

1983

## **Kae Smith v. Dan M. Vuicich : Brief of Appellant**

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

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KAE SMITH,	)	
Plaintiff/Appellant,	)	BRIEF OF APPELLANT
vs.	)	
DAN M. VUICICH,	)	Case No. 19392
Defendant/Respondent.	)	

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BRIEF OF APPELLANT

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APPEAL FROM JUDGMENT OF DISTRICT COURT  
OF SALT LAKE COUNTY

HONORABLE KENNETH RIGTRUP, JUDGE.

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	)	
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NATURE OF CASE

This was an action for trespass upon unimproved property and a Counterclaim for abuse of process and for statutory attorneys' fees.

STATEMENT OF FACTS:

Plaintiff/Appellant alleged that the defendant trespassed upon certain unimproved property and used certain vehicles and equipment thereon (in order to construct a swimming pool on his own property) without her consent and this caused damage to her soil, its natural contouring and vegetation upon said property (R 3,4). The defendant contended that he had oral permission of Plaintiff/Appellant to do so and denied that the use he made of said property caused it any damages (R 7,8). Contending that Plaintiff/Appellant's suit had no merit whatsoever and his use of it and after use treatment improved the property the Defendant/Respondent filed a Counterclaim with his Answer (R 9,10).

## DISPOSITION IN COURT BELOW

After a jury trial which resulted in a verdict in favor of Defendant/Respondent and against Plaintiff/Appellant on all issues, the Court dismissed the Complaint and entered judgment for \$3,300 on the Counterclaim (R 106,107). Plaintiff/Appellant filed a Motion for Judgment Notwithstanding the Verdict (R 109) and a Motion for a New Trial (R 110). They were denied (R 116,117).

## RELIEF SOUGHT ON APPEAL

Plaintiff/Appellant seeks to have this Court reverse the lower court and remand the case with instructions to dismiss the Counterclaim with prejudice and to enter a judgment of "no cause of action" thereon.

## ARGUMENT

### POINT I

#### RESPONDENT'S COUNTERCLAIM DOES NOT STATE A CLAIM.

Defendant/Respondent's Counterclaim failed to state a cause of action for abuse of process and it was therefore error to enter a judgment thereon. To the extent said Counterclaim alleged an action for civil malicious prosecution, the Counterclaim was dismissed without prejudice upon a Motion to Dismiss (R 37,38). Defendant/Respondent's pleading on which the judgment for abuse of process is grounded (R 73) alleges that Plaintiff "has commenced this meritless action against defendant maliciously and with intent to defraud defendant" (R 10).

The first consideration is whether this defense may be raised at this late date. Rule 12(h) of U.R.C.P. provides that certain defenses are not waived even though not presented by motion, answer or reply and the first

of such defenses enumerated as such exceptions to the general rule is "the defense of failure to state a claim upon which relief can be granted."

Respondent's pleading rather clearly (and correctly) implies that the filing of a lawsuit which lacks merit does not, standing alone, justify recovery as it asserts that such was done "maliciously and with intent to defraud." Rule 9(b) U.R.C.P., however, states that "In all averments of fraud or mistakes, the circumstances constituting fraud or mistake shall be stated with particularity." Since there were no particulars stated in the subject pleading, the sole issue on this point is whether or not an allegation that the party complained about filed a lawsuit "maliciously" states all the elements required for a claim based on abuse of process. Appellant contends that the authorities on this point require more. Although the term "abuse of process" is a "label for a variety of dissimilar situations which have in common only the fact that actionable injury was inflicted in connection with the use of judicial process" (1 Am Jur 2d, 252, Abuse of Process, Sec. 4) under the circumstances of this case (Sec. 13 of authority last cited, to-wit "Institution and prosecution of civil action") one must allege not only maliciousness but also "without probable cause" (Sec. 13, *supra*). The Court correctly instructed the jury that they might find Appellant guilty of abuse of process if they found that she brought this lawsuit "solely for the purpose of vexing and harassing Respondent or pursued this lawsuit in an effort to force him into settlement to which she knew that she was not entitled to" (R 89). A comparison of such specification of "without probable cause"

shows the disparity between "stating a claim upon which relief can be granted" and the pleading here challenged. To uphold such pleadings is to render pleadings meaningless. In 1976 this Court in the case of Crease v. Pleasant Grove City, 519 P.2d 888, 30 Utah 2d 451 held that the "essence of that cause of action is a perversion of the process to accomplish some improper purpose. ." (P. 890). Although that case reversed a jury verdict on the lack of evidence to such those essential elements, it does establish what those elements are and their pleading was essential to state a cause of action under the circumstances applicable in this case.

#### POINT II

THERE WAS INSUFFICIENT EVIDENCE OF ANY IMPROPER PURPOSE ON THE PART OF PLAINTIFF/APPELLANT TO SUSTAIN A JUDGMENT FOR ABUSE OF PROCESS.

The only evidence in the record as to the Plaintiff/Appellant's purpose in initiating this action other than her own testimony which asserted a proper purpose was the testimony of Respondent "Just for the money. I can't see any other reason" in response to his counsel's question "Have you formulated a conclusion as to her apparent intentions in bringing this lawsuit?" (T135). That testimony does not sustain a finding of an improper purpose in bringing a lawsuit. If it did, the vast majority of unsuccessful plaintiffs would be in jeopardy for suing for the money, which is a proper purpose of a lawsuit. At the argument on the motion for a new trial Respondent's counsel asserted that were a dozen or so places in the record where the evidence sustained a wrongful purpose but all of them would be encompassed within a claim that plaintiff had

had not testified truthfully. Appellant respectfully submits that a jury verdict on the issues in question does not prove Appellant lied at all (she offered no evidence at all as to damages to her property. Her brother alone testified as to that). A much more likely conclusion is that the jury did not believe the property had been damaged (only \$300 actual damages were asserted - the main reason for the suit according to Appellant's testimony was to protect her against lawsuit that might be brought by her neighbors if the road built by Respondent over her property caused such erosion as would dump debris on their property - the property being very steep and sloping in two directions) and punitive damages against Respondent would not be proper even if she had not consented but Respondent reasonably believed she had (he only asserted on oral consent whereas he knew she wanted a written contract).

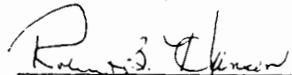
Where, as in this case, the damages sought for abuse of process are the amount of the attorney's fees this Court might well conclude that the issue of attorney's fees should be decided by the trial court pursuant to Sec. 78-27-56, U.C.A., 1953 (Supp. 1981) rather than by the jury since the Legislature has seen fit to make that a discretionary statutory remedy when either party to a lawsuit proceeds without merit and not in good faith. The trial court in this case did not see fit to use that law as the basis of or to bolster the jury verdict on which the judgement is based on that ground. Judges obviously are better qualified by both training and experience to determine the existence of the two elements necessary to create liability and to assess the amount of such an award where proper.

In the trial court Respondent convinced the jury that Appellant's claim was without merit. For at least equally good reason Appellant urges this Court to find that Respondent's Counterclaim is without merit. To equate a purpose of obtaining money through a judgment in a trespass case where the defendant admittedly went upon plaintiff's land with heavy construction equipment which necessarily caused damage to plaintiff's land, however temporarily, with such an improper purpose as to sustain a counterclaim judgment for abuse of process is to arm the defense with an awesome weapon which may thoroughly chill an injured party's application for redress through the courts. At the very least this Court ought to require the trial court to refrain from allowing the jury to award damages on such a counterclaim where the facts do not impel him to award statutory attorney's fees.

#### CONCLUSION

This case should be remanded to the District Court to enter judgment in favor of Plaintiff/Appellant on the Counterclaim as to the abuse of process claim upon which the present judgment is based.

Respectfully submitted this 10<sup>th</sup> day of October, 1983.



Robert B. Hansen  
Attorney for Plaintiff/Appellant

#### RECEIPT

The undersigned hereby acknowledges receipt of two copies of the foregoing brief this \_\_\_\_\_ day of October, 1983.

\_\_\_\_\_  
Lynn S. Davies  
Attorney for Defendant/Respondent