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# Paul K. Bevan and Little Mountain Development v. George Buzianis and Twin Peaks, Inc. : Appellant's Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

PAUL K. BEVAN and  
LITTLE MOUNTAIN DEVELOPMENT  
CO. INC.

Plaintiffs-Respondents,

Case No. 17666

vs.

GEORGE BUZIANIS and  
TWIN PEAKS, INC.,

Defendants-Appellants.

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APPELLANTS' BRIEF

Plaintiffs-Respondents,

Case No. \_\_\_\_\_

vs.

GEORGE BUZIANIS and  
TWIN PEAKS, INC.,

Defendants-Appellants.

STATEMENT OF THE CASE

This is an appeal from Findings of Fact, Conclusions of Law and Judgment entered by the Honorable Homer Wilkenson, following a Bench trial in the Tooele County Division of the Third Judicial District Court.

RELIEF SOUGHT ON APPEAL

Appellants seek an order of this Court reversing the Judgment of the Trial Court and dismissing the Plaintiff's complaint with prejudice for failure to prove a cause of action against Defendants or either of them.

STATEMENT OF THE ISSUES

1. The evidence in the case does not support the Courts' findings of Fact numbers 1, 3, 5, 6, and 7; conclusions of law number 1 through 4; or the Judgment.
2. The Court erred in refusing to grant Defendants' Motion to Dismiss.
3. There was no evidence in the case upon which the Court could determine that Defendants' converted property belonging to Plaintiffs.
4. There is no evidence in the case upon which the Court could reasonably base its award of damages.

## STATEMENT OF THE FACTS

This case arose from an incident that occurred August 18, 1979. On August 18, 1979 George Buzianis, President of Twin Peaks, Inc., requested an employee of Twin Peaks, Inc. to proceed to the area of approximately 150 East Skyline Drive in Tooele, Utah and pick up and haul certain large rock located by the Skyline Drive roadside to a construction site owned by Defendant, Twin Peaks, Inc. See Plaintiff's Trial Memorandum, Record at p. 26; Testimony of Gus Buzianis, TR. at p. 140-143. Most of the rocks in the area came from a trench which had been dug for a water line laid by Tooele city along Skyline Drive south of the roadway. Gus Buzianis went to Skyline Drive and began loading rocks from a site located by the edge of the road and identified on Exhibit 15 with Green "L's" identified as "L1, L2, and L3". See TR. at p.p. 147-148. George Buzianis had instructed Gus to get rocks from the area identified on Exhibit 15 as "B-1, B-2" see TR. p. 142-143. Gus was instructed to take rocks next to the curb. See TR. at p. 143 Ln. 8-25, p. 144 Ln. 1-2. The rocks were loaded into a dump truck which was rated at 17,000 pounds. Gus made three loads of rocks with the truck not very full. See TR. at p. 145-146. The first load came from "right near the curb where this turn in the road is" (TR. at p. 147, Ln. 13) (Exhibit 15 "L"). The second load came from "further west and also in the street" (TR. p. 147 at Ln. 18) ("L2" of Exhibit 15). The last load (third load) came from the area marked "L3" on Exhibit 15. (TR. p. 148 at Ln. 2-9) Gus Buzianis testified that he took some rocks from the edge of the road and some from south of the curb. The area where some of the rocks were taken is shown in Exhibit 20 by the purple X. See TR. at p. 148 Ln. 14 to p.

151 Ln. 25. Gus stated that each load of rocks did not fill the truck more than half full by volume. See TR. at p. 152. The three loads of rocks taken from along Skyline Drive were used by Twin Peaks, Inc. to construct a retaining wall. George Buzianis was given permission by Douglas Vern Sayers, Tooele City Mayor, to remove rocks from the city right of way on Skyline Drive. See TR. at p. 315, Ln. 10-16.

The mayor believed them to be the property of Tooele city and that the city could save money by not having to hire others or use city monies to remove the rocks. The dispute in this case involves whether or not the rocks taken by Twin Peaks, Inc., belong to Plaintiff, and, if so, the amount of damages Plaintiffs should recover.

#### ARGUMENT

I. THE EVIDENCE IN THE CASE DOES NOT SUPPORT  
FINDINGS OF FACT NUMBERS 1, 3, 5, 6 AND 7;  
CONCLUSIONS OF LAW NUMBERS 1 THROUGH 4;  
OR THE JUDGMENT OF THE COURT.

The Findings of Fact, Conclusions of Law and Judgment, entered by the Court over objections by Defendants, are totally without foundation in the evidence. Each separate finding and conclusion objected to will be set out and argued separately.

The objection to Finding of Fact #1 is technical and relates solely to the fact that the finding does not relate to issues in the lawsuit, nor is it set to a time reference. It is really meaningless and superfluous.



Finding of Fact #3 states "that property consisting of a roadway now designated as Skyline Drive and twelve foot right of way was conveyed to Tooele City on February 17, 1969. The Court further finds that the Plaintiff's, Little Mountain Development Company, Inc. are the owners of record of the property on the south side of said Tooele City right of way extending from 50 East Skyline Drive easterly through 200 East Skyline Drive." See record at 5. The evidence was that Tooele had been granted on "80 foot right of way" see Exhibit 25, TR at p. 181, Ln. 21-24. The only kind of survey of any type referred to in the entire trial was a "Route Survey" run by Dale James. See TR. p. 174 at Ln. 23-25. Mr. James never did survey the property lines in the area. See TR. p. 174 at Ln. 12-25. Mr. James differentiated a "route survey" from a "property line survey" by stating that a "route survey" uses the center line of a road as a basis for doing some work. See TR. p. 175, Ln. 1-3. Mr. James did a route survey from east of the disputed area to Main Street on the west. Id at Ln. 4-12. Mr. James testified that there are differences of opinion on the width of the Skyline right of way. TR. p. 178, Ln. 10-12. In an attempt to determine the right of way west to Main Street, Mr. James projected the right of way west to Main Street. TR. p. 178, at Ln. 19-25. Mr. James stated the center of the road, showing points of the curb, all the way to Main Street. TR. p. 179 at Ln. 14-19. He measured everything including back to back curbs. TR. p. 179-180. He stated that property line was 12 feet south of curb line. Id at p. 180. Mr. James stated that the street is seven feet narrower north of the center line than south, but the street was designed to be an 80 foot right of way. TR. p. 181, Ln. 11-23. The measurement from back

of curb to back of curb was 49 feet. See TR. p. 80 Ln. 17-20. With 49 feet curb to curb and 12 feet south, if the centerline is the center of the right of way, there is a discrepancy in the measurements which has never been explained. Mr. James stated the street is 7 feet narrower on north than south but never explained how that might affect the boundary lines because he was doing a "route survey" not a "property line survey" and he was concerned with the path of the roadway, not the location of property lines. A route survey begins with a center-line of a road as a point of reference. Mr. James never surveyed the actual property line. TR. p. 174, Ln. 12-25.

On cross examination Mr. James testified that he had never had an opportunity to survey the property (Exhibit 13) deeded to Plaintiff by Douglas and Colleen Gordon. See TR. p. 184 at Ln. 4-13. Mr. James also could not delineate the property lines of Plaintiff's property either before or after the deed of Septemeber 5, 1979 (after the incident referred to in this lawsuit). TR. p. 185-186.

The critical point of Mr. James testimony is that he never surveyed the property lines. In fact, he testified he never did a property line survey, but only did a route survey. The route survey was to measure the right of way and uses the center line of the roadway as a reference point. He never had occasion to do an actual survey of property lines. TR. at p.p. 174-175.

The problem with using the testimony of Mr. James as a basis for finding #3 is two fold. First no boundary survey was done to establish property lines. Second, Mr. James' measurements for the route

survey were from the center of Skyline Drive. Not only do we not know where that was with respect to property lines, but also nothing was established by the Plaintiff as to where the actual property line was. Mr. James testified there were opinion differences on the width of the right of way. His measurements were to establish the route of Skyline Drive, not to establish property lines. He staked the center of the road and made measurements. TR. p. 179. Mr. James stated the curb line was 12 feet north of the property line, however, as he testified this was based upon measurements from the center line of a route survey. Mr. James never performed an actual metes and bounds property survey to determine the property line of the property owned by Plaintiff. TR. at p. 184, Ln. 4-14. Although Mr. James' measurements were from the centerline of a route survey, there is no evidence that the center of the road was in fact the center of the property granted to Tooele as a right of way. If in fact the centerline of Skyline Drive was the center of the granted right of way, then the property line could not have been 12 feet south of the curb back. The testimony was that back of curb to back of curb, the roadway was 49 feet. TR. p. 80, Ln. 17-20. Half of that (i.e. centerline to back of curb on the south side) would be 24.5 feet. The right of way was 80 feet. Half of that (centerline to property line) would be 40 feet. Thus, back of curb to property line on the south (assuming that the center of the road was the center of the right of way) would be 15.5 feet. (40 feet - 24.5 feet) The problem with even this is that we have no testimony that the center of Skyline Drive is the same location as the center of the right of way. This is the reason a route survey is useless in this case. It does not delineate the actual

property lines. Absent an actual property line survey, no finding can be made as to the actual property line. Clearly, there was no basis for a finding that there was a twelve foot right of way south of the curb.

Finding #5 states "The Court futher finds that two one-half dump truck loads of boulders totaling 8 1/2 tons each were taken from the Plaintiff's property and were converted to the Defendant's own use and benefit ..." Defendants objected to the Court's finding that the rocks were taken from Plaintiffs property and to the finding of the amount of rocks taken.

First with regard to the finding that the rocks were taken from Plaintiff's property. In the Case of Barbizon of Utah, Inc. v. General Oil Co., 24 Utah 2d 321, 471 P.2d 148 (1970) this Honorable Court stated that in a case where the boundary to property is in dispute, the Plaintiff must succeed by virtue of his own proof and not by the lack of proof on the part of Defendant. In the present case, for the Plaintiff to succeed, he must prove that the rocks taken came from his property. A situation very similar to the present case arose in Smith v. Moore Mill and Lumber Co., 536 P.2d 1238 (Ore. 1975). In this case, the Plaintiff claimed that Defendant had removed timber from lands owned by the Plaintiff. The Oregon Supreme Court stated that in a situation where one party comes onto land to which a second party claims to be the owner and removes timber (or rocks), then:

"The resolution of (the) conflict depends upon the location of the boundary ..." 536 P.2d at 1240.

The Oregon Court stated that in order to make the determination it would be necessary to complete a proper survey so that it could be determined how the spot where the trees (or other property) were removed related to the actual boundaries of the property claimed by the parties. In the Smith case, there had been disputed evidence of an actual boundary survey, but the Court stated:

We do not need to determine that Cunniff's (the Defendants) survey was correct; we need only find that the Plaintiffs did not establish the boundary claimed by them to be the true line because in absence of such proof, they failed to make their case. Id.

This case stands for the proposition that in a case such as this, where Plaintiffs claim rocks were removed from their property, to prevail, Plaintiffs must establish by a preponderance of the evidence, and by an actual survey, that the spot from which the rocks were taken is located on property which they own. Another case holding the same way is Knott Coal Corporation v. Kelly, 417 S.W.2d 253 (Ken.1967). In Kelly, the Kentucky Supreme Court held that absent a proper survey showing that the property allegedly removed actually came from property which the survey showed belonged to Plaintiff, the Plaintiff could not support a Judgment against the Defendant Coal Company for removal of coal. The Court held the burden is on Plaintiff to show by proper evidence (which the Court held to be a properly conducted survey) that they in fact owned the land from which the coal was removed. The Court stated:

It is fundamental that the burden rested upon the appellee (as Plaintiffs below) to affirmatively establish their own title; they could not rely upon the weakness of appellant's title. The burden was on the Plaintiffs to locate the boundaries and to show that the land in dispute was embraced within the lines claimed by them. 417 S.W.2d at 256 (emphasis added).

The Court further held that the construction is to prevail which is most against the party claiming under an uncertain survey. In the present case we have not an "uncertain survey" but no survey at all. Dale James, the only licensed surveyer to testify stated he had never done a property line survey. TR. at p. 174, Ln. 16-22; 184 at Ln. 13. Mr. James certainly never testified that any particular spot, from which it was claimed rocks were taken, was located on property owned by Plaintiff. This determination is critical to Plaintiff's case. The Plaintiff has totally failed to establish any evidence to show that any spot from which rocks were taken belonged to Plaintiffs.

In the case of State of Florida, Board of Trustees v. Charley Toppino & Sons, Inc., 514 F.2d 700 (5th Cir., 1975), the Fifth Circuit Court of appeals was called upon to decide an appeal which had the same issue as is before the Court in this case. The case involved a claim by Plaintiffs that Defendant had entered upon land owned by the Plaintiff and removed soil (as opposed to rocks as in our case) from Plaintiffs property. In holding that the Trial Court had properly granted Defendants Motion to Dismiss for failure to meet the burden of proof (the motion which was denied by the Trial Court in this case), the appellate Court noted:

The determination of the first issue, ownership, depends upon whether the excavation of the yacht turning basin took place on the property of Appellant. This in turn depends upon the establishment of a boundary line. 514 F.2d at 702.

Thus the Circuic Court determined that in order for the Plaintiff to prevail, the actual boundary line must be established by competent evidence. The Court stated:

Florida law places the burden of proof upon the one claiming the existance of the boundary line to establish its exact location. A claimant does not carry his burden moreover when his proof consists of inaccurate or inconclusive exhibits and testimony. 514 F.2d at 702-03.

In the present case, there is no survey of the boundary lines of Plaintiff's property. There is no testimony or other competent evidence from which the Court could properly make a finding that rocks were taken from property of Plaintiff. The only evidence is Mr. Bevan's opinion (properly objected to by Defendants) as to the fact he thought rocks came from his property. There is no competent evidence saying (by survey or otherwise) that the spots (as shown in Exhibit 15 and 20) where rocks were taken were on property owned by Plaintiff.

It should be noted by the Court that in the Toppino case, supra, the Circuit Court determined that the proof of the boundary line was "inaccurate and inconclusive", notwithstanding the fact that there had been two official surveys made. In the present case, Plaintiffs either neglected or refused to conduct a boundary line survey, from which the Court could have properly made a determination regarding the spot where the rocks were taken. Mr. Bevan went to extreme lengths to maintain a physical, on site record of the place from which rocks were allegedly taken, even to the extent of painting some rocks a bright orange in the area. Having done so, it is astonishing that he did not follow through and seek to obtain a survey to show that the said spot was

on his property. His failure to do so indicates that either (1) he knew an actual survey would show he did not own the spot from which the rocks allegedly came; or (2) that he thought everything north of his "orange" rocks was city property.

The Plaintiff has totally and completely failed to meet the burden of proof necessary to establish a case against Defendants. There is no competent evidence in the case which would establish that the spots from which rocks were taken belonged to Plaintiffs. There is no survey of the property line. Hence, under the cases cited herein, the trial court had no proper basis for making a finding that Defendants removed rocks from property owned by Plaintiffs and the Trial Court should have granted Defendant's Motion to Dismiss made at the close of Plaintiff's case. TR. p. 218 at Ln. 9-13.

Second, with regard to the amount of rocks taken, it is the purest of speculations for the Court to make a finding that the Defendants took two loads of rock weighing 8 1/2 tons (17,000 lbs).

The only testimony we have in the case regarding how many rocks were taken is that the Plaintiff, Mr. Bevan, and Gus Buzianis. Mr. Bevan testified that on August 18, 1979 he came to the area in question and saw Gus Buzianis loading rocks into a dump truck. TR. at p.47. Mr. Bevan took a picture (Exhibit 20) that shows Mr. Buzianis loading rocks. TR. at p. 48. Mr. Bevan testified he did not know where the rocks in the truck came from. TR. p. 95-96. He did not know whether the rocks taken came from the trench or not. TR. p. 96 at Ln. 7-11. Mr. Bevan did not see where most of the rocks in the truck came from. TR. p.97 at Ln. 2-13. Mr. Bevan observed only one truck load of rocks being taken. TR. p. 97



at Ln. 22-25. Exhibit 20 clearly shows the area from which rocks are being removed. A careful look shows that the area covered by the purple X is being cleared of rocks. Exhibit 20 clearly shows the spot from which rocks are being loaded. To sum up Mr. Bevan's testimony he saw a few rocks loaded from the area of Exhibit 20 (not all the rocks in the truck) and only observed the one loading. Mr. Gus Buzianis testified he took three loads of rock. TR. p. 147-148. The first load was taken near the curb at the mark "L" in green ink in Exhibit 15. The second load was taken "further west and also in the street." (Exhibit 15, green mark "L2") TR. p. 147, Ln. 10-25. Thus the only testimony as to the first two trucks is that the rock came from the edge of the street, possibly inside as much as 10-12 feet. TR. p.p.148-149. Mr. Wilson, counsel for Plaintiffs, asked:

Did you ever load any rocks within say ten, twelve feet inside the curb line?

Mr. Robinson: I presume you are asking south.

The witness: I am trying to visualize ten or twelve feet.

Mr. Robinson: Excuse me, your honor. For purposes of the record may I clarify the question. Are you asking south of the curb line?

Q (By Mr. Wilson): Yes, south of the curb line. Did you ever have occasion to load rocks that were more than twelve feet south of the curb line?

A: It would be close. I am not sure without measuring.  
TR. at p. 148-149.

Then referring to Exhibit 20, Mr. Buzianis stated he was loading rocks (third load) "right here where you can see I have done it" (TR. p. 150, Ln. 16-17) (See Exhibit 20. purple X).

Mr. Buzianis testified that the rated capacity of the truck was 17,000 pounds. TR. p. 145 at Ln. 19. However, he stated that the size (weight) of the load being hauled depends on what you are hauling. TR. p. 145 at Ln. 13-14. The truck was loaded half full of rocks. TR. p. 152 at Ln. 20. The third load came from the area circled "L3" in green on Exhibit 15. TR. p. 148 at Ln. 8-9. Load three came from the edge of the street and somewhat inside. Id at Ln. 14-21.

There is absolutely no way from this evidence to reach a figure of the rocks taken, let alone whether or not any may have belonged to Plaintiff. We have no competent evidence as to the weight of a half truck load of large rocks. The truck had a rated capacity of 17,000 pounds. This figure tells the maximum load the truck should carry, not what it can carry. A truck full of feathers is not 17,000 pounds, neither would a truck full of lead bars weigh 17,000 pounds. There is absolutely no basis in the record from which the Court could make a finding as to the weight of the rocks taken, and since the only evidence of value introduced by Plaintiffs was based upon a per-pound value, there is no proper basis upon which damages could be awarded.

Finding of Fact #7 relates to the amount of damages (\$340) to be awarded to Plaintiffs. For the reasons set forth hereinabove, Defendants assert that the damage award is based entirely upon speculation as to the amount of rock removed from the site and there is no factual basis for such award.

The Conclusions of Law and Judgment are also defective, having been based upon the erroneous findings as set forth hereinabove. The

Court erred in denying Defendants Motion to Dismiss and in concluding that Defendants removed two one-half dump truck loads of rock totaling 17 tons from Plaintiffs property. Also the damage award is erroneous as the figures are not mathematically correct.

II. THE COURT ERRED IN REFUSING  
TO GRANT DEFENDANT'S MOTION TO DISMISS

At the close of Plaintiffs case, Defendants made a Motion to Dismiss for failure to establish a prima-facie case. TR. at 218, Ln. 8-12. This motion was argued to the Court at that time. TR. p. 218-245. The motion was based upon the failure of Plaintiffs to establish either that the rocks taken belonged to Plaintiffs, or that they were removed from property owned by Plaintiff.

The key issue in this case is whether the rocks removed by Gus Buzianis for Twin Peaks, Inc. belonged to Plaintiffs. To Prevail Plaintiffs must show they owned the rocks. Plaintiffs undertook to meet this burden by trying to prove the rocks taken, or some portion thereof, were removed from property owned by Plaintiffs. This ignores the proposition that rocks laying on Plaintiffs' property might not belong to Plaintiffs (which point will be addressed later), but for the sake of argument we will begin by assuming that rocks on Plaintiffs' property belong to Plaintiffs.

After Plaintiffs rested, Defendants argued that the burden was not met because there was no evidence in the case that any rocks were taken from land owned by Plaintiffs.

The Barbizon case, supra, holds that where boundary is disputed, Plaintiff must succeed by his own proof. Plaintiffs must show the rocks came from their property. They did not do so. Plaintiffs own case never at any point claimed any land closer than 12 feet south of the curb. Yet there is no evidence in the case that any rocks were taken more than 12 feet south of the curb. No competent evidence exists that would show the distance from the curb to the area of the purple X in Exhibit 20. Gus Buzianis said he loaded in the curb area. On direct examination he was asked if he took rocks from more than 12 feet south of the curb and he said "I am not sure without measuring". TR. p. 149 at Ln. 9. There are no proper measurements. The evidence certainly does not preponderate in favor of the proposition that rocks were taken more than 12 feet south of the curb.

The fatal flaw in Plaintiffs' case is the lack of a survey relating to the place where rocks were taken. The law is clear. One who claims that something was removed from their property must establish by survey that the particular piece of property from which the taking was carried out belonged to them. See State of Florida, Board of Trustees v. Charley Toppino & Sons, Inc., supra; Smith v. Moore Mill and Lumber Co., supra; Knott Coal Corporation v. Kelly, supra.

Mr. Eevan, over objection of Defendants (TR. p. 18-21) testified to what he thought he owned. Mr. James, the surveyer, did a route survey and made some measurements from the center line of Skyline Drive. Mr. James did not, however, ever do a survey of the property owned by Plaintiffs. TR. p. 174 at 16-22. No survey was ever done to

show who owned the spots shown by Exhibit 15 and 20 where rocks were taken. The critical point is that Plaintiffs are proceeding backwards. The only surveyer in the case testified that the only measurements he made related to city property. There was no testimony that in fact the street was on all fours within the area granted by the deed from the Gordons to the City (Exhibit 25). In Knott Coal Corporation v. Kelly, supra, the Kentucky Court held that Plaintiff cannot prevail in this kind of case by the weakness in Defendants' case, but must prove by a competent survey that the land from which (property) was taken belonged to them. See 417 S.W.2d Ut 256. In the evidence presented, there has been testimony regarding what Tooele owns, but no testimony as to a survey of the property Plaintiff owns. Under the cases cited, Plaintiff can only succeed by showing both (1) the place from which the rocks were removed, and (2) by survey that the place from which the rocks were removed was owned by Plaintiff. The Plaintiffs totally failed in both aspects due to lack of a survey of the spot from which rocks were removed.

Even assuming they had met the burden of showing by survey that they owned the property from which rocks were removed, there is ample evidence that Mr. Bevin had rocks pushed up onto his property, from the city's waterline excavation, and there is no evidence Plaintiffs owned the land where the water line excavation was made. Hence, rocks owned by the city may have been pushed onto his land and no way existed to distinguish them.

Therefore, having totally failed to meet the burden of showing that rocks were removed from land owned by Plaintiffs, Plaintiffs' case should have been dismissed and the Court erred in failing to grant Defendants' Motion to Dismiss.

III. THERE WAS NO EVIDENCE IN THE CASE  
FROM WHICH THE COURT COULD DETERMINE THAT  
DEFENDANTS CONVERTED PROPERTY BELONGING TO PLAINTIFFS.

To prevail, Plaintiffs have the burden of showing that Defendants took property belonging to Plaintiffs and converted it to their own use. The boundary question has been discussed and Defendants assert that absent a showing that rocks were taken from Plaintiffs property (which must be established by a competent survey) the Plaintiffs have no other means of showing ownership of the rocks.

Defendants respectfully submit that Plaintiffs failed to show that rocks were taken from their property, but even if they had met this burden, they have failed to show title to the rocks.

The testimony is clear that a large number of rocks were taken out of Tooele city's excavation for the water line. TR p. 84-86. Mr. Bevan testified that he hired Mr. Key who moved a number of boulders from the city property onto his property. TR.p. 136, Ln. 2-10. Mr. Bevan further admitted that the rocks taken could have been "city rocks" that had been pushed onto his property (assuming the rocks were taken from his property) TR. p. 136-38. Mr. Bevan had no knowledge whether the rocks taken were rocks pushed from the city property onto his property or not. Absent some testimony that the rocks taken actually belonged to Plaintiffs, their case must fail. There is no basis in the record for finding that Plaintiffs owned the rocks removed by Defendants, even if Plaintiffs had been able to prove they owned the land from which the rocks were removed.

IV. THERE IS NO EVIDENCE IN THE CASE  
UPON WHICH THE COURT COULD  
REASONABLY BASE ITS AWARD OF DAMAGES.

Assuming, for the sake of argument, that Plaintiffs proved that "some" rocks were taken from their property (which Defendants deny), there is no basis for determining damages. The evidence is at best inconclusive. Three dump truck loads (half full) were removed. The uncontroverted testimony is that two of them were not taken from Plaintiff's property. The rocks were taken from the curbside, and south of but next to the curb. (see Exhibit 15, 20) Mr. Bevan saw two scoops of rocks put on the truck (part of one load). It is the purest of speculation that any of the other rock came from Plaintiffs land. Gus Buzianis said he took the rocks "right near the curb", TR. p. 147, Ln. 14, and "further west. and also in the street" the third load was in the "X" area of Exhibit 20. Mr. Bevan testified there were rocks out 15 feet onto the pavement. TR. p. 94 at Ln. 9-18.

The Court bases its damage award on weight, and yet there is no evidence anywhere in the record as to weight of the rocks taken. There is testimony that the truck had a capacity of 17,000 pounds, but no testimony as to the weight of the rocks taken. Therefore, it is pure speculation to reach the award given by the Court, and it should not be allowed to stand.

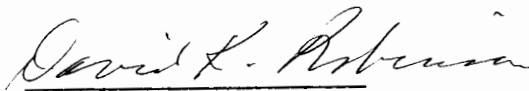
CONCLUSION

WHEREFORE, premises considered, Defendants respectfully assert that there was no evidence in the case from which the award of the Court could be justified, and this court should reverse the Judgment of the Trial Court and remand the case to the Trial Court with instructions that the case be dismissed with prejudice and that costs be awarded to Defendants-Appellants.

Respectfully submitted this 2 day of December, 1981.



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