

1989

# Vaughn and Jeanne Keller v. Mr. and Mrs. John Olson : Brief of Appellee

Utah Court of Appeals

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Dean H. Becker; Attorney for Appellant.

Kent L. Christiansen; Mueller and Christiansen; Attorney for Appellee.

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890311-CA

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH

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VAUGHN and JEANNE KELLER,	)	
	)	
Plaintiff and Appellants,	)	Court of Appeals
	)	Case No. 890311-CA
vs.	)	
	)	
MR. and MRS. JOHN OLSON,	)	District Court
	)	Case No. C88-1559
Defendant and Appellee.	)	
	)	

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BRIEF OF APPELLEE

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Appeal from The Findings and Judgment of the  
Third District Court of Salt Lake County,  
State of Utah, Honorable David S. Young

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ARGUMENT PRIORITY CLASSIFICATION NO. 16

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Dean H. Becker  
433 South 400 East  
Salt Lake City, Utah 84111  
Attorney for Appellant

Kent L. Christiansen  
MUELLER & CHRISTIANSEN  
300 IBM Plaza  
420 East South Temple  
Salt Lake City, Utah 84111  
Attorney for Appellee

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Dean H. Becker  
433 South 400 East  
Salt Lake City, Utah 84111  
Attorney for Appellant

Kent L. Christiansen  
MUELLER & CHRISTIANSEN  
300 IBM Plaza  
420 East South Temple  
Salt Lake City, Utah 84111  
Attorney for Appellee

**LIST OF PARTIES TO THE PROCEEDING**

**Appellants:**

Vaughn Keller  
Jeanne Keller

**Appellee:**

John Olsen  
Faye Olsen

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## **STATEMENT OF JURISDICTION**

This appeal is taken pursuant to the authority of Rules 3 and 4 of the the Utah Rules of Appellate Procedure and pursuant to the authority of Title 78, Chapter 2a, Section 3, paragraph 2(j) of the Utah Code Annotated (1953 as amended).

## **STATEMENT OF ISSUES PRESENTED FOR REVIEW**

1. Whether the trial court erred in granting the Olsen's motion to dismiss the Keller's claims for failure to meet their burden of proof after having heard all of the evidence at trial?

2. Whether the trial court properly granted the Olsen's motion for attorney's fees pursuant to U.C.A. Section 78-27-56?

3. Whether the Olsens are entitled to an award of their attorney's fees on appeal, pursuant to Rule 33(a) of the Rules of the Utah Court of Appeals?

## **DETERMINATIVE STATUTES AND RULES**

### **RULE 41(b) UTAH RULES OF CIVIL PROCEDURE**

. . . . After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). . . .

#### **RULE 50(a) UTAH RULES OF CIVIL PROCEDURE**

A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right to do so and to the same extent as if the motion had not been made. A motion for directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific ground(s) therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

#### **RULE 52(a) UTAH RULES OF CIVIL PROCEDURE**

. . . . Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. . . .

#### **UTAH CODE ANNOTATED, SECTION 78-27-56**

(1) In civil actions, the court shall award reasonable attorney's fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith.

#### **STATEMENT OF THE CASE**

##### **a. Nature of the Case**

On March 9, 1988, the Kellers filed a lawsuit against Mr. and Mrs. Olsen, alleging that the Olsens intentionally and maliciously poisoned and destroyed a row of spruce trees growing between the parties' properties. The Kellers further accused the Olsens of trespassing onto the Keller property and violating Utah Code Annotated, Section 78-38-3.

**b. Course of the Proceedings**

The matter came before the Court in a bench trial on September 20, 1988, before the Honorable Judge David S. Young, in the Third District Court of Salt Lake County. At the conclusion of the Keller's case, counsel for the Keller's rested. The Olsens made motion to the court at that time for the entry of a directed verdict. The Court, sitting without a jury, granted the Olsen's motion to involuntarily dismiss all of the Keller's claims on the basis that they had failed to establish a prima facie case against the Olsens or to meet their burden of proof on any of their allegations.

Subsequently, the Olsens filed a motion for an award of attorney's fees pursuant to Utah Code Annotated, Section 78-27-56. That motion was argued to the court on October 17, 1988. The Court ruled that the Olsens were entitled to their attorney's fees and costs pursuant to Utah Code Annotated, Section 78-27-56.

**c. Disposition of the Case by the Trial Court**

The Court entered its Findings of Fact and Conclusions of Law, and Judgment in favor of the Olsens on October 24, 1988. Thereafter the Court entered Judgment on plaintiff's motion for Attorney's Fees and Costs on November 1, 1988. On November 23, 1988, the Kellers filed their Notice of Appeal as to both Judgments.

**d. Relevant Facts**

Vaughn and Jeanne Keller are the owners of certain real

property located in West Jordan, Utah. (Record p. 7, lines 14-25; Record p. 109, lines 14-18). Vaughan Keller's parents lived on the subject property in a trailer home since approximately 1960. (Record p. 111, lines 7-8), and had a good relationship with their neighbors, the Olsens. (Record p. 27, lines 18-22; p. 97, lines 15-18; p. 121, lines 9-22). Mr. Keller, the father, passed away in 1983, and Mrs. Keller, the mother, passed away in 1984. (Record p. 27, lines 18-22; p. 97, lines 15-18; p. 121, lines 9-22). John and Faye Olsen have resided next door to the Keller residence since November 1974. (Record p. 96, lines 14-16).

There were at one time fourteen blue spruce trees on the northern border of the Keller property. (Findings at para. 6). At some point before his death, Mr. Keller, the father, had problems with his heart (Record p. 97, lines 5-14), and was unable to care for the trees. (Record p. 97, lines 22-23). Mr Olsen requested permission to trim the trees, and Mr. Keller consented (Record p. 97-98).

In the Spring of 1985, some of the trees started to show signs of a purple tinge to the branches. (Record p. 29, lines 3-12; Record p. 118, lines 9-25; p. 119, lines 1-3). At the time of trial, twelve of the fourteen trees on the northerly border of the Keller property had died. (Findings at para. 6). The Olsens also had problems getting anything to grow in the area between the parties' properties. (Record p. 108, lines 2-10).

Both Vaughn and Jeanne Keller offered unsupported testimony that they believed the trees had been damaged or poisoned by the Olsens. (Record p.50, lines 21-22; Record p. 123, lines 10-24; Record p. 132, lines 3-25 p. 133, lines 1-10).

The Kellers also attempted to have the soil beneath the trees analyzed, but were informed that a soil test was ineffective for such a problem and that any foreign substance present in the soil would dissipate quite readily. (Record p. 46, lines 4-8).

The Keller's expert testified that he found evidence of red spider mite in one of the trees which could have contributed to the demise of the trees. (Record p. 86, lines 10-23). The most damaging testimony however, came from the Keller's own expert when he testified that he couldn't say with any certainty what caused the damage to the trees. (Record p. 89, lines 16-18; Record p. 93 lines 14-17; Record p.14, lines 24-25; p. 142, lines 1-7; Record p. 144, lines 6-19).

Absolutely no evidence whatsoever was presented to support the Keller's third cause of action for punitive damages. (Record p. 140, lines 18-24). There was also no testimony which would have afforded the trial court any basis to conclude that the Olsens caused the problem with the trees. (Record p. 142, lines 4-7).

### SUMMARY OF ARGUMENTS

The trial court correctly dismissed the Keller's claims for failure to establish a prima facie case and to meet their burden of proof concerning the allegations in the complaint. The Findings and Judgments of the trial court are substantiated by the evidence, or lack thereof, which was adduced at trial.

The trial court correctly found that the Kellers failed to prove what caused the death of the blue spruce trees, and that they failed to prove that the Olsens intentionally, or otherwise, sought to poison or destroy the blue spruce trees or the lawn belonging to the Kellers. The trial court properly concluded that there was no evidence to support a claim for punitive damages, no evidence that the Olsens committed a trespass, and no evidence that the Kellers were entitled to recover damages pursuant to U.C.A. Section 78-38-3.

Finally, the trial court was justified in awarding the Olsens their attorney's fees and costs pursuant to U.C.A. 78-27-56, based on the fact that the Keller complaint was without merit and lacking in "good faith". Because appellants have failed to provide the court a complete record, the trial court's award of attorney's fees and costs should be afforded a presumption of validity and upheld.

Inasmuch as the Kellers have failed to meet their burden in showing that the trial court erred in its decisions,

accordingly the judgments below should be affirmed.

### ARGUMENT

#### I. THE KELLERS HAVE FAILED TO MEET THEIR BURDEN OF SHOWING SUBSTANTIAL ERROR ON THE PART OF THE TRIAL COURT SO AS TO WARRANT A CHALLENGE TO THE TRIAL COURT'S FINDINGS AND JUDGMENT

As appellants, the Kellers bear the substantial burden of establishing that the trial court committed reversible error. Their challenge to the findings and judgment of the trial court requires that they sustain the burden of showing "clearly erroneous" reversible error. Rule 52(a) Utah Rules of Civil Procedure.

The appropriate standard of review applicable to a challenge of the trial court's findings and judgment is that the appellate court should regard the trial court's finding and judgment with a presumption of validity and correctness. Rule 52(a) Utah R.Civ.P.; Doelle v. Bradley, 784 P.2d 1176 (Utah 1989); Cornish Town v. Koller, 758 P.2d 919 (Utah 1988); Hatcheson v. Gleave, 632 P.2d 815 (1981); Kohler v. Garden City, 639 P.2d 162 (1981).

The Kellers are required to sustain that burden of showing error, based upon a review by the appellate court with a presumption of validity to the findings and judgment of the trial court. Further, the record must be construed in the light most favorable to the prevailing party at the trial court level. The decision of the trial court should not be

disturbed unless the appellate court finds substantial support for such reversal in the evidence. Doelle v. Bradley, supra; Cornish Town v. Koller, supra; Hatcheson v. Gleave, supra; Kohler v. Garden City, supra.

To successfully attack findings of fact, an appellant must first marshal all the evidence supporting the findings and then demonstrate that, even if viewed in light most favorable to the trial court, the evidence is legally insufficient to support the findings. Doelle v. Bradley, supra; Reid v. Mutual of Omaha Insurance Company, 776 P. 2d 896, 899 (Utah 1989); In re Estate of Bartell, 776 P. 2d 885, 886 (Utah 1989); Cornish Town v. Koller, 758 P.2d 919 (Utah 1988); Scharf v. BMG Corp., 700 P. 2d 1068, 1070 (Utah 1985). The legal sufficiency of the evidence is determined under Rule 52(a) Utah Rules of Civil Procedure, which provides: "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Utah R. Civ. P. 52(A). A trial court's factual finding is deemed "clearly erroneous" only if it is against the clear weight of evidence. Reid v. Mutual of Omaha Insurance Company, supra, 776 P.2d at 899-900; In re Estate of Bartell, supra, 776 P.2d at 886; See also, Western Kane County Special Service, Dist. No. 1 v. Jackson Cattle Co., 744 P.2d 1376, 1377 (Utah 1987).



In the present case, the Kellers have not attempted to marshal the evidence in support of the trial court's findings or demonstrate that the evidence supporting the findings is legally insufficient. Their brief repeatedly argues that reasonable minds could differ concerning the cause for the demise of the subject trees, but ignores the fact that the judge was the trier of fact, and after hearing the entirety of Plaintiff's case, determined that they had not met the requisite burden of proof. There is therefore no reason to disturb the trial court's findings or judgments.

The Kellers base their appeal on basically two areas in which they claim the trial court committed reversible error. First, the Kellers argue that the court was required to find that there was basis upon which reasonable minds, acting fairly, could so find as to require a denial of the Olsen's motion to dismiss (directed verdict). (Appellant's Brief at 5, 10, and 15.) Secondly, the Kellers contend that the trial court's award of attorney's fees to the Olsens, pursuant to Section 78-27-56 of the Utah Code, was improper because (a) the filing of the complaint was not without merit, and (b) that the action was brought in good faith. (Appellant's Brief at 15-19).

With regard to the first point, the Kellers rely on several appellate decisions involving jury trials, wherein the court granted directed verdicts. Although the Olsen's motion for dismissal presented to the court at the conclusion

of Plaintiffs' case, took the form of a motion for directed verdict, in reality the court treated it as a motion for dismissal under Rule 41(b). The trial court's Findings of Fact and Conclusions of Law, and Judgment, each reflect that the Court granted the Olsen's a motion for involuntary dismissal. (Findings, para. 7-8; Conclusions of Law, para. 2-5; Judgment p.2).

The Court's findings and judgment are consistent with the provisions of Rule 41(b), which specifically requires the Court to enter it's Findings of Fact and Conclusions of Law. Wherein the trial court was the trier of fact in this case, the court's treatment of the Olsen motion as one for involuntary dismissal under Rule 41(b) was proper. The Findings and Judgment should not be disturbed on appeal without a clear and convincing showing that the court committed reversible error.

The trial court heard all of the evidence presented by the Kellers to support their various claims. The evidence presented by the Kellers simply did not support their claim that the defendants caused the demise of their trees. Absolutely no evidence was presented to support the Keller's claim that Mr. and Mrs. Olsen had trespassed upon their property. Despite representations to the contrary in the Keller's appellate brief, their own expert testified that he could not determine with any degree of certainty as to what actually caused the demise of the trees. (Record p. 93, line

14-17, Record p. 88, lines 10-13; Record p. 89, lines 10-18.

The standard of appellate review, as enumerated in Rule 52(a), and recent decisions of the Utah Supreme Court and the Utah Court of Appeals, dictates that appellants bear a significant burden to show that the trial court committed substantial error in making the findings and judgment which it did. The legal presumption that the trial court's findings and judgment are valid and correct must be overcome by a compelling showing that the trial court committed reversible error.

The Kellers have not made such a showing nor have they overcome that burden, particularly when one considers that the record on review must be construed in the light most favorable to the Olsens in this case.

II. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR WHEN  
IT DISMISSED PLAINTIFF'S CLAIMS WITH PREJUDICE,  
AFTER HAVING HEARD THE ENTIRETY OF  
PLAINTIFF'S EVIDENCE

At the close of the Keller's case, counsel for the Olsen's made a motion for directed verdict on the basis that the Kellers failed to meet their burden of proof on all elements of the causes of action alleged in their complaint. (Record, p. 137, lines 7-15). In effect, the court treated that motion as one for involuntary dismissal pursuant to Rule 41(b) of the Utah Rules of Civil Procedure, and held that the Kellers had failed to meet their burden of proof on all of

their allegations. (Record, p. 140-143; Findings, para. 7-8; Conclusions of Law, para. 2-5).

In ruling on a motion for directed verdict or non-suit, it is well established that where a jury sits, the court should consider all evidence in the light most favorable to the party against whom it is directed. Virginia S. v. Salt Lake Care Center, 741 P.2d 969 (Utah App. 1987); Management Comm. of Graystone Pines Homeowners Ass'n v. Graystone Pines, Inc., 652 P.2d 896, 898 (Utah 1982); Kim v. Anderson, 610 P.2d 1270 (Utah 1980); Asay v. Rappleye, 593 P.2d 132 (Utah 1979). However, in the case where the court sits without a jury, a different situation arises. "This fundamental distinction between jury and non-jury trials should not be ignored." Winegar v. Slim Olsen, Inc., 252 P.2d 205, 206-207 (Utah 1953).

Where the judge is the trier of fact, Rule 41(b) must be applied. The judge may appropriately grant a motion for dismissal if he finds that the claimant has either failed to make out a prima facie case or when the trial judge is not persuaded by the evidence presented by the claimant. Lemon v. Coates, 735 P.2d 58 (Utah 1987); Wessel v. Erickson Landscaping, 711 P.2d 250, 252, (Utah 1985).

Rule 41(b) provides in part:

After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to

relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). . . .

The court pointed out in Winegar v. Slim Olson, Inc., supra, that this rule applies only in non-jury cases where the court sits as the fact finder. In that case the court quoted approvingly from United States v. United States Gypsum Co., 67 F.Supp. 397, 418 (D.C. Cir. 1946) where the rule was explained and justified in the following words:

When a court sitting without a jury has heard all of plaintiff's evidence, it is appropriate that the court shall then determine whether or not the plaintiff has convincingly shown a right to relief. It is not reasonable to require a judge, on motion to dismiss under rule 41(b), to determine merely whether there is a prima facie case, such as in a jury trial should go to the jury, when there is no jury - to determine merely whether there is a prima facie case sufficient for the consideration of a trier of the facts when he is himself the trier of the facts. To apply the jury trial practice in non-jury proceedings would be to erect a requirement compelling a defendant to put on his case and the court to spend the time and incur the public expense of hearing it if the plaintiff had, according to jury trial concepts, made "a case for the jury," even though the judge had concluded that on the whole of the plaintiff's evidence the plaintiff ought not to prevail. A plaintiff who has had full opportunity to put on his own case and has failed to convince the judge, as trier of the facts, of a right to relief, has no legal right under the due process clause of the Constitution, to hear the defendants' case or to compel the court to hear it, merely because the plaintiff's case is a prima facie one in the jury trial sense of the term.

Id. 252 P.2d at 207. For a further discussion of the rule and its application, see also, Lawrence v. Bamberger R.R. Co., 3 Utah2d 247, 282 P.2d 335 (1955); and 55 A.L.R.3d 272 (1974), and cases cited therein.

Thus in the instant case the trial court sitting as finder of the facts was entitled at the end of the plaintiffs' presentation of evidence to weigh that evidence, and if it found it to be unbelievable or insufficient in some regard, to make a ruling on the merits of the evidence and dismiss the complaint. See also, Johnson V. Bell, 666 P.2d 308 (Utah 1983).

In reviewing involuntary dismissals, appellate courts must give great weight to the findings made and the inferences drawn by the trial judge, and only reverse them if they are clearly erroneous. Southern Title Guar. Co. v. Bethers, 761 P.2d 951 (Utah App. 1988); State v. Walker, 743 P.2d 191, 193 (Utah 1987); Lemon v. Coates, supra; Wessel v. Erickson Landscaping Co., supra.

The Kellers have not demonstrated that the trial court's Findings and Judgment were clearly erroneous. They have failed to marshal the evidence in any way so as to support a claim that the trier of fact was in error. Accordingly, this Court should affirm the trial court's decision.

### III. THE TRIAL COURT PROPERLY AWARDED DEFENDANTS THEIR ATTORNEY'S FEES

On October 17, 1988, approximately one month after the trial of this case, the trial court heard argument on the Olsen's motion for their attorney's fees and costs pursuant to Utah Code Annotated, Section 78-27-56. After hearing and argument, the court granted the Olsen's motion, and

accordingly awarded to them their reasonable attorney's fees and costs. A record was made of that proceeding, although the appellants herein have never requested a transcript of the hearing.

The Kellers have failed to provide the Court of Appeals a transcript of the proceedings below concerning the Motion for Attorney's Fees and Costs pursuant to Section 78-27-56. This Court has repeatedly held that an appellant may not succeed on a claim of error when relevant portions of the record are not before it; in such a case, the proceedings before the trial court are presumed to support the trial court's findings. Cornish Town v. Koller, 758 P.2d 919, 922 (Utah 1988); Burke v. Burke, 733 P.2d 498, 498 (Utah 1986) (per curiam); Wood v. Myrup, 681 P.2d 1255, 1257 (Utah 1984); see In re Cluff's Estate, 587 P.2d 128, 128 n. 1 (Utah 1978); see also, Union Bldg. Materials Corp. v. Kakaako, 5 Haw.App. 146, 149-153, 682 P.2d 82 (1984).

In the event that the court determines to review the trial court's award of attorney's fees, the two elements for review are (1) whether the action was without merit, and (2) whether it was brought in "good faith". Cady v. Johnson, 671 P.2d 149, 151 (Utah 1983).

Relative to the term "without merit", it was stated in Can-Am Petroleum Co. v. Back, 331 F.2d 371 (10th Cir. 1964), that the term implies "bordering on frivolity". The dictionary definition of "frivolous" is "of little weight or

importance having no basis in law or fact." While there may be some distinction between these two terms in other areas of the law, for purposes of this statute the terms are synonymous. Cady v. Johnson, supra, 671 P.2d at 151.

In addition to finding the claim to lack merit, the trial court must also find that plaintiffs' conduct in bringing suit was lacking in good faith. In Tacoma Assoc. of Credit Men v. Lester, 72 Wash.2d 453, 458, 433 P.2d 901, (1967), the court defined "good faith" as:

(1) An honest belief in the propriety of the activities in question (2) no intent to take unconscionable advantage of others; and (3) no intent to, or knowledge of the fact that the activities in question will, [sic] hinder, delay or defraud others.

Cady v. Johnson, supra, 671 P.2d at 151.

In dismissing the Keller's claims, the trial court addressed each of the allegations in the complaint. (Record at pp. 140-144). The Court specifically stated that there was "no testimony that would give me any basis upon which I can conclude that there s a legitimate basis for me to conclude that the defedants caused the problem." (Record p. 142, lines 4-8). Further, the Court went on to say, "I think that this complaint is being pursued more because of a nuisance than anything and that, to me, I think, it is very unfortunate because it puts me in a difficult spot." (Record p. 142, lines 17-20).

Respondents assert that without the record, the court has no alternative but to presume the validity of the trial



court's findings. Notwithstanding, respondents submit the trial court also found that the Keller's action was without merit and lacked the element of "good faith", and accordingly the judgment for attorney's fees and costs should be affirmed.

IV. PURSUANT TO RULE 33A, UTAH RULES OF APPELLATE PROCEDURE  
DEFENDANTS REQUEST AN AWARD OF THEIR COSTS  
AND ATTORNEY'S FEES RELATED TO THIS APPEAL

The Olsens request the Court award to them their reasonable attorney's fees incurred in responding to this appeal. In support of their request, the Olsens cite the Court to it's decision in Eames v. Eames, 735 P.2d 395 (Utah App. 1987). Therein the Court determined that the appellants' claims on appeal were frivolous and failed to meet the standards of good faith, and awarded attorney's fees and costs.

Subsequently, in the case of O'Brien v. Rush, 744 P.2d 306 (Utah App. 1987), the Court held that in reviewing the trial court's award of attorney's fees, it was appropriate to consider the "good faith" element, but such a subjective standard is inappropriate for an appellate court. Id. at 310 (Emphasis added).

Rule 33(a) states that attorney fees may be awarded when the "motion made or an appeal taken under these rules is either frivolous or for delay . . ."

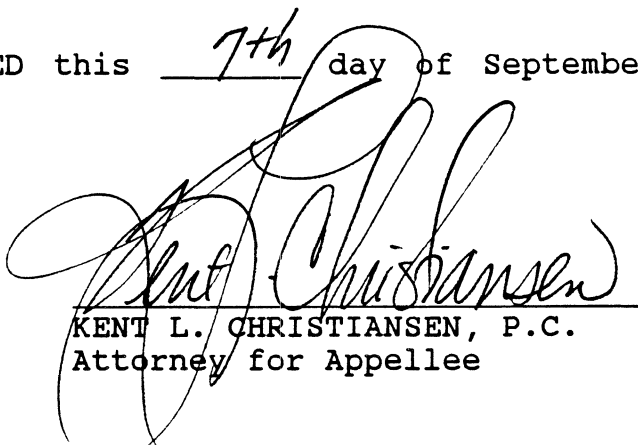
The Olsens contend that there is no legal or factual

basis for appeal of the trial court's findings or judgment of September 20, 1990, nor is there merit to the challenge of the trial court's judgment for attorney's fees and costs entered on November 1, 1988. For this reason, the Olsens respectfully request the Court to award them their attorney's fees and costs related to this appeal pursuant to Rule 33(a).

#### CONCLUSION

Based upon the trial court's findings and judgments, the void of evidence in the record to support the claims of the Kellers, and the foregoing arguments and legal precedent which support the finding and judgments, the Olsens respectfully submit that the decisions of the trial court must be upheld. The Olsens further request the Court to award to them their reasonable attorney's fees and costs related to this appeal pursuant to Rule 33 of the Utah Rules of Appellate Procedure.

RESPECTFULLY SUBMITTED this 7<sup>th</sup> day of September, 1990.

  
KENT L. CHRISTIANSEN, P.C.  
Attorney for Appellee

"EXHIBIT A"

KENT L. CHRISTIANSEN, P.C.  
MUELLER, CHRISTIANSEN & MCLELLAND  
Attorneys for Defendants  
777 Clark Leaming Office Center  
175 South West Temple  
Salt Lake City, UT 84101  
Telephone: (801) 359-3762

OCT 21 1988

*C. Rutter*

---

IN THE THIRD DISTRICT COURT, SALT LAKE COUNTY

STATE OF UTAH

---

VAUGHN and JEANNE KELLER,

Plaintiffs,

-VS-

MR. and MRS. JOHN OLSEN,

Defendants.

)  
)  
)  
) FINDINGS OF FACT  
) AND CONCLUSIONS OF LAW  
)  
)

) Civil No. C88-1559

) Judge David S. Young  
)

---

This matter came on regularly before the court for a non-jury trial on September 20, 1988, the Honorable David S. Young, Utah State District Judge, presiding; Dean Becker appearing for plaintiffs, Vaughn and Jeanne Keller (hereinafter "Kellers"); Kent L. Christiansen of Mueller, Christiansen and McLelland, appearing for the defendants John and Faye Olsen (hereinafter the "Olsens"); and the parties having adduced evidence by way of testimony and documentary exhibits and having argued the matter to the court, and the court having reviewed the file, exhibits and memoranda submitted by the parties and being fully advised in the premises, and good cause appearing, now,

therefore, the court hereby makes the following:

FINDINGS OF FACT

1. That the Kellers are the owners of that certain real property located at 6853 South 1300 West, West Jordan, Utah.

2. That the Olsens are the owners of that certain real property which borders the Keller property on the north, located at 6841 Anderson Way, West Jordan, Utah.

3. The claims of the Kellers against the Olsens arose in Salt Lake County and involve a controversy in excess of \$10,000.00.

4. This court has jurisdiction to hear this matter.

5. There exist along the north border of the Keller's property a dense row of fourteen (14) Blue Spruce trees.

6. That of the fourteen (14) Blue Spruce trees which exist on the northern border of the Keller's property, twelve (12) of the trees are completely dead.

7. The Kellers have failed to adduce evidence proving what actually caused the death of the Blue Spruce trees.

8. The Kellers have failed to adduce evidence to prove that the Olsens intentionally, or otherwise, sought to poison or destroy the Blue Spruce trees or the lawn belonging to the Kellers.

9. That the twelve (12) dead Blue Spruce trees which form the border on the northern side of the Keller's property

constitute a dangerous and unhealthy condition such that it effects the comfortable enjoyment of life and/or property of the Olsens.

From the foregoing Findings of Fact, the court draws the following:

#### CONCLUSIONS OF LAW

1. That this court has jurisdiction to decide the disputed claims between the Kellers against the Olsens.

2. That the evidence adduced at trial fails to support the Keller's claim that the Olsens are liable in any way for the death or destruction of the Blue Spruce trees.

3. That the evidence adduced at trial fails to support the Keller's claim for trespass.

4. That the evidence adduced at trial fails to support the Keller's claim that the Olsens violated Section 78-38-3, Utah Code Ann., (1953 as amended).

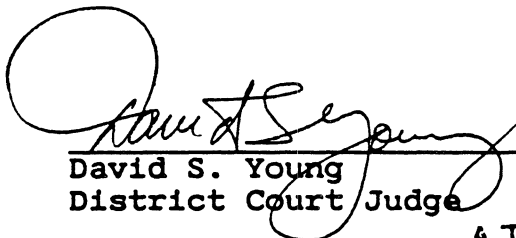
5. That no damage suffered by the Kellers is recoverable as against the Olsens.

6. That the twelve (12) dead Blue Spruce trees which form the border on the northern side of the Keller's property constitute a nuisance, and that the Kellers are ordered to abate said nuisance by removing the trees on or before October 20, 1988, thirty (30) days from the date of the court's ruling.

7. That the Olsen's motion for Involuntary Dismissal should be granted against the Kellers in accordance herewith, and

an appropriate Judgment of Dismissal entered.

DATED this 24<sup>th</sup> day of October, 1988.

  
\_\_\_\_\_  
David S. Young  
District Court Judge

APPROVED AS TO FORM:

ATTEST  
H. DIXON HAWLEY  
Clerk

By C Porter  
Deputy Clerk

By: \_\_\_\_\_  
Dean Becker  
Attorney for Plaintiffs

"EXHIBIT B"

KENT L. CHRISTIANSEN, P.C.  
MUELLER, CHRISTIANSEN & MCLELLAND  
Attorneys for Defendants  
777 Clark Leaming Office Center  
175 South West Temple  
Salt Lake City, UT 84101  
Telephone: (801) 359-3762

OCT 21 1988

*C. Fortin*

---

IN THE THIRD DISTRICT COURT, SALT LAKE COUNTY

STATE OF UTAH

---

VAUGHN and JEANNE KELLER,

Plaintiffs,

-VS-

MR. and MRS. JOHN OLSEN,

Defendants.

JUDGMENT

Civil No. C88-1559

Judge David S. Young

---

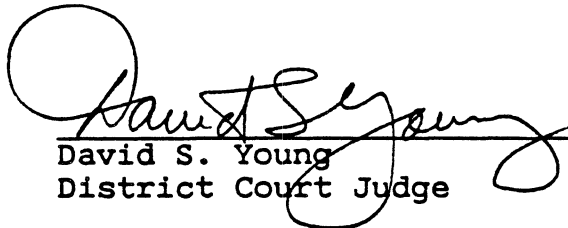
This matter came on regularly before the court for a non-jury trial on September 20, 1988, the Honorable David S. Young, Utah State District Judge, presiding; Dean Becker appearing for plaintiffs, Vaughn and Jeanne Keller (hereinafter "Kellers"); Kent L. Christiansen of Mueller, Christiansen and McLelland, appearing for the defendants John and Faye Olsen (hereinafter the "Olsens"); and the parties having adduced evidence by way of testimony and documentary exhibits and having argued the matter to the court, and the court having reviewed the file, exhibits and memoranda submitted by the parties and being fully advised in the premises, and good cause appearing, now,

therefore, it is hereby:

ORDERED, ADJUDGED, AND DECREED that the Plaintiffs, Vaughn and Jeanne Keller, are ordered to abate the unlawful nuisance which exists on their property at 6853 South 1300 West, West Jordan, Utah, to wit, twelve (12) dead Blue Spruce trees located on the northern boundary of said property; and are hereby ordered to remove said trees on or before October 20, 1988.


IT IS FURTHER ORDERED, that the Olsen's motion for dismissal of all claims with prejudice is granted against the Kellers, and judgment of said dismissal with prejudice is entered herewith.

DATED this 24<sup>th</sup> day of October, 1988.

  
David S. Young  
District Court Judge

APPROVED AS TO FORM:

ATTEST  
H. DIXON HAWLEY  
Clerk

By   
Deputy Clerk

By: \_\_\_\_\_  
Dean Becker  
Attorney for Plaintiffs



W.D. <sup>1984</sup> <sup>1984</sup> <sup>1984</sup>

STATE OF UTAH

11-2-88 4:28 P.M.

Defendants.

Judge David S. Young

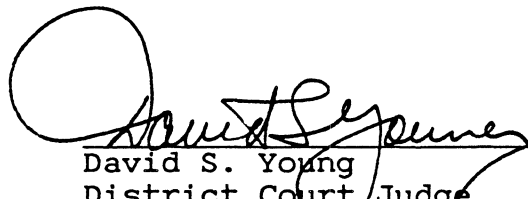
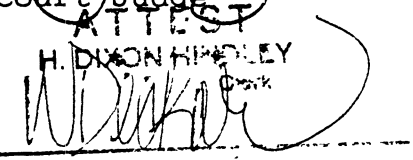
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parties and being fully advised in the premises, and good cause appearing, now, therefore, it is hereby:

ORDERED, ADJUDGED, AND DECREED that the Defendants, John and Faye Olsen are awarded their reasonable attorney's fees in the amount of \$3,126.50, together with their costs of \$324.75, for a total of \$3,451.25;

IT IS FURTHER ORDERED, that this judgment shall be augmented by an amount of twelve percent (12%) per annum, post-judgment interest, until such time as it shall be fully satisfied; and by an amount equivalent to the reasonable additional attorney's fees and costs expended to collect said judgment, as shall heretofore be established by affidavit.

DATED this 15<sup>th</sup> day of November, 1988.

  
David S. Young  
District Court Judge  
ATTEST  
H. DIXON HINLEY  
Clerk  
By 

APPROVED AS TO FORM:

By: \_\_\_\_\_  
Dean Becker  
Attorney for Plaintiffs

CERTIFICATE OF MAILING

Pursuant to Rule 2.9 of the Rules of Practice before the Utah District Courts, I hereby certify that on the 18<sup>th</sup> day

of October, 1988, I mailed a true and correct copy of the foregoing Judgment for Attorney's Fees and Costs Pursuant to Utah Code Ann., Section 78-27-56 (1953 as amended) to the Plaintiff's Attorney, by placing the same in the U.S. Mails, and properly addressed as follows:

Dean H. Becker  
Attorney at Law  
4059 South 4000 West  
West Valley City, Utah 84120



Kent L. Christiansen, P.C.

1 Q WHAT EXACTLY HAPPENS TO THE UNDERGROWTH OR  
2 THE VEGETATION BENEATH THE TREE?

3 A WELL, IT DIES OUT AS THE NEEDLES ACCUMULATE  
4 AND ALSO THE LOWER BRANCHES DIE OUT. AND USUALLY FOR  
5 PROPER MAINTENANCE THEY SHOULD BE TRIMMED OFF.

6 Q IN YOUR EVALUATION DID YOU FIND WATER STRESS  
7 AT ALL?

8 A NOT AT THE TIME I WAS THERE.

9 Q DID YOU CONCLUSIVELY FIND THAT IT WASN'T A  
10 CONTRIBUTING FACTOR OR DID YOU DETERMINE THAT IT WASN'T  
11 THE FACTOR THAT CAUSED THE DEATH?

12 A IT WASN'T THE FACTOR. IT MAY HAVE BEEN A  
13 CONTRIBUTING FACTOR BUT IT WASN'T THE FACTOR, IN MY OPINION.

14 Q JUST SO I'M CLEAR, IS IT YOUR TESTIMONY THAT  
15 YOU COULD NOT CONCLUDE WITH ANY CERTAINTY THE ACTUAL CAUSE  
16 OF DEATH OF THESE TREES?

17 A NOT WITH ANY CERTAINTY, NO.

18 MR. CHRISTIANSEN: THANK YOU. I HAVE NO OTHER  
19 QUESTIONS AT THIS TIME.

20 JUDGE YOUNG: REDIRECT?

21

22

REDIRECT EXAMINATION

23

BY MR. BECKER:

24

25

Q WE REFERRED PREVIOUSLY TO A TRENCH IN THE AREA  
AT THE BASE OF THE TREES. WOULD THAT TRENCH BE WITHIN

"EXHIBIT E"

1 WHAT'S IN HIS REPORT. THE STATEMENT THAT MR. BECKER REFERS  
2 TO STILL FALLS FAR SHORT OF THE CAUSATION REQUIREMENTS  
3 THAT THE PLAINTIFF BEARS THE BURDEN OF PROVING TO THE  
4 COURT.

5 THE STATEMENT THAT MR. KELLER ALLEGES WAS MADE  
6 BY MY CLIENT THAT OUR ATTORNEY SAID WE COULD POISON THE  
7 TREES ON OUR SIDE OF THE PROPERTY, IT DOESN'T IDENTIFY  
8 HOW THE TREES WERE KILLED, IT DOESN'T IDENTIFY WHO KILLED  
9 THE TREES, AND TO USE THAT AS THE BASIS FOR ESTABLISHING  
10 CAUSATION WHETHER WE PROCEED WITH DEFENDANT'S CASE OR  
11 NOT IS NOT GOING TO MAKE A BIT OF DIFFERENCE WHEN IT COMES  
12 TO THE BURDEN THAT THE PLAINTIFF BEARS TO ESTABLISH CAUSATION

13 JUDGE YOUNG: WELL, IT'S TIME TO STOP. IS  
14 THERE SOMETHING THAT HE SAID IN THAT REPLY THAT YOU FEEL  
15 THAT YOU HAVE AN OPPORTUNITY, OR SHOULD HAVE AN OPPORTUNITY  
16 TO RESPOND TO?

17 MR. BECKER: NO.

18 JUDGE YOUNG: ALL RIGHT. LET'S DEAL WITH THE  
19 EASY MATTER FIRST. THERE HAS BEEN NO TESTIMONY WHATSOEVER  
20 IN RELATION TO PUNITIVE DAMAGES AND, THUS--NOR, IS THERE  
21 ANYTHING IN THE COMPLAINT TO ALLEGE A CAUSE OF ACTION  
22 FOR PUNITIVE DAMAGES. THERE IS ONLY A PRAYER FOR THAT  
23 IN THE COMPLAINT. THUS, THE PUNITIVE DAMAGE CLAIM WILL  
24 BE DISMISSED.

25 THAT LEAVES ONLY THE CAUSE OF ACTION FOR THE

1 \$4,500.00 WHICH IS LEFT AS TO A TRESPASS CAUSE OF ACTION  
2 AND/OR THE CAUSE OF ACTION, SECOND CAUSE OF ACTION AS  
3 TO TRESPASS. THE FIRST CAUSE OF ACTION IS AS TO THE INTENTIONAL  
4 POISONING OF THE TREES. AND THE THIRD CAUSE OF ACTION  
5 IS ONE IN WHICH THE COURT WOULD DEAL WITH 78-38-3 AND  
6 ITS APPLICATION AS TO WHETHER TREBLE DAMAGES MIGHT BE  
7 AWARDED.

8 SO THAT PUNITIVE CAUSE OF ACTION IS DISMISSED.  
9 NOW, AS TO THE FIRST AND SECOND CAUSES OF ACTION.  
10 THE COURT BELIEVES THAT THE APPROPRIATE CONCLU-  
11 SION TO THIS CASE IS THAT THE DIRECTED VERDICT BE GRANTED.  
12 AND I WILL GRANT THE DIRECTED VERDICT.

13 NOW, LET ME JUST MAKE A COUPLE OF COMMENTS  
14 IN RELATION TO MY OBSERVATIONS OF THE END OF THIS CASE,  
15 AND THEY ARE THESE. THAT IT'S CURIOUS TO ME THAT NO ONE  
16 ASKS EITHER MR. OR MRS. OLSEN WHETHER THEY POISONED THE  
17 TREES. THAT QUESTION WAS NEVER ASKED ON DIRECT EXAMINATION.  
18 NOR DID THEY ASK WHAT THEIR GARDENING PROCEDURES WERE  
19 IN THAT SPACE BETWEEN THEIR HOUSE AND THE TREES. THAT,  
20 TO ME, I THOUGHT, WAS CURIOUS AS TO WHY THERE WAS NOT  
21 ANY DIRECT QUESTION ASKED IN RELATION TO THAT. THIS LEAVES  
22 THE CASE ONLY WITH THE COURT TO CONCLUDE THAT THERE IS  
23 AN UNFORTUNATE COINCIDENCE THAT THE TREES DIED AND THERE  
24 IS NO TESTIMONY, IN FACT--MR. LABRUM, HIS TESTIMONY THAT  
25 I NOTED STATED "THAT HE CANNOT CONCLUDE WITH ANY DEGREE

1 OF CERTAINTY THE CAUSE OF DEATH." WHETHER THE CAUSE OF  
2 DEATH IS TOO MUCH WATERING, WHICH IS UNLIKELY, WHETHER  
3 IT IS SOME CHEMICAL, WHICH HE THINKS MAY OR MAY NOT HAVE  
4 HAPPENED, OR WHAT IT IS, THERE'S NO TESTIMONY THAT WOULD  
5 GIVE ME ANY BASIS UPON WHICH I CAN CONCLUDE THAT THERE  
6 IS A LEGITIMATE BASIS FOR ME TO CONCLUDE THAT THE DEFEN-  
7 DANTS CAUSED THE PROBLEM.

8 NOW, I WILL ADMIT THAT THERE IS AN UNFORTUNATE  
9 COINCIDENCE ON THAT PROPERTY AND THERE IS THE UNFORTUNATE  
10 CIRCUMSTANCE THAT THOSE TREES ALONG THAT LINE ARE DEAD  
11 WHEN OTHERS HAVE SURVIVED AND THAT, TO ME, I THINK, IS  
12 UNFORTUNATE.

13 I THINK IT'S UNFORTUNATE ALSO THAT THE CHILDREN  
14 OF THE DECEASED KELLERS DETERMINED TO PURSUE THIS LITIGATION  
15 WHEN REALLY THE COMPLAINT WAS THEIR PARENTS. THEY DON'T--  
16 I DON'T SEE THERE'S ANY EVIDENCE OF DECLINE IN PROPERTY  
17 VALUE AS A RESULT OF THOSE TREES. I THINK THAT THIS  
18 COMPLAINT IS BEING PURSUED MORE BECAUSE OF A NUISANCE  
19 THAN ANYTHING ELSE AND THAT, TO ME, I THINK, IS VERY  
20 UNFORTUNATE BECAUSE IT PUTS ME IN A DIFFICULT SPOT.

21 NOW, IN ADDITION TO THE FINDING THAT THE DIRECTED  
22 VERDICT SHOULD BE GRANTED, AS I HAVE STATED, I ALSO FIND  
23 THAT THE TREES AS THEY NOW EXIST ON THAT PROPERTY ARE  
24 A NUISANCE AND THAT THOSE DEAD TREES MUST BE REMOVED.  
25 AND THAT NUISANCE MUST BE ABATED. AND I WILL ALLOW 30

1 DAYS FOR THAT TO BE CONCLUDED. IN FACT, I WILL ALLOW  
2 45 DAYS FOR THAT TO BE CONCLUDED AND THAT WILL PROVIDE  
3 YOU WITH THE OPPORTUNITY TO DETERMINE WHETHER YOU WISH  
4 TO APPEAL THIS CASE, AND IF YOU DO, YOU MUST SEEK FROM  
5 THE APPELLATE COURT A STAY FOR THE REMOVAL.

6 I THINK FURTHER COMMENTS NEED NOT BE MADE.  
7 I'VE INDICATED THAT THE DIRECTED VERDICT IS GRANTED.  
8 THAT CONCLUDES THE CASE AND THE MATTER IS--

9 MR. BECKER: CAN I ADDRESS THE COURT FOR A  
10 SECOND, YOUR HONOR, PLEASE?

11 JUDGE YOUNG: PLEASE.

12 MR. BECKER: FOR THE PURPOSES OF MAKING APPLI-  
13 CATION TO HOMEOWNER'S INSURANCE THAT COVERS THIS PROPERTY,  
14 AS PART OF THE ORDER DISMISSING THIS, DOES THE COURT FIND  
15 BASED UPON MR. LABRUM'S TESTIMONY THAT SOME TYPE OF  
16 POISONING KILLED THE TREES?

17 JUDGE YOUNG: I CAN'T FIND THAT. MR. LABRUM'S  
18 TESTIMONY, IN HIS OWN LANGUAGE, IS THAT--AND I QUOTED  
19 HIS LANGUAGE.

20 MR. BECKER: I BELIEVE THAT WAS WITH REFERENCE  
21 TO MR. CHRISTIANSEN'S QUESTION OF WHETHER IT WAS GASOLINE  
22 OR ALCOHOL OR SALT OR SOME OTHER CHEMICAL SUBSTANCE THAT  
23 KILLED IT. AND AS I RECALL, MR. LABRUM SAID HE COULDN'T  
24 TESTIFY AS TO CETAINTY WHAT KILLED IT. WHEN I ASKED HIM--

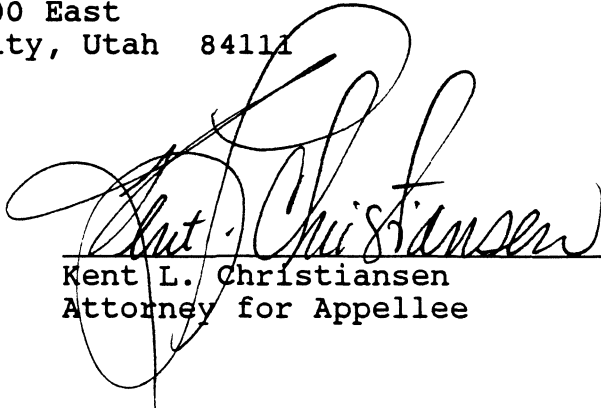
25 JUDGE YOUNG: IT SEEMS TO ME THAT MAY BE A



CERTIFICATE OF SERVICE

This is to certify that on the 7th day of September, 1990, pursuant to Rule 26(b) of the Utah Rules of Appellate Procedure, I served four (4) copies of Appellee's Brief to the counsel for Appellants by hand delivering those same copies to the following:

Dean H. Becker  
Attorney at Law  
433 South 400 East  
Salt Lake City, Utah 84111

  
Kent L. Christiansen  
Attorney for Appellee