

1989

# Vaugh and Jeanne Keller v. Mr. and Mrs. John Olson : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH

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VAUGHN and JEANNE KELLER, :  
 :  
Plaintiff and Appellants :  
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vs. :  
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MR. and MRS. JOHN OLSON :  
 : Civil No. 890311-CA  
Defendant and Respondents: :  
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Priority No. 16

BRIEF OF APPELLANT

Appeal, Petition for Review from Third District Court of Salt  
Lake County, State of Utah, Judge Young

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## STATEMENT OF JURISDICTION

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

## STATEMENT OF ISSUES PRESENTED FOR REVIEW

A. The issues for the decision of the Court of Appeals are:

1. Did the trial court err in granting the Defendants' oral Motion for Directed Verdict at the conclusion of the Plaintiffs' testimony?

2. Are there questions of fact upon which reasonable minds could differ which preclude the granting of the Directed Verdict by the trial Court?

3. Did the Plaintiffs file the suit with the good faith expectation of prevailing on the merits?

4. Does the action as filed by the Plaintiffs have merit?

5. Was the trial court obligated to hear the testimony of the Defendants before determining that the weight of the circumstantial evidence was so insufficient as to grant a Motion for Directed Verdict?

B. Standard of review

1. For Directed Verdict:

The 1979 case of Asay v. Rappleye, 593 P.2d 132, in referring to the standard for judicial review of a directed verdict, states:

In deciding a motion for directed verdict, the Court must consider the evidence in the light favorable to the party against whom it is directed; and unless in so doing there is no basis upon which reasonable minds acting fairly thereon could so find the issues as to entitle the plaintiff to recover, the motion should not be granted . . . Id. at 133.

The standard for appellate review of a directed verdict is again set forth in the case of Management Committee, etc. v. Graystone Pines, 652 P.2d 896, 897-898 (1982):

A directed verdict is only appropriate when the court is able to conclude, as a matter of law, that reasonable minds would not differ on the facts to be determined from the evidence presented.

This Court's standard of review of a directed verdict is the same as that imposed upon the trial court. We must examine the evidence in the light most favorable to the losing party, and if there is a reasonable basis in the evidence and in the inferences to be drawn therefrom that would support a judgment in favor of the losing party, the directed verdict cannot be sustained. Id. at 897-898.

The Court is also referred to the Utah Court of Appeals case of Virginia S. v. Salt Lake Care Center 741 P.2d 969 (1987) which cites the above Graystone decision with approval.

## 2. For Attorney's Fees:

In the 1987 case of Topik v. Thurber, 739 P.2d 1101, the Utah Supreme Court examined the issue of awarding attorney's fees for a "bad faith" filing, and cited to the 1983 case of Cady v. Johnson, 671 P.2d 149 for authority concerning the standard for the award of attorney's fees. Cady states that the court must find that the claim is both "without merit" Id. at 151 and "lacking in good faith." Id.

Therefore, the standard for awarding attorney's fees under Utah Code Section 78-27-56 states that the claim by the unsuccessful party must be both "without merit" and "lacking in good



faith."

### **DETERMINATIVE STATUTES AND RULES**

Utah Rules of Civil Procedure, Rule 50(a), entitled Motion for directed verdict; when made, effect states:

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 with any assent of the jury.

The pertinent portion of Section 78-27-56 of the Utah Code states as follows:

(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 .  
. . . .

Finally, Section 78-38-3 of the Utah Code states:

Any person who cuts down or carries off any wood or underwood, tree or timber, or girdles or otherwise injure any tree [or] timber on the land of another person, or on the street or highway in front of any person's house, town or city lot, or cultivated grounds, or on the commons or public grounds of any city or town, or on the street or highway in front thereof, without lawful authority, is liable to the owner of such land, or to such city or town, for treble the amount of damages which may be assessed thereof in a civil action.

### **STATEMENT OF THE CASE**

The instant matter was filed by the Plaintiff alleging that the Defendants intentionally and maliciously poisoned and destroyed a row of spruce trees growing between the parties'

property. The Defendants were further accused of trespassing on the property of the Plaintiffs and of violating the above Utah statute, Section 78-38-3.

The matter was heard without jury before the Honorable Judge David Young in the Third District Court of Salt Lake County. At the conclusion of the Plaintiff's case, the Plaintiff rested, the Defendant moved for the entry of a directed verdict and the Court granted the Motion for Directed Verdict. Subsequently, the Defendant moved for an award of attorney's fees pursuant to Utah Code Section 78-27-56 and the Court granted such award of attorney's fees, but did not make any specific findings of fact concerning the award of attorney's fees. This appeal followed.

#### **STATEMENT OF THE FACTS**

The Plaintiff Vaughn Keller obtained the subject property after the death of his father in 1983 (Appeal Transcript of Trial, referred to hereafter as T., page 1110, lines 22-23) and the death of his mother in 1984 (T., p. 118, l. 8-9). Vaughan Keller's parents lived on the subject property which was a trailer home located in West Jordan, Utah, since approximately 1960 (T. p. 111, l. 7-8) and had a good relationship with their neighbors, the Defendants (T., p. 27, l. 18-22; p. 97, l. 15-18; p. 121, l. 9-22).

However, that "good" relationship deteriorated when the Keller's Blue Spruce trees which were planted directly between the parties' trailer homes started to become large and to shade the Defendant's lawn (T., p. 97, l. 19-25; p. 98, l. 1-3, l. 13-

18, 25; p. 99, l. 3-11). In fact, the Defendants became so concerned with the shading effect of the Blue Spruce trees that they went to the City of West Jordan to inquire concerning the existence of a "Sunshine Law" to prohibit the Kellers from blocking their sun. (T., p. 99, l. 12-25; p. 100, l. 1). West Jordan reportedly had no such law, but the Defendants trimmed the trees to their border nevertheless (T., p. 28, l. 13-22; p. 100, l. 2-14; p. 114, l. 23-25; p. 116, l. 1-14) and the parties continued in their controversy.

The Defendant, Mr. Olsen, became so upset regarding the trees that he severed his relationship with Mr. Keller, the father of Plaintiff Vaughn Keller, and threatened to take Mr. Keller to court to stop the trees from blocking their sun (T., p. 100, l. 15-25).

Mr. Keller, the father, passed away in 1983, supra and Mrs. Keller, the mother, passed away in 1984, supra, and in early spring of 1985 the twelve Blue Spruce interspaced with eight shorter junipers (T., p. 11, l. 21-23) began to die (T. p. 29, l. 9-12; p. 118, l. 9-25; p. 119, l. 1-3). Vaughn Keller, the Plaintiff, noticed at the time that the trees began to die that a new ditch, running parallel to the trailer and exactly the length of the trailers (T. p. 122, l. 1-2, 18) had been dug between the property of the Kellers and Olsen, which ditch contained a "white substance." (T. p. 119, l. 6-19). Concerned about the dying trees and the ditch with the white substance, Plaintiff Vaughn Keller went to the next door trailerhome of the Defendants and asked to speak to John Olsen, the Defendant. (T. p. 120, l. 1-3). Defendant Mrs. Olsen stated that Plaintiff Vaughn Keller could

not speak to her husband, and then stated, as testified by Plaintiff Vaughn Keller (T. p. 120, l. 14-25):

(Plaintiff): I asked her, I said, I would like to speak with John.

(Attorney): Okay.

(Plaintiff): And she said no, in that frame of voice, and I made eye contact with her and she just glaring at me and I just stood there and looked at her because it kind of startled me and she says, for your information, she says, our lawyer told us we could poison them trees on our side of the fence and, she says, and you get off our property. So I just started to back up. I never turned by back to her. I started backing up and she said, you're a damned lousey rotten coward too.

Plaintiffs did attempt to analyze the soil with the "white" residue, but were informed that a soil test was ineffective for such problem and that any foreign substance put into the soil would dissipate as quickly as two weeks or as long as six months (T. p. 46, l. 4-8)

The property is surrounded by Blue Spruce and Juniper trees (T. p. 12, l. 5-15; p. 14, l. 2-4; p. 17, l. 19-21, 22-23) and only the Blue Spruce and Juniper trees directly between the two properties are dead. In fact, while the remainder of the two properties is enhanced with lawn and gardens, nothing at all grows between the two properties where the ditch runs, (T. P. 18, l. 2-6, 16-22) even though the Defendants Olsen used to grow cantalopes between the trailers when the Kellers (parents) were alive (T. p. 90, l. 5-14).

At the trial of the matter, Plaintiff Vaughn Olsen testified that in his "right" opinion (T. p. 123, l. 12) the reason that the trées died was that the Defendants killed the trees to do away with the shade (T. p. 123, l. 15-24; p. 132, l. 15-24; p. 133, l. 3-7). Plaintiff Jeanne Keller also testified that in her

opinion, the Defendants Olsen had poisoned the trees with salt (T. p. 50, l. 21-25; p. 51, l. 1-5)

Also testifying at the trial was an expert horticulturist, Miles Labrum, who stated that he had examined the trees to ascertain the reason for the death of the trees (T. p. 66, l. 15-17). Mr. Labrum conclusively stated that the reason for the death of the trees was not due to insect infestation (T. p. 67, l. 14-25); was not due to too much or too little water (T. p. 70, l. 23-25); was not due to too much heat (T. p. 91, l. 10-22) and could only be the result of chemical action (T. p. 72, l. 2-25; p. 73, l. 1-7; p. 94, l. 21-25; p. 95, l. 1).

#### **SUMMARY OF ARGUMENTS**

The Plaintiffs' state that the trial court did not properly apply the standard for the dismissal of an action to this case, for viewing the evidence objectively, it is certainly likely that reasonable minds could differ regarding an evaluation of the evidence before the Court as it existed at the conclusion of the Plaintiffs' case in chief. The Motion for Directed Verdict was improperly granted for the totality of the direct and circumstantial evidence, viewed objectively, certainly weighs in favor of the Plaintiffs and not against them.

In addition, the award of attorney's fees to the Defendants pursuant to Utah's "Bad Faith" statute is improper. Based upon the objective evidence under their control and as testified to by the Court; the expert witness testimony, and the totality of the circumstantial evidence, the case has merit and was further filed

in good faith by the Plaintiffs with the expectation of recovery and with no purpose to delay, hinder or defraud the Defendants.

### **ARGUMENT**

A. THE TRIAL COURT ERRED IN GRANTING THE DEFENDANTS' ORAL MOTION FOR DIRECTED VERDICT.

1. Case Law: The trial court granted the Defendants' oral Motion for Directed Verdict at the conclusion of the Plaintiffs' case. The Findings of Fact signed by the Court simply state that the Plaintiffs "have failed to adduce evidence proving what actually caused the death of the Blue Spruce trees" and that the Plaintiffs "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." (Findings of Fact, paragraphs 7 and 8).

The case law in Utah regarding the granting of a directed verdict specifically states that the trial court must consider all the evidence in a light most favorable to the party against whom the motion is directed. While there are a number of cases on the topic, the most recent cases found are Asay v. Rappleye, 593 P.2d 132 (1979) which involved the Plaintiff, a building contractor, who sued the Defendants, homeowners, for work he undertook on the residence of the Defendants. The Plaintiff submitted into evidence a contract for the work to be performed, testified that the work had been completed, and further testified that the Defendant expressed her satisfaction with the work which

was performed.

At the conclusion of the Plaintiff's case, the Defendants moved for the issuance of a directed verdict which the Court granted. In reviewing the granting of the motion for directed verdict, the Supreme Court observed:

In deciding a motion for directed verdict, the Court must consider the evidence in the light favorable to the party against whom it is directed; and unless in so doing there is no basis upon which reasonable minds acting fairly thereon could so find the issues as to entitle the plaintiff to recover, the motion should not be granted . .

. .

In view of the testimony of the plaintiff and his son that the work was completed . . . and the evidence that the plaintiff had not been paid therefor, it is apparent that there was a dispute as to whether the work had been completed in accordance with the terms of the contract . . . . Consequently, we are unable to see justification for the granting of defendants' motion for a directed verdict. Id. at 133.

In Asay, the Supreme Court found that there was a dispute, and that reasonable minds could find issues to entitle the Plaintiff to recover, and that the directed verdict was not well taken.

In the same vein is the 1982 case of Management Committee, Etc. v. Graystone Pines, 652 P.2d 896 which also involves construction matters, but the Plaintiff is suing the builder for defects in the building of condominiums. Plaintiff's purpose of existence was to maintain the common areas of the condominiums; leaks developed in the roof; Plaintiff hired an independent roofer to fix the leaks but the roof continued to leak; the parties hired their own experts who disagreed on the solution; and the foundation leaked and the parties various experts again testified contrary to one another. The trial court did not let the matter go to the jury, but granted the Defendant's motion for

directed verdict.

The Supreme Court ruled that:

The foregoing evidence raised substantial issues of fact as to the alleged defects that could only be determined by the jury as fact-finder. Therefore, it was error for the trial judge to rule against plaintiff, as a matter of law, and to direct a verdict in favor of defendants. Id. at 899.

And why was it error to rule against the plaintiff? The Court set out its standard on directed verdicts as follows:

A directed verdict is only appropriate when the court is able to conclude, as a matter of law, that reasonable minds would not differ on the facts to be determined from the evidence presented.

This Court's standard of review of a directed verdict is the same as that imposed upon a trial court. We must examine the evidence in the light most favorable to the losing party,, and if there is a reasonable basis in the evidence and in the inferences to be drawn therefrom that would support a judgment in favor of the losing party, the directed verdict cannot be sustained. Id. at 897-898.

The Court therefore affirms its previous ruling in Asay, supra, and confirms that a directed verdict must not be granted if "reasonable minds would not differ on the facts to be determined from the evidence submitted" supra.

Finally, the Utah Court of Appeals cites the above Graystone Pines decision with approval in the 1987 case of Virginia S. v. Salt Lake Care Center, 741 P.2d 969, 971.

## 2. Application of the Facts to the Law:

In determining whether the directed verdict should have been rendered against the Plaintiff in the above matter, the standard set by the Utah appellate Courts, i.e.:

i. examine the evidence in light most favorable to losing party;



ii. must be reasonable basis in:

a. evidence; and

b. inferences

iii. so that reasonable minds could differ on the facts.  
must be adhered to in this matter.

Did the Plaintiff establish evidence and inferences so that reasonable minds could differ? The answer must be in the affirmative in light of the following testimony and proof offered at the trial by the parties, lay witnesses and an expert witness:

i. The lot was surrounded by Blue Spruce and Juniper trees which, until early spring of 1985, were all in good health.

ii. In early spring of 1985, only those twelve Blue Spruce, interspersed with eight Junipers, which set directly between the two housetrailer and which directly shaded the Defendants' housetrailer, showed signs of discoloration. At no time have any of the other Blue Spruce surrounding the lot showed any signs of death or disease.

iii. When the Plaintiff asked to see Mr. John Olsen concerning the discoloration of the trees, Mrs. Olsen, stated to the Plaintiff, Vaughn Olson, "Our attorney told us we could poison the trees."

iv. The trees continued to discolor and die, but only those twenty trees between the trailers and directly next to a ditch in which was found a "white substance" by the Plaintiffs.

v. The parents of Vaughn Keller and the Defendants Olsen were very good friends and neighbors until controversy arose concerning the growth of the Blue Spruce and the shading it produced on the Defendant Olsens' property, at which time the

neighbors became rather vitrolic towards one another, even to the extent that a lawsuit was threatened by the Defendants to take out the offending shade trees.

vi. The Plaintiffs' expert, Miles Labrum, examined the trees, and concluded that insects did not cause the death of the trees, water stress did not cause the death of the trees, heat did not cause the death of the trees, but chemical action did cause the death of the trees.

vii. A ditch exists between the properties, which ditch first appeared in early 1985 and which has a "white substance" on the surface of the ditch. Prior to the time of the ditch and the controversy, cantalopes grew well in the location, but at the present time, and since spring of 1985, nothing grows between the two trailers.

3. Conclusion: It is undeniable that the Plaintiffs presented sufficient evidence and inferences for reasonable minds to differ on the facts as determined by the evidence. The Court clearly erred in granting the motion for directed verdict, and the decision must be reversed and remanded for trial.

B. THE TRIAL COURT ERRED IN AWARDING ATTORNEY'S FEES TO THE DEFENDANTS FOR AN ALLEGED "BAD FAITH" FILING

1. Case Law:

The leading Utah case establishing the standards under which to determine an award of attorney's fees pursuant to Utah Code Section 78-27-56 is Cady v. Johnson, 671 P.2d 149 (1983).

The case involves Plaintiffs who received from the

Defendants cash and a written Earnest Money offer on real property. The Defendants did not complete the sale, the Plaintiffs retained the downpayment of five hundred dollars and then sued for the real estate commission and expenses in reselling the residence. The cause of action for expenses in reselling the residence was dismissed at trial by Plaintiffs' own motion, and the cause of action for real estate commissions was dismissed by the Court. Upon motion by the Defendants, the trial court then awarded Defendants their attorney's fees pursuant to Utah Code Section 78-27-56 for pursuing "meritless" actions and for stating to the trial judge that there would be material issues presented at the trial when in fact there were no material issues presented at the trial.

In addressing the issue of the award of attorney's fees, the Court first states that the statute was not meant to "be applied to all prevailing parties in all civil suits." Cady at 151, and that two elements must be present before attorney's fees are awarded under the "bad faith" statute. First, the claim must be "without merit" which the Court defines as "bordering on frivolity," Id. at 151, meaning "of little weight or importance having no basis in law or fact." Id.

The second determination which must be made is whether the "plaintiff's conduct in bringing the suit was lacking in good faith" Id. And as ably defined by the Court, "good faith" is

(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.

To establish lack of good faith, one must prove that one or more of these factors is lacking.

. . . .

In other words, not only must there be substantial evidence that the claim was lacking basis in either law or fact and therefore frivolous, but there must be sufficient evidence that the unsuccessful party lacked at least one of the good faith elements heretofore stated.

Id. at 151-152

In 1987, the Utah Court of Appeals cited Cady, supra with approval in the matter of Hatanaka v. Struhs, 738 P.2d 1052 (1987) and affirmed a finding by the trial court that the defendant's actions in the boundary dispute matter did have some degree of merit, even if ultimately unsuccessful, and that there was no justification for an award of attorney's fees.

However, in a case handed down the following day, the Utah Court of Appeals, again citing Cady, supra, with approval, found in the matter of Topik v. Thurber, 739 P.2d 1101 (1987), that attorney's fees were justified as the defendant lied ("testified falsely") on the stand and presented a defense which was partially in "bad faith."

## 2. Application of the Facts to the Law:

Again, the standard set forth to justify awarding attorney's fees to the prevailing party under Cady, supra is:

i. the case must be "without merit," meaning "bordering on frivolity;" and

ii. the conduct of the losing party must be lacking in good faith, which good faith is:

a. honest belief in the case;

b. no intent to take unconscionable advantage of

others; and

c. no intent to hinder, delay or defraud.

Thus the question for the instant Court is whether the Kellers' case was without merit and, finding such, was it not filed in good faith.

Addressing first the issue of the relative merit of the case, the Plaintiffs plainly testified that:

- i. The trees began to change color;
- ii. A "white substance" was observed in a new ditch running parallel to the discolored trees;
- iii. Mrs. Olsen directly stated that her attorney told them they could poison the trees on their side of the property;
- iv. The trees did die, but only those particular trees located directly between the trailers and not the other numerous, same species trees surrounding the property of the Plaintiff;
- v. An expert testified that the trees were not killed by insects or overwatering or heat, but by a "chemical substance."

The weight of the testimony, if only for the purpose of determining the issue of attorney's fees, indicates that the case indeed does have merit, is not frivolous, and does have a strong basis in fact. Viewed objectively, there is the strong likelihood that the Plaintiffs could prevail before a trier of fact, thus invalidating any contention that the matter has no merit.

However, for argument's sake, (without admitting such) assuming that the matter did not have any merit, the next question is whether the matter is lacking in good faith.

Plaintiff Vaughn Olsen testified that in his "right" supra opinion, the Defendants killed the trees and Plaintiff Jeanne Keller also testified that it was her belief that the trees were poisoned by the Defendants. There is no testimony of any nature which proves or alleges that the Plaintiffs intended to take unconscionable advantage of others or that they attempted to hinder, delay or defraud anyone.

Thus, not one of the three above-mentioned elements of good faith were proved lacking, and the standard for the award of attorney's fees is not met.

Without question, the action was filed in good faith by the Plaintiffs who believed and continue to believe that the matter does have merit, and that there are no grounds whatsoever for the granting of attorney's fees in this matter.

#### CONCLUSION

The Plaintiffs pray that the Court set aside the Order of Dismissal and the award of attorney's fees, and remand this matter to the trial court for a new hearing.

Respectfully submitted this \_\_\_\_ day July, 1990.

---

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#### DELIVERY CERTIFICATE

I certify that I delivered a true and correct copy of the foregoing Brief of Appellant to:

Kent L. Christiansen

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Salt Lake City, Utah

on the \_\_ day of July, 1990

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