view, constituted clear and prejudicial error and deprived defendants of a fair trial.

POINT V.

THE INJUNCTIVE RELIEF AWARDED BY THE COURT VIOLATES DUE PROCESS OF LAW.

The court's findings and injunction require defendants to remove the existing barriers and further to refrain from constructing, erecting or placing between the residences of the parties, similar barriers to light, view and air in excess of the height of the existing wall between the residences. The court's ruling, grounded in nuisance, has the effect of depriving defendants of their right to fully use and enjoy their property without any award of compensation. The court's injunction expressly imposes a light, air and view easement burdening defendants' property over their side yard. As has been discussed previously, such easements are not favored and cannot arise by implication. The court's injunction therefore violates the due process provisions of the Federal Constitution under the Fifth Amendment thereof and the Fourteenth Amendment thereto and additionally violates the Constitution of Utah, Article I, Section 7. Article I, Section 7 of the Constitution of Utah provides "No person shall be deprived of life, liberty or

property, without due process of law." In interpreting Article I, Section 7 of the Constitution, the Utah Supreme Court has held that as the provision in the Constitution of Utah is substantially similar to the Fifth and Fourteenth Amendments to the Federal Constitution, the decisions of the federal supreme court are highly persuasive as to the applications of this clause of the Constitution of Utah. Untermeyer v. State Tax Comm., 102 U.214, 129 P.2d 881. As early as 1885, the U.S. Supreme Court has ruled that where a state by its law authorizes the taking of private property without compensation, there is not due process of law. Kentucky Railroad Cases, 115 U.S. 321, 6 S.Ct. 57 (U.S. 1885). The Georgia Supreme Court has held that requiring removal of outdoor signs on private property adjoining interstate highways was unconstitutional as controlling and limiting the use of private property without just compensation. State Highway Department v. Branch, 22 Ga. 770, 152 S.E. 2d 372 (Ga. 1966). The restriction on plaintiffs' right to use their property in manners which otherwise comply with zoning laws and building ordinances without compensation to them is improper. The court's order has that effect and is therefore unconstitutional.

The constitutional doctrine has particular application to the case of a spite fence. Because a private property owner can generally use his property as he sees fit (see Schulz v. Quintana, 576 P.2d 855 (Utah, 1978), the right to limit use of the property without compensation is restricted. In Baillargeon v. Press, 11 Wash. App. 59, 521 P.2d 746 (Wash. App. 1974), the court found that restriction of a property owner's rights regarding property in the presence of any motive other than malice arises to a constitutional deprivation of property without due process of law.

The court's order is additionally overbroad in that it restricts any structure erected between the premises which exceeds the height of the wall. This restriction has been imposed in an area zoned M-1 where improvements could otherwise be built right to the property line as high as 80 feet high. The court's injunction additionally goes beyond the relief prayed for in plaintiffs' Complaint. Plaintiffs therein requested only removal

of the fences to comply with city ordinances. At trial it was stipulated that the improvements complied with city ordinances, yet the court chose, in spite of ample evidence of a motive other than spite for erection of the partitions, to order their removal and further restrict construction of additional improvements exceeding the height of the cinder block wall between the two houses. Nowhere in the Settlement Stipulation was there any provision that no improvement would be erected in defendants' side yard higher than the cinder block wall. The matter is not addressed. The law with respect to spite fences does not sanction such a broad order. Defendants are deprived of the use of their property without any compensation and the result of the injunction is therefore unconstitutional. The injunction should be dissolved and the case remanded for new trial.

CONCLUSION

Defendants were deprived of a fair trial in this action by virtue of the court's failure to instruct the jury that no implied right to light, air or view exists. The jury was thus free to speculate that such right existed despite overwhelming authority to the contrary. Indeed, it was the deprivation of light, air and view that plaintiffs claimed as their greatest injury.

The Settlement Stipulation between the parties governs the construction of a cinder block wall. The partitions which were the subject of this action were not attached to the cinder block wall and were erected after its construction, according to defendants, in order to further protect their privacy. The court's failure to instruct on implied rights to light, view and air clearly prejudiced the defendants and warrants a reversal of the Judgment on Verdict and Injunction.

The court failed to properly instruct the jury with respect to nuisance, particularly with regard to the impact of the spite fence doctrine on the general law of nuisance. Generally, a property owner may use his property as he sees fit so long as it does not cause harm to others. The court failed, despite defendants' exception to so

instruct the jury. Additionally, the law provides that no implied rights to light, air or view exist. Such rights must be expressly granted. Thus, mere interference with light, air or view cannot constitute grounds for nuisance where no duty to preserve the light, air or view of the plaintiff is mandated. The law has developed to require that removal of fences can be required and damages awarded only when it is determined that the fence was erected for no useful purpose but solely for spite. The court's failure to instruct the jury with respect to the property owner's rights to use his own property as he desires, providing harm, other than deprivation of light, air and view, is not caused to other adjoining landowners was error. The jury was likely so confused with respect to the applications of nuisance doctrine to this case that it could not be expected to properly apply the law. This confusion in the instructions and failure to give an instruction with respect to a property owner's rights to use his property was error and prejudiced the defendants.

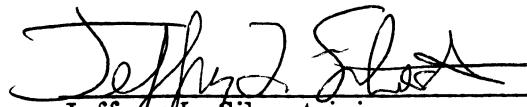
As a matter of law, the court erred in interpretation of the Settlement Stipulation and implied and permitted the jury to imply a covenant for light, view and air which was not within the four corners of the document. The Stipulation was drafted by plaintiff's counsel and should have been construed against them. In the presence of any ambiguity with respect to a grant of light, air or view over defendants' property, the defendants should have prevailed. The court could, as a matter of law, have ruled that no such right existed. Failure to do so was error. In effect the court has implied and permitted the jury to imply a right to light, air and view, contrary to the common law.

The court made repeated evidentiary errors in excluding testimony offered by defendants on direct and cross-examination of witnesses, offered to demonstrate the proclivity of the plaintiffs for invading the privacy of the defendants. This testimony, if admitted, would have demonstrated that plaintiffs invaded defendants' privacy by peering over the wall, by climbing on the roof of the plaintiffs' residence to look over the cinder block wall, and by repeatedly calling governmental authorities including building

inspectors and police officers to investigate defendants. If the court had ruled properly, defendants would have established the reputation of the Behunins in the neighborhood for snoopiness and invasion of privacy. These items were excluded from evidence despite the fact that plaintiffs, on direct examination, put their reputation into issue by testifying that they felt their reputation in the neighborhood was good and by calling a character witness in Hetti Vandongen to testify about their reputation for being good neighbors and not invading the privacy of others. The court's refusal to permit defendants to rebut this testimony was error as the rebuttal went to credibility and further to establishing the affirmative aspects of defendants' defenses regarding their privacy motive for erecting the partitions which were the subject of the action. The court's evidentiary rulings were individually and cumulatively so prejudicial to the defendants' defense that a new trial is warranted.

The effect of the court's injunction is to violate the constitutional rights of the defendants by depriving them of the use of their property without compensation. The court has effectively implied a light, air and view easement either under the theory of contract or under a theory of nuisance. As indicated above, both theories are erroneous in the presence of evidence that the motive of the defendants was to protect their privacy rather than solely to harass and damage plaintiffs. Given these errors it is appropriate that this court reverse the Judgment on Verdict and dissolve the injunction issued by the trial court. The matter should be remanded to the trial court for a new trial.

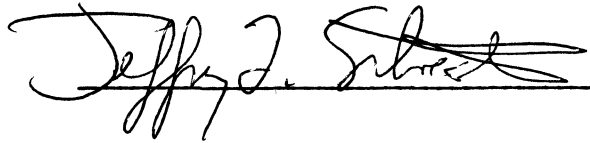
DATED this 26th day of February, 1985.


Jeffrey L. Silvestrini
COHNE, RAPPAPORT & SEGAL
Attorneys for Defendants/
Appellants

MAILING CERTIFICATE

The undersigned hereby certifies that four true and correct copies of the foregoing BRIEF OF APPELLANT was mailed, postage fully prepaid, on the 26th day of February, 1985 to the following:

Steven F. Alder
Attorney at Law
1325 South Main, Suite 201
Salt Lake City, Utah 84115



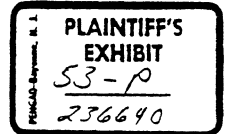
vic/Gallegos4

KENT M. KASTING
ADAMS, KASTING & ANDERSON
Attorney for Plaintiffs
Suite 200, The Glass Factory
Arrow Press Square
Salt Lake City, Utah 84101
(801) 532-6996

[Signature]
BY CLERK

IN THE DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH



-----oOo-----
JOSEPH M. BEHUNIN and)
ARDELLA BEHUNIN,)

Plaintiffs,)

STIPULATION

vs.)

MARK GALLEGOS and)
ARLENE GALLEGOS,)

Defendants.)

Civil No. 236640

-----oOo-----
COMES NOW the Plaintiffs named above, Joseph M. Behunin and Ardella Behunin, by and through their attorneys, Adams, Kasting & Anderson, and the Defendants, Mark Gallegos and Arlene Gallegos, by and through their attorney, Conne, Rappaport & Segal, and hereby agree and stipulate as follows:

1. The parties each desire to settle and compromise the above captioned action and have entered into this Stipulation to accomplish that end.
2. Plaintiffs, upon the terms and conditions hereinafter set forth agree to cause this action to be dismissed with prejudice and upon the merits, upon the completion of the respective obligations of the parties as hereinafter set out, and further will cause and are agreeable to a dissolution of the Temporary Restraining Order which has arisen out of this action.
3. Defendants, upon the terms and conditions hereinafter set forth, agree to cause their Counterclaim filed in this action to be dismissed with prejudice and upon the merits, upon

the completion of the respective obligations of the parties as hereinafter set out.

4. It is agreeable to the Plaintiffs that the Defendants be allowed to construct a cinderblock wall in accord with the dimensions hereinafter set out along the Western boundary of Plaintiffs' property (the Eastern boundary of Defendants' property). This wall is to be placed upon the foundation which was constructed by Defendants prior to the institution of this action against Defendants. The wall will be constructed of standard size and quality cinderblock. It shall commence on the Northwest corner of Plaintiffs' property and thence run in a southerly direction along the Western boundary line of Plaintiffs' property (the Eastern boundary line of Defendants' property) and shall be of a height not to exceed 4 feet including proper capping material. It shall continue at a height not exceeding 4 feet to the Northwest corner of Plaintiffs' residence. At the Northwest corner of Plaintiffs' residence, the wall shall be increased to a height not to exceed 5 feet including proper capping material, and shall continue at a height not exceeding 5 feet until it reaches the Southwest corner of Plaintiffs' residence. At the Southwest corner of Plaintiffs' residence, the wall shall be increased to a height not exceeding 7 feet including proper capping material and shall continue at a height not exceeding 7 feet to its termination point at the Southwest corner of Plaintiffs' property (the Southeast corner of Defendants' property)

5. Defendants agree that the cinderblock wall will be constructed in accord with standard building specifications and this construction will include installation of proper footings, if necessary, and reinforcement bars to prevent the wall from collapsing, sinking or tipping over on to Plaintiffs' property.

6. Defendants further agree to contact the Salt Lake City Building Inspector and request that he inspect the footings which were installed prior to the institution of this action so as to make certain that said footings have been properly installed and are of a proper depth and quality and have not in any way deteriorated during the pendency of this action. Defendants will so notify Plaintiffs through their attorney when this inspection has been completed and approval for further construction of the wall has been obtained.

7. Defendants further agree to secure any and all necessary building permits from Salt Lake City or any other appropriate governmental authority so that the construction of said wall be in compliance with applicable Salt Lake City zoning ordinances and building requirements.

8. Defendants agree that the construction of said wall will commence as soon as it is reasonably possible after the existing footings have been inspected and after all necessary building permits have been obtained so that the completion of the wall will be effectuated as soon as is reasonably possible.

9. Defendants agree that the contractor who will construct the wall will be duly licensed under the laws of the State of Utah.

10. Defendants agree that upon completion of the construction of the wall, final approval will be secured from the Salt Lake City Building Inspector and proof of such approval will be furnished to Plaintiffs' counsel by Defendants' counsel.

11. Defendants agree not to damage Plaintiffs property during the time of construction of the wall, and in the event ^{visible} Defendants cause/damage to Plaintiffs' property and/or premises, Defendants will restore Plaintiff's property and/or premises and repair any such damage or injury at no cost to Plaintiffs.

M.V.G.
A.G.
J.B.
A.B.

12. Plaintiffs agree to remove the chain link fence which presently exists on the West side of Plaintiffs' property and it is agreeable to the parties that in the event Defendants' contractor, while in the process of constructing the wall, can give assistance to Plaintiffs in so removing the chain link fence with the use of the equipment he may have available to him on Defendants' property at the time of construction, he (Defendants' contractor) will reasonably attempt to do so.

13. It is further expressly agreed between the parties that the boundary line established by the East side of the wall upon its completion shall become the Western boundary line of the Plaintiffs' property and the Eastern boundary line of Defendants' property, and Defendants will claim no interest in the property on the East side of the wall and Plaintiffs will claim no interest in the wall or in the property on the West side of the wall.

14. The parties agree to work in a cooperative and reasonable manner so that the obligations and responsibilities imposed upon the respective parties under the terms of this Stipulation may be fulfilled.


DATED this 18 day of July, 1977.

ADAMS, KASTING & ANDERSON
By: Kent M. Kasting
Kent M. Kasting,
Attorney for Plaintiffs

Joseph M. Benunin
Joseph M. Benunin

Ardella Behunin
Ardella Behunin

CONNE, RAPPAPORT & SEGAL

By 
ROBERT SEGAL
Attorney for Defendants


MARK GALLEGOS


ARLENE GALLEGOS

FILED IN CLERK'S OFFICE
Nov 9 10 02 AM '00

[Handwritten signature]

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

JOSEPH M. BEHUNIN and
ARDELLA BEHUNIN,

Plaintiffs,

vs.

MARK GALLEGOS and
ARLENE GALLEGOS,

Defendants.

:
:
:
:
:
:

SPECIAL VERDICT

CIVL NO. 236640

We, the jury in the above-entitled action, for our special verdict, answer the questions submitted as follows:

1. Do you find by a preponderance of the evidence that the parties intended to be bound by the stipulation?

YES X NO _____

2. If you do find an intention to be bound by the stipulation do you further find from the terms of the stipulation and by a preponderance of the evidence that the parties intended to restrict obstructions to light, view and air along the boundary between their properties in a general way as well as to restrict the height of the wall?

YES X NO _____

3. If you find an implied intent not to obstruct the boundary do you find by a preponderance of the evidence the placement of the two (2) fences a breach of the terms of the stipulation?

YES X NO _____

4. If you find that the defendants breached the stipulation by the placement of barriers along the property line between the houses, what amount do you find by a preponderance of the evidence to be the actual damages incurred, if any?

\$ —0—

5. If you so find that the defendants breached the stipulation and find by a preponderance of the evidence they did so maliciously what amount do you find by a preponderance of the evidence as an amount of exemplary or punitive damages, if any?

\$ 1000

6. Do you find by clear and convincing evidence that the two fences constitute a nuisance?

YES X NO

7. If you so find that the two fences constituted a nuisance, what amount do you find by clear and convincing evidence to be actual damages incurred, if any?

\$ 1600

8. If you find that the fences erected by defendants constituted nuisance and by clear and convincing evidence that the defendants erected the fences maliciously, what amount do you find by clear and convincing evidence as an amount of exemplary or punitive damages, if any?

\$ 5000

SIGNED and returned into court this 7th day of November, 1983.

Thomas J. Miller
FOREMAN

STEVEN F. ALDER
Attorney for Plaintiffs
1325 South Main, Suite 201
Salt Lake City, UT 84115
Telephone: 486-4607

FILED IN CLERKS OFFICE
SALT LAKE COUNTY, UTAH

JUL 3 4 09 PM '84

H. DIXON HINGLEY, CLERK
3RD DIST. COURT

BY *[Signature]*
FOR DEPUTY CLERK

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

| | | |
|-----------------------|---|-------------------------|
| JOSEPH M. BEHUNIN and |) | |
| ARDELLA BEHUNIN, |) | |
| |) | |
| Plaintiffs, |) | I N J U N C T I O N |
| |) | |
| vs. |) | |
| |) | |
| MARK GALLEGOS and |) | |
| ARLENE GALLEGOS, |) | Civil No. <u>236640</u> |
| |) | |
| Defendants. |) | |

The foregoing matter having been tried to a Jury on the 3rd and 7th of November 1983 and the Jury having returned a verdict in favor of the plaintiffs and the plaintiffs having asked the Court for an order granting injunctive relief based on the findings of the jury and the plaintiff's motion for injunctive relief having come on for hearing before the Court on the 21st day of December 1983 and the Court having heard the argument of counsel and being fully advised makes the following findings and order:

1. The placement of the various barriers between the residences of the parties above the height of the existing walls and in front of the plaintiff's windows was a breach of the prior stipulation of the parties.

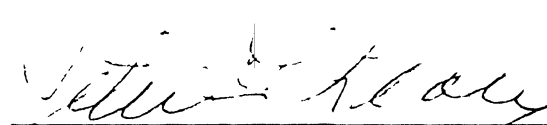
2. The placement of the various barriers between the residences of the parties above the height of the existing wall and in front of the plaintiff's windows was intentional and malicious and constitutes a nuisance to the plaintiffs.

3. The plaintiffs are entitled to injunctive relief.


NOW THEREFORE THE DEFENDANTS ARE HEREBY ORDERED to remove the existing barriers between the residences other than the existing wall including the eight foot redwood fence now existing between the defendant's front fence line and the northeast corner of the defendants' house and the eight foot redwood and fiber glass barrier along to the existing wall and to refrain from constructing, erecting or placing between the residences of the parties similar barriers to light, view and air in excess of the height of the existing wall between the residences.

DATED this 3 day of Oct, 1984.

BY THE COURT


Honorable Peter F. Leary
District Court Judge

ATTEST
H DIXON HINDLEY
Clerk

By 
Deputy Clerk

STEVEN F. ALDER
 Attorney for Plaintiffs
 1325 South Main, Suite 201
 Salt Lake City, UT 84115
 Telephone: 486-4607

FILED IN CLERKS OFFICE
 SALT LAKE COUNTY, UTAH

JUL 3 4 04 PM '84

H. DIXON HINDLEY CLERK
 3rd DIST. COURT

BY ~~AND~~ ~~DEPUTY CLERK~~

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

JOSEPH M. BEHUNIN and
 ARDELLA BEHUNIN,

Plaintiffs,

vs.

MARK GALLEGOS and
 ARLENE GALLEGOS,

Defendants.

BK188 NO. 1595

7-3-84 4:30 P.M.

JUDGMENT ON VERDICT

236640

Civil No. 236640

The foregoing matter having been heard before a jury with the Honorable Peter F. Leary presiding on the 3rd and 7th of November, 1983 and having been submitted to a jury on the 7th day of November 1983 and the Court and Jury having heard the testimony of witnesses and arguments of Counsel and the Jury having been instructed by the Court as to the law and its duties and having entered it's verdict pursuant to specific interrogatories as attached hereto

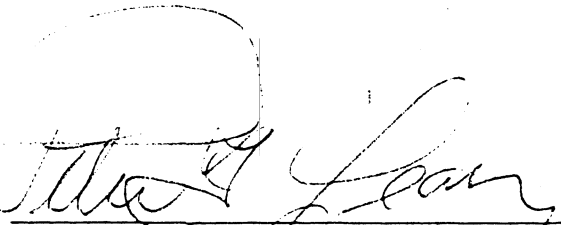
NOW THEREFORE the Court enters the following judgment in accordance with the Jury Verdict:

1. The plaintiffs are awarded as general damages from the defendants for the nuisance created by the defendant, the sum of \$1,000.00.


2. The plaintiffs are awarded as punitive damages for their intentional and malicious acts creating a nuisance to the plaintiffs, the amount of \$5,000.00.

DATED this 2 day of July, 1984.

BY THE COURT


Honorable Peter F. Leary
District Judge

ATTEST
H. DIXON HINDLEY
Clerk

By 
Deputy Clerk

Approved as to form
Jeffrey D. Silver
5-30-84

CERTIFICATE OR MAILING

I certify that I mailed a true and correct copy of the foregoing Judgment on Verdict to:

Mr. Jeffrey L. Silvestrini
Attorney for Defendants
66 Exchange Place
Salt Lake City, UT 84111

this 26th day of May, 1984.

Mary Ann Williams

INSTRUCTION NO. 15

Anything which is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance and the subject of an action. Such action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by nuisance.

INSTRUCTION NO. 16

No one may make an unreasonable use of his own property to the material injury of his neighbors. The determination is whether the act or use is a reasonable exercise of the dominion which the property owner has by virtue of his ownership over his property having regard for all interests affected; his own and those of his neighbors and public policy.

APPENDIX G

INSTRUCTION NO. 18

A fence is not lawful if it subserves some useful purpose, however slight, when the underlying intent and result are to cause injury to the property of another.

APPENDIX H

INSTRUCTION NO. 21

A spite fence or structure is defined as one which is of no beneficial use or pleasure to the owner but was erected and is maintained by him^{Solely} for the purpose of annoying his neighbor or with malicious motive of injuring him by shutting out his air, light and views.

APPENDIX I

1 MR. ALDER: I HAVE NO OTHER OBJECTIONS EXCEPT FOR THE
2 RECORD I UNDERSTAND YOUR RULE ON POINT OF LAW. FOR THE
3 RECORD I VOICE MY OBJECTION TO THE INSERTION OF THE WORD
4 "SOLELY" IN INSTRUCTION 21, I SUPPOSE IT IS, AND THAT I
5 BELIEVE IT IS INCONSISTENT WITH THE STATUTE ON NUISANCE IN
6 UTAH AND I JUST MAKE THAT OBJECTION FOR THE RECORD. I HAVE
7 NO FURTHER OBJECTIONS FOR THE INSTRUCTIONS.

8 THE COURT: MR. SILVESTRINI?

9 MR. SILVESTRINI: YOUR HONOR, THE ONLY EXCEPTION I
10 HAVE IS TO THE COURT'S INSTRUCTION NUMBER 18, "A FENCE IS
11 NOT LAWFUL IF IT SUBSERVES SOME UNUSEFUL PURPOSE." I
12 BELIEVE THAT INSTRUCTION ISN'T CONSISTENT WITH UTAH LAW. IN
13 THE ROWLEY IF THERE IS SOME USEFUL PURPOSE, THEN THE FENCE
14 IS NOT UNLAWFUL.

15 FURTHER, I OBJECT TO THE NEGATIVE CHARACTERIZA-
16 TION OF THE INSTRUCTION. I BELIEVE IT SHOULD BE WORDED IN
17 A DIFFERENT SENSE TO IMPLY THAT IF THEIR--LANDOWNER MAY USE
18 HIS PROPERTY AS HE SEES FIT SO LONG AS HE OBSERVED DUE
19 REGARD TO SAFETY AND RIGHTS OF OTHERS. THAT WAS EMBODIED
20 IN AN UNNUMBERED INSTRUCTION WHICH WAS REFUSED BY THE COURT
21 FOUND ON THE UTAH CASE OF SCHULZ V. QUINTANA, 576 P.20 855.
22 THAT INSTRUCTION READS:

23 "A LANDOWNER MAY USE HIS PROPERTY
24 AS HE SEES FIT SO LONG AS HE OBSERVES A DUE REGARD
25 FOR THE SAFETY OF OTHERS AFFECTED BY HIS PROPERTY

1 AND DOES NOT CAUSE UNREASONABLE HARD TO OTHERS
2 AND THE VICINITY THEREOF."

3 MY EXCEPTION GOES AS WELL TO INSTRUCTION 18 AND
4 ALSO THE REQUEST THE INSTRUCTION WAS NOT GIVEN.

5 ADDITIONALLY, YOUR HONOR, WE EXCEPT TO THE FACT
6 THAT THE COURT HAS FAILED TO GIVE ANY INSTRUCTION IN THIS
7 CASE WITH REGARD TO THE EXISTENCE OR LACK OF EXISTENCE OF A
8 LIGHT AND AIR EASEMENT UNDER UTAH LAW. WE OFFERED A NUMBER
9 OF INSTRUCTIONS ON THAT ISSUE, SPECIFICALLY THE ONE FOUND
10 IN THE NEVADA CASE OF BOYD V. MCDONALD, 408 P.2D 717
11 INDICATING THAT A PROPERTY OWNER HAS NO IMPLIED RIGHT TO
12 A LIGHT AND AIR EASEMENT. WE THINK THAT INSTRUCTION SHOULD
13 BE GIVEN WITH REGARD TO THE NUISANCE CLAIMS IN THE MATTER.

14 THE COURT: WELL, THE COURT'S POSITION ON THAT IS
15 THAT UTAH STATUTE IS PREVAILING AND THE INSTRUCTION DEFINES
16 WHAT A NUISANCE IS AND IT DOES NOT SELECT OUT ANY PARTICULAR
17 TYPES OF CONDUCT SUCH AS A PERSON BEING REQUIRED TO HAVE
18 EASEMENTS FOR LIGHT AND AIR.

19 DO YOU HAVE ANY OTHER EXCEPTIONS?

20 MR. SILVESTRINI: YOUR HONOR, WE WOULD EXCEPT TO THE
21 PARAGRAPH NUMBER 5 OF THE SPECIAL VERDICT. THAT ONE GOES
22 TO PUNITIVE DAMAGES IN REGARD TO BREACH OF CONTRACT.

23 THE COURT: WELL, ALL RIGHT. WHAT ABOUT THE OTHER
24 PART? WHAT ABOUT 6, 7, AND 8?

25 MR. SILVESTRINI: NO OBJECTION TO 6, 7, OR 8, YOUR

1 A I'M NOT SURE IF I CALLED OVER--YES, I DID. YES,
2 I CALLED THE POLICE ON THE OBSCENE GESTURES ONE TIME.

3 Q DO YOU KNOW WHETHER OR NOT THE POLICE OFFICERS
4 GAVE MR. GALLEGOS ANY CITATION OR--

5 A NO, I DON'T.

6 Q IS THAT THE ONLY TIME YOU CALLED THE POLICE TO
7 COME OVER TO THE GALLEGOS RESIDENCE?

8 A NO, SIR.

9 Q HOW MANY OTHER TIMES WOULD YOU SAY YOU CALLED
10 THE POLICE?

11 A QUITE A FEW.

12 THE COURT: WELL, WHAT IS THAT GOING TO DO IN HELPING
13 TO SOLVE THE PROBLEM?

14 MR. SILVESTRINI: YOUR HONOR, I BELIEVE IT TENDS TO
15 SHOW THE REASON WHY MY CLIENTS DESIRE THE PRIVACY, AND
16 PRIVACY IS AN ISSUE.

17 MR. ALDER: I THINK WE NEED A FOUNDATION, YOUR HONOR,
18 AS TO WHAT--OBVIOUSLY WE'RE NOT EXPLORING THE ENTIRE
19 RELATIONSHIP BETWEEN THESE PARTIES, AND THE ONLY PROBLEMS
20 AT ISSUE HERE IS THE BARRIER WALL. IT HAS BEEN ADMITTED
21 THERE ARE MANY--

22 THE COURT: I TAKE IT YOU'RE MAKING AN OBJECTION THAT
23 THE QUESTIONS ARE OUTSIDE THE SCOPE OF EXAMINATION?

24 MR. ALDER: THAT'S HOW TO PHRASE IT.

25 THE COURT: THE OBJECTION IS SUSTAINED.

APPENDIX K

1 PICTURE WAS TAKEN FROM?

2 A I THINK IT WAS TAKEN FROM THE FRONT CORNER OF
3 OUR HOUSE.

4 Q ON YOUR PROPERTY?

5 A YES.

6 Q DO YOU KNOW WHAT DIRECTION YOU'RE LOOKING AT
7 IN THIS PICTURE?

8 A YOU'RE LOOKING FROM THE NORTH TO THE SOUTH.

9 Q DID YOU TAKE THAT PICTURE?

10 A NO, I DID NOT.

11 Q DO YOU KNOW WHO TOOK IT? DO YOU KNOW WHO TOOK
12 IT?

13 A MY HUSBAND.

14 Q WHAT KIND OF PRIVACY PROBLEMS, IF ANY, DID YOU
15 HAVE WITH THE BEHUNINS AFTER THE ERECTION OF THE CONCRETE
16 BLOCK WALL?

17 MR. ALDER: OBJECTION, YOUR HONOR. THE QUESTION IS
18 AFTER THE ERECTION OF THE WALL AND OBVIOUSLY THE ISSUE IS
19 WHAT WAS THE INTENTION OF THE PARTIES AT THE TIME OF THE
20 ERECTION OF THE WALL, AND SHE HAS ALREADY TESTIFIED SHE HAD
21 NO PROBLEMS PRIOR TO THE ERECTION OF THE WALL. SO, I DON'T
22 SEE WHAT RELEVANCE PRIVACY PROBLEMS HAVE TO THE WALL.

23 MR. SILVESTRINI: YOUR HONOR, IN DEFENSE OF THAT, I
24 INDICATE THAT I THINK THE REAL ISSUE IN THIS CASE--PARTIES
25 HAVE STIPULATED THAT THEY CAN BUILD A WALL.

1 THE COURT: WELL, THERE IS NO QUESTION ABOUT THAT.

2 MR. SILVESTRINI: OKAY. THE PROBLEM IN THIS CASE IS
3 THE GREEN BARRIER AND THE WOOD BARRIER WHICH THEY ERECTED
4 SUBSEQUENT TO THE ERECTION OF THE FENCE.

5 THE COURT: THAT'S RIGHT.

6 MR. SILVESTRINI: THE QUESTION IS A MATTER OF
7 MOTIVATION.

8 THE COURT: WHY DON'T YOU ASK HER ABOUT THAT.

9 MR. SILVESTRINI: I WILL IF THE OBJECTION IS OVERRULED.

10 THE COURT: THE OBJECTION IS SUSTAINED.

11 Q (BY MR. SILVESTRINI) AFTER THE ERECTION OF THE
12 CONCRETE BLOCK FENCE WERE THERE ANY OTHER STRUCTURES
13 INSTALLED AT THE SAME TIME BY THE CONTRACTOR WHICH WOULD
14 EXTEND UP AND ABOVE THE LEVEL OF THE CONCRETE BLOCK FENCE?

15 A NO, NOT AT THE TIME THE CONTRACTOR DID IT; NO.

16 Q FOR HOW LONG AFTER THE ERECTION OF THE CONCRETE
17 FENCE WOULD YOU SAY THERE WAS NO BARRIER ABOVE THE LEVEL OF
18 THE FENCE?

19 A ABOUT FOUR MONTHS, THREE TO FOUR MONTHS.

20 Q WHAT HAPPENED TO CHANGE THE LEVEL OF THE FENCE
21 AFTER THREE OR FOUR MONTHS?

22 A WELL, MR. BEHUNIN WAS ALWAYS COMING THROUGH
23 BETWEEN THE HOUSE AND THE WALL AND LOOKING IN OUR YARD, AND
24 ONE OTHER REASON IS WE'RE TRYING TO IMPROVE OUR PLACE AND
25 THAT IS ON OUR PATIO.

APPENDIX L

REDIRECT EXAMINATION

BY MR. SILVESTRINI:

Q MRS. GALLEGOS, I SHOW YOU WHAT HAS BEEN MARKED
AS EXHIBIT P-53 AND ASK YOU IF YOU CAN IDENTIFY THAT DOCUMENT.
IS THAT THE SETTLEMENT STIPULATION?

A YES.

Q ENTERED IN THIS CASE, IS IT NOT?

A YES.

Q YOU SIGNED THAT DOCUMENT?

A YES.

Q DO YOU KNOW WHO PREPARED THAT DOCUMENT?

A I BELIEVE BEHUNINS' ATTORNEY DID TALKING TO OUR
ATTORNEY, TOO. THE TWO OF THEM TALKING TOGETHER, BUT I
BELIEVE HE WROTE IT UP.

Q DO YOU KNOW WHO MR. AND MRS. BEHUNINS' ATTORNEY
WAS?

A KASTING.

Q OKAY. IT'S ON THAT DOCUMENT, ANYWAY, ISN'T IT?

A YES. KASTING.

Q YOU READ THAT DOCUMENT BEFORE YOU SIGNED IT,
DIDN'T YOU?

A YES, I DID.

Q IS THERE ANYTHING IN THAT DOCUMENT GRANTING ANY
KIND OF A RIGHT IN THE BEHUNINS' TO LIGHT OR AIR?

A NO, SIR.

1 THE COURT; THIS IS NOT PROPER REDIRECT. YOU HAVE
2 BEEN OVER THAT BEFORE ON YOUR DIRECT EXAMINATION.

3 MR. SILVESTRINI: YOUR HONOR, I BELIEVE THIS--

4 THE COURT: I HAVE RULED, COUNSEL.

5 MR. SILVESTRINI: YOUR HONOR, I BELIEVE--

6 THE COURT: COUNSEL, I RULED ON IT.

7 MR. SILVESTRINI: ALL RIGHT. NO FURTHER QUESTIONS.

8 RECROSS EXAMINATION

9 BY MR. ALDER:

10 Q YOU SAY YOU'RE IMPROVING YOUR LOT, AND I WAS
11 WONDERING IF YOU WOULD DRAW FOR ME THE SIZE OF YOUR LOT,
12 SIDE OF YOUR HOUSE, HOW IT IS SITUATED, AND THE IMPROVEMENTS.

13 A YOU MEAN DO IT AT THIS TIME?

14 Q YES.

15 A DO YOU WANT THE DIMENSIONS OF OUR PROPERTY?

16 Q IF YOU KNOW THEM, THAT WOULD BE HELPFUL.

17 A IT'S 126. THIS IS NORTH. THIS IS SOUTH. THIS
18 IS 126 FEET. THIS WAY IT'S 90 FEET.

19 NOW, YOU WANT OUR HOUSE?

20 Q YES. LOCATE IT AS IT IS LOCATED ON YOUR
21 PROPERTY. MAYBE YOU SHOULD PUT THE OTHER PROPERTY LINE.

22 A THIS IS THE CINDER BLOCK WALL. THIS IS THE
23 PORCH. THIS IS THE CINDER BLOCK WALL. THIS IS THE PORCH,
24 PORCH HERE.

25 Q WOULD YOU DRAW FOR ME THE WINDOW OPENINGS ON

APENDIX M

1 THE WITNESS; YES.

2 MR. ALDER; I ASK FOR FURTHER FOUNDATION AS TO
3 RELATIONSHIP, HOW YOU OBSERVED IT.

4 Q (BY MR. SILVESTRINI) IN WHAT MANNER DID YOU
5 OBSERVE THE RELATIONSHIP BETWEEN THE GALLEGOS AND THE
6 BEHUNINS?

7 A IN WHAT MANNER? I NEED THAT FURTHER CLARIFIED.

8 Q WHAT KIND OF THINGS HAVE YOU BEEN PRIVY TO IN
9 TERMS OF CONTACT BETWEEN THE GALLEGOS AND BEHUNINS?

10 A WHAT HAVE I OBSERVED? THE HATFIELD-MCCOY TYPE
11 FIGHTING GOING ON.

12 Q YOU OBSERVED THAT FROM YOUR HOUSE LOOKING
13 OUTSIDE?

14 A YES.

15 Q SO, YOU--

16 A AND ALSO IN THE BACK OF GALLEGOS' YARD.

17 Q YOU HAVE SEEN WHAT'S GOING ON PRETTY MUCH ACROSS
18 THE STREET, PEOPLE GOING TO AND FROM.

19 A YES, SIR.

20 THE COURT: WELL, COUNSEL, ASK A QUESTION AND DON'T
21 TRY AND TESTIFY.

22 Q (BY MR. SILVESTRINI) WHAT KIND OF THINGS DID YOU
23 OBSERVE MR. AND MRS. BEHUNIN DOING WITH RESPECT TO THE
24 GALLEGOS PROPERTY?

25 A I HAVE SEEN THEM BOTH COME OUT AND GO TO THE

1 FRONT OF THE CONCRETE FENCE AND LEAN OVER AND LOOK INTO THE
2 GALLEGOS' FRONT YARD TO SEE WHO WAS GOING TO THEIR DOOR.
3 I HAVE OBSERVED THE PEACE SYMBOL BEING PASSED BACK AND
4 FORTH BY THE PARTIES, AND I HAVE OBSERVED HUNDREDS OF TIMES
5 OF JOE PULLING OUT OF THE DRIVEWAY, SLOWLY DRIVING AROUND
6 THE BLOCK TO OBSERVE THE THREE FENCED, THE CHAINLINK FENCED
7 AREAS OF THE GALLEGOS' YARD ANYTIME ANYTHING WAS GOING ON
8 THERE.

9 Q DID YOU EVER HAVE AN OPPORTUNITY TO VISIT THE
10 GALLEGOS' BACKYARD WHERE WATER AND WALL WERE AT ISSUE?

11 A YES, SIR. MY CAMERA WAS USED TO TAKE THE
12 PICTURE.

13 Q I SHOW YOU WHAT HAS BEEN MARKED AS EXHIBIT D-45
14 AND ASK IF YOU CAN TELL US ANYTHING ABOUT THAT PICTURE.

15 A YES. I RECEIVED A CALL ONE--I BELIEVE IT WAS
16 SATURDAY MORNING, IF I'M NOT MISTAKEN.

17 Q DO YOU REMEMBER ABOUT WHEN SATURDAY MORNING?

18 A NO, I CANNOT. IT'S BEEN THREE TO FIVE YEARS
19 AGO, I WOULD SAY.

20 MR. ALDER: YOUR HONOR, I REALLY DON'T OBJECT TO THOSE
21 QUESTIONS EXCEPT THAT I THINK IT'S A WASTE OF THE COURT'S
22 TIME. I DON'T THINK THERE'S ANY RELEVANCE TO THE WATER
23 MATTERS AT HAND. HE HAS ALREADY BEEN OVER THIS A MILLION
24 TIMES. WE DON'T KNOW WHY IT MATTERS THAT THE HOSE IS
25 RUNNING OR IF THE WALL WAS WET UNDERNEATH AND WATER--IT

1 SEEMS TO JUST WASTE THE COURT'S TIME, THIS TYPE OF THING.

2 MR. SILVESTRINI: I ASK THAT WE CAN APPROACH THE BENCH.

3 THE COURT: NO. THE OBJECTION IS SUSTAINED.

4 Q (BY MR. SILVESTRINI) DID YOU OBSERVE WATER IN
5 THE BACKYARD OF THE GALLEGOS PROPERTY?

6 A YES.

7 Q CAN YOU RECALL WHERE THE WATER WAS FROM?

8 MR. ALDER: OBJECTION. I BELIEVE THE OBJECTION WAS
9 SUSTAINED.

10 THE COURT: THE OBJECTION WAS SUSTAINED.

11 Q (BY MR. SILVESTRINI) DID YOU EVER KNOW MR. AND
12 MRS. BEHUNIN TO EXPRESS AN INTEREST BY THEIR CONDUCT IN THE
13 COMINGS AND GOINGS IN YOUR YARD?

14 MR. ALDER: OBJECTION.

15 THE COURT: SUSTAINED.

16 MR. SILVESTRINI: NO FURTHER QUESTIONS, YOUR HONOR.

17 CROSS-EXAMINATION

18 BY MR. ALDER:

19 Q YOU SAID YOU ARE A PROPERTY OWNER IN THE AREA.

20 A YES.

21 Q HAS YOUR PROPERTY EVER BEEN CONSIDERED A
22 NUISANCE?

23 A NO.

24 Q NEVER BEEN CHARGED WITH ANY VIOLATION AS A
25 PROPERTY OWNER ON EUCLID AVENUE?