

1980

Penelko, Inc., A Utah Corporation v. Price Rentals,
Inc., A Utah Corporation And John Price
Associates, Inc., A Utah Corporation, Et Al. :
Respondent's Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

PENELKO, INC., a Utah corporation,

Plaintiff and Appellant,

vs.

PRICE RENTALS, INC., a Utah
corporation,

Defendant and Respondent,

No. 16601

and

JOHN PRICE ASSOCIATES, INC., a
Utah corporation, et al.,

Defendants.

RESPONDENT'S BRIEF

APPEAL FROM JUDGMENT OF THE THIRD JUDICIAL
DISTRICT COURT OF SALT LAKE COUNTY
HONORABLE BRYANT H. CROFT

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TABLE OF CONTENTS

	Page
NATURE OF THE CASE	1
DISPOSITION BY THE LOWER COURT	1
RELIEF SOUGHT ON APPEAL	1
FACTS	1
A. Appellant's Lease and Construction Of Improvements	1
B. Lower Court Proceedings and Jury Verdict . .	3
ARGUMENT	6
POINT I. THE LOWER COURT PROPERLY REFUSED TO GRANT A MANDATORY INJUNCTION AND, IN ANY EVENT, THE QUESTION CONCERNING INJUNCTIVE RELIEF IS MOOT BECAUSE OF APPELLANT HAS SOLD ITS THEATER AND LEASEHOLD PROPERTY	6
A. Appellant's Claim For A Mandatory Injunction Is Moot	6
B. Appellant Has Failed To Show That It Is Entitled To A Mandatory Injunction In The Present Action	8
POINT II. APPELLANT IS NOT ENTITLED TO ATTORNEY'S FEES IN THE PRESENT ACTION	14
A. Plaintiff's Claim For Attorney's Fees Is Barred By Lack Of Privity	14
B. Appellant's Claim To Attorney's Fees Is Barred For Failure To Introduce Evidence Of Attorney's Fees During Trial	16
C. Appellant's Claim of Attorney's Fees Cannot Be Sustained Because It Is Impossible To Determine Whether The Verdict Was Based Upon Tortious Conduct or Breach of Lease	21

	Page
D. The Lower Court Lacked Jurisdiction To Consider Appellant's Motion For Attorney's Fees Because The Court's Order Of July 2, 1979, Became Final, And Both Parties Filed Notices Of Appeal Before The Issue Was Heard By The Court	22
CONCLUSION	24
CERTIFICATE OF SERVICE	25

TABLE OF CASES AND AUTHORITIES

<u>Abdulkadir v. Western Pacific Railroad Co.,</u> 318 P.2d 339 (Utah 1957)	18
<u>Agmar v. Solomon,</u> 87 Cal.App. 127, 261 P. 1029 (1927)	11, 12
<u>Ashworth v. Charlesworth,</u> 231 P.2d 724, 729 (Utah 1951)	16
<u>Berman v. Sinclair Refining Co.,</u> 451 P.2d 742, 745 (Col. 1969)	15
<u>Borgen v. Wigglesworth,</u> 369 P.2d 360, 363-64 (Kan. 1962)	9, 11
<u>Clawson v. Garrison,</u> 3 Kan.App.2d 188, 592 P.2d 117, 128 (Kan. 1979)	9, 11
<u>Crouch v. Pixler,</u> 320 P.2d 943 (Ariz. 1958)	19
<u>Denver, City and County of v. Glendale Water and Sanitation District,</u> 380 P.2d 553, 555 (Col. 1963)	11
<u>Eldredge v. Jensen,</u> 89 Idaho 243, 404 P.2d 624, 626 (1965)	15
<u>Erisman v. Overman,</u> 358 P.2d 85 (Utah 1961)	21
<u>FMA Financial Corporation v. Build, Inc.,</u> 17 Utah 2d 80, 404 P.2d 670, 673-74 (1965)	16, 17, 18

	Page
<u>Hickman v. Sixth Dimension Custom Homes, Inc.,</u> 543 P.2d 1043, 1044 (Ore. 1975)	9
<u>Holland v. Brown,</u> 394 P.2d 77 (Utah 1964)	21
<u>Jewett v. Deerhorn Enterprises, Inc.,</u> 281 Ore. 469, 575 P.2d 164, 166 (1978)	11
<u>Latses v. Nick Florine, Inc.,</u> 99 Utah 214, 104 P.2d 619 (1940)	5, 14, 15, 16
<u>Mason v. Mason,</u> 160 P.2d 730 (Utah 1952)	19
<u>Mendez v. Bowie,</u> 118 F.2d 435, 439 (1st Cir. 1941), <u>cert. den.</u>	6, 7
<u>Needle v. Scheinberg,</u> 187 Md. 169, 49 App.2d 334 (1946)	12
<u>Paul v. Milk Depots, Inc.,</u> 41 Cal.Rptr. 468, 396 P.2d 924, 926-27 (1964)	6
<u>Petty v. Clark,</u> 129 P.2d 568 (Utah 1942)	17
<u>Renzel, E. H. Co. v. Warehousemen's Union,</u> 16 P.2d 369, 106 P.2d 1, 3 (1940)	11
<u>Richards v. Hodson,</u> 485 P.2d 1044 (Utah 1971)	18
<u>Rios v. Bowie,</u> 314 U.S. 639 (1941)	6, 7
<u>Roosendaal Construction and Mining Corporation v. Holman,</u> 28 Utah 2d 396, 503 P.2d 446, 448 (1972)	6
<u>Salt Lake County v. Kartchner,</u> 552 P.2d 136, 139 (Utah 1976)	7, 8, 9
<u>Seattle, Port of v. International Longshoremen's and Warehousemen's Union,</u> 52 Wash.2d 317, 324 P.2d 1099, 1100 (1958)	11

	Page
<u>State v. Reid,</u> 190 Kan. 376, 375 P.2d 588, 592 (1962)	11
<u>Stuart v. Titus,</u> 400 P.2d 797, 800 (Okla. 1965)	9
<u>Swain v. Salt Lake Real Estate and Investment Co.,</u> 279 P.2d 709, 711 (Utah 1955)	16
<u>Valley Mortuary v. Fairbanks,</u> 225 P.2d 739 (Utah 1950)	17
<u>Waggoner v. Oregon Automobile Insurance Company,</u> 526 P.2d 578, 582 (Ore. 1974)	19
<u>Walker, Inc. v. Thayn,</u> 17 Utah 2d 120, 405 P.2d 342 (1965)	23

AUTHORITIES CITED

4 Am.Jur.2d, <u>Appeal and Error</u> , §306-307	23
22 Am.Jur.2d, <u>Damages</u> , §165	21

RULES CITED

Utah Code Annotated §34-27-1	18
Utah Code Annotated §38-1-18	18
Utah Code Annotated §78-11-10	18
Utah Code Annotated §78-37-9	18
Utah Rules of Civil Procedure, Rule 72(a)	23
Utah Rules of Civil Procedure, Rule 73(a)	23

NATURE OF THE CASE

This case involves an action commenced by Penelko, Inc., for damages and injunctive relief as a result of claimed violation of certain provisions of its lease and for tortious interference with its theater business.

DISPOSITION BY THE LOWER COURT

Following a trial by jury, a verdict was rendered against respondent and in favor of appellant in the amount of \$65,000. The lower court entered its judgment on the verdict in the sum of \$65,000 and denied appellant's motions for injunctive relief and attorney's fees.

RELIEF SOUGHT ON APPEAL

Respondent, Price Rentals, Inc., seeks affirmance of the lower court's orders denying appellant's motions for injunctive relief and attorney's fees.

FACTS

A. Appellant's Lease And Construction Of Improvements.

The basic facts of the present case are set forth in the brief of Price Rentals, Inc. (Appellant) in Appeal No. 16588 from the lower court's judgment on the verdict in the present case in the sum of \$65,000 against Price Rentals, Inc. Of particular importance for purposes of this appeal, however, is appellant's lease for its theater property, which contains the following provisions:

There is hereby allotted to the lessee for parking, a strip of land 70 feet in width and 234 feet in depth, running from the South side of the above-described parcel to the North side of 9400 South Street, and an additional tract 40 feet in width and 162 feet in depth, from the parcel next adjoining the West side of this tract The lessee shall install and maintain at a grade established by the lessor and in accordance with the standard of the Albertsons parking lot, all paving, lighting, curbs and gutterings, sidewalks and other walkways necessary for the possession and use of the said premises or required by any governmental authority for the use of and access to the same. (Emphasis added) (Paragraph 2.)

All parking facilities, lighting facilities and open spaces upon the leased premises are to be used in common with other occupants of property of the lessor for the maintenance and development of a shopping center and no barrier shall be constructed or permitted which will bar access to such parking facilities and access roads by tenants of other premises or their customers or guests. The lessor shall provide in leases of adjoining property similar covenants and agreements so that the lessee shall have similar unobstructed access to parking, lighting and other common facilities of adjoining tenants. (Emphasis added) (Paragraph 7.)

It is the intention of the parties that this shall be a lease of land only for the purpose of construction of buildings or improvements in connection with an integrated shopping center; that both of the parties hereto will encourage the development of adjoining properties for such purpose (Emphasis added) (Paragraph 8.)

The preamble to appellant's lease further provides that the land leased to appellants would include "parking space and access to be set aside and allotted as hereinafter more particularly described." (Emphasis added) That parking space and access area was located between appellant's theater to the north and 9400 South to the south.

At the time of execution of said lease and at the time respondent commenced construction of the improvements referred to in appellant's complaint, no curbs, gutters, sidewalks or traffic control improvements had been constructed along 9400 South in front of the common parking lot described in appellant's lease. (Pages 1762-1766, 2177-2179.) Similarly, no defined access lane existed in the lot. Traffic could enter from and gain access to 9400 South along the entire southerly boundary of the parking lot. Inasmuch, however, as the parties to the lease knew that Sandy City would soon require construction of such improvements in the lot as the shopping center was developed, paragraphs 3 and 8 were inserted in the lease to provide for the construction of curbs, walkways and defined access routes in and along the front of the parking facility. (Pages 1762-1766, 2177-2179.)

It is also significant that, following the trial, appellant assigned all of its right, title and interest in its theater lease and conveyed its interest in the theater building and improvements. The assignment and conveyance documents were recorded June 19, 1980, as Entry Nos. 3444396 and 3444397 in the Office of the Salt lake County Recorder.

B. Lower Court Proceedings And Jury Verdict.

When plaintiff's claims, including alleged trespass resulting from respondent's construction of the above improve-

ments, were submitted to the jury, the court did not request a special verdict from the jury with respect to each of those seven claims. Respondent, however, requested the court to instruct the jury to return a special verdict for each claim of wrongful conduct, including: (1) construction of a driveway over the eastern portion of the common parking area, (2) construction of landscaping and curb at the entrance to the common parking area South, (3) construction of a flagpole in the landscaped area, (4) removal of two lights installed by Utah Power & Light Company in the common parking area, (5) removal of appellant's theater sign from the access way to the common parking area, (6) construction of the Perkins' Cake & Steak Restaurant, and (7) tortious interference with appellant's theater business. (Pages 915-917) Since a special verdict form was not submitted by the court, the jury returned a general verdict only. (Page 1104.) Contrary to appellant's assertions in its brief, the jury did not find that respondent had violated appellant's lease by placing landscaping at the entrance to the common parking area, by constructing a driveway in the common area, by erecting a flagpole in the landscaped area, or by constructing the Perkins' Cake & Steak Restaurant. (Brief of Appellant, pages 2, 5 and 6) In fact, the court held, as a matter of law, and instructed the jury that respondent did not violate appel-

lant's lease by constructing the restaurant and that the restaurant was not located on appellant's leasehold or the common parking area. (Page 1203.) When appellant argued at the hearing on its motion for a mandatory injunction that such wrongful conduct had occurred, the court considered the evidence and denied appellant's motion.

After the jury had returned its verdict and the court had issued its final order denying defendant's motion for judgment notwithstanding the verdict or, in the alternative, a new trial, appellant filed a motion for assessment of attorney's fees. The motion was supported by affidavits of counsel, claiming total expenditures and fees in the amount of \$30,000, although no evidence of attorney's fees had been introduced at the trial. (Pages 1245-1247, and 1225-1230) On September 11, 1979, the trial court issued a memorandum decision denying that motion. (Pages 1649-1659) In its decision, the court cited the case of Latses v. Nick Floring, Inc., 99 Utah 214, 104 P.2d 619 (1940), in which this Court held that a lease covenant pertaining to attorney's fees does not run with the land and that a claim for attorney's fees is barred by lack of privity between a lessee and an assignee of the lessor. The lower court then held that, since a covenant to pay attorney's fees is a personal covenant and not a covenant running with the land, respondent, as assignee of appel-

lant's lessor, was not liable to appellant for the payment of such fees.

Appellant now seeks a reversal of the lower court's orders denying appellant's motions for both injunctive relief and attorney's fees.

ARGUMENT

POINT 1

THE LOWER COURT PROPERLY REFUSED TO GRANT A MANDATORY INJUNCTION AND, IN ANY EVENT, THE QUESTION CONCERNING INJUNCTIVE RELIEF IS MOOT BECAUSE APPELLANT HAS SOLD ITS THEATER AND LEASEHOLD PROPERTY.

A. Appellant's Claim For A Mandatory Injunction Is Moot.

Injunctive relief should not be awarded where events have rendered such relief unnecessary or ineffectual or where the question becomes moot due to changed circumstances that occur during the course of a pending action or appeal. Paul v. Milk Depots, Inc., 41 Cal.Rptr. 468, 396 P.2d 924, 926-27 (1964); see also Roosendaal Construction and Mining Corporation v. Holman, 28 Utah 2d 396, 503 P.2d 446, 448 (1972). If, during the course of a pending action, a plaintiff sells the property to which the requested injunction pertains, he loses his right to such relief. In Mendez v. Bowie, 118 F.2d 435, 439 (1st Cir. 1941), cert. den. sub nom Rios v. Bowie, 314 U.S. 639 (1941), the court stated:

The owner of the premises, as long as he retains the title, has an interest in restraining the trespass which affects the value of his property. . . . The right of action for an injunction is an incident of the ownership of the property. The right of action for damages is personal to the owner and still remains with him after he has disposed of the property; and when he has ceased to be the owner it is all there is left of his cause of action, for, as he has no further interest in the premises, he has no right to ask for an injunction . . . and, if he has already begun a suit for an injunction and damages . . . he is no longer entitled to an injunction because he has ceased to be the owner. . . . The grantee who has taken title to the premises alone has an interest in obtaining an injunction. That right belongs to him exclusively. Nobody else has any interest in it.

It is also the law of this jurisdiction that a mandatory injunction, such as that sought by appellant in the present action, should be denied where there is little or no benefit to the complainant. Salt Lake County v. Kartchner, 552 P.2d 136, 139 (Utah 1976).

In the present case, appellant is barred from seeking a mandatory injunction, compelling removal of the restaurant, driveway and curb and landscaping, because it has sold its theater building and its rights under the subject ground lease. Not only has appellant given up its right to injunctive relief as a result of the sale, but the imposition of a mandatory injunction when appellant no longer has any interest in the property would confer no benefit on appellant within the meaning of Kartchner. Accordingly, the lower court's order denying appellant's motion for an injunction should be upheld.

B. Appellant Has Failed To Show That It Is Entitled To A Mandatory Injunction In The Present Action.

Appellant contends that it is entitled to a mandatory injunction as a matter of law because respondent's construction of the restaurant, curb landscaping, and driveway was intentional and that placement of the driveway, curb and landscaping in the common parking area was not the result of accident or innocent mistake. Appellant further states that such an injunction should be issued without consideration of the equities of the case where a continuing trespass is ruinous or irreparable, or impairs the just enjoyment of the subject property. This position, however, is not supported by Utah law, nor can it be maintained on appeal since plaintiff failed to meet its burden in proving by clear and convincing evidence that respondent's conduct was intentional or that the alleged trespasses would be ruinous or irreparable, or would impair appellant's just enjoyment of the property.

In Salt Lake County v. Kartchner, supra at 138, the Court stated that a mandatory injunction should be denied where the granting of such an injunction would be inconsistent with basic principles of justice and equity, even though it is within the scope of relief available in equity courts. The Court then observed that, under the facts before it, the effect of a mandatory injunction would to be destroy for all practical purposes an enclosed carport valued at \$2,000.00

and that such relief should never be granted where it might operate inequitably or oppressively. Id. at 140. As noted above, the Court also emphasized that a mandatory injunction should be denied where there is little or no benefit to the complainant. Id. at 139.

The Court's position that equitable factors should be considered is consistent with that of other jurisdictions. In Hickman v. Sixth Dimension Custom Homes, Inc., 543 P.2d 1043, 1044 (Ore. 1975), for example, the Court stated that mandatory injunctions are not regarded with judicial favor and are used only with caution and in cases of great necessity. Such relief, according to the court, depends upon broad principles of equity and, clearly, may be denied in the court's discretion in accordance with the equities and justice of the case. The Court then stated:

The court may refuse an injunction in certain cases where the hardship caused to the defendant by the injunction would greatly outweigh the benefit resulting to the plaintiff. The injunction does not issue as a matter of absolute or unqualified right but is subject to the sound discretion of the Court. Although the authorities have not uniformly adopted the comparative injury doctrine, we are convinced that it represents the better rule. Id. at 1045.

See also, Stuart v. Titus, 400 P.2d 797, 800 (Okla. 1965); Borgen v. Wigglesworth, 369 P.2d 360, 363-64 (Kan. 1962); Clawson v. Garrison, 3 Kan.App.2d 188, 592 P.2d 117, 128 (Kan. 1979).

The proper standard to be applied in the present case, therefore, is whether the hardship caused to respondent by the requested injunction would greatly outweigh the benefit resulting to appellant or whether it would operate inequitably or oppressively. When the equities in the present case are balanced against the rules set forth by this Court, it is clear that the granting of a mandatory injunction to a party who no longer has any interest in the property would create substantial hardship and unnecessary expense without any benefit to appellant. Further, inasmuch as Sandy City expressly required construction of the driveway, landscaped area and associated curb as a traffic control device to regulate traffic to and from the common parking facility, such an injunction would cause immediate conflict with a requirement imposed by a governmental entity that is not a party to the present action. It seems reasonable to conclude that the court weighed the various burdens and benefits related to the imposition of such a drastic remedy and concluded that in light of the substantial hardship that would result to respondent, injunctive relief was not appropriate under the circumstances. Such a determination would not be an abuse of the Court's discretion.

It will also be noted that plaintiff never requested the court to submit to the jury the issue of whether respondent's

construction of the subject improvements was intentional, whether it would be ruinous or irreparable, or whether it would impair the just enjoyment of the property, as appellant now argues on appeal.

In this regard, a party seeking injunctive relief has the burden of proving the elements that entitle him to such relief. See Port of Seattle v. International Longshoremen's and Warehousemen's Union, 52 Wash.2d 317, 324 P.2d 1099, 1100 (1958); E. H. Renzel Co. v. Warehousemen's Union, 16 P.2d 369, 106 P.2d 1, 3 (1940). The standard of proof necessary in cases where injunctions are sought is clear and convincing evidence. Jewett v. Deerhorn Enterprises, Inc., 281 Ore. 469, 575 P.2d 164, 166 (1978); Borgen v. Wigglesworth, supra at 363-64; Clawson v. Garrison, supra at 128. If the court is in doubt as to whether injunctive relief is proper, such relief should be denied. State v. Reid, 190 Kan. 376, 375 P.2d 588, 592 (1962); City and County of Denver v. Glendale Water and Sanitation District, 380 P.2d 553, 555 (Col. 1963).

Even under appellant's own theory, if respondent's alleged conduct was not intentional, but rather the result of accident or innocent mistake, or if the construction of the above improvements would not be ruinous or irreparable or would not impair the just enjoyment of the property, appellant would not be entitled to a mandatory injunction. Agmar

v. Solomon, 87 Cal.App. 127, 261 P. 1029 (1927); Needle v. Scheinberg, 187 Md. 169, 49 App.2d 334 (1946). In determining the relief to be granted in the present case, the lower court had a clear understanding of the relative merits of the claims asserted by the parties. Appellant had not requested the court to submit to the jury the questions of whether respondent's conduct was intentional or accidental or whether the improvements would impair the just enjoyment of appellant's property. In fact, there was substantial evidence to the contrary, and the jury returned a verdict denying punitive damages, which were instructed to be awarded if respondent's conduct was intentional or malicious.

Paragraph 3 of appellant's lease expressly provided that all paving, curbs and gutters and sidewalks would be constructed in the future in accordance with the requirements of "any governmental authority for the use of or access" to the property. Since appellant's leased property was surrounded by vacant land and it was the intention of the parties under paragraph 8 of the lease that an integrated shopping center would be constructed and that the parties would encourage the development of adjoining properties for such a purpose, it was clear that additional facilities would be constructed in the area surrounding appellant's theater, all in accordance with Sandy City's requirements. The court

may well have concluded, and the denial of injunctive relief evidences that the Court did conclude, that respondent's construction of improvements adjacent to and along the edge of the common parking area was not intentional but was undertaken in accordance with respondent's understanding and interpretation of the above lease provisions, even assuming that the court did consider the issues of intent and irreparable injury. Further, when appellant made its motion for injunctive relief, the court was unable to determine from the general verdict of the jury whether construction of the driveway, curb or landscaped area violated any provisions of appellant's lease. In fact, it was impossible to determine whether the verdict was based on a violation of the lease provisions or whether it was based on tortious interference with appellant's business. In view of such uncertainty and with the court's express ruling that construction of the restaurant did not violate any provision of appellant's lease, there simply was no basis in the record for granting a mandatory injunction. The court, therefore, properly denied appellant's motion for an injunction, even assuming for purposes of argument that appellant's standard for injunctive relief is correct.

POINT II

APPELLANT IS NOT ENTITLED TO ATTORNEY'S FEES IN THE PRESENT ACTION.

A. Plaintiff's Claim For Attorney's Fees Is Barred By Lack Of Privity.

In Latses v. Nick Flooring, Inc., supra, this Court reviewed the applicability of an award of attorney's fees in a case similar to the present action. As in the present case, the lease in Latses provided that the parties to the lease agreed to pay all costs and attorney's fees incurred by the other in the event of litigation to enforce the covenants of the lease. In Latses, the landlord-appellant had purchased the subject property and had taken it subject to the tenant-respondent's lease. In an action for breach of lease, the trial court decided in favor of the tenant and awarded him attorney's fees in the amount of \$500. The landlord took exception to the award on the basis that there was no privity between him and the tenant and that the covenant for attorney's fees did not run with the land when he purchased it from the prior owner. On appeal, the Court held:

We are of the opinion that appellants are correct in their version of this part of the case. This was purely a personal covenant as between the parties to the contract. Though appellants purchased the property subject to the tenancy, they did not expressly agree to abide by all the terms of the lease. They would be bound only by covenants in the lease which affected the estate or the interest in the land conveyed or leased. Id. at 625.

The Court therefore vacated the judgment for attorney's fees.

The provision for attorney's fees in appellant's lease in the present case provides that the successful party in an action to enforce the terms of the lease would be entitled to reasonable attorney's fees. However, when appellant's lessors leased the shopping center to respondent, the lease stated merely that it was "subject to and together with [the] Penelko Theater lease"; it did not expressly provide that respondent would abide by all of the terms of the lease, including the provision for attorney's fees, nor did it contain a provision that all terms would be binding on the assigns of the parties.

Appellant argues in its brief that the sales documents in Latses did not provide that the purchase would be subject to the terms of the lease. (Brief of Appellant, pages 10, 11). It is a basic principle of property law, however, that a purchaser who buys property subject to an outstanding lease takes that property subject to the lease, and the Court so stated in Latses. Berman v. Sinclair Refining Co., 451 P.2d 742, 745 (Colo. 1969); Eldredge v. Jensen, 89 Idaho 243, 404 P.2d 624, 626 (1965). It does not matter whether the sales documents so provide. The lease of the shopping center property to respondent in the present case merely listed the outstanding leases pertaining to the property and

accomplished no more or no less than what the law imposed in any event. Just as in Latses, the property was taken subject to an existing lease, without any provision wherein respondent agreed to be bound by all terms and covenants of the lease. Since, as the Court held in Latses, a covenant for attorney's fees does not run with the land, appellant should not be awarded any attorney's fees in this action. The only parties in privity with plaintiff under the lease were the initial lessors, and those parties were dismissed out of the lawsuit on a motion for a directed verdict upon conclusion of the evidence.

B. Appellant's Claim For Attorney's Fees Is Barred For Failure To Introduce Evidence Of Attorney's Fees During Trial.

The amount of attorney's fees to be awarded in an action at law is a question of fact to be determined by the trier of fact on the basis of proper evidence, just as any other question of fact. FMA Financial Corporation v. Build, Inc., 17 Utah 2d 80, 404 P.2d 670, 673-74 (1965). The only exception to that rule is when the parties stipulate as to the amount or the Court's determination of the amount without submission of evidence. See, id., Swain v Salt Lake Real Estate and Investment Co., 279 P.2d 709, 711 (Utah 1955); Ashworth v Charlesworth, 231 P.2d 724, 729 (Utah 1951).

This Court has held repeatedly that a jury trial should be provided to the parties on all issues of fact raised in legal causes of action. Valley Mortuary v. Fairbanks, 225 P.2d 739, 749 (Utah 1950); Petty v. Clark, 129 P.2d 568, 570 (Utah 1942). In Petty, for example, the Court considered procedures to be used in resolving legal and equitable issues raised in the same case and held:

Where the issues are legal issues, the fact that equitable relief may be prayed for, to carry into effect the judgment based upon the legal issues, is not sufficient to deprive either party of his right to have the legal issues submitted to a jury.

The Court also held that a claim by a plaintiff to recover money owing under a contract is clearly an issue of fact which must be submitted to the jury, as is a claim for attorney's fees. FMA Financial Corporation v. Build, Inc., *supra* at 673-74. Instruction Number 90.50 of the Jury Instructions For Utah, as approved by a committee consisting of judges and practicing attorneys who devoted long hours of work to compile a set of jury instructions upon which counsel could rely, instructs the jury to fix reasonable attorney's fees where such fees are provided for by contract or statute. This instruction reflects the opinion of the judges and lawyers serving on the committee that the question of reasonable attorney's fees is an issue of fact to be submitted to the jury where the jury sits as a trier of fact, and not the judge

presiding over the trial. This instruction and the rules set forth above, of course, do not apply to cases tried under Utah Code Annotated §§34-27-1, 38-1-18, 78-11-10 and 78-37-9. The present case, however, does not fall within the above statutory provisions, and respondent's right to a jury trial on the issue of attorney's fees, as well as all issues of fact, "should be scrupulously safeguarded." See Abdulkadir v. Western Pacific Railroad Co., 318 P.2d 339, 341 (Utah 1957).

In FMA Financial Corporation, supra at 673, the Court also held that it is "fundamental that a judgment must be based upon the evidence before the court." The Court further stated that the plaintiff's claim for attorney's fees was an issue of fact which would require a proper evidentiary basis:

Thus it was part of the plaintiff's case to which it had the burden of proving. Failing to offer proof of any character on this issue had the same effect as would the failure to offer proof as to any other controverted issue. There is nothing upon which to base a finding. The defendants' objection that the finding as to attorney's fees is not supported by any evidence is well taken Id. at 674.

Similarly, in Richards v. Hodson, 485 P.2d 1044, 1046 (Utah 1971), the Court reiterated that it had held on numerous occasions that attorney's fees cannot be allowed unless there is evidence to support them.

The position of this Court with respect to the issue of attorney's fees is consistent with that of other jurisdic-

tions. In Crouch v. Pixler, 320 P.2d 943 (Ariz. 1958), for example, the Supreme Court of Arizona considered whether the question of attorney's fees should be submitted to the jury and whether an award of attorney's fees should be based upon the evidence. The Court cited the Utah case of Mason v. Mason, 160 P.2d 730 (Utah 1945), and stated that courts generally hold that, to justify a finding of reasonable attorney's fees, there must be evidence in support of such a finding. The Court, therefore, refused to award attorney's fees to the plaintiff, stating:

The issue as to reasonable attorney's fees was not submitted to the jury, and no evidence was adduced as to the services rendered by the attorney for the reasonable value thereof. 320 P.2d at 946.

The Supreme Court of Oregon, in Waggoner v. Oregon Automobile Insurance Company, 526 P.2d 578, 582 (Ore. 1974), also stated:

It has long been settled in Oregon that the amount of attorney fees to be allowed in both an action at law and a suit in equity is a question of fact to be determined by the trier of the facts upon pleading and evidence in the same manner as any other question of fact, unless the parties stipulate that the court may fix the attorney fees without hearing evidence on that issue.

Therefore, unless an award of attorney's fees in a jury trial is based upon evidence submitted to the jury, a contracting party is not entitled to attorney's fees.

In the present case, appellant submitted a proposed instruction, patterned after the JIFU instruction regarding attorney's fees, to the court for submission to the jury. At no time during the trial, however, did appellant introduce any evidence relating to the amount of work devoted to the case by appellant's attorneys or the value of that work. Appellant considered this to be a jury issue at the time of submittal of its proposed instructions to the court, and even took exception to the court's refusal to submit its attorney's fee instruction to the jury. (Page 2529) When respondent opposed appellant's motion for attorney's fees and raised before the lower court the arguments set forth above, appellant did not argue, either in its brief or at the hearing, that the court had written on its proposed instruction "denied -- to be determined by the court". (See page 1653) Instead, for the first time in this action and for the convenience of argument, appellant takes a contrary position, stating that it relied on the court's apparent position, as reflected by the above notation, that the court would determine the attorney's fees, when neither party to this action knew of the court's position until after the court issued its memorandum decision nearly four months after the jury had rendered its verdict. (See affidavits of counsel for respondent [Pages 1667-68 and 1671-762], stating that

the question of who should set the amount of attorney's fees was never raised during the trial or in chambers and that counsel did not become aware of the court's position that it would fix attorney's fees, until September 1979, when they received the court's memorandum decision. Counsel for appellant filed no opposing affidavits.)

C. Appellant's Claim of Attorney's Fees Cannot Be Sustained Because It Is Impossible To Determine Whether The Verdict Was Based Upon Tortious Conduct Or Breach of Lease.

As a general rule and in the absence of any contractual or statutory provision therefor, attorney's fees incurred by the plaintiff in litigation are not recoverable as an item of damages, either in a contract or a tort action. Holland v. Brown, 394 P.2d 77, 80 (Utah 1964); Erisman v. Overman, 358 P.2d 85, 88 (Utah 1961); 22 Am. Jur.2d, Damages §165. In the present case, plaintiff set forth two basic causes of action. First, appellant alleged that respondent had violated certain provisions of its lease, and second, that respondent had entered into a willful and malicious course of conduct designed to destroy plaintiff's business and force abandonment by plaintiff of its theater and lease. The first of appellant's claims is therefore based upon a lease, which contained a provision regarding attorney's fees, while the second cause of action is based upon a tort for which attorney's fees are not permitted under Utah law. Both issues were submitted by

the court to the jury without use of a special verdict form, although respondent submitted a special verdict which would have required the jury to specify the claims upon which the verdict was based. Consequently, when the jury returned its verdict in the present case, it could not be determined whether the verdict was based upon breach of contract or tortious injury to appellant's business. Appellant, therefore, is not entitled to recover attorney's fees. To have asked the court to indulge in speculation as to the basis upon which the verdict was rendered would have clearly been erroneous.

D. The Lower Court Lacked Jurisdiction To Consider Appellant's Motion For Attorney's Fees Because The Court's Order of July 2, 1979, Became Final, And Both Parties Filed Notices of Appeal Before The Motion Was Heard By The Court.

Upon conclusion of the trial in the present case, the Court reserved for a future determination only the issue of injunctive relief. That issue was resolved by way of a subsequent motion, which was heard by the Court on June 27, 1979. On or about July 2, 1979, the Court entered its order denying appellant's motion for injunctive relief and respondent's motion for judgment notwithstanding the verdict, or in the alternative, a new trial. No other motions were made by any of the parties to this action following the trial and prior to issuance of the July 2, 1979, order. Accordingly, the court's order denying the respective post-trial motions

of the parties became final within the meaning of Rule 72(a) of the Utah Rules of Civil Procedure, and the time for filing an appeal from this final order began to run in accordance with Rule 73(a).

On July 9, 1979, however, appellant filed its motion for attorney's fees. Before that motion was heard by the court, both respondent and appellant filed timely notices of appeal and designations of record on appeal. However, appellant did not call to the court's attention the issue of attorney's fees prior to the conclusion of the trial, nor did it make any effort to reserve the issue of attorney's fees for a later determination by the court.

In the absence of a judgment reciting that the court would retain jurisdiction over the issue of attorney's fees until a later proceeding, the court's judgment became final on July 2, 1979. See Walker, Inc. v. Thayn, 17 Utah 2d 120, 405 P.2d 342, 343 (1965). Appellant did not make any post-trial motions to alter or amend the judgment in accordance with the Utah Rules of Civil Procedure, nor did it make any motion to toll the running of the time for appeal.

Further, even if appellant's motion for attorney's fees were properly filed, plaintiff subsequently abandoned that motion by filing its notice of appeal. See 4 Am.Jur.2d, Appeal and Error, §306-307. In this regard, it should be noted that Rule 72(a) of the Utah Rules of Civil Procedure pro-

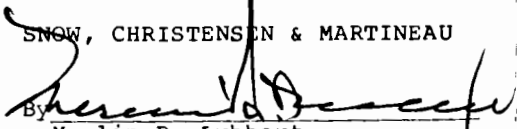
vides, if any additional claims remain to be determined by the trial court prior to appeal, a party to an action may file a notice preserving his right to appeal on the decided issue until a final determination is made of any remaining claims. Appellant did not file such a notice in the present case and thereby waived its right to have any further post-trial motions considered by the court. Accordingly, when both parties filed their notices of appeal from the court's final order of July 2, 1979, jurisdiction over the case became vested in the Utah Supreme Court and appellant lost any right to seek attorney's fees.

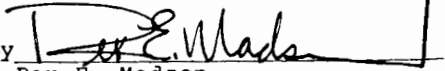
CONCLUSION

The lower court properly exercised its discretion in denying appellant's motion for injunctive relief. Furthermore, appellant sold all of its interest in the leased property and no longer has a claim for such relief. The court also properly denied appellant's motion for attorney's fees for the reasons stated above. Both rulings should now be sustained on appeal.

Respectfully submitted this 25th day of September, 1980.

SNOW, CHRISTENSEN & MARTINEAU

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CERTIFICATE OF SERVICE

I hereby certify that I served two copies of the foregoing Respondent's Brief by mailing the same, postage prepaid, respectively to William H. Henderson, 431 South 300 East, Suite 208, Salt Lake City, Utah 84111; and Mark S. Miner, Newhouse Building, Suite 525, Salt Lake City, Utah 84101.

Dated this 25th day of September, 1980.

Alison McCandless