

2003

# Loueda Allen Jensen v. Utah Labor Commission : Reply Brief

Utah Court of Appeals

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**IN THE COURT OF APPEALS OF THE STATE OF UTAH**

**LOUEDA ALLEN JENSEN,**

**Charging  
Party/Petitioner/Appellant,**

**v.**

**UTAH LABOR COMMISSION,**

**Respondent/Appellee.**

**REPLY BRIEF OF APPELLANT**

**Court Of Appeals No: 20030597-CA**

**Agency Decision No. 8-00-0684**

**PETITION FOR REVIEW**

**LABOR COMMISSION, ADJUDICATION DIVISION**

**JUDGE SHARON J. EBLEN,**

**AND LABOR COMMISSIONER R. LEE ELLERSTON**

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**UTAH APPELLATE COURTS**

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**MAR 10 2004**

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### **Utah Statutes**

U.C.A. §63-46b-16(4) & (4)(g)

(4) The appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following:

...

(g) the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court.

### **Utah Case Authority**

*Grass Drilling Co. v. Board of Review*, 776 P.2d 63, 67 (Utah Ct. App. 1989)

## ARGUMENT

### **1. There is no issue of trial *de novo*.**

The Appellee goes on at length regarding there being no right to a *de novo* hearing. This entire argument is a red herring apparently designed to confuse the Court. Appellant's Motion for Review states: "This Motion is based on the fact that the evidence before the Administrative Law Judge does not support the Findings, and that at least one of the findings is clearly erroneous." The plain language of the Motion for Review (Addendum, Document No. 9) indicates that the evidence does not support the "findings" (plural), then proceeds to address in detail one of those. Giving a detailed rebuttal of one fact does not excuse the Labor Commission from considering the adequacy of evidence to support all of the findings. Such consideration is not a *de novo* hearing.

### **2. Appellee is attempting to require Appellant to prove a negative, when the Appellant's assignment or error is entirely consistent with the applicable statute.**

When Appellee asserts that Appellant has failed to "marshal the facts," this is nothing more than a bid to require her to prove a negative. The essence of the Appellant's claim that the evidence does not support the findings is that there is a lack of substantial evidence. This Court's review is conducted pursuant to U.C.A. §63-46b-16(4)(g), which states that:

(4) The appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially

prejudiced by any of the following:

...

(g) the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court.

U.C.A. §63-46b-16(4) & (4)(g)

Thus, the Appellant's assignment of error is not only proper, but tracks exactly the statute dealing with relief from the actions of an administrative agency. That this statute has real meaning is evident from *Grass Drilling Co. v. Board of Review*, 776 P.2d 63 (Utah Ct. App. 1989). "This 'substantial evidence test' grants appellate courts greater latitude in reviewing the record than was previously granted under the Utah Employment Security Act's 'any evidence of substance' test." *Id.* at pg. 67.

**3. Although Appellee is correct in stating that the statute keeps the unemployment decision from being binding, it may, and should have been, considered by the Labor Commission and the Administrative Law Judge.**

The citation by Appellee indicates what Appellant had missed, that the decision in the unemployment case is not binding. However, it is a part of the Agency Record, and is certainly highly relevant on the issue of whether there was a discharge for cause. At a minimum, it should have been considered by the ALJ in rendering her decision, though she could, admittedly, have chosen to find to the contrary. However, the record is devoid of any indication that the ALJ so much as *looked at* the reasoned determination of a coordinate agency. There is special significance in this because that decision was made on an appeal which reversed the original determination. Common sense indicates that

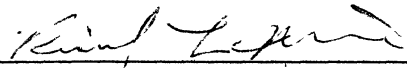
when another agency reversed a initial determination to make a ruling in favor of Appellant, that determination should be carefully considered before a contrary determination is made. That was not done in this case. This suggests strongly that the Administrative Law Judge simply rubber stamped the city's decision without considering all of the evidence in the record.

The Administrative Law Judge also failed to consider the inconsistency of Fountain Green City's actions in this matter, first denying that they had terminated Appellant at all, then changing their position to a claim that she was not a full-time employee, then claiming that she was fired for just cause.

### **CONCLUSION**

The "whole record before the Court" indicates that the City of Fountain Green has repeatedly changed their position to try to find something to excuse their actions. Even the Administrative Law Judge found a *prima facie* case. The supposedly non-discriminatory reason for the firing is not supported by "substantial evidence when viewed in light of the whole record before the court." This is evident from the Labor Commission's reversal on the full-time employee issue, the failure to so much as consider an appeal decision in favor of Appellant on the termination for cause issue, and the city's constantly changing legal positions throughout this action. Judgment should be entered in her favor, with a subsequent hearing on damages.

DATED this 5th day of March, 2004

  
Richard L. Musick  
Attorney for Appellant

***CERTIFICATE OF SERVICE***

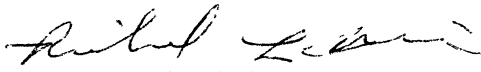
The undersigned does hereby certify that on March 5, 2004, I caused to be served a true and correct copy of the foregoing document upon the persons named below, at the addresses set out below their names, either by mailing, hand delivery, Federal Express, in a properly addressed envelope, postage prepaid, or by telecopying, as indicated below.

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\_\_\_\_\_



FOXTAIL PROPERTIES, LLC )  
 )  
 )  
 Plaintiff/Appellant, )  
 )  
 vs. )  
 )  
 REECE GOODRICH, TRUSTEE; )  
 SHIRLEY ANN GOODRICH, TRUSTEE; )  
 REECE GOODRICH, )  
 SHIRLEY ANN GOODRICH; ) CASE NO. 20031050 - CA  
 BOYD J. BROWN; )  
 MANUELA H. BROWN; )  
 JEROME H. MOONEY; )  
 BONNIE S. MOONEY; AND )  
 REMA, INC., )  
 )  
 Defendants/Appellees.

Appeal from Order Granting Defendants' Motion for Summary Judgment and dismissing Plaintiff's Complaint, entered on December 9, 2003, in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Sheila K. McCleve, Judge, presiding.

Attorney for Plaintiff/Appellant

Attorney for Defendants/Appellees

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## **ARGUMENT**

Throughout their Appellant's Brief, Defendants once again attempt to define the "act of trespass" as the installation of the utilities in the 1970s. If this were indeed the "act of trespass" of which Foxtail complains, Defendants would be correct in their assertion that Foxtail could not maintain a cause of action for trespass both because Foxtail did not have "actual or constructive possession of the land" at that time, and because Foxtail's claim would be barred by the statute of limitations. However, Foxtail has repeatedly explained that its cause of action is not based on the installation of the utilities, but on (i) Defendants' failure to remove the utilities, and (ii) Defendants' continued use of the utilities. Moreover, Foxtail has explained why both of these "acts of trespass" are actionable under both Utah case law and under the common law of trespass, as reflected in the Restatement (Second) of Torts, and why these "acts of trespass" are not barred by the statute of limitations. Similarly, Defendants have failed to convincingly argue that this Court should dispense with the usual rule requiring absolute unity of title to establish an easement by implication. Finally, because Foxtail has not had an opportunity to present evidence relevant to its request for a mandatory injunction, this Court should not affirm the District Court's judgment on the

alternative ground that is not entitled to such relief.

POINT I. FOXTAIL HAS STATED A CAUSE OF ACTION  
FOR TRESPASS.

Defendants contend that their refusal to remove the utilities cannot constitute a trespass because (i) the installation of the utilities in the 1970s was not "wrongful," (ii) Defendants do not have a duty to remove the utilities, and (iii) Defendants' continued use of the utilities does not, "for all practical purposes" cause water to flow through Foxtail's property. However, it is primarily Defendants' failure to properly identify the "act of trespass," not a correct legal analysis, that leads Defendants to this conclusion.

The "acts of trespass" of which Foxtail complains are (i) Defendants' failure to remove the utilities, and (ii) Defendants' continued use of the utilities. Foxtail has not complained that the installation of the utilities in the 1970s was wrongful and has not sought redress on that basis. Therefore, Defendants' contention that Foxtail cannot maintain its cause of action based on the installation of the utilities, while true, is nothing more than a diversion and does not help this Court in its analysis.

Similarly, Defendants' argue that their refusal to remove the utilities is not a trespass because they are under no "duty" to do so. See Restatement (Second) of Torts § 158 (1965) (Trespass occurs when one "fails to remove from

the land a thing which he is under a duty to remove." In making this argument, Defendants' again look to the original installation of the utilities as the only possible basis for such a duty, stating, "The duty could only arise if the utilities were wrongfully placed upon Foxtail's property." Appellee's Brief at 14. Although Defendants are correct that the installation of the utilities was not wrongful, Defendants' duty to remove them arises not as a result of the installation, but as a result of their failure to remove the utilities after Foxtail revoked the consent given by Foxtail's predecessors in interest to maintain the utilities in their present location.

Section 160 of Restatement (Second) of Torts provides:

§ 160. Failure to Remove Thing Placed on Land  
Pursuant to License or Other Privilege

A trespass may be committed by the continued presence on the land of a structure, chattel, or other thing which the actor or his predecessor in legal interest has placed on the land

(a) with the consent of the person then in possession of the land, if the actor fails to remove it after the consent has been effectively terminated.

Restatement (Second) of Torts § 160 (1965). As explained in Appellant's Brief, pp. 19-21, Defendants had permission to install and use the utilities in their present location at least until the year 2000. When that consent was revoked, a duty arose on the part of Defendants to remove the utilities.

Defendants also ignore the fact that their continued use of the utilities gives rise to a duty to remove them. Foxtail has offered to remove the utilities at its own expense if Defendants would stop using the utilities. In the hearing on Defendants' Motion for Summary Judgment, Foxtail's counsel stated:

Foxtail would be happy to remove the pipes and the manhole cover at its own expense, as long as the defendant was ordered to stop using that, because we can't do it -- Foxtail can't do that, it's public policy reasons, unless they stop using it first.

R. 211 (p. 41). However, Defendants continue to use the utilities and refuse to allow Foxtail to remove them, even at its own expense. Unless Defendants are willing to abandon the utilities entirely and allow Foxtail to remove the utilities itself, they have a duty to remove them. They cannot have it both ways.

Defendants cite U.P.C., Inc. v. R.O.A. Gen'l, Inc., 990 P.2d 945 (Utah Ct. App. 1999) in support of their position that Foxtail cannot maintain an action for trespass because Defendants have no duty to remove the utilities. That case, however, is distinguishable. In U.P.C., the defendant refused to remove a billboard sign foundation from the plaintiff's land upon the expiration of the defendant's lease. The lease was silent as to who, if anyone, had the obligation to remove the foundation. The Court held that in such a case, where the respective duties of contracting



parties are reflected in a written agreement, the Court would not look outside the contract itself to impose an additional duty on one of the parties. The Court stated, "'a court may not make a better contract for the parties than they have made for themselves.'" Id. at 954 (quoting Ted R. Brown & Assocs., Inc. v. Carnes Corp., 753 P.2d 964, 970 (Utah Ct. App. 1988)). In the instant case, we have no contract, written or otherwise, relating to the installation, use, or removal of the utilities. Because U.P.C. is a case of contract interpretation and we have no contract in this case, U.P.C.'s holding is not applicable.

Finally, Defendants argue that their continued use of the utilities does not constitute a "wrongful entry" of water onto or beneath the surface of Foxtail's property because "[f]or all practical purposes, the utilities contain a permanent column of water, which has been present since the early 1970s." Appellee's Brief at 14. This argument ignores the simple and undisputed facts that Defendants have continually used the utilities since they were installed and that the water in the pipes today is not the same water that was in the pipes thirty years ago. It cannot reasonably be disputed that, as long as Defendants continue to use the utilities, water continues to flow through them, entering Foxtail's property as it does so.

Defendants are also incorrect when they state that

their continued use of the utilities does "not cause Foxtail any deprivation of its property that is separate and distinct from the mere presence of the utilities themselves." Id. As explained above, the only reason that Foxtail cannot remove the utilities itself is because Defendants continue to use them. *See supra* p. 4. Moreover, as long as water is flowing through the utilities on Foxtail's property, Foxtail risks a leak resulting in damage to Foxtail's building or erosion of its soil. These risks would be eliminated if Defendants stopped using the utilities.

POINT II. FOXTAIL'S CLAIM IS NOT BARRED BY THE  
STATUTE OF LIMITATIONS.

Once again, Defendants argue that *the installation of the utilities*, if a trespass at all, must be characterized as a permanent trespass which accrued for statute-of-limitation purposes at the time the utilities were installed in the 1970s. Once again, Defendants are correct in their characterization of this "act of trespass" as a permanent trespass and in their conclusion that any claim based only on this "act of trespass" would be barred by the statute of limitations. Once again, however, Defendants ignore the two "acts of trespass" identified by Foxtail as the bases for its cause of action: i) Defendants' failure to remove the utilities; and (ii) Defendants' continued use of the utilities - both of which should be characterized as

continuing trespasses.

Defendants argue first that the installation of the utilities is analogous to the dumping of debris in Breiggar Properties, L.C. v. H.E. Davis & Sons, Inc., 52 P.3d 1133 (Utah 2002), and that because the dumping of debris was characterized as a permanent trespass, so should the installation of the utilities. However, the dumping of debris was the "act of trespass" in Breiggar whereas the installation of the utilities is not the "act of trespass" in this case. When the "act of trespass" is properly identified as either Defendants' failure to remove the utilities or as Defendants' continued use of the utilities it becomes clear that the trespass is continuing in nature.

The Court in Breiggar recognized that a continuing trespass is characterized by "multiple acts of trespass [giving rise to] multiple causes of action." Id. at 1135. As explained thoroughly in Appellant's Brief, pp. 23-27, "[e]very moment that Defendants fail to [remove their utilities] gives rise to a new cause of action." Similarly, as long as Defendants' continue to use the utilities, a new cause of action accrues every time Defendants use their water.

Defendants cite two California cases and one Pennsylvania case in support of their argument that an encroachment effecting a permanent change in the condition

of the land is a permanent trespass. See Appellee's Brief at 18-20 (citing Castelletto v. Bendon, 13 Cal. Rptr. 907 (Cal. App. 1961); Bertram v. Orlando, 227 P.2d 894 (Cal. App. 1951); Sustrik v. Jones & Laughlin Steel Corp., 197 A.2d 44 (Penn. 1964)). While those cases may reflect the law in those jurisdictions, they certainly do not reflect the law in Utah or the position taken by the Restatement (Second) of Torts. In Stevensen v. Goodson, 924 P.2d 339, 348 (Utah 1996), the Utah Supreme Court recognized that, "[a] cause of action based upon encroachment is of the nature of either a continuing trespass or a nuisance." Moreover, a comment to Section 160 of the Restatement, specifically states:

e. *Continuing trespass.* The intentional violation of such a duty of removal [arising out of the revocation of consent] constitutes a continuing trespass for the entire time during which the actor is under a duty to remove the thing, and gives to the possessor of the land a series of independent causes of action for trespass.

Restatement (Second) of Torts § 160 cmt. e (1965). See also, 2 C.J.S. *Adjoining Landowners* § 51 (2003) ("The maintenance of an encroachment on the land may be a continuing trespass, a nuisance, or both."). Therefore, despite Defendants' argument to the contrary, the clear weight of authority and the position taken by the Utah Supreme Court is that an encroachment such as the presence

of Defendants' utilities on Foxtail's property constitutes a continuing tort.

Finally, Defendants argue that Hoary v. U.S., 64 P.3d 214 (Colo. 2003) (en banc) stands for the proposition that the concept of continuing trespass does not apply whenever the invasion of property rights is socially beneficial. This is not what Hoary says. The Court in Hoary first explains the concepts of continuing trespass and continuing nuisance and cites numerous cases indicating that they remain viable concepts in Colorado. See id. at 218-19 (citing Steiger v. Burroughs, 878 P.2d 131, 136 (Colo. App. 1994) (defendant's house remaining on plaintiff's property constituted continuing trespass); Cobai v. Young, 679 P.2d 121, 123-24 (Colo. App. 1984) (snow sliding from defendant's roof to plaintiff's house constituted continuing trespass); Docheff v. City of Broomfield, 623 P.2d 69, 71 (Colo. App. 1980) (defendant's storm drainage system flooding plaintiff's adjacent property constituted continuing trespass). The Court then goes on to recognize an exception to the concept of continuing trespass which had been established by Colorado courts in the early part of last century. This exception specifically applies to irrigation ditches and railway lines because they "represented a class of enterprises 'so vital to the future development of our state.'" Id. at 219 (quoting Middelkamp v. Bessemer

Irrigating Ditch Co., 103 P. 280, 284 (Colo. 1909)).

Ultimately, the Court in Hoary declined the Defendants' invitation to extend this exception to the trespass at issue in that case. Hoary at 221-22. In short, Hoary does not support the Defendants' contention that any socially beneficial property invasion must be characterized as a permanent trespass. Rather, Hoary stands for the proposition that "[f]or continuing intrusions - either by way of trespass or nuisance - each repetition or continuance amounts to another wrong, giving rise to a new cause of action" unless the intrusion is an irrigation ditch or a railway line. Id. at 218-220.

POINT III. DEFENDANTS DO NOT HAVE AN EASEMENT BY IMPLICATION.

Defendants acknowledge the usual rule that an easement by implication requires absolute unity of title. However, they ask this Court to carve out an exception to this rule under the facts of this case. See Appellee's Brief at 21. In short, Defendants argue that because Foxtail was aware of the location and use of the utilities at the time it purchased the property, the element requiring absolute unity of title should be eased to require only partial unity in this case. However, Defendants do not cite any case in which any court from any jurisdiction has ever carved out the exception they seek. Instead, they point to some general language in Butler v. Lee, 774 P.2d 1150 (Utah Ct.

App. 1989) in support of their argument and then they misapply that language to the facts of this case. Moreover, Defendants utterly fail to address the rationale behind the unity of title requirement and fail to explain why that rationale should be set aside here.

In Butler, this Court explained that an easement by implication arises "'as an inference of the intention of the parties to a conveyance,'" rather than out of the express language of the conveyance. Id. at 1153 (quoting Adamson v. Brockbank, 185 P.2d 264, 270 (1947)). The Court spelled out the specific elements of such an easement and held that when these elements are present, it is presumed that "the parties contracted with a view to the condition of the property as it actually was at the time of the transaction." Id. at 1152-53.

Defendants rely upon this language in arguing that because Foxtail knew about the utilities at the time it purchased its property, only partial unity of title should be required. However, Defendants' reliance upon this language is misplaced and its argument is illogical. First, the "transaction" referred to in Butler is the transaction in which the unity of title was severed - not the transaction in which the present owner purchased its property. Second, there is no logical connection between Foxtail's purchase and the creation of an easement by

implication. An easement by implication is created at the time unity of title is severed. A subsequent transaction cannot cause an easement by implication to be created or defeated. Defendants' argument is simply illogical.

Moreover, Defendants have not countered Foxtail's argument in its Appellant's Brief at 29-31 that the absolute unity of title requirement is supported by a strong policy rationale. This policy was summarized in Farley v. Howard, 70 N.Y.S. 51, aff'd 65 NE 1116 (App. Div. 1901) as follows:

[The] rule [requiring absolute unity of title] necessarily involves the proposition that the man creating the easement is the absolute owner of both lots, and has, therefore, the right to put upon either any incumbrance he likes. Quite clearly the rule fails in this case. Howard was the absolute owner of 32 only. As to 34 he owned but a one-half interest. While he could do what he pleased with his undivided one-half interest in that lot, he could not impose upon Dumond's one-half interest any burden whatever.

Id. at 53. Similarly, the common owners of the Victoria Canyon and Elizabeth House properties at the time of development collectively owned only a one-half interest in the Elizabeth House property. The other one-half interest was owned by Elizabeth Drinkhaus, who had no ownership interest at all in the Victoria Canyon property. R. 120, 197. Absent an explicit agreement to the contrary (of which there is no evidence in the record), those common owners could not impose any burden whatsoever on Drinkhaus' interest in the Elizabeth House.



In sum, Defendants have failed to demonstrate why this Court should deviate from its rule that an easement will not be upheld unless "the clear weight of the evidence supports each of the elements necessary to constitute an easement by implication." Butler at 1152.

POINT IV. DEFENDANTS' ARGUMENT THAT FOXTAIL IS NOT ENTITLED TO INJUNCTIVE RELIEF IS PREMATURE AND THEIR CLAIM THAT FOXTAIL IS NOT ENTITLED TO DAMAGES IS INCORRECT.

Defendants contend that the District Court's judgment should be affirmed because Foxtail is not entitled to the injunctive relief it requested in its Complaint. See Appellee's Brief at 26-29. However, because Foxtail has not had an opportunity to present evidence in support of its prayer for injunctive relief nor has the District Court had an opportunity to evaluate such evidence, Defendants' argument is premature.

Trial courts have discretion in determining whether to grant injunctive relief or award damages to an aggrieved party. Englert v. Zane, 848 P.2d 165, 170 (Utah Ct. App. 1993). Utah courts follow a "balance of injury" test to determine which remedy to award. Id.

Under that test, an equity court may exercise its discretion not to grant injunctive relief when the plaintiff is not irreparably harmed by the violation, the violation was innocent, defendants' cost of removal would be disproportionate and oppressive compared to the benefits plaintiffs would derive from it, and plaintiffs can be compensated by damages.

Id. at 170-71 (quoting Crimmons v. Simonds, 636 P.2d 478, 480 (Utah 1981)). In order to properly apply this test, trial courts must consider evidence presented by the parties relevant to the factors set forth in the test. See id. at 171; See also Hatanaka v. Struhs, 738 P.2d 1052, 1054 (Utah Ct. App. 1987). "Where a court's ruling on a motion for an injunction is based on its consideration of the evidence presented in light of relevant legal factors, the grant or denial of injunctive relief rests within the discretion of the trial court." Hunsaker v. Kersh, 991 P.2d 67, 69 (Utah 1999).

In the instant case, Foxtail has not had an opportunity to present any evidence in support of its request for an injunction. Before a court can rule on the issuance of an injunction, Foxtail must have an opportunity to present evidence of the harm it will suffer if the Defendants are allowed to continue to use the utilities in their present location. Specifically, Foxtail would want to present evidence of (i) the risk of damage to Foxtail's building or land caused by a potential water leak; (ii) the impact the utilities have on the rental value of Foxtail's apartments (an unsightly manhole cover now sits in the middle of Foxtail's lawn); and (iii) the impact the utilities have on the resale value of Foxtail's property. Moreover, Defendants must present evidence of the harm and

inconvenience they would suffer if required to move the utilities. None of this evidence was presented to the District Court and the District Court never made any decision with respect to Foxtail's request for an injunction.

If this Court does evaluate Foxtail's request for an injunction, even in the absence of the necessary evidence in the record, Foxtail believes it would be entitled to an injunction under the rationale of Hatanaka, 738 P.2d 1052. In that case, the plaintiff brought suit against his neighbor seeking a mandatory injunction requiring the neighbor to remove a fence, dirt, and debris the neighbor had placed on the plaintiff's property but in an area where the location of the property line was in dispute. After a thorough consideration of the evidence presented, the trial court delineated the boundary and concluded that the neighbor was "trespassing on plaintiff's property when [he] constructed the fence and deposited the dirt and debris." Id. at 1054. The trial court went on to grant the injunction ordering the neighbor to remove the fence, dirt, and debris, and also permanently enjoining the neighbor from doing similar future acts on the plaintiff's property. Id. On appeal, this Court upheld the injunction, even though it specifically noted that the neighbor's conduct was not willful or malicious. Id. In other words, even an innocent

trespasser (such as Defendants in the instant case) can be subjected to the burden of injunctive relief, as Foxtail has requested.

Finally, Defendants contend that Foxtail would not be entitled to compensatory damages caused by the alleged trespass. First, Defendants fail to recognize that the District Court could award damages even though Foxtail did not specifically request an award of damages in its Complaint. Rule 54(c)(1) of the Utah Rules of Civil Procedure provides, in relevant part:

Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, *even if the party has not demanded such relief in his pleadings.*

Utah R. Civ. P. 54(c)(1) (emphasis added).


Second, Defendants are not correct when they state that there is "no basis for an award of money damages." Appellee's Brief at 26. One measure of damages for trespass is the diminution in value of the property caused by the encroachment. Walker Drug Co., Inc. v. La Sal Oil Co., 972 P.2d 1238, 1244 (Utah 1998). Of course, Foxtail would have to present evidence, such as the expert testimony of an commercial property appraiser, to support its claim that its property is worth less with the utilities and manhole cover than it would be if they were removed. However, Foxtail has not had an opportunity to present such evidence yet.

Another possible measure of damages is the loss of rental value of Foxtail's apartments caused by the presence of the utilities on Foxtail's property. Although this type of loss might be difficult to measure, Foxtail should be given an opportunity to present the necessary evidence.<sup>1</sup>

#### CONCLUSION

For all the foregoing reasons, the District Court's decision should be reversed and this case should be remanded for further consideration of Foxtail's claim consistent with the positions set forth in Foxtail's briefs.

SUBMITTED this April 22, 2004.

  
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David S. Kottler  
Attorney for Plaintiff/Appellant

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<sup>1</sup> As an aside, the difficulty in ascertaining damages provides an additional reason for the trial court to issue the requested injunction. See Strawberry Elec. Serv. Dist. v. Spanish Fork, 918 P.2d 870, 881 (Utah 1996) (injunction is appropriate where "[m]onetary damages would be difficult and perhaps impossible to ascertain, and [the business] would be forced to bring continuing and successive lawsuits for damages."); see also Hunsaker v. Kersh, 991 P.2d 67, 70 (Utah Ct. App. 1999) ("Loss of business and goodwill may constitute irreparable harm susceptible to injunction.").

CERTIFICATE OF DELIVERY

I, DAVID S. KOTTLER, hereby certify that I have personally delivered eight copies of the foregoing to the Utah Court of Appeals, 450 South State Street, 5<sup>th</sup> Floor, P.O. Box 140230, Salt Lake City, Utah, 84114-0230, and two copies to the office J. Bruce Reading and William G. Wilson, SCALLEY & READING, P.C., 50 South Main Street, Suite 950, P.O. Box 11429, Salt Lake City, Utah 84147-0429, this 22<sup>nd</sup> day of April, 2004.

  
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David S. Kottler