

1986

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

Utah Supreme Court

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**BRIEF**

UTAH

DEPARTMENT

OF THE

JUDICIAL

BRANCH

DOCKET NO. 860065

IN THE SUPREME COURT OF THE STATE OF UTAH

\* \* \* \* \*

JOSEPH M. BEHUNIN and  
ARDELLA BEHUNNIN,

Plaintiffs/Respondents,

vs.

MARK GALLEGOS and  
ARLENE GALLEGOS,

Defendants/Appellants.

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*860065-CA*

Supreme Court  
Appeal No. 20206

District Court  
Civil No. 236640

BRIEF OF RESPONDENT

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

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**FILED**  
MAR 28 1985

Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

\* \* \* \* \*

JOSEPH M. BEHUNIN and  
ARDELLA BEHUNNIN,

Plaintiffs/Respondents,

vs.

MARK GALLEGOS and  
ARLENE GALLEGOS,

Defendants/Appellants.

\* \* \* \* \*

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PARTIES TO THE PROCEEDING:

Plaintiffs:

Joseph M. Behunin and Ardella Behunin  
1063 Euclid Avenue  
Salt Lake City, Utah

Defendants:

Mark Gallegos and Arlene Gallegos  
1065 Euclid Avenue  
Salt Lake City, Utah

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There shall be but one form of civil action,  
and law and equity may be administered in  
the same action.

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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; and by the  
judgment the nuisance may be enjoined or  
abated, and damages may also be recovered.

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HARMLESS ERROR. No error in either the  
admission or the exclusion of evidence, and  
no error or defect in any ruling or order or  
in anything done or omitted by the court or  
by any of the parties, is ground for granting  
a new trial or otherwise disturbing a  
judgment or order, unless refusal to take  
such action appears to the court inconsistent  
with substantial justice. The court at every  
stage of the proceeding must disregard any  
error or defect in the proceeding which does  
not affect the substantial rights of the  
parties.

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#### RULINGS ON EVIDENCE.

(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) Offer of Proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

Utah Rules of Evidence, Rule 403 .....	18, 24
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#### EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, OR WASTE OF TIME.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

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## STATEMENT OF ISSUES PRESENTED ON APPEAL

There are four main questions of law presented by this appeal:

1. Is a party to a stipulation which in major part limits the height of a barrier wall between adjoining properties, precluded from enforcing such restrictions against subsequent barriers erected along the boundary between their properties in excess of the height limitations?

2. Is the erection of a fence under the circumstances of this case a nuisance? This is a case of first impression for spite fence nuisance in Utah. The court has an opportunity to clearly set forth the law.

3. Did the trial court properly exercise it's discretion in the administration of the proceedings and the admission of evidence; specifically, did the court prejudicially err in excluding evidence offered by the defendant?

4. Is the injunctive relief granted by the court restricting barriers in excess of the stipulated height of the wall between the residence of the parties, precluded by Constitutional prohibitions against taking property without compensation?

## SUMMARY OF ARGUMENTS

All but one of the defendants' numerous arguments and issues hinge on two dominant preceptions of the case and the law. These two views are, first, that the case involves the issue of an implied easement to light and air, and second that the court improperly excluded evidence. The final argument questions the constitutionality of the injunction imposed by court.

1. The plaintiff's case was plead, proved and argued on the theories of contract and nuisance. As the defendant concedes there are no Utah cases concerning implied easements for light and air. The defendants presume the law in Utah to be similar to that of the majority of other jurisdictions: that there is no implied right to light and air. Defendants then argue that this presumption is supreme over other law applicable to the case.

The defendants contend that both contracts in which restrictions on light and air may be implied from the express contract terms, and a nuisance which is based in part on interference with light and air must yield to the supposed prohibition to implied rights to light and air.

In response, Plaintiffs argue that the established law of contract interpretation provides for a determination that an express agreement may, by implication, include prohibitions against activities that restrict light and air that are not individually stated. Defendants concede that an easement may be

created by express grant. Similarly, plaintiffs respond that a nuisance is a broad category of objectionable activities which limit other property rights an individual may acquire by deed or contract.

To have instructed the jury that a right to light and air could not be implied would have misstated the law of contracts and nuisance.

2. The second major view of the case presented by several of the defendants' arguments is that the defendants were precluded from presenting the evidence for their case at trial. The body of this brief will demonstrate that this is not true but rather that the defendants were allowed to proceed and did present evidence to support all of the defenses that they argued. Thus, if there was error, which is not admitted, it was harmless.

3. The final argument presented by the defendants concerns the constitutionality of the injunctive relief granted. The relief ordered was primarily corrective; ordering the removal of the barriers found to be in violation of the stipulation and a nuisance. To a lesser extent the relief ordered was prescriptive; ordering the defendants to cease erecting "similar barriers".

The plaintiffs argue that the court's order merely restated the findings as to the meaning of original stipulation and the law of nuisance and is not beyond the normal power of a court to enforce its orders and set forth the findings and the law.

The defendants cite no Utah authority for their position that the injunction is a taking where the prescribed activity is a nuisance, or prohibited by contract.

#### STATEMENT OF CASE AND FACTS

The defendants' statement of the case and facts is fairly adequate for the court's understanding of the dispute except for the following omitted matters:

1. Upon questioning at trial all parties agreed they had no prior disputes or problems and considered each other good neighbors until the wall was planned by the defendant, Mark Gallegos. (Mrs. Behunin, T-336; Mr. Behunin, T-438; Mrs. Gallegos, T-447; Mr. Gallegos, T-494) At trial the plaintiff, Mrs. Behunin testified that the defendant, Mark Gallegos told her he intended to construct a cinderblock wall ten (10) feet high along the entire length of the property line and that she would need her lights on night and day (T-339). Mrs. Gallegos testified that Mr. Gallegos threatened to build the wall "Forty feet tall, not ten" (T-448, 449). The wall would have created a concrete obstruction two feet, two inches from the kitchen window; one foot, seven inches from the bedroom window; and one foot eleven inches from the bathroom window of the plaintiffs' home (T-427 - 429).

2. The plaintiff, Mrs. Behunin testified that subsequently she was contacted by Mr. Gallegos by telephone and

told, "Well I'm going up with that wall and it's going to be dark in there and your're going to have to leave your lights clear on all day" (T-341).

3. The plaintiffs obtained an attorney and filed a complaint and obtained a restraining order to stop the wall (T-343). The affidavits, complaint and answers to interrogatories emphasized the concern for loss of their view and light because of the anticipated height of the wall (T-356-359, Pleadings and Exhibits 54-P, 55-P).

4. The stipulation, (Exhibit 53-P) resolving the dispute over the proposed wall was negotiated at a time when both parties were represented by counsel and was executed by both parties' counsel (T-355 and T-452). The stipulation clarified the location and limited the height of the wall.

(5) Almost immediately upon completion of the stipulated lower wall, the defendants placed 4 x 8 foot pieces of plywood on end against the wall directly in line with the plaintiffs' windows (T-361-363). These unpainted plywood boards remained rattling (T-365) and blocking the plaintiff's light and view (T-357, 358) until after the plaintiffs commenced the lawsuit (T-365). An eight foot high partition replacing the 4 x 8 plywood boards, was placed against the wall in 1982. It was built from wood and green fiberglass (T-366). This partition also blocked the light requiring the Plaintiffs lights to be on all the time (T-371) and blocked their view (T-395 and 383, Exhibits P-2, P-3, P-5 and P-6).

(6) After the wall was completed the parties relationship was not good (T-374). The defendants' placed signs in their windows facing the plaintiffs' home. These signs alternately stated "Nosy Josey" or "Nosy Rosey" (T-376-378, Exhibits P-8 and P-11). The defendant often came into his yard when the plaintiffs were outside and made obscene gestures to them (T-375). On the barrier fence that was erected by the defendant between the property line at the sidewalk and their home, the defendant, Mr. Gallegos wrote in white spray paint, "Fence Inspector" (T-375, Exhibit P-13, T-515).

(7) The court was presented with testimony attempting to show acts of the plaintiffs that were alleged to consist of unwarranted intrusion into the defendants affairs. Over 35 pages of such allegations were presented by defendants through three witnesses and their own testimony. Acts alleged included calling the police, looking over the wall, coming to the front yard to see who was at the defendants' front door, making obscene gestures, watching construction in defendants' yard from the plaintiffs' roof, and watering and digging near the wall. By way of rebuttal the plaintiffs presented the testimony of one neighbor and one police officer as well as their own testimony. All testimony was limited to individual observations or knowledge. The plaintiffs' explained that they minded their own business. (The numerous factual references for the specific testimony and objections are contained in the body of the brief under Point III.)

(7) The evidence also showed that the defendants had only one front room window on the east side of their house facing the plaintiffs' home (T-484 and 515) and that their yard extended to the west over a large distance which was unrestricted and available for improvements and use (T-486), and that the entire remaining perimeter of their property was fenced with a 6 foot high chain link fence (Exhibit D-37, T-507).

### ARGUMENT

#### I.

THE BARRIERS ERECTED BY THE DEFENDANTS WERE A BREACH OF THE STIPULATION WHEREBY THE PARTIES INTENDED TO LIMIT THE HEIGHT OF BARRIERS ALONG THE BOUNDARY BETWEEN THEIR PROPERTIES.

A primary concern of the plaintiffs, beginning with the defendants' declaration to build a 10 foot high wall and included in all pleadings and discussions was the height of the wall and the loss of their view and light. This concern about the height of the wall was incorporated into the restrictions of the stipulation as to the height of the wall. The stipulation provided at Paragraph 4 in part.

"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)." (Emphasis added)

Almost immediately upon completion of the wall plywood sheets eight (8) feet high were placed against the wall in the area of the plaintiffs windows. These were later replaced by redwood and green fiberglass barriers.

The plaintiffs argued these actions were a breach of the terms of the stipulation. The stipulation included those terms implied from the express language of the stipulation as having been intended by the parties. The stipulation also included the duty of good faith and cooperation required by law.

In State Auto & Casualty Underwriters v. Salisbury, 494 P.2d 529 (Utah 1972) the court said at 531.

Arising from what is commonly known and accepted as to customs and experience in everyday affairs of life, parties [to a



contact] each have the right to assume that the other will perform duties he agrees to do with reasonable care, competence, diligence and good faith even though such terms are not expressly spelled out in the contract.

The jury found by special interrogatories the purpose and intent of the stipulation to be to "restrict obstruction 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 generally".

This finding was not in conflict with the evidence. The testimony of all parties about the initial discussions about the wall related primarily to height, and to darkness in the plaintiff's house and loss of her view. The height agreed upon of five (5) feet provided primarily for a view out the windows and was not to accomodate any other criteria. It is the traditional rule of the Utah court to review the evidence in the light favorable to the findings of the jury and judgment entered, State Auto, supra at 532.

The placement of the plywood and subsequent barriers had the effect of breaching this intent and evidenced a lack of good faith and cooperation. It was not necessary that the contract expressly exclude all types of boundaries since "common experience" would not lead individual neighbors to expect plywood and other barriers to be subsequently erected between them when the height of the boundary wall had been so arduously negotiated.

## II.

THE INSTRUCTIONS TO THE JURY PROVIDED LEGALLY SUFFICIENT  
GROUNDS TO SUPPORT THE FINDING OF A NUISANCE.

### A.

The jury finding of nuisance was based on jury instructions that were consistent with the general view of spite fence nuisance law and were not inconsistent with the law that should be adopted by the Utah court.

The only Utah nuisance case cited by the defendants' brief is the case of Rowley v. Marrcrest Homeowners Ass'n, 656 P.2d 414 (Utah 1982) where in clear dicta at 419 the court states:

As a general proposition, one who erects an otherwise useless structure for the sole purpose of injuring a neighbor makes an improper use of his property. Sundowner, Inc. v. King, 95 Idaho 367, 509 P.2d 785 (1973), Burke v. Smith, 69 Mich 380, 37 N. W. 838 (1888).

The plaintiffs' believe that Rowley does not state the correct law to be applied in this case. For this reason, this case and the evolution of the general proposition will be discussed in detail. The facts in spite fence cases are generally very similar to the case at bar.

In Sundowner, supra the parties had previously been in litigation concerning alleged misrepresentations in the sale of a motel property. The parties were adjoining property owners. One party built a structure described as a "fence or sign" 85 feet in length and 18 feet high approximately 2 feet from the adjoining property owner's motel building, restricting the passage of light and air to it's rooms.

The court noted that the older cases or English rule were founded on the premise that the property owner has an absolute right to use his property in any matter he desires. This rule was rejected by Burke v. Smith (also cited by the Utah Court in Rowley) which set forth what became known as the American Rule on spite fences. The rule is most often expressed by quoting from Burke supra at 37 N.W. 842.

But it must be remembered that no man has a legal right to make malicious use of his property, not for any benefit or advantage to himself, but for the avowed purpose of damaging his neighbor. To hold otherwise would make the law a convenient engine, in cases like the present, to injure and destroy the peace and comfort, and to damage the property, of one's neighbor for no other than wicked purposes which in itself is or ought to be unlawful . . . what right has the defendant, in the light of just and beneficant principles of equity, to shut out God's free air and sunlight from the windows of his neighbor, not for any benefit or advantage to himself, or profit to his land, but simply to gratify his own wicked malice against his neighbor?

The facts of the Sundowner case are important. The defendant had alleged that the wall was useful for advertising purposes.

However, the court found that the wall did not serve a useful advertising purpose although it was used for advertising and ordered it reduced to six feet in height.

The facts illustrate that the courts generally have expoused the dicta of Burke concerning no useful purpose while in fact making a finding of intent and disregarding an arguable "useful purposes".

This is evident in a series of Wyoming cases in which the Wyoming court ultimately disgarded the Burke language and adopted a more realistic statement of the law.

In Erickson v. Hudson, 249 P.2d 523 (Wyo 1952), the litigants were adjoining property owners in Evanston, Wyoming, who had previously been involved in adjudication over the location of their property line. The fence complained of was constructed to a height of 6-1/2 feet and to within 5-1/2 inches of the eaves of the house and within 13 inches of a wall. The side facing the neighbor was painted with creosote which caused the plaintiff to become ill. The houses were only 6 to 7 feet apart.

The justification for the fence was that it was built on the defendant's own property, served a useful purpose of providing privacy and kept peace with his neighbors.

The court made this final determination at 532.

That the defendants sought privacy and peace may be true, but the beneficial purpose of the fence in that connection, if any, at least as to the height of it is far out of proportion to the injury inflicted. Common sense dictates that it would be offensive to any neighbor whatever. The cause and underlying reason for the erection was the ill-feeling toward the plaintiffs . . .

The court upheld an order reducing the fence to the height of the window sills.

A subsequent Wyoming case Schork v. Epperson, 287 P.2d 467 (Wyo 1955) was substantially similar in facts: a solid wooden fence was erected 9 feet high and came close to the eaves of the house preventing it from receiving sunshine until almost noon and compelling the plaintiffs to use electric lights during the day. The defendants claimed it was useful as a windbreak and as a snowfence.

The Wyoming court cited the Utah case of Dahl v. Utah Oil Refining Co., 71 Utah 1, 262 P.269, (1927) and Cannon v. Neuberger, 1 Utah 2d 396, 268 P.2d 425 (1954) for the proposition that "the test of whether the use of the property constitutes a nuisance is the reasonableness of the use complained of in the particular locality and in the manner and under the circumstances of the case", Dahl supra at 273.

The court then noted that spite fence cases have not enjoyed this broader definition of nuisance. The court criticised the narrow interpretation of the American Rule set out in Burke supra requiring that "malice must be unmixed with any benefit to the party erecting the fence", Schork, at 470. The court cites cases that have held that "liability ensues when malice is the dominate factor and the usefulness of the structure is limited and merely incidental".

The court next examined the Restatement of the Law of Torts, Sections 826 to 829, intentional invasion of another's land, which it notes does not adopt a "useful purpose" standard but rather balances the utility of the conduct to the gravity of the harm.

Finally, the Court in Schork adopts a balancing standard of its own at 470,

The actor is liable "unless the utility of the actor's conduct outweighs the gravity of the harm."

The plaintiffs believe the history of the Wyoming court's use of the American Rule and reasoning is persuasive. The strict American Rule puts the plaintiff to the burden of disproving a "useful purpose" under some artificial criteria when in fact it is obvious that a fence may be "useful", but that the "use" was not the purpose. Legal fictions create bad law, confuse the jury and obscure the true issues of the case.

This view of the Wyoming court is consistent with the Utah Statutory definition of Nuisance. Section 78-38-1, Utah Code Annotated provides:

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; and by the judgment the nuisance may be enjoined or abated, and damages may also be recovered.

This statute has been applied to numerous other nuisance circumstances such as Dahl, an Oil Refinery; Neuberger, a question of trees constituting nuisance; Brough v. Ute Stampede Assn., Inc., 105 U 446, 142 P.2d 670 (1943), a carnival adjacent to a home; Wade v. Fuller, 12 U.2d 299, 365 P.2d 802 (1961), operation of a drive-in cafe; and Ludlow v. Colorado Animal By-Products Co., 104 U. 221, 137 P.2d 347 (1943) a rendering plant in a farming community. The cases developed a balancing of interests tests in Utah, as best stated in Neuberger at 426:

. . . our court . . . has never interpreted the first word of the statute to mean "anything at all which [(is)] any person considers to be offensive to the senses" etc. Rather it has held that the term "nuisance" is applied to "the unreasonable, unwarrantable or unlawful use by a person of his property", and that every person has a right to the reasonable enjoyment of his property. As to what is a reasonable use of one's property must necessarily depend upon the circumstances of each case for a use for a particular way, in one localilty, that would be lawful and a nuisance in another . . . The test of whether the use of property consitutes a nuisance is the reasonableness of the use complained of in the particular locality and in the manner and under the circumstances of the case.

This same test could be wisely applied in spite fence nuisance cases as it has been done in Wyoming. The reference in Rowley to the American Rule and Sundowner, are contrary to the statute and Utah case law.

B.

The facts of the instant case clearly support the finding of the jury that the fence was of no beneficial use or purpose and that the fence was erected solely for the purpose of annoying the plaintiffs. This was the finding required by Jury Instruction 21 which was modified by the Court to clarify this point. Thus the presence of Instruction 21 put the plaintiff to the more severe test. The jury was free to disregard as unbelievable the testimony of the defendants that the fence served the useful purpose of providing them privacy. Upon review this Court must view the facts in light most favorable to the findings of the jury, State Auto, supra at 532.

Jury Instruction 18 is arguably at odds with Instruction 21. However, plaintiff believes that the two instructions are consistent and merely clarify the American Rule; i.e. whether a fence is installed solely for malice may require or permit the jury to disregard possible uses that are not actual uses.

Jury Instructions 15 and 16 accurately state the definition of a nuisance generally as explained by the Utah statute and Utah cases. To the extent that Utah's general law of nuisance is more broad than the American Rule of spite fence nuisance these instructions may appear inconsistent with Instructions 18 and 21. If this court were to adopt the American Rule, the jury's instructions would, nevertheless, not have been unclear or in error. The jury was instructed that for a fence to be a nuisance it must be erected solely for purposes of malice.



The general explanations of nuisance were subordinate to this specific finding required by the instructions for a fence. This was not reversible error Morgan v. Mammoth Min. Co., 26 U 174, 72 P. 688 (1903); In re Richards Estate, 5 U.2d 106, 297 P.2d 542 (1956).

Plaintiff argues that if there was error in the instructions, the error was the reference and use of the American rule rather than the better rule applied in other Utah nuisance cases and expoused by the Wyoming court in Schork, supra. This "error" was to the defendants' favor and is not a basis for reversal or remand.

### III.

THE EVIDENCE PRESENTED TO THE JURY AND THE EVIDENCE EXCLUDED  
WAS NOT PREJUDICIAL TO THE DEFENDANTS NOR BEYOND THE  
PROPER DISCRETION OF THE TRIAL COURT

The defendants in their brief argue at great length that the trial court improperly excluded admissable evidence. The evidence that is thought to have been excluded was, infact, usually not excluded, but merely limited either because of the court's impatience that so much of such evidence had been admitted throughout the proceedings or because the defendants' counsel failed to pursue the area further.

The areas felt by defendants to have been inadequately presented are identified in their brief as follows:

(a) Plaintiffs alleged excessive summoning of the police;

(b) Opinions of neighbors concerning the plaintiff's reputations for invasion of the privacy of others;

(c) Privacy problems of the defendants requiring the wall;

(d) (h) and (i) Defendants' actions related to possibly undermining the wall.

(e) Telephone calls to building inspectors related to the wall;

(f) The opinion of the plaintiff concerning the allegations in the Complaint; and

(g) The opinion of the defendant concerning the intent of the settlement stipulation relative to light and air.

As the defendants conceded in their brief, disputes between neighbors are often unpleasant and lead to name calling and mud slinging. The plaintiffs agreed to dismiss their actions for defamation and intentional infliction of mental distress. Their strategy was to preclude the type of bickering that would have undermined the sympathies of the jury and prevented a determination of the crucial issues.

This was also the burden of the trial court. Rule 403 of the Utah Rules of Evidence recognizes the need for discretion of the trial court to balance relevancy with the risks of prejudice confusion, undue delay or needless presentation of

cumulative evidence. This discretion is not to be disturbed unless it clearly appears that the trial court so abused it's discretion that there was a likelihood that injustice resulted. State v McCardell, 652 P.2d 942 (Utah, 1982).

The potential for prejudice, delay and confusion was particularly high in this case because of the large number of extraneous issues between the parties, the lack of specific complaints and temptation to introduce evidence of innuendo or general conclusions as to character. Plaintiffs believe the complete record shows the court judiciously balanced the numerous factors to see that justice resulted and that there was no abuse of this discretion.

In specific response to the defendants individual objections the plaintiff makes the following observations:

(a) and (e) The specific objection of defendants is an inability to introduce evidence that Mrs. Behunin called the police and building inspector often.

The plaintiff was questioned by defendant's counsel concerning the calls to the building inspector. She testified without objection. Counsel then asked about inspection papers. Since the plaintiffs did not contend that the wall was built without compliance, this question was objected to as being irrelevant. The objection was sustained and the defendants' counsel moved to other areas of cross examination (T-390). This line of questioning was not renewed with any other witness.

Mrs. Behunin did not testify on direct examination to calling the police. The court on it's own, objected to the questions by defendants' counsel about police calls as being beyond the scope of the questioning on direct testimony (T-402). Prior to the courts objection Mrs. Behunin testified she had called the police when given an obscene gesture by the defendant and on quite a few occasions (T-401). The court's objection did not precluded the defendants from testifying on these matters on direct or of asking other witnesses about police calls, but no questions were asked. The plaintiffs introduced the testimony of a police officer, (T-422) called by the plaintiffs concerning a loud music disturbance. He testified the music was loud enough to justify a complaint and that the defendant told the officer's partner, "He didn't really care what [they] had to say, he was going to do what he darn well liked" (T-424). Again, following this testimony, the defendants failed to offer testimony of their own or other witnesses including any police officers or public officials to testify that they received calls that were not justified.

The court's single objection was correct. The failure to proceed further at a later time precluded the testimony, not the court.

(b) and (c) Plaintiffs' reputation for snoopiness. The court permitted over 37 pages of testimony by five witnesses concerning the problems the defendants had with the plaintiff.

At T-437 - 439 the defendants' counsel questioned Mr.

Behunin concerning his activities near the wall and while the wall was being built.

At T-454, and T-457, Mrs. Gallegos testified about "problems" with the plaintiffs.

The plaintiffs' counsel objected. Plaintiffs contended that problems after the wall and barriers were erected were not relevant to the question of motive for building the wall and erecting the barriers. Nevertheless, the court permitted the defendant to ask about the plaintiffs' activities that justified erecting the barriers in addition to the wall.

Mrs. Gallegos testified concerning one incident of Mr. Behunin possibly looking over the wall in his back yard (T-457). She also was allowed to testify about the plaintiffs coming to the front yard when the defendants had guests (T-459). She testified about Mr. Behunin often walking between the wall and his house, (T-461) and being on the roof when the defendants' contractor was pouring a patio in the defendants' back yard (T-462-463). Further questions were asked at concerning alleged offensive actions by Mr. Behunin (T-468-469).

The defendants were allowed to call Mr. Hadehaim, the contractor, who testified about Mr. Behunin watching them work on the patio in defendants' back yard. He testified that he worked for 4 or 5 days and noticed Mr. Behunin watching once from the roof and once tell an employee to not sit on the wall (T-475-479).

The defendants called Mr. Gallegos who was allowed to testify that after the wall was erected the plaintiffs would go to

the front yard when they had guests at their door (T-499). He was directed to testify as to particular instances. He then testified to two occasions he could recall (T-500-504).

The defendants called a witness, a neighbor, Mr. Kay Snow who testified concerning his observation of the relationship between the plaintiffs and the defendants. His testimony was general in nature as to types of activity he observed (T-526-527).

The defendants called as a witness a neighbor, Mr. Edwin Christensen, who testified in a manner similar to Mr. Snow. (T-500-532)

The defendants also called as a witness the persons who lived in the defendants' home prior to them. Their testimony as to the reputation of the Behunins was not permitted. They had no knowledge except from 16 years prior. The record already established that the parties had no disputes or privacy problems prior to the wall.

In rebuttal to all of the foregoing, the defendants called the police officer whose testimony has been summarized and Mrs. VanDongen, a neighbor. She testified in a manner similar to the other neighbors, Mr. Snow and Mrs. Christensen, concerning her observation of the relations between the plaintiffs and defendants. (T-439-440).

Thus, in summary it can be seen that defendants were not precluded from introducing evidence of possible intrusive behavior. The jury had before it abundant testimony to conclude a need for privacy. The jury was apparently not persuaded.

(d) (h) and (i) Testimony about plaintiffs' actions relating to possibly undermining the wall. The defendants' fascination with the idea that the plaintiffs wanted to destroy the wall continually frustrated the court. Abundant testimony was permitted. Yet it became clear by all of defendants' witnesses that this testimony was not relevant to the defendants' claims or defenses to the extent of the testimony offered. The record is filled with testimony about watering the wall (T-475, 491, 535-536) or watering ground around the wall, (T-467-468, 479, 480, 527) shaking the wall (T-433, 466) or digging around the wall (T-467-468) including pictures of water puddling. Finally the court restricted further testimony on this subject. This is a prime example of where evidence was limited because it was already excessively permitted by the court. As the court said it was a "time waster".

(f) and (g) The defendants testified concerning their understanding of the stipulation prior to the objections. The objectionable testimony was repetitious. The testimony of the plaintiff concerning the language of the complaint was properly excluded as not having been her language but her attorney's which she testified she hadn't really read (T-397).

The foregoing detailed analysis of the record demonstrates that the court did not abuse its discretion in ruling on the admissibility of evidence. The defendants had full opportunity to present their evidence and defenses. Thus the errors alleged, if there were any, were not prejudicial so as to

have a substantial influence on the verdict as required for remand under Rules 103 and 403, Utah Rules of Evidence; Rule 61 of the Utah Rules of Civil Procedure; Stagmeyer v. Leathum Bros. Inc., 20 U.2d 421, 439 P.2d 279 (1968) and McCardell, supra. It is clear that the jury chose not to believe the evidence presented by the defendants but rather to believe the testimony of the plaintiffs.

#### IV.

THE INJUNCTIVE RELIEF GRANTED IS CONSTITUTIONAL.

The Order of the Court granting injunctive relief is made pursuant to the provisions of Article VIII, Section 19 of the Utah Constitution providing that:

There shall be but one form of civil action, and law and equity may be administered in the same action.

This section as interpreted by the Utah Court in actions seeking injunctive relief, provides that the determination by the jury of issues of fact and damages <sup>does not</sup> ~~do~~ preclude the court from granting injunctive relief. See Salt Lake City v. Anderson, 106 U 350, 148 P.2d 346 (1944).

As already cited, the provisions of Section 78-38-1 Utah Code Annotated provided that ". . . by judgment the nuisance may be enjoined or abated". The language of the court's Order carrying out the constitutional and statutory responsibility,



merely echos the findings of the jury concerning it's interpretation of the stipulation and the findings of nuisance. The language is not overly broad.

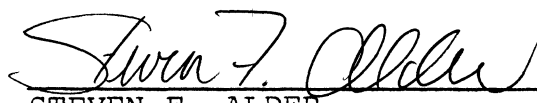
The injunctive relief ordered is consistent with the injunctive relief ordered in similar cases by the courts of Wyoming in Hudson and Schork, supra; and the Utah court in Wade v. Fuller, supra. It is consistent with the policy of the court to avoid duplicity of lawsuits and to grant relief on one action to the extent possible.

The defendants cite no Utah authority for their position that the injunction is a taking where the prescribed <sup>activity</sup> ~~authority~~ is <sup>a</sup> nuisance, or prohibited by contract.

#### CONCLUSION

The finding of the jury should be sustained and the injunction imposed by the court affirmed. The stipulation was properly interpreted to preclude the subsequent barriers. The finding of the jury was, consistent with law of spite fence nuisance either under the American Rule which was properly explained to the jury or under the broader nuisance provisions of Utah law. The Court should abandon the dicta of Rowley and adopt the better rule of Dahl and Neuberger.

DATED this 28<sup>th</sup> day of March, 1985.

  
STEVEN F. ALDER  
Attorney for  
Plaintiffs/Respondents

CERTIFICATE OF MAILING

I certify that four true and correct copies of the foregoing Brief of Respondent were hand-delivered to:

Mr. Jeffrey L. Silvestrini  
Attorney for Defendants/Appellants  
COHNE, RAPAPORT & SEGAL  
66 Exchange Place  
Salt Lake City, UT 84111

this \_\_\_\_\_ day of March, 1985.

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