

1993

Glen E. Fuller and Connie J. Fuller v. Preston E. Bown, William L. Bown, Ronald L. Bown, and Jeffrey C. Bown : Brief of Appellant

Utah Court of Appeals

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**UTAH COURT OF APPEALS
BRIEF**

IN THE UTAH SUPREME COURT
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**GLEN E. FULLER and
CONNIE J. FULLER,**

Plaintiffs-Appellants,

v.

**PRESTON E. BOWN, WILLIAM L. BOWN,
RONALD L. BOWN and JEFFREY C. BOWN,**

Defendants-Appellees.

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DOCKET NO. 930367 CA

No. 

93-0367-CA

BRIEF OF PLAINTIFFS-APPELLANTS

Appeal from Judgment of the First District Court of Box Elder County
Honorable Ronald O. Hyde, Judge

GLEN E. FULLER #1136 (pro se)
CONNIE J. FULLER (pro se)
245 N. Vine St., #608
Salt Lake City, Utah 84103


Plaintiffs-Appellants

GEORGE K. FADEL
170 W. Fourth South
Bountiful, Utah 84010

Attorney for Defendants-Appellees

FILED
Utah Court of Appeals

JUN 07 1993


Mary T. Noonan
Clerk of the Court

IN THE UTAH SUPREME COURT

GLEN E. FULLER and	:	
CONNIE J. FULLER,	:	
Plaintiffs-Appellants,	:	No. 930187
v.	:	
PRESTON E. BOWN, WILLIAM L. BOWN,	:	
RONALD L. BOWN and JEFFREY C. BOWN,	:	
Defendants-Appellees.	:	

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JURISDICTION OF THE COURT

This Court has jurisdiction in this matter pursuant to Section 78-2-2(3)(i), Utah Code Annotated, as amended.

ISSUES FOR REVIEW AND STANDARD FOR REVIEW

(1) Did appellants sustain and prove recoverable cause-of-action damages by reason of appellees' overlapping mineral filing?

(2) Were appellants, acting as pro se litigants, thereby barred from recovering the reasonable value of legal and related services, and other expenses incurred, as damages, in clearing the title to their mining claims?

(3) Are appellants entitled to recover, as damages, the reasonable value of their pro se legal services and other expenses on this appeal?

.....

Except for a review of several factual matters pertaining to damages in Issue (1), the other two issues question whether appellants are barred from recovering cause-of-action damages by reason of their pro se appearance in this case (and on this appeal).

It will require an analysis and an interpretation of the Utah case of Smith v. Batchelor (1992), 832 P. 2d 467, both within the context of the factual and legal situation presented in that case, as well as a determination of the scope and extent of the broad--and somewhat gratuitous--statement enunciated in that case, which, if interpreted in the manner adopted by the trial court in this case, would bar an attorney-litigant from recovering both as a successful party (on the substantive cause of action) and for

services performed in litigating and securing that recovery (procedurally); and, further,

If in this appeal the trial court's all-inclusive interpretation of the pro-se-litigant rule of Smith v. Batchelor should be adopted, it will be necessary for this Court to reconcile that broad interpretation with Utah Constitution Article I, Section 7 (due process of law), Section 11 (the right to pursue a civil case pro se) and Section 24 (equal protection of the laws), together with the guarantee of those basic constitutional rights against state action as provided by the Fourteenth Amendment to the U. S. Constitution.

DETERMINATIVE STATUTORY AND CONSTITUTIONAL PROVISIONS

Two related sections of Utah's mining law are of importance in understanding the basic cause of action involved in this litigation. They are contained in Utah Code Anno., 1953, as amended:

40-1-2. Discovery monument--Notice of Location--Contents.

The locator at the time of making the discovery of such vein or lode must erect a monument at the place of discovery, and post thereon his notice of location, which shall contain:

(5) If a placer or millsite claim, the number of acres or superficial feet claimed, and such a description of the claim or mill site, located by reference to some natural object or permanent monument, as will identify the claim or mill site.

40-1-3. Boundaries to be marked.

Mining claims and mill sites must be distinctly marked on the ground so that the boundaries thereof can be readily traced.

The ultimate and overriding authority in this matter is the provision of Utah Constitution, Art. I, Sec. 11, pertaining to the right of pro se litigants to appear in court in their own behalf:

Sec. 11. (Courts open--Redress of injuries.)

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

STATEMENT OF THE CASE

A. Nature of the Case.

This is a case where pro se litigants were denied recovery for cause-of-action damages in a slander-of-title action involving mining claims solely because one of the pro se plaintiffs was an attorney.

B. Course of Proceedings and Disposition in Trial Court.

A non-jury trial was held in this matter on February 23, 1993, wherein appellants sought punitive and compensatory damages against appellees. Appellants' damages evidence, furnished by Glen E. Fuller, an attorney and quarry operator-owner, consisted primarily of cash outlays and time spent by him in removing the cloud of appellees' mining claim, which overlapped portions of two mining claims belonging to appellants that had been worked for 37 years.

The trial court denied punitive damages; also, it denied compensatory damages because they consisted in part of the reasonable value of services performed by an attorney acting as a pro se

plaintiff.

The Complaint was dismissed with prejudice. This appeal followed.

C. Statement of Facts.

Appellants located a building stone mining claim (Exh. P-2) on a large deposit of blue-green (turquoise-colored) quartzite stone in a mountainous area of Box Elder County in 1955 (R. 085). Subsequently, in 1962 they located a contiguous millsite claim (Exh. P-3) upon which were constructed a crushing plant (with bins), storage yard, loading docks, concrete rock bins, equipment garages, and a cabin. The two claims encompassed 75.379 acres (R. 005), according to the official U.S. Mineral Survey, and both were located in the NW $\frac{1}{4}$ and the W $\frac{1}{2}$ of the NE $\frac{1}{4}$ of Section 18, Tp. 13 N., R. 13 W., Salt Lake Base & Meridian, U.S. Survey. The Notices of Location filed in the Box Elder County Recorder's Office (Exhs. P-2 and P-3) and with the Bureau of Land Management (BLM) in Salt Lake City (Exhs. P-11 and P-12) all expressly stated that portions of both claims were located in the NE $\frac{1}{4}$ of Section 18, as well as in the NW $\frac{1}{4}$ of Section 18.

On Sept. 14, 1991, appellants entered into a Quarry Sales Agreement (Exh. P-4) with Northern Stone Supply, Inc., of Oakley, Idaho, covering the two mining claims, improvements and equipment. Paragraph VI of the Agreement specified that, upon making the three required payments, appellants would convey title to the buyer--

"with warranties of good and sufficient title and without any encumbrances existing thereon;"

At the time the Agreement was being finalized and during the course of a title examination, appellants discovered that appellees had recorded a building stone mining claim (Exh. P-5) on the W½ of the NE¼ (80 acres) of Section 18 in the Box Elder County Recorder's Office on April 2, 1990. Appellees' claim included the SE corner (and claim monument) of appellants' Turquoise Stone Placer claim and almost all of their Turquoise Stone Millsite Claim (R. 002), including all of the improvements located thereon. (Exhs. P-1 & P-6)

From Sept. 19 through Sept. 26, 1991, appellants, Kim G. Fuller, and three surveyors engaged by Northern Stone Supply, Inc. carefully examined all of the 80 acres covered by appellees' Boulder Haven No. 1 building stone claim (R. 91-92, 98, 139), but they found no evidence that appellees had erected any Notice of Location on the land nor had they monumented any of the corners of their purported claim.

Appellees' Answer to the Complaint (R. 013) and William Bown's letter to appellants dated Feb. 5, 1992 both asserted that their mining claim was "valid" (Exh. P-8), but on interrogation at trial William Bown admitted that their claim had not been monumented in any manner as required by law. Kim G. Fuller also testified that his inspection of the area enclosed within appellees' purported claim did not reveal monumentation of any kind.

On Jan. 24, 1992, appellants mailed four certified letters (Exh. P-7) to appellees demanding they immediately remove the cloud of the Boulder Haven No. 1 from appellants' claims and that they be furnished with documentary proof of their actions. William Bown responded by letter on behalf of appellees on Feb. 5,

1992, admitting the overlap upon appellants' valid claims, but stating that the overlap was accidental, mistaken and unintentional and that "appropriate proceedings have begun which will restore your claims to their prior, and proper status." The final sentence of the body of the letter departed from his prior conciliatory position--and, in effect, set the stage for the litigation that followed--with the following statement:

"You can call at the B.L.M. office for documentation of our amendment actions as I will provide you with none." (Exh. P-8)

(Emphasis added)

On interrogation at the trial, William Bown responded:

Q. And so, in other words, we were to wait until you did something to clear the title and that's about what it amounted to, wasn't it?

A. It was just that you could call there to find out what I had done. You demanded I furnish you with proof and I just responded that you can go pick up the proof yourself.

(R.113)

On April 13, 1992, appellants checked with the B.L.M. office (Exh. P-13) in Salt Lake City, and on April 28 and May 1, 1992, they traveled to Brigham City and inspected the files and records in the Box Elder Records Office, but appellees had done nothing to clear the title of appellants' claims by "amendment proceedings" or otherwise. Thereupon, after waiting more than three months, on May 1, 1992, appellants filed their Complaint to quiet title, based on slander-of-title allegations, seeking compensatory and punitive damages, and other relief.

Summons and Complaint were served on Ronald L. Bown on May 6, 1992 (R. 009), and on Preston E. Bown and Jeffrey C. Bown on May 29, 1992 (R. 010 and 011), but William L. Bown could not be found. However, after Ronald had been served, William signed, and secured the signatures of the other three appellees upon, a relinquishment of the Boulder Haven No. 1 mining claim and filed it with the B.L.M. office in Salt Lake City on May 18, 1992--12 days after Ronald had been served. Appellees took no action respecting their filing in the Box Elder County Recorder's Office.

On August 5, 1992, a private process server served Summons and Complaint (R. 008) on William L. Bown, who, upon being questioned at trial as to his whereabouts while being sought for several months, gave the following response:

Q. And why did you wait nearly three months to take any action?

A. Well, basically at that time in my life there were some other things going on that took a little more precedence as far as I was concerned. I knew in my heart, knowing mining laws and other things, I knew what my intentions would have been and I knew the actual harm, if any, that I had done to the title of your claim and also there were other things happening ..."

(R. 114)

(Underlining added)

On August 10, 1992, after William had contacted his attorney (R. 118), appellees executed an "Abandonment and Disclaimer of Mining Claim"(which appellants prepared), and the same was recorded on that date with the Box Elder County Recorder by appellants. Thus,

Legal & Trial Expenses

Exh. 13

Nature of Service

Date	Task Performed	Hourly Rate		
		Surveyor Assistant	Paralegal	Legal
Sept. 19, 1991	Secured copy of conflicting claim; travel; and examined and found NW corner & SW corner of NE 1/4 Sec. 18. also studied entire area of overlap, walked the surface, and prepared map for purchaser; assisted surveyors from Burley, Idaho	\$30.00	\$45.00	\$90.00
Sept. 26, 1991		15.0	2.0	
Jan. 24, 1992	Certified letters to all defendants			1.5
Feb. 10, 1992	Researched office files for matters relating to Williams response of Feb. 5, "old bill," etc.			1.0
Apr. 13, 1992	Reviewed BLM files re Williams "Amend't" action		1.5	
Apr. 21, 1992	Reviewed files at Box Elder Recorder's office re Williams "Amend't" Action		3.0	
May 1, 1992	Follow-up research at Box Elder Co. Rec. office		3.0	
May 1, 1992	Prepare and file Complaint			2.5
May 2, 1992	Research "Slander of Titles"			6.0
Aug. 8, 1992	Draft "Abandonment & Disclaimer of Claim"			1.0
Aug. 10, 1992	Meeting & Conference @ Fadel's office			2.0
Dec. 1, 1992	Telephone "Discovery Conference" @ Fadel's off.			1.5
Feb. 1, 1993	Secure & assemble Exhibits for trial			2.0
Feb. 2, 1993	Pre Trial @ Brigham City			2.5
Feb. 3, 1993	Prepare, assemble & mail Trial Briefs			3.5
Feb. 6, 1993	Meeting with witness (Kim); outline evidence			5.0
Feb. 8, 1993	Secure cert. copies from BLM office			1.0
Feb. 13, 1993	Research and Assemble Reply Brief			4.5
Feb. 23, 1993	Trial & travel			5.0
	Prepare & assemble this chart			1.0
		(15 hours) 450.00	(9.5 hours) 427.00	(40 hours) 3600.00

Litigation - related costs:

Sub-Total \$ 4,427.00

1-24-92	Certified Copies of letters to Da	\$ 9.39	}	197.39
5-1-92	File Complaint	75.00		
5-1-92	Serve Summons & Complaint	106.00		
8-12-92	Record "Abandonment & Disclaimer"	7.00		

Total \$ 4,624.39

This Exhibit P-13, modified as indicated with red additions, was furnished to the trial court (R.062) along with appellants Objections to proposed Findings of Fact and in support of Motion for Judgment in the amount of title-clearing costs: \$2,334.39.

the encumbrance on the title of appellants' mining claims was finally removed. (Exh. P-10)

Appellees refused to pay appellants anything by way of reimbursement for their expenses and time spent prior to August 10, 1992, in clearing title to the latters' mining claims (R.145-146), so the matter proceeded to trial before Judge Hyde, sitting without a jury, on Feb. 23, 1993.

At the close of the trial, Judge Hyde announced that he would not award any punitive damages but that "the question of whether you are entitled to attorney fees to clear that title I'm not prepared to rule on at this time and I will consider that." (R.149)

(Underlining added)

On Feb. 26, 1993, after reviewing the parties' Trial Briefs, Judge Hyde issued a Memorandum Decision, ruling as follows:

"The only matter not ruled upon at trial was Plaintiff's request for attorney fees.

I hold that the case of Smith v. Batchelor, 832 P 2d 467 (1992) is controlling. That case holding 'That Pro Se Litigants should not recover Attorney Fees regardless of their professional status' is applicable to this case."

(R. 056)

As soon thereafter as appellees' counsel prepared and served proposed Findings of Fact, Conclusions of Law, and Judgment, appellants immediately prepared and served their Objections to the same (R. 058-059), together with a Motion for Judgment (in favor of appellants) in the sum of at least \$2,334.39, which amount represented necessary out-of-pocket expenses and the reasonable value of their services up to and including August 10, 1992--but not thereafter--as damages incurred in clearing title to their mining claims. (See breakdown of Exh. P-13 charges on opposite page)

Appellants contended, as they had previously maintained in their trial Briefs, that Smith v. Batchelor did not preclude their recovery in the circumstances.

Appellants' Objections and Motion were filed with the Court on March 11, 1993 (R. 058), together with courtesy copies for Judge Hyde, and appellees filed no response. Without further ruling, and disregarding appellants' Objections and Motion, the trial Court signed and entered the Findings of Fact, Conclusions of Law, and Judgment, as submitted by appellees, on March 19, 1993, dismissing the Complaint with prejudice. (R. 067-068)

SUMMARY OF ARGUMENTS

Appellants, appearing as pro se plaintiffs in the trial court, were denied their right under the Utah Constitution and the Fourteenth Amendment to the U. S. Constitution to recover cause-of-action damages for a wrong committed against them and their properties by appellees.

ARGUMENT

I.

APPELLANTS PROVED THAT THEY SUSTAINED RECOVERABLE DAMAGES BY REASON OF APPELLEES' OVERLAPPING MINERAL FILING.

Appellants' Complaint (R.001) alleged ownership of their two placer and millsite mining claims (including legal descriptions established by a certified U. S. mineral survey), that portions of both claims were located in the West ½ of the NE¼ of Section 18, Tp. 13 N., R. 13 W., S. L. B. & M., U. S. Survey, that appellees recorded and filed their overlapping Boulder Haven #1 mining claim of April 2, 1990 (which included appellants' cabin, rock bins, storage garages, yard, crushing plant and headquarters area--approximately 5 acres).

Appellees admitted the foregoing allegations, but denied further allegations, claiming that their claim was valid as to the portion of the 80 acres that was not overlapped and that their recording and filing were made in good faith. With respect to appellants' claim for punitive and compensatory (special) damages incurred in removing the cloud from their title, appellees asserted that appellants sustained "no loss." (R.014)

As set forth in the Statement of Facts, the testimony of Kim G. Fuller (R. 91-92, 98) and the admissions of appellee William L. Pown (R. 130) conclusively established that appellees failed to erect a Notice of Location or to monument any of the corners of their alleged claim on the ground as required by law:

40-1-2. Discovery monument--Notice of Location--Contents.

The locator at the time of making the discovery of such vein or lode must erect a monument at the place of discovery, and post thereon his notice of location, which shall contain:

(5) If a placer or millsite claim, the number of acres or superficial feet claimed, and such a description of the claim or mill site, located by reference to some natural object or permanent monument, as will identify the claim or mill site.

40-1-3. Boundaries to be marked.

Mining claims and mill sites must be distinctly marked on the ground so that the boundaries thereof can be readily traced.

And see Fuller v. Mountain Sculpture, Inc. (1957), 6 U. 2d 383, 314 P. 2d 840, where, 35 years earlier, "claim jumpers" attempted to acquire a portion of the northwest corner of this same placer claim.

Although William Bown attempted to explain, in terms of what would be found (R. 125) in areas where U.S. government surveys exist in a feeble effort to "monument" his claim, his vague explanation was inadequate and wrong. The U. S. survey system monuments the four cardinal corners of each section (640 acres, more or less); in addition, between each of the four one-mile courses going around each section, monuments are placed at intervals of one-half mile (called quarter corners). Thus, each section will have eight monuments. And since the $W\frac{1}{2}$ of the $NE\frac{1}{4}$ of Section 18 is 80 acres, the only government monument that would be present would be found at the NW corner of the 80 acres (i.e., at the north quarter corner of Section 18). And it was not until the early summer of 1992, when the U. S. mineral surveyor was working the area, that Kim G. Fuller and appellant Glen E. Fuller located that monument, sans any evidence of a mineral monument of any kind. (R.94, 148-149)

In the absence of proper posting and monumentation, appellees' contentions as set forth in their Answer (R. 013) and Trial Brief that their claim was "valid" and that they were "junior appropriators" (over and above a millsite claim, no less, without citing authority), all must fail. Their "paper claim" was void; in short, appellees were "claim jumpers."

Although appellee William Bown contended that the overlap created by his Boulder Haven #1 "claim" was unintentional and accidental, the background facts support a different scenario. Before filing his "claim" he went to the BLM office and examined the Fuller file and (only) the map therein accompanying (only) appellants' placer claim (R. 127, 134 and Exhs. P-11 and D-2). Curiously, he failed to give any reason for neglecting to further examine the file, which also contained appellants' contiguous, and easterly, millsite claim. He concluded that his "claim" would not overlap any part of appellants' placer claim, but he saw no reason to further examine the file. (Exh. P-2 and R. 127, 131, 134-135)

The evidence must be assessed as establishing that William Bown was well aware that appellants' millsite area was within the W $\frac{1}{2}$ of the NE $\frac{1}{4}$ of Section 18 and that, whether believing that appellants' claim was faulty or that it did not exist as to that area, he intentionally and deliberately filed upon the millsite area.

Q. (Mr. Fuller) What was your purpose to check the files in the first place?

A. To make sure I wasn't going to be overlapping.

I knew where your claims were basically within a hundred yards,

I knew that, common sense, because I'd been there a lot. I pulled that map to make sure we weren't clipping into your claim.

Q. You've been over there a lot, haven't you, on our claims?

A. You bet.

(R.135)

Q. So you've known that area quite well, haven't you?

A. I know the area ...as far as site pretty well.

(R.136)

William Bown's intimate knowledge of the millsite area certainly made him cognizant of the fact that there were substantial operations and improvements located east of appellants' placer claim. He had also been a good friend of Gary Mullard (Northern Stone Supply, Inc.) from about the time of the filing of appellees claim on April 2, 1990 (R.119) , and William Bown was aware that prospective purchasers were interested in appellants' properties. Moreover, he knew that Mullard was interested in "green" stone (R. 121) and, had he found a flaw in, or no filing of, a claim to appellants' millsite area, he would have been in a strong "bargaining position" if appellants were to make a sale.

A. (William Bown) He (Mullard) needed green, he wanted to get involved in the green, and I tried to set him up and that's all it was.

(R.120)

Underlining added

If appellees' filing on the millsite area had been the only filing of record, or if appellants' millsite claim had been defective for any reason, appellees could have demanded access through appellants' placer claim and across the Dugway Road so as to get

into the upper reaches of Rock Canyon, from which they had been barred despite three prior unsuccessful attempts (R. 110-111); better yet, they could have claimed title to, and negotiated the sale of, appellants' millsite area and all of its improvements.

Unfortunately for appellees, their further research at the BLM office after receiving appellants' letter of January 24, 1992 (Exh. P-7) revealed (R. 134) that appellants had filed and recorded their millsite claim (Exh. P-12), that appellees' overlapping "paper claim" was of no value to them even if it had been valid, and that any plan that appellees may have concocted had come to naught.

If this Court should think that mining "claims" are always filed for the sole purpose of extracting minerals from the ground, a different motive also existed in the case of Springer v. Southern Pacific Co. (1926), 67 U. 590, 248 P. 819.

Appellants provided the trial court and opposing counsel with a detailed breakdown of time (and its reasonable value), expenses, and the nature of necessary steps involved in clearing title to their mining claims (Exh. P-13), commencing on Sept. 19, 1991, with an on-site examination of appellees' "claim" area, and extending through the filing of the Complaint on May 1, 1992, and terminating on August 10, 1992, when they were provided with the final document (Exh. P-10) that enabled appellants to remove the cloud from their title on the Box Elder County records. Exhibit 13 also provided a time-and-services summary of steps from and after August 10, 1992, in bringing this matter to trial.

Exhibit P-13 (and see corroborating testimony--R. 138-142)

classified appellants' pro se services according to three separate categories, using modest hourly charges for each. As an attorney, only 14 hours were charged by appellant Glen E. Fuller to legal services up to and including August 10, 1992, the balance to that date being allocated to "paralegal" and "surveyor assistant" categories at \$30 and \$45 per-hour charges, respectively. Total services and expenses in clearing title (through August 10, 1992) were computed in the sum of \$2,334.39. (Exh. P-13 and R. 138-142)

Although this Court may feel reluctant to express an opinion as to whether appellants out-of-pocket expenses and their opinion of the reasonable value of necessary services expended are fair and justified, it should be noted that appellants, appearing pro se, were certainly in a position to best minimize trial-clearing efforts and costs than would have been the case had other similar professional assistance been secured. Further, and certainly an element that this Court should recognize, although appellant Glen E. Fuller was interrogated by counsel for appellees on other matters, not a single item on Exhibit P-13, or his corroborating testimony (R. 138-142), was inquired into or challenged on cross-examination, by brief, on argument, or otherwise. The evidence on special damages stands uncontradicted; the only issue is whether appellants' recovery is denied solely by reason of the trial court's interpretation of the effect of a single Utah court case.

Professional services are involved in most cases being tried today. Doctors testify in personal injury matters and provide medical services; appraisers furnish written opinions of value and testify concerning the same, mechanical engineers inspect and testify concerning machinery and equipment defects--the list is endless.

Lawyers' services are invariably utilized, both in and out of court, in clearing title to property. As such, those expenses (or their reasonable value) become an element of damages. This fact has been recognized in two Utah slander-of-title cases: Dowse v. Doris Trust Co. (1949), 116 U. 106, 208 P. 2d 956, and Olsen v. Kidman (1951), 120 U. 443, 235 P. 2d 510.

Selected excerpts taken from the two referenced cases, supported by the Restatement of Torts and 50 Am Jur 2d, are set forth in the following sub-topics:

PUBLICATION BY RECORDING

"Liability may be predicated on the filing or recording of a false instrument purporting to affect the title to property, such as an affidavit, ..." 50 Am. Jur 2d, Libel and Slander, Section 541.

FALSITY OF THE WORDS

" It is not necessary that the publisher of a disparaging statement know or believe it to be false nor is it necessary that as a reasonable man he should know or believe that it is untrue. Furthermore, it is immaterial that he has reasonable grounds for his belief in its truth. As in an action for defamation, if the other essentials to liability are present, the publisher of disparaging matter takes the risk that it is untrue. " Olsen v. Kidman, 120 Utah 443, 235 P.2d 510, 513 (1951), as quoted from Restatement on Torts, Section 625.

" Slander of title is effected by one who without privilege publishes untrue disparaging statements with respect to the property of another under such circumstances as would lead a reasonable person to foresee that a prospective purchaser or lessee thereof might abandon his intentions ... In order to commit the tort actual malice or ill will is unnecessary. (Citing authority) ' " Olsen v. Kidman, 120 Utah 443 , 235 P.2d 510, 512 (1951).

PECUNIARY LOSS OR SPECIAL DAMAGES

" Thus the vendibility of land, chattels or intangible things may be impaired when a statement makes them appear less desirable for purchase, lease or other dealings than they actually are. But the liability does not accrue until the publication of the disparaging matter operates as a substantial factor in determining the decision of a prospective purchaser or other interested person, to refrain from buying or otherwise acquiring the thing in question or causes the owner to incur the expense of such legal proceedings as may be available or necessary to remove the cloud upon the vendibility that is cast upon it by the publication." (Emphasis added) Restatement of Torts 2d, Section 632.

"It is defendant's contention that plaintiff having failed to allege and prove a particular sale or sales which had been lost because of its action that plaintiff had failed to present for the consideration of the court, an essential element of the action for slander of title, i.e., a pecuniary loss. It is defendant's contention that attorney's fees are not recoverable as special damages and that such damages can only be proved by the loss of a particular sale which must be alleged as well as proved. It cites as authority for this contention the cases of McGuinness v. Hargiss, 56 Wash. 162, 105 P. 233, 21 Ann. Cas. 220, Hubbard v. Scott, 85 Or. 1, 166 P. 33 and City of Shreveport, v. Kahn, 194 La. 55, 193 So.461. All of the above cases have held that attorneys' fees are not recoverable in an action for slander of title. However, we are not impressed with the reasoning of those cases and others to the same effect. The action of slander of title is based on a wrongful act but for which the plaintiff would not have had to incur any expense, either for costs or for attorney's fees. The reasoning in Chesebro v. Powers, 78 Mich. 472, 44 N.W. 290, is more in harmony with justice." Dowæ v. Doris Trust Co., 116 Utah 106, 208 P. 2d 956, 958 (1949)

"Attorney's fees are certainly a reasonable expense of litigation." Dowse v. Doris Trust Co., 116 Utah 106, 208 P. 2d 956, 959 (1949). In accord is Olsen v. Kidman, 120 Utah 443, 235 P. 2d 510 (1951).

" Section 633, Pecuniary Loss (1)The pecuniary loss for which a publisher of injurious falsehood is subject to liability is restricted to

(a) The pecuniary loss that results directly and immediately from the effect on the conduct of third persons, including impairment of vendibility or value caused by disparagement, and

(b) The expense of measures reasonably necessary to counteract the publication, including litigation to remove the doubts cast upon vendibility or value by disparagement.

(Emphasis added)

(2)"

Restatement of Torts 2d, Sec. 633.

DISPARAGING STATEMENT MAY BE ANY

UNFOUNDED CLAIM

"To be disparaging a statement need not be a complete denial of title in others, but may be any unfounded claim of an interest in the property which throws doubt upon its ownership. (citing authority)" Olsen v. Kidman, 120 Utah 443, 235 P.2d 510, 513 (1951).

" Thus if the defendant says that the plaintiff's title to a particular piece of land is not good, the plaintiff must prove that his title is marketable since the test of a good title is its marketability. If, on the other hand, the disparagement consists of a statement that there is a particular defect in the other's title, the other as plaintiff need only show that his title is free from that defect. " Restatement of Torts Second, Section 634.

PUNITIVE DAMAGES

" The defendant real estate broker had no lien. The plaintiff's title was slandered when the purported lien was recorded without privilege to do so. ... The evidence also supports the award of ... punitive and exemplary damages." Olsen v. Kidman, 120 Utah 443, 235 P. 2d 510, 513 (1951).

" That punitive damages may be awarded in an action for slander of title see Hopkins v. Drowne, 21 R. I. 20, 41 A. 567. " Dowse v. Doris Trust Co., 116 Utah 106, 208 P. 2d 956, 959 (1949).

.....

The facts of this case come within the umbrella of the law, both as to special damages and punitive damages. In order to remove the cloud of appellees' claim from appellants' properties, as provided for and required by their Quarry Sales Agreement (Exh. P-4), appellants were required to expend money and effort.

II.

THE UTAH CASE OF SMITH V. BATCHELOR DOES NOT PRECLUDE APPELLANTS' RECOVERY OF DAMAGES BECAUSE OF THEIR PRO SE APPEARANCE AT TRIAL.

Implicit in the trial court's Memorandum Decision (R.056) holding that Smith v. Batchelor (Utah 1992), 832 P. 2d 467, was controlling in this case, was a recognition that appellants had in fact clearly established damages but that they could not recover due to the technicality of having handled their litigation pro se. Appellants contend the rule of that case is otherwise.

Smith v. Batchelor involved an employment-type claim based upon the federal Fair Labor Standards Act (and the corresponding Utah Payment of Wages Act) for back wages and overtime pay.

Plaintiff, an attorney appearing pro se, was granted relief on the substantive portion of his claim for back wages and overtime, but he was denied recovery for the reasonable value of his attorney services in handling and litigating the claim as expressly provided for under the FLSA (i.e., procedural relief).

The Utah Supreme Court interpreted the FLSA provision allowing for attorney's fees as follows:

We decline to join these courts in allowing pro se attorneys to recover fees while lay pro se litigants go uncompensated. In our view, such a result discriminates between lay and attorney litigants. It is a sufficient advantage to a lawyer-litigant that he or she is capable of competently presenting his or her claim without the need of retained counsel. Because we are loath to enhance that advantage by giving the lawyer-litigant recovery, not only as a successful party, but also as that party's attorney, we hold that pro se litigants should not recover attorney fees, regardless of their professional status.

Although the final language of the decision, if taken out of context, might be construed as barring all pro se litigants from recovering attorney fees in every manner of case, it is clear that the decision is limited to statute-provided attorney fees of a procedural nature where discrimination would allow attorney-pro-se litigants to recover such fees but lay-pro-se litigants could not recover such fees. As for the right to recover on the basic claim, however, Smith v. Batchelor clearly recognizes that an attorney pro se litigant can recover damages; in fact, our Utah Constitution extends this right to attorney-pro-se litigants and lay-pro-se litigants alike. Justice Stewart, dissenting in Smith v. Batchelor, accepted the majority's "discrimination" position, but pointed out that it was misplaced and inapplicable.

No other case can be found which, if analyzed carefully under its controlling law and facts, is identical to Smith v. Batchelor.

Further, for the trial court in this case to accept the all-encompassing, out-of-context and broad statement from Smith v. Batchelor as controlling all manner of attorney pro se appearances, the result would effectively bar all persons from their constitutional right to represent themselves in court as guaranteed by Utah Constitution, Art. I, Sec. 11:

Sec. 11. (Courts open--Redress of injuries.)

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

Further, the foregoing constitutional right, coupled with Art. I, Sec. 7 (due process) and Art. I, Sec. 24 (uniform operation of the laws), in total effect, would be nullified and circumvented if litigants could represent themselves (pro se) in court but would be denied all manner of recovery because of their pro se appearance. That result is exactly what took place in this case under the trial court's decision and judgment.

Cases can be found from other jurisdictions which seemingly represent a "split of authority" of sorts as to whether pro se litigants (be they lay persons or attorneys) can recover "attorney fees" in litigation. However, each case must be carefully analyzed because the critical factor in nearly every case involves a rule of court, a statute, or a contractual provision providing for attorney fees (i.e., as procedural "costs") to be awarded in addition to the substantive award constituting the gist of the action. The foregoing distinction is critical.

As illustrative, an annotation at 78 A.L.R. 3rd 1119 deals with the right of a pro se litigant to recover attorney's fees against an opposing party as an element of costs. And, as previously mentioned, since at common law attorney's fees could not be recovered as costs against an opponent in litigation, there must be a rule of court, statute, or an underlying agreement in order that they be allowed in such situations. 20 Am Jur 2d, Costs, #72.

Numerous "cost-type" lay-pro-se and attorney-pro-se litigant cases providing for "attorney's fees" under one of the three mentioned categories were cited in Smith V. Batchelor--itself a "cost-type" attorney's fee situation controlled by statute.

In comparing this case with Smith v. Batchelor, we find no discrimination problem involving a lay-pro-se litigant and an attorney-pro-se litigant; nor does this case involve the recovery of "costs" or their equivalent pursuant to some court rule, statute, or underlying agreement--procedural relief. Stated again, this case seeks damages resulting from taking steps necessary to remove an encumbrance placed on the title to real property. And, as set forth in Dowse v. Doris Trust Co. and Olsen v. Kidman, necessary title-clearing expenses, including attorney's fees, are included in the measure of damages. Therefore, damages based on substantive rights distinguishes this case even further from the pro-se-attorney problem discussed in Smith v. Batchelor. And, since Smith's pro se appearance did not deny him recovery of back pay and overtime, the rationale of that case actually supports plaintiffs-appellants' position in this case.

Nor has an examination of any of the few cases denying recovery of attorney's fees as "costs" pursuant to rule of court,

statute, underlying agreement, or common law, revealed a single instance where damages based upon the underlying substantive right involved have ever been denied by reason of either an attorney-pro-se or a lay-pro-se appearance. To have done so would have encountered constitutional objections in almost every state and a possible encounter with the Fourteenth Amendment to the U.S. Constitution.

.....

Cases awarding pro se attorney's fees have abandoned any rule or requirement that such services be supported by actual cash payments; instead, the test of the reasonable value of the services rendered has been adopted by the great majority of the courts. In the case of Renfrew v. Loysen (1986), 222 Cal. Reporter 413, a long line of California cases (many of which were quoted by other courts) were overruled and rejected with the following reasoning:

The logic of past decisions that do not allow an attorney to recover fees when he appears on his own behalf is unclear. Although such an attorney does not pay a fee or incur any financial liability therefor to another, his time spent in preparing his case is not somehow rendered less valuable because he is representing himself rather than a third party. Accordingly, it appears he should be compensated when he represents himself if he would otherwise be entitled to such compensation.

.....

It seems obvious that the prosecution of an ...action by an attorney acting pro se involves a tangible commitment of time and skills--a lawyer's only 'stock in trade'--having a substantial economic value which realistically could have been available for other gainful application.

And from Winer v. Jonal Corp. (Montana 1975), 545 P. 2d 1094:

The better rule is that a party who appears for himself, and is himself an attorney or counselor at law, is entitled to be awarded the same costs as he would be entitled to had he employed another.

In a case which analyzed the pros and cons of allowing an attorney to recover for his pro se efforts, the New York case of

McMahon v. Schwartz (N.Y. 1981), 438 N.Y.S. 2d 215, made the following observations:

The plaintiff, like any other professional man, is paid for his time and services, and if he renders them in the management and trial of his own cause it may amount to as much pecuniary loss or damage to him as if he paid another attorney for doing it.

.....

It can make no difference to a party who, by law, is bound to pay costs including attorney's fees, whether the fees are to be paid to an attorney representing himself or another attorney employed by him.

III.

APPELLANTS SHOULD BE AWARDED ADDITIONAL ATTORNEY'S FEES AS DAMAGES ON APPEAL.

Recognizing that attorney's fees and court costs and other expenditures necessary to clear title in a slander of title case is an equitable concept; recovering those expenditures is another matter. Too often, as in this case, it plainly appears that a separate trial and its attendant expenses could easily exceed the amount recoverable as damages under Dowse and Kidman. And even, as here, if the expenses and the costs of litigation are combined in a single action (Exh. P-13) and segregated, the trial-recovery portion of the total will exceed the title-clearing portion. There is no "cost-type" rule of court, statute or agreement that will compensate appellants for the trial-recovery portion of their expenditures in this case.

If the trial court had awarded appellants judgment for their title-clearing expenditures in the sum of \$2,334.39, appellants would have recovered 50% of their total title-clearing and trial

expenditures (assuming that they could collect on the judgment)--gaining exactly nothing. But what if, as here, judgment for their title-clearing expenditures be denied at the trial court level and they are forced to appeal?

Inasmuch as the litigation expenses necessary to clear the title to property in a slander of title action where a plaintiff prevails are not finalized until the judgment is affirmed on appeal (or, conversely, where a plaintiff is denied recovery at trial and must appeal to secure what should have been the judgment), appellate courts have recognized that attorney's fees on appeal should be awarded as an extension of title-clearing damages.

In the case of Hamilton v. Telex Corporation (Okla. 1981), 625 P. 2d 106, where suit was brought to recover attorney's fees both under a contract and a statutory provision, it was held that pro se attorney's fees should be awarded both at trial stage and on appeal. The case involved a combination of regular legal services and also legal services under the statute. Although a "cost-type" statutory provision for attorney's fees was involved, the case is basically similar to this case in its reasoning and result.

Even more to the point, in the slander of title action addressed in Olsen v. Kidman the Utah Supreme Court ruled on appeal as follows:

The judgment is affirmed. The case is remanded to the trial court to assess as damages the reasonable amount of attorney's fees in defending the judgment on appeal.

(Underlining added)

CONCLUSION

By their very nature, slander-of-title cases usually require proof that contains factual circumstances sufficient to justify both compensatory and punitive damages. However, once the degree of proof has established a cause of action, it is often difficult to present additional evidence of sufficient wrongdoing necessary to convince a trier of fact that punitive damages should be awarded. Be that as it may, in this case the reasonable expenditures of clearing title in the amount of \$2,334.39 are undisputed.

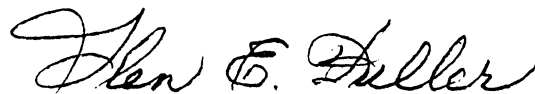
As for the remainder of the expenditures in the amount of \$2,290.00 (as shown on Exh. P-13), there is no specific rule of court, "cost-type" statute, or underlying agreement providing for trial-related expenditures in this case. On the other hand, appellants submit that, considering all of the facts and circumstances in this case, appellees' defenses to appellants' monetary claims and allegations at trial were without merit and were taken in bad faith. As such, undisputed trial-related expenditures in the amount of \$2,290.00 should also be awarded to appellants pursuant to 78-27-56, Utah Code Anno. 1953, as amended.

Because of the necessity of having to maintain this appeal--and as expressly set forth in Olsen v. Kidman--appellants are entitled to pro se attorney's fees on appeal.

ACCORDINGLY, appellants submit that this Court make and enter its decision and order that appellants have judgment for title-clearing expenditures in the amount of \$2,334.39 and trial-related expenditures in the sum of \$2,290.00, both amounts being undisputed; and, further, that this matter be remanded to the trial court to

assess, as damages, the reasonable amount of pro se attorney's fees in securing judgment on appeal.

Respectfully submitted.



Glen E. Fuller (pro se)



Connie J. Fuller (pro se)

PLAINTIFFS-APPELLANTS