

1995

Jack Perry v. Verl A. Jensen, Margene H. Jensen, C and A Construction, Inc., Eric Orton : Brief of Appellee

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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IN THE UTAH COURT OF APPEALS .A10

DOCKET NO. 950813-CA

JACK PERRY

:

Plaintiff/Appellee

:

95-0813-CA

vs.

:

Case No. 95-0453 CA

VERL A. JENSEN, MARGENE H. JENSEN, :
C & A CONSTRUCTION, INC. and
ERIC ORTON,

Argument Priority 15

Defendants/Appellants :

BRIEF OF APPELLEE

APPEAL FROM THE JUDGMENT AGAINST THE DEFENDANTS BY THE FOURTH
JUDICIAL DISTRICT COURT OF UTAH COUNTY, STATE OF UTAH,
THE HONORABLE RAY M. HARDING SR.

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Utah Court of Appeals
SEP 25 1996
Marilyn M. Branch
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IN THE UTAH COURT OF APPEALS

JACK PERRY

:

Plaintiff/Appellee

:

vs.

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Case No.

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C & A CONSTRUCTION, INC. and
ERIC ORTON,

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JURISDICTION

Jurisdiction is proper in this court pursuant to Utah Code Ann. Section 78-2a-3(2)(k) (Supp. 1994).

ISSUES PRESENTED FOR REVIEW

The issues presented for review are whether the legal conclusions of the trial court are correct as to the following:

1. Should the trial court finding that there was no fraud in this matter be upheld?
2. Should the remedy ordered by the trial court be affirmed?

STANDARD OF REVIEW

The proper standard of review when appealing a trial court's failure to find fraud is a clearly erroneous standard. *Alta Industries Ltd. v. Hurst*, 846 P.2d 1282, 1286 (Utah 1993); *Crookston v. Fire Insurance Exchange*, 817 P.2d 789, 800 (Utah 1991); *Gillmor v. Wright*, 850 P.2d 431, 433 (Utah 1993).

The standard of review where an equitable remedy is being attacked is a clearly erroneous standard. *LHIW, Inc. v. DeLorean*, 753 P.2d 961, 963 (Utah 1988); *Ferris v. Jennings*, 595 P.2d 857, 859 (Utah 1979).

A marshalling of the evidence is required for this standard of review.

DETERMINATIVE AUTHORITY

There is no determinative authority.

STATEMENT OF THE CASE

A. Nature of the Case.

This case stems from a boundary dispute between adjoining property owners. (R. at 24). The dispute was created both by errors in legal descriptions, and surveys which used differing starting points. (R. at 689). Plaintiff obtained quitclaim deeds to a 20-foot strip of real property located between Plaintiff's and Defendants' east/west boundary. This strip of real property was not contained in the legal description of either Defendants' or Plaintiff's deeds. The title to the 20-foot strip of real property rested in a predecessor in interest to the Defendants' property. Since Defendants claimed that their east/west boundary line abutted the foundation of Plaintiff's building, Plaintiff obtained the quitclaim deeds to protect his real property by extending his west boundary by 20 feet. (R. at 725 page 63 ln 10-17; R at 726 page 67 ln 10-21; R at 738 page 113 ln 6-17; R at 739 page 117 ln 2-9).

This action was initially filed against Utah County to enforce the recording of the quitclaim deeds. (R. at 7). Defendants were joined in order to obtain a quiet title to the 20-foot strip of property and to proceed with a trespass cause of action. (R. at 24) Defendants counterclaimed for quiet title, fraud, and emotional distress. (R. at 83).

B. Proceedings Below.

Defendant Utah County was dismissed from this action. (R. at 72). The issues regarding ownership of the disputed strip of land were decided through cross motions for summary judgment. (R. at 507, 509, 511). (Those issues are not before the court on appeal). The remaining issues were reserved for trial.

STATEMENT OF THE FACTS

Because this is an appeal of a factual determination made by the trial court, (See Brief of Appellants at pgs 2-3), the facts for purposes of review are those found by the trial court (R at 694-687) and are as follows :

1. Plaintiff Jack Perry is a resident of Utah County, State of Utah.

2. Defendants Verl A. Jensen and Margene H. Jensen are husband and wife and are residents of Utah County, State of Utah.

3. Defendant C & A Construction, Inc. is a corporation organized under the laws of the State of Utah having its principal place of business in Utah County, State of Utah.

4. Most of the events forming the basis of the causes of action occurred in Utah County, State of Utah.

5. In March 1988, Defendants Jensen purchased the real property located at 900 N. and 900 E., City of Provo, County of Utah, State of Utah.

6. Plaintiff Perry acquired the apartment complex known as the Robert E. Lee Apartments located at 876 E. 900 N., city of Provo, State of Utah, on September 30, 1988.

7. The Perry property abuts the Jensen property on the West and South boundary lines of the Jensen property.

8. The Jensen property has been sold and resold a number of times in the last fifteen years. Multiple mistakes in the property descriptions on the deeds and in the surveys had created uncertainty as to the actual location of the boundary line between the parties' properties. These errors in property descriptions have been resolved by the Court in its Summary Judgment dated November 23, 1993.

9. Defendants' Jensen contracted with C & A Construction, Inc. to build an eight-plex apartment building on the Jensen property.

10. In May 1989, construction began on the 8-plex apartment building.

11. Defendants Jensen did not perform a survey when they purchased the property in March 1988, nor did they perform a survey prior to the commencement of construction.

12. A survey of the Jensen property was performed in 1985 by Dudley and Associates.

13. The Dudley survey in 1985 fixed the West boundary line of the Jensen property abutting the foundation of the buildings on the Perry property.

14. Perry challenged the location of the West boundary line of the Jensen property as determined by the 1985 Dudley survey.

15. As a result of the dispute between Perry and Jensen as to the actual location of the West boundary line of the Jensen property, the City of Provo required the Jensens to perform a survey in May 1989 shortly after construction on the 8-plex began.

16. Glen Calder, at the request of Jensen, performed a survey of the Jensen property in May 1989.

17. Glen Calder using the same legal description as Dudley used in 1985, fixed the West boundary line of the Jensen property abutting the foundation of Perry's apartments.

18. Jensen then hired Dudley and Associates to perform another survey.

19. The Dudley survey also set the West boundary line abutting the foundation of Perry's building.

20. Perry hired Robert Gunnell to perform a survey.

21. The Gunnell survey placed the west property line approximately 6.5 feet from the foundation of Perry's building.

22. The Provo City building department, after the west boundary lines had been established approximately six feet from the Perry building foundation, issued a permit on June 9, 1989.

23. On July 10, 1989, Perry obtained a restraining order stopping construction by Jensen.

24. On July 10, 1989, Defendants obtained an order setting aside the restraining order.

25. Defendants were not delayed in the construction of their apartment building by the obtaining of the restraining order by Plaintiff.

26. The construction of the 8-plex was completed within a reasonable time.

27. During the construction process, the Defendants Jensen made changes to the plans for the condominiums that caused the delay in locating long-term financing for the project.

28. Defendants Jensen were not hindered in obtaining a construction loan by any of the actions of Perry.

29. Defendants Jensen completed the 8-plex and received a certificate of occupancy on September 1, 1989.

30. Defendants were not delayed or hindered in completion of the 8-plex by any conduct or actions of Perry.

31. There is no evidence that the Defendants Jensen suffered severe emotional distress as a result of the actions of Perry.

32. The hives suffered by Defendant Margene Jensen were the result of stress which may have been caused by a number of factors but cannot be said to have been proximately caused by the conduct and/or actions of the Plaintiff.

33. There is no evidence that Plaintiff intentionally entered into conduct with the purpose of causing the Defendants emotional distress.

34. During construction, the Defendants trespassed on the Plaintiff's property for which the Plaintiff should be compensated in the sum of \$1.00 (One Dollar).

35. Defendants removed shrubbery, trees and topsoil from the Plaintiff's property. Plaintiff is not entitled to damages for loss of trees, shrubs or other landscaping because Plaintiff cannot establish a value for the items allegedly removed.

36. There is no evidence that Plaintiff made any fraudulent statements to Defendants or to anyone else.

37. There is no evidence that Plaintiff engaged in fraudulent conduct toward Defendant or anyone else.

38. The footings of the Defendants Jensens retaining wall extends onto the Plaintiffs property.

(R. at 694-687.) (Marshalled evidence in support of the facts found by the trial court are set forth separately in another portion of this brief).

SUMMARY OF THE ARGUMENT

Defendants' appeal should be denied because:

1. Defendants' have failed to marshal the evidence;
2. Defendants did not rely on Plaintiffs alleged misrepresentation;
3. Defendants failed to cite authority and to cite to the record in support of their argument against the trial court's awarding of an equitable remedy for Defendants' encroachment;

4. Defendants have failed to show that the trial court abused its discretion in awarding Plaintiff an equitable remedy for Defendants' encroachment.

The appropriate standard of review for an attack on the trial court's failure to find fraud is a clearly erroneous standard which requires that Defendants must marshal the evidence. Defendants have failed to marshal the evidence in favor of the trial court's findings and attempt to offer carefully selected facts in their own favor, therefore, the appellate court should assume that the trial court's findings are supported by the record.

One of the elements of a cause of action of fraud is that Defendants must show by clear and convincing evidence that they reasonably relied upon the alleged misrepresentations of Plaintiff. Defendants do not claim that they relied upon the alleged misrepresentations of Plaintiff but base their cause of action for fraud on the reliance of third parties who are not parties to this action. Defendants failed to present any evidence at trial supporting their reliance on the misrepresentations allegedly made by Plaintiff. In fact, Defendants do not claim that they relied on the misrepresentations allegedly made by Plaintiff, nor do they recognize that they must prove their reliance in order to establish a cause of action for fraud. Therefore, the court's finding should upheld by the appellate court.

Defendants failed to cite any authority or to cite to the record in support of their argument that the trial court erred in granting Plaintiff an equitable remedy for encroachment. Without citing authority and without citing to the record to support their argument, Defendants' argument and limited analysis is meaningless and the court should refuse to address this issue and assume the correctness of the trial court's findings and judgment.

The proper standard of review for the trial court fashioning an equitable remedy is an abuse of discretion. Courts have broad discretion in fashioning equitable remedies, and Defendants have failed to demonstrate that the court abused its discretion in ordering the remedy in this case. *LHIW, Inc. v. DeLorean*, 753 P.2d 961, 963 (Utah 1988).

Plaintiff is entitled to a reasonable attorney's fee for having to defend against Defendants' appeal on the grounds that Defendants' appeal is frivolous. Defendants' appeal is not grounded in fact, is not supported by existing law, and does not attempt to extend, modify, or reverse existing law. Defendants' appeal is necessarily frivolous, and Plaintiff is entitled to recover a reasonable attorney's fee incurred in defending against Defendants' appeal. (Rule 33, Utah Rules of Appellate Procedure).

ARGUMENT

I. APPELLANT HAS NOT MARSHALLED THE EVIDENCE, THEREFORE, FACTUAL DETERMINATIONS OF THE TRIAL COURT ARE BEYOND CHALLENGE.

The standard of review in challenging the failure of the trial court to find fraud is a clearly erroneous standard.

Wright argues on appeal that the jury did not have sufficient evidence upon which to base its verdict of fraud. We of course consider the evidence in a light favorable to the verdict and "we will not substitute our judgment for that of the jury where the verdict is supported by substantial and competent evidence." *Von Hake v. Thomas*, 705 P.2d 766, 769 (Utah 1985). Moreover, Wright's duty on appeal is to "marshal all the evidence supporting the verdict and demonstrate that, even viewing the evidence in the light most favorable to that verdict, the evidence is insufficient to support it." *Id.* (citing *Scharf v. BMG Corp.*, 700 P.2d 1068, 1070 (Utah 1985)). With this standard of review in mind, we note that Wright's marshaling of the evidence is adequate to permit our consideration of this issue.

Wright v. West Side Nursery, 787 P.2d 508, 512 (Utah App. 1990). A clearly erroneous standard requires Defendants to marshal the evidence in support of the factual determinations of the trial court and, then, demonstrate by clear and convincing evidence that the findings of the trial court are clearly erroneous. *Id.* at 512.

Defendants, having failed to marshal the evidence, and having failed to demonstrate that the evidence fails to support the trial court's findings when viewed in a light most favorable to the Plaintiff is sufficient grounds to reject Defendants'

attack on the fraud finding. *Crookston v. Fire Insurance Exchange*, 817 P.2d 789, 800 (Utah 1991).

Where a marshalling standard exists, the failure to marshal the evidence is not tolerated by appellate courts. (See *Ashton v. Ashton*, 733 P.2d 147, 150 (Utah 1987). In *Oneida/SLIC v. Oneida Cold Storage et. al.*, 872 P.2d 1051 (Utah Ct.App. 1994) this court stated:

Utah appellate courts do not take trial courts' factual findings lightly. We repeatedly have set forth the heavy burden appellants must bear when challenging factual findings. To successfully appeal a trial court's findings of fact, appellate counsel must play the devil's advocate. "[Attorneys] must extricate [themselves] from the client's shoes and fully assume the adversary's position. In order to properly discharge the [marshalling] duty ..., the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists," *West Valley City v. Majestic Inv. Co.*, 818 P.2d 1311, 1315 (Utah App. 1991); accord *In re Estate of Bartell*, 776 P.2d 885, 886 (Utah 1989); *State v. Walker*, 743 P.2d 191, 193 (Utah 1987); *Commercial Union Assocs. v. Clayton*, 863 P.2d 29, 36 (Utah App. 1993); *Ohline Corp v. Granite Mill*, 849 P.2d 602, 604 (Utah App. 1993). Once appellants have established every pillar supporting their adversary's position, they then "must ferret out a fatal flaw in the evidence" and show why those pillars fail to support the trial court's findings. *West Valley City*, 818 P.2d at 1314. They must show the trial court's findings are "so lacking in support as to be 'against the clear weight of the evidence,' thus making them 'clearly erroneous.'" *Bartell*, 776 P.2d at 886 (quoting *Walker*, 743 P.2d at 193).

Oneida/SLIC v. Oneida Cold Storage et. al., 872 P.2d 1051-1053, (Utah Ct.App. 1994).

Because the Defendants are challenging the factual findings of the trial court, while refusing to marshal the evidence, an appellate court should not consider any factual issues on appeal

and assume the trial court's findings are supported by the record.

If the evidence is not properly marshalled, we will assume the findings are supported and proceed to review "the accuracy of the lower court's conclusions of law and the application of that law in the case.

Lake Philgas v. Valley Bank and Trust Company, 845 P.2d 951, 959 (Utah App. 1993), (quoting *Saunders v. Sharp*, 806 P.2d 198, 199 (Utah 1991)).

Therefore, the findings of the trial court must be upheld and the Defendant's appeal must be denied.

II. THE MARSHALLED EVIDENCE DEMONSTRATES THAT DEFENDANT FAILED TO PRESENT CLEAR AND CONVINCING EVIDENCE SUPPORTING FRAUD.

Although it has not been clearly argued by the Defendants, Defendants base their cause of action for fraud on misrepresentations allegedly made by Plaintiff to third parties, who are not parties to this lawsuit. The courts in Utah have recognized a cause of action for fraud on statements made to third parties in a professional/client relationship. *Milliner v. Elmer Boxing Co.*, 529 P.2d 806 (Utah 1974).¹ However, Plaintiff cannot find any cases in Utah recognizing a cause of action for fraud based on misrepresentations to third parties which do not involve a professional/client relationship.

The law governing fraud actions based on statements to third parties is found in Section 531 of the Restatement of Torts:

¹The *Milliner* case involved statements made by an accountant to his client which were repeated by the client to a third-party. It was the third-party who sued the accountant.

One who makes a fraudulent misrepresentation is subject to liability to the person or class of persons whom he intends or has reason to expect to act or refrain from action in reliance upon the misrepresentation, for pecuniary loss suffered by them through their justifiable reliance in the type of transaction in which he intends or has reason to expect that conduct to be influenced.

Section 531 has generally been applied to situations where a contractor has made fraudulent representations to a purchaser who tells the representations to a subsequent purchaser or in a professional/client relationship. See *Woodward v. Deitrich*, 378 PA. Super. 111, 548 A.2d 301,304,308,309,312,313,316.

Assuming a cause of action for fraud based upon representations to third parties exist in Utah, under the facts of this case, Defendants must prove that they relied on the alleged misrepresentations made by Plaintiff to third parties and that their reliance was reasonable. In addition, Defendants must prove the other elements of fraud: 1) a representation was made, 2) concerning a presently existing material fact, 3) which was false, 4) which Plaintiff either (a) knew to be false or (b) made recklessly, knowing that there was insufficient knowledge upon which to base such a representation, 5) for the purpose of inducing Defendants to act upon it, 6) Defendants acting reasonably and in ignorance of its falsity, 7) did in fact rely upon it, 8) and were thereby induced to act, 9) to Defendant's injury. *Educator's Mutual Ins. Ass'n v. Allied Prop. and Cas. Ins. Co.*, 890 P.2d 1029 (Utah 1995).

On appeal, Defendants have the heavy burden to "present in comprehensive and fastidious order, every scrap of competent

evidence introduced at trial which supports the very findings that appellant resists. *Oneida-SLIC v. Oneida Cord Storage & Whse. Inc.*, 872 P.2d 1054 (Ut. Ct. App. 1994)

After establishing all the competent evidence supporting the trial court's findings the Defendants "must ferret out a fatal flaw in the evidence" and demonstrate why that evidence fails to support the trial court's finding. *Id.* The Defendants must show that the trial court's findings are "so lacking in support as to be against the clear weight of evidence thus making them clearly erroneous." *Id.*

Therefore, to sustain their challenge to the trial court's factual findings, the Defendants must: (1) marshal all the evidence that supports the findings², and (2) demonstrate that despite the evidence, the findings are so lacking in support as to be against the clear weight of the evidence and thus clearly erroneous.³ *K.K. v. State*, 913 P.2d 771 (Utah App. 1996). In determining whether the trial court's findings are clearly erroneous, it does not matter that there is evidence contrary to the trial court's findings. What matters is whether there is a sufficient basis for the trial court's findings. *Schuman v. Green River Motel*, 835 P.2d 992 (Utah App. 1992). Thus, the appellate court accepts as true all testimony and reasonable influences flowing therefrom that tends to support the trial court's

²Defendants have failed to marshall the evidence.

³Defendants have failed to demonstrate that the findings are so lacking in support as to be clearly erroneous.

findings and will disregard all conflicts in evidence contrary to the trial court's findings. *Gold Standard Inc. v. Getty Oil Co.*, 281 Utah Adv. Rep. 59 (Utah 1996); *Brown v. Richards*, 849 P.2d 143 (Utah App. 1992).

1. DEFENDANTS DID NOT RELY ON THE ALLEGED MISSTATEMENTS OF PLAINTIFF.

The Defendants must demonstrate that they were acting reasonably and in ignorance of the falsity of the alleged misrepresentations and did in fact rely upon the misrepresentations. *Conder v. A.L. Williams & Assoc.*, 739 P.2d 634 (Ut. Ct. App. 1987). Thus, not only must Defendants show there was reliance, but that their reliance was justifiable under the circumstances. *Id.* Defendants must show some objective corroborations to the claims that they relied upon the misrepresentations. *Id.*

The evidence presented at trial clearly demonstrates that Defendants did not rely on the alleged misrepresentations and that the marshalled evidence amply supports the findings of the trial court.

The marshalled evidence demonstrates that:

- 1) Defendants failed to have the property surveyed prior to commencing construction; *R at 781, page 271, line 13 through page 272, line 13.*
- 2) Defendants did not know the location of the boundary, but nevertheless commenced construction; *R at 782, page 275, line 15 through page 276, line 4.*
- 3) Defendants were required by the city to obtain a survey because the location of the boundaries were not known by Defendants; *R at 753, page 175 lines 6-11.*
- 4) Defendants wanted to know the facts before acting upon Plaintiff's claim of ownership, but nevertheless continued construction; *R at 78-784, page 281 line 24 through page 282 line 12; R at 779 page 264 lines 6-15.*

- 5) Defendants believed they owned the property and that Plaintiff did not own the property; *R at 779-780 page 265 line 13 through page 266 line 10.*
- 6) Defendants believed Plaintiff's claim of ownership to be false; *R at 780 page 266 lines 9-10.*
- 7) Defendants didn't believe Plaintiff's statement of ownership. *R at 785 page 287 lines 7-16.*
- 8) Defendants hired attorneys to resist Plaintiff's claim of ownership. *R at 780 page 266 lines 16-25; R at 780 page 268 lines 4-7.*
- 9) Defendants let the attorneys and surveyors handle the Plaintiff's claim of ownership. *R at 786-787 page 293 line 21 through page 284.*

These facts clearly support the court's finding that there was no fraud. Defendants did not rely upon any alleged misrepresentations by Plaintiff, always believed they were the owners of the property and resisted the Plaintiff's claim of ownership. Defendants never claimed that they relied on the alleged misrepresentations of Plaintiff and did not present any evidence at trial that they relied on the alleged misrepresentations of the Plaintiff, thereby failing to establish, or even recognize, this essential element of the cause of action for fraud.

From the beginning, Defendants refused to rely on the alleged misrepresentations of Plaintiff, but instead denied Plaintiff's claim of ownership to the property. Therefore, Defendants cannot claim that they reasonably relied on the alleged misrepresentations of Plaintiff since they, at all times, denied and resisted Plaintiff's claim of ownership.

Notwithstanding the imposition on the Defendants in having to defend against those claims, the Defendants did not rely on those representations to their detriment; indeed, they did all that they could to resist them.

DeBry v. Cascade Enters, 879 P.2d 1353 (Utah 1994).

MARSHALLED EVIDENCE

A. Defendants knew of the Plaintiff's claim to the 20-foot strip of property and the consequences if Plaintiff owning the property.

Q. (BY MR. BRADFORD) Were you aware of deeds Mr. Perry had obtained to the westerly 20 feet of your property, that he had obtained quitclaim deeds for?

A. Yes.

Q. And he had recorded those?

A. Yes. I didn't know he recorded them, but I knew he had them.

Q. And did they show up on title searches in the preliminary title reports?

A. I was informed of them by he and a Mr. Clint. Testimony of Defendant Verl Jensen, R at 777 page 277, line 17 to page 256, line 2.

Q. What did you understand about the effect on your project if you had in fact lost that 20 feet of property on the west edge of your ground?

A. I would have been subservient to Mr. Perry. Testimony of Defendant Verl Jensen, R at 781 page 270 line 23 to page 271 line 1.

B. Defendants did not know the location of the boundary lines prior to commencing construction, but nevertheless commenced construction.

Q. (BY MR. FISHER) Now, as I understand it, you mentioned there was a time that Mr. Perry complained to you concerning the -- or expressed concern concerning the west boundary line, east/west boundary line; is that correct?

A. That was one of the concerns he had expressed to my employees and they had related to me, yes. And then I talked with him. And I thought it was on the telephone originally.

Q. Showing you what's marked as exhibit number 8, have you seen that document before?

A. I have.

Q. And what is that?

A. That is a letter that was delivered to our company. I don't know who it was given to, but it eventually worked its way to me.

- Q. And that's the letter Mr. Perry testified he had delivered expressing his concerns?
- A. It is.
- Q. And showing you what's been marked as exhibit #9, do you recognize that?
- A. I do.
- Q. And what is it?
- A. That is the letter that I wrote to Mr. Perry in response suggesting ways that his concerns, listed in the last paragraph, could be taken care of. This letter was never answered by the way
- Q. Okay. Looking at this little diagram we did here. At the time of this letter, where did you understand the east/west boundary line to lie?
- A. At the time of that letter?
- Q. Uh-huh (affirmative).
- A. That east/west boundary line had really not been determined at that time.
- Q. So you didn't know where it was?
- A. Only from the visual look we had from the two existing properties. As far as the survey, the surveys took place immediately after Mr. Perry expressed a concern.
- Q. Okay. Would you just read the first -- right here where it says "land dispute." Would you just read the first sentence there.
- A. I will. It says: "Land dispute: Based upon our last survey markers, Dr. Jensen's property goes up flush with your existing building line. I realize that it is your understanding that your property is 3-4 feet beyond the building line. Nonetheless, it appears that it would be in the interest of both parties to remove all dirt, trees and grass up flush with the existing retaining wall and then concrete the entire area. Dr. Jensen has agreed to pay for the cost of this work --"
- Q. I just wanted the first part. We're going to talk about that. Here don't you say, based upon the last survey markers Dr. Jensen's property goes up flush with your existing building line, right up flush with the square apartments, is that right?
- A. His Squire Apartments. I think Mr. Calder's survey showed the property going up flush with Jack Perry's apartment, not squire. Testimony of Alan Bird an owner of Defendant C&A Construction, R at 749, page 159, line 1 to page 161, line 1.

- Q. Mr. Jensen, when you purchased the property that you now have the squire apartments on, did you have a survey performed?
- A. We've had surveys performed. I can't remember exactly
- Q. Isn't it true you did not have a survey at the time you purchased the property?
- A. I don't know that to be true. C&A said they would check out the boundaries and have it done for me, and that's all I can tell you about it.
- Q. I'm talking about the time you purchased the property?
- A. From Mr. Shepard?
- Q. Yes.
- A. No, I did not.
- Q. Did I just understand you correctly that C&A was responsible to have a survey performed?
- A. I asked them if they would do that for me.
- Q. And that was prior to construction at the time you signed the contract with them to do the construction?
- A. Yes.
- Q. To your knowledge did they have a survey performed prior to starting construction?
- A. I assumed they had. I didn't ask them because I had asked them to do so. You can ask them. Testimony of Verl Jensen, R at 781 page 271 n 13 to page 272 ln 13.
- Q. So at that time it's your testimony that you did not understand that your east/west boundary line was located at Mr. Perry's foundation?
- A. I really didn't, no.
- Q. Where did you understand at that time the boundary line was located?
- A. Generally on those projects before building permits are issued, there's certain set-backs. I assumed those set-backs were honored when those buildings were made. I wasn't going to worry about it. That wasn't a problem.
- Q. Do you know what those set-backs were?
- A. I don't. Residential, commercial, business easements all vary but it's usually described in the plan.
- Q. If I understand your testimony correctly, you really didn't know where the east/west boundary line was; it may have been 1 foot up to 15, 20 feet, whatever the set-back would be?

- A. I assumed it had been there -- I'm the last piece of property to be developed there. I assumed it had been there many years and probably pre-established, correct.
- Q. Now, because of the conflict of where the location of the east/west boundary line, there was a survey that was performed, correct?
- A. I wanted a survey done. That was always my position. I had no intention of encroaching on Mr. Perry's property. Testimony of Verl Jensen, R at 782 page 276 line 25 to page 276 line 3.
- Q. You don't know then that he located the boundary line to also be in Mr. Perry's foundation?
- A. I left that up to C&A. I felt that's their business. I just really do. Testimony of Verl Jensen, R at 783 page 279 ln 8-11.
- Q. Now in comparing the survey you did in 1985 to the survey you did in may 1986, using the dimensions of a 100 feet in 1985, would that not have placed the east/west boundary line into Mr. Perry's foundation?
- A. Yes, it would have, or at least very close to it, yes. Testimony of Dudley Surveyor R at 811, page 392, ln 4-10
- C. After learning of the 20-foot discrepancy, Defendants did not rely upon the alleged misrepresentations but continued construction, and, only after being required by Provo City, did Defendants survey the property to determine the location of the boundaries.**
- Q. When you began construction of this project, did Mr. Perry make some protestation regarding property lines and your excavation?
- A. Yes. He had -- I guess had several conversations with subcontractors and some of my employees. I had a telephone call with him. He expressed some concerns. We discussed those concerns. I then went and met with Provo city, asked them how we could resolve some of those concerns. At that time his major concern was location of the garbage dumpster, and he wanted that relocated. I went to Mr. Carlson of provo city, told him what his concerns were. Asked him if there was any way to redesign the site plans to address those concerns. He told me that was the only place they would allow that. I gave that information to Dr. Jensen. He offered some suggestions to try and rectify the problem to help Mr. Perry out and I wrote a letter based on that and sent it to him that same day.

- Q. What was the suggestion?
- A. As I recall, without the letter, I think there were three items that he was concerned about. One was where the property line was on the west boundary. The second concern was the dumpster location. And the third concern was -- I can't remember what the third concern was without the letter. But those were the two that I remember. And Mr. Jensen made a suggestion, after talking with Provo city on all three of those suggestions. And I asked Mr. Perry in the letter if he had other suggestions, if we could work it out, please let me know and he never did get back in contact with me.
- Q. Was there ever a concern expressed by Mr. Perry regarding the south boundary?
- A. The south boundary line was not a concern as we talked.
- Q. Was there ever a concern expressed by Mr. Perry regarding the south boundary?
- A. The south boundary line was not a concern as we talked.
- Q. With the concern expressed by Mr. Perry regarding boundary lines, what efforts did you and your workers take to try to avoid any kind of a trespass or any problems?
- A. After the problem was expressed to me from Mr. Perry, we had two different surveyors come in and survey the property. One was a Glen Calder from Mapleton. The other was Roger Dudley and associates from Orem. The two points of their survey were quite different, about four, four and a half feet apart. Mr. Calder's survey placed -- it would have been the southwest corner of the property almost on top of the foundation of Mr. Perry's building. The survey that Dudley and associates did, placed that same corner further to the east, and further to the north
- Q. To the east by about how many feet?
- A. About 6 to 7 feet.
- Q. So two surveys were done at your request, is that correct?
- A. That's correct.
- Q. One by Mr. Calder --
- A. And one by Mr. Dudley. Testimony of Alan Bird, R at 745, page 142, line 13 to page 144, line 20.
- A. Mr. Calder, Glen Calder of Mapleton did the first survey and Mr. Dudley did the second survey. And then I believe Mr. Dudley went out several other times

because of discrepancies in deeds and titles and did subsequent surveys for several days or weeks trying to align and decide where that line would be at. And we kept Provo city very much informed of the progress of those surveys and what was going on.

Q. Did you continue construction on the project during the time you were getting the surveys?

A. We did, at the approval of Provo city. Testimony of Alan Bird,R at 750, page 162, lines 10-20.

THE WITNESS: I know that the concern we had was that Mr. Calder's point showing the property line was actually right up to the building line of Mr. Perry's. That's why we asked for another survey, and that was the Dudley survey and it was more favorable to Mr. Perry than the Calder survey was. And Mr. Jensen paid for both of those surveys. And I think in the letter I wrote him on may 5th, that's why Mr. Jensen wanted to resolve the thing as quickly and equitably as possible and instructed me to do so. And I tried several times to do just that. And Mr. Jensen also instructed me to pay for all costs that were involved. Testimony of Alan Bird,R at 750, page 164, lines 3-15.

Q. Do you recall when you received from the city the go-ahead for the continuing of the construction?

A. I don't remember the exact date. I know there was -- in fact I don't recall that they stopped construction. They just simply wanted a survey. And I don't recall what date that was, but I know I was in constant communication with both the building department and the zoning department over what we were doing and why we were doing that.

Q. So from the time they wanted the survey until you actually received word from the city that they were happy or accepted a survey, you really didn't stop construction?

A. Not on the building, no. I don't believe we had started construction at that time.

Q. Now you had, with the boundary lines, the concerns that were being expressed by Mr. Perry on the boundary line. Did you have discussions with Mr. Jensen regarding that?

A. I did.

Q. And did you also have discussions with Mr. Jensen regarding the problems in locating the boundary line?

A. I did.

- Q. And he was fully aware of that?
- A. Yes. He asked me to try and resolve those things with Mr. Perry and he would take care of any of the costs that were incurred with the resolution of that problem.
- Q. I want to make sure I understand. Do you recall in your deposition you mentioned that there were actually two times you stopped construction; once was when the city requested a survey and once was when the restraining order was served?
- A. I recall that in the depositions, yes.
- Q. But your testimony is now you did not stop construction during the time you had to have the survey?
- A. I do not require -- I do not remember Provo city actually requiring us to stop construction. We hadn't -- the first time in May when the problem was brought, we actually weren't forming footings, we weren't pouring concrete. We were doing demolition and excavation. And under Utah law or with most cities, building permits are when construction actually begins, when you form footings and foundation walls. I know there was concern there. I know there were problems with the subcontractor. And I don't remember all of the details of that specifically. It's only been six years ago.
- Q. I think your testimony was here, that you received a restraining order one day and the next day you received the order that lifted the restraining order; is that correct?
- A. Yes. And that came about a month and a half later.
- Q. What do you mean by a month and a half later?
- A. Well, you had the problem with the survey when excavation was taking place. The restraining order I believe took place sometime in June. It was the first part of July when construction was actually being done.
- Q. The month and a half between the survey and --
- A. Yeah. And that as I recall, the restraining order was issued on one day, the restraining order was lifted the next day.
- Q. Do you recall in your deposition when I asked you how long a delay before the restraining order was lifted, you mentioned it was about seven to 10 days?
- A. I recall you say that, yes.
- Q. Actually wasn't the order lifting the restraining order signed on the very same day that the restraining order was delivered to you?

- A. I know it was the next morning before we could actually get to work. So whether it actually took place that afternoon, that evening, that night, within a 24 hour period -- we had a good attorney. He resolved it quickly, whatever he did. Testimony of Alan Bird,R at 753 page 175, line 6 to page 178, line 12.
- Q. So when you first became aware that he was upset or somehow things were not going well, what was it that first brought that to your attention?
- A. Umm, I just received a phone call from -- that he had stopped the activities of the backhoe working in there, cleaning up the building and working on the site.
- Q. What was your reaction to that?
- A. First of all, I didn't understand it. And second of all, I just called C&A and asked them to see what was going on. Testimony of Verl Jensen,R at 777 page 257, lines 9-19.
- Q. Do you recall having any discussions with allen bird regarding that letter?
- A. He told me they had a stop work order and I assumed it was in letter form.
- Q. Did he discuss with you the problem with the location of the east/west boundary?
- A. He -- if he did, all I said I wanted done was it to be verified by the city of Provo and continue.
- Q. Okay. Now you say "verify." What was going to be verified?
- A. Well, it wasn't going to be able -- I couldn't tell them where the points were. I'm not a surveyor. So I assumed they knew the people to contact to have that done. Testimony of Verl Jensen,R at 782 page 275 line 15 to page 276 line 4.
- Q. Now, because of the conflict of where the location of the east/west boundary line, there was a survey that was performed, correct?
- A. I wanted a survey done. That was always my position. I had no intention of encroaching on Mr. Perry's property. Testimony of Verl Jensen,R at 782 page 277 line 23 to page 276 line 3.
- Q. You mentioned at one point that the city -- or that there were surveys requested. You requested them, C&A requested surveys. Was that request as a response to the city stating they wished to have a survey before the project continued construction on the project?

A. I don't think they would have given me a continuation of work, let me go to work if they hadn't had that done, or I would assume that.

Q. You don't recall being told that a survey was being required by the city?

A. Well, they held me up for about three or four weeks, two or three weeks -- I can't remember -- while we waited for it to be done. No question about that. And we honored that. Testimony of Verl Jensen, R at 783, page 280 ln 19 to page 281 ln 8.

Q. Now, from the time construction started until the surveys were completed and were commenced again, did you have any discussions with Mr. Perry regarding this boundary line?

A. Boy, I'm sure we did. I just can't remember. There was so many phone calls and so many people telling me that they owned and so many people trying to belittle me and coerce me into submission, there was a lot of things said and I had no facts on any of them and that's why I wanted the city and Dudley to at least pinpoint the points because I was upset. If in fact I had bought a piece of property and I didn't get what I paid for, that would have made me very upset also. Testimony of Verl Jensen, R at 783-784 page 281 ln 24 to page 282 ln 12.

D. Defendants, upon learning of Plaintiff's ownership of the 20-foot strip of property, immediately took action to resist Plaintiff's ownership and refused to accept Plaintiff's ownership of the property.

THE WITNESS: Well naturally I was dumbfounded first of all, because I had tried to pursue everything in a correct manner by purchasing it through a title company, with title insurance, paying off all parties involved who had a partial interest in the property previously. And I assumed everything was set until I heard this statement.

Q. And so how did you react to that?

A. Well, I basically said I'm not going to react until I find out who has the facts. Testimony of Verl Jensen, R at 779 page 264 lines 6-15.

Q. Were you aware at one point Mr. Perry filed some legal papers and got some kind of restraining order or stop work order?

A. Yes.

Q. How did you become aware of that?

A. Well they just informed me.

Q. Who?

A. C&A.

Q. What was your reaction?

A. Get it cleaned up and get back to work. We totally felt we were on our property at all times.

Q. Do you recall that a lawsuit, at least one lawsuit was eventually initiated over this problem?

A. At least one.

Q. Do you recall when that happened?

A. I don't.

Q. Did you read over the lawsuit?

A. I think I turned it over to my attorney. I don't remember.

Q. Do you recall if you understood what the claim was and about the 20-foot strip that they were claiming?

A. Well, I thought that was a falsehood any way, so I didn't put much credibility to it. So I just handed it to my attorney. Testimony of Verl Jensen, R at 779-780 page 265, line 13 to page 266, line 10.

Q. Now, who did you have -- what attorney did you have representing you at that time?

A. At that particular time I think it was Mr. Jackman.

Q. Did you have any other attorney representing you with regard to this dispute with Mr. Perry?

A. For a short time I think a Mr. Glazier, as I remember, wrote a memorandum to them, to Mr. Clint and Mr. Perry.

Q. Do you recall how much you paid Mr. Glazier for his services? Testimony of Verl Jensen, R at 780 page 266, line 16-25

Q. (BY MR. BRADFORD) Have you retained the firm of Bradford and Brady to represent you in this matter?

A. I have. Testimony of Verl Jensen, R at 780 page 268, lines 4-7

Q. But there was one time you testified, too, that they came into your office and they had indicated to you that they had received a deed to a 20-foot strip of property; is that correct?

A. They owned a 20-foot piece of property in the middle of my project, correct.

Q. And I believe your testimony was though, that you didn't put much credibility in that statement, is that correct?

A. That's my statement. Testimony of Verl Jensen, R at 785 page 287 lines 7-16.

Q. My question again was that you were not concerned about your title to that 20-foot strip of property; isn't that correct?

A. I had no position at that point. They came in the middle of the day and informed me they, with knowledge, knew and owned my property. I was upset, and you can't resolve something you don't know anything about. Testimony of Verl Jensen, R at 785 page 288 line 2-9.

Q. Okay. Would you turn to page 82, please of your deposition.

A. What page?

Q. 82.

A. Okay.

Q. I'll read, starting with line 7 and if you'll just read your answers: "And they came into your Provo office; is that correct?"

A. "That's correct."

Q. "What do you recall being discussed at that meeting?"

A. "Mr. Clint, I was informed, he had been a past employee of a title insurance company and had discovered that this void had occurred in my lot, that they had title to or a deed to -- what do you call it, a quitclaim deed to."

Q. "Do you specifically recall any other discussion?"

A. "I was pretty busy."

Q. "What was your response?"

A. "I couldn't even believe it."

Q. "Did you make any comment to them?"

A. "I just said, and I asked them, I probably told them I don't believe it. We'll have to have the attorneys check it out."

Q. "What did you do at that meeting to check it out?"

A. Called Mr. Jackman. At that point I think -- he was my attorney as I recall."

Q. "Did you do anything else?"

A. "I went back to work." Testimony of Verl Jensen, R at 785 page 288 line 10 to page 289 line 17.

- Q. (BY MR. FISHER) Did you at some point become aware -- or you did become aware at some point that there was a problem with the legal description which created a 20-foot strip of property on your east/west boundary line which did not appear to be in your deed, correct?
- A. Only at the time of the meeting with Jackman.
- Q. And when did that meeting take place?
- A. I don't have the date.
- Q. Okay. Was that during the period of time that the surveys were being performed or just after?
- A. It was just -- I think probably just -- probably right during the same time.
- Q. Is it fair to say once you learned that again, you just let the attorneys, the surveyors and C&A construction take care of it; is that correct?
- A. Well, I couldn't correct it. I mean I had all the powers that be, C&A, the attorneys, Dudley and the Provo city, were all there. If I felt they couldn't do it, I surely couldn't. Testimony of Verl Jensen, R at 786-787 page 293 line 21 to page 284 line 16.
- Q. Line 20: "What was the next thing you did specifically to determine whether or not you were the owner or you were the owner of this 20-foot strip of property, other than contact Mr. Jackman?"
- A. That's it. He was my attorney --" Oh excuse me. "That's it. Had him contact whatever parties he thought he could to resolve it." Testimony of Verl Jensen, R at 788 page 298 line 1-9
- E. Defendants believed that the boundary line dispute was resolved when the City permitted them to continue work on the project.**
- Q. Then did you believe that the boundary line dispute was resolved?
- A. As soon as they were able to obtain a continuation-of-work order. I figured they would not allow the work to continue unless those things were resolved. What else was I supposed to do. Testimony of Verl Jensen, R at 784 page 282 ln 13-18.
- Q. Back to the boundary line dispute again for just a second. You mentioned that you thought after the surveys had been performed, the city allowed you to go back to work, that the boundary line had been resolved.
- A. I assume so. Testimony of Verl Jensen, R at 784 page 284 line 23 to page 285 line 3.

Q. Had you ever been told that at any time since the construction had been completed that the boundary line dispute had been resolved?

A. By him or by who?

Q. By anyone?

A. I just made an assumption that if C&A was able to get a work order started again after all the problems, that probably Dudley and Provo city had agreed to the points and that was what they were going to use. I'm not sure it's resolved to this day. Testimony of Verl Jensen, R at 785 page 286 line 3-12.

2. PLAINTIFF WILL NOT INCLUDE MARSHALLED EVIDENCE ON THE OTHER ELEMENTS OF FRAUD.

It is clear that Defendants did not rely on any misrepresentations allegedly made by Plaintiff. Defendants have never claimed that they relied on misrepresentations allegedly made by the Plaintiff, have always believed that they owned the 20-foot strip of property, and resisted Plaintiff's claim of ownership. Because the evidence demonstrates that Defendants did not rely on misrepresentations allegedly made by Plaintiff, and for purposes of brevity, Plaintiff is not including in his brief marshalled evidence supporting the trial court's findings that other elements of fraud are supported by the record. Plaintiff has marshalled such evidence and will supplement this brief if requested by this Court.

III. DEFENDANTS HAVE NOT PROPERLY BRIEFED "ENCROACHMENT."

Defendants' second argument is titled "ENCROACHMENT." The argument is brief, does not cite to the record, and cites no legal argument or authority in support of the argument. (See Brief of Appellants at p. 21). Utah courts have addressed cases where appellants fail to set forth adequate legal analysis and

citation to the record in their briefs. In *State v. Price*, 827 P.2d 247, 249 (Utah App. 1992), this court stated:

Utah courts have also declined to reach the merits of an issue on appeal due to inadequate legal analysis. In *State v. Day*, 815 p.2d 1345 (Utah App. 1991), the defendant asserted, among many arguments, that he was denied due process of law because of the inadequacy of his trial counsel. Although he listed several errors his counsel allegedly committed, he neglected "to establish any of these arguments in the record or by legal authority." *Id* at 1351. We determined that this failure rendered the defendant's argument and analysis meaningless. Therefore, we refused "to address this issue and assumed the correctness of the trial court's judgment." *Id*.

(See also *First Security Bank of Utah v. Creech*, 858 P.2d 958, 962 (Utah 1993).

The portion of Defendant's brief under the title "ENCROACHMENT," must not be considered by the court.

IV. THE COURT HAS BROAD DISCRETION IN FASHIONING EQUITABLE REMEDIES.

In the argument set forth under the title "Encroachment" in the "Brief of Appellants," the crux of Defendant's arguments is that the ordered remedy is too extreme or too harsh under the circumstances. In making this argument, Defendants fail to discuss whether the remedy ordered by the trial court is appropriate under Utah law. The remedy which was ordered by the trial court appropriately addresses the relief sought by Plaintiff in bringing this action.

The "Amended Complaint," (R. at 24-18) is the pleading which sets forth Plaintiff's claims against Defendants. Among those claims is a trespass claim. (R. at 21-20). Trespass is an action at law, but may have equitable remedies. *Hansen v. Hart*,

26 Utah 229, 72 P. 938, 939 (1903), *Huges v. Dunlap*, 91 Cal. 385, 27 P. 642, 643 (Calif. Supreme Court, 1891). In the Complaint, Plaintiff prayed for equitable remedies as there was no suitable remedy at law. (R. at 19). The trial court in deciding this case has entered findings and an order reflecting an equitable remedy. (R. at 697-687). Where a trial court has fashioned an equitable remedy, appellate courts apply an abuse of discretion standard upon review. *Morris v. Sykes*, 624 P.2d 681, 684 (Utah 1981).

Keeping that standard in mind, the Utah Supreme Court stated the following in *Thurston v. Box Elder County*:

With the foregoing in mind, we address Thurston's contention that reinstatement with back pay is the only appropriate remedy for the wrongful termination of his employment. The spectrum of remedies available in a breach of contract action is not as narrow as Thurston asserts. A trial court is accorded considerable latitude and discretion in applying and formulating an equitable remedy. *LHIW, Inc. v. Delorean*, 753 P.2d 961, 963 (Utah 1988); *Morris v. Sykes*, 624 P.2d 681, 684 (Utah 1981) We review the trial court's determination of a remedy in this case under a standard that acknowledges considerable discretion in the trial court, and we will not upset the court's ruling unless it constituted an abuse of discretion. *Morris*, 624 P.2d at 684.

Thurston v. Box Elder County, 892 P.2d 1034, 1041 (Utah 1995).

Defendants have failed to argue, let alone demonstrate, that the trial court abused its discretion in fashioning the remedy which was ordered in the case at bar. Without arguing that the court abused its discretion, Defendants cannot prevail on their claim that the remedy ordered by the trial court was inappropriate.

V. PLAINTIFFS ARE ENTITLED TO RECOVER ATTORNEYS FEES ON APPEAL.

In addition to the difficulties on the merits set forth above, the Brief of Appellants is deficient and improper in a

number of other respects, and is frivolous pursuant to rules 33 and 40 of the Utah Rules of Appellate Procedure:

a. The brief fails to properly cite to the record. (See Brief of Appellants at 1-11).

b. The brief contains the wrong standard of review for both issues. (See Brief of Appellants at 1-2).

c. It contains no marshalling of the evidence, despite making an attack on a factual finding. (See "Brief of Appellants at 1-11).

d. It contains no indication that the issues were preserved for appeal. (See Brief of Appellants at 1-2).

e. The brief contains extensive references to materials which were not part of the trial record. (See Brief of Appellants at 1-11).

f. The brief is filled with irrelevant derogatory references to Plaintiff. (See Brief of Appellants).

g. The brief contains no citation or legal authority in support of the argument under encroachment. (See Brief of Appellants at 21).

h. It contains only very limited references to any legal argument or authority. There are only 4 case citations in the body of the brief, and two of those are string cites which follow one of the other citations. (See Brief of Appellants at 12-22).

i. Defendants have used their brief as though appellate review extended them the opportunity for a trial de novo. (See Brief of Appellants).

Each of these concerns are addressed in the memorandum in support of motion to strike which has been filed by Plaintiff. Considering the above problems, and the difficulties with Plaintiff's position on the merits, it is easy to determine that Defendants have not prosecuted this appeal in good faith. Instead, this is a frivolous appeal as defined by rules 33 and 40 of the Utah Rules of Appellate Procedure. Rule 33(b) of the Utah Rules of Appellate Procedure defines a frivolous appeal as follows:

For purposes of these rules, a frivolous appeal, motion, brief, or other paper is one that is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law. An appeal, motion, brief, or other paper interposed for the purpose of delay is one interposed for any improper purpose such as to harass, cause needless increase in the cost of litigation, or gain time that will benefit only the party filing the appeal, motion, brief, or other paper.

In *Schoney v. Memorial Estates*, 863 P.2d 59, 63, 224 Utah Adv. Rep. 35 (Utah App. 1993), the court adopted a definition of frivolous appeal from *Black's Law Dictionary*, pg. 601 (5th ed. 1979): *Black's* defines a frivolous appeal as follows: "one in which no justiciable question has been presented and appeal is readily recognizable as devoid of merit in that there is little prospect that it can ever succeed." This definition closely fits the appeal filed by Plaintiffs in the case at bar. Defendants failed to present evidence on their reliance on the misrepresentations allegedly made by Plaintiff and failed to recognize their reliance as an essential element to be proven in a cause of action for fraud. Since Defendants' reliance, is a

necessary element which Defendants had to prove by clear and convincing evidence, Defendants' appeal is devoid of merit and there is no prospect that it could ever have succeeded.

Upon review it is clear that Plaintiff's appeal is not grounded in fact, is not supported by existing law, and does not attempt to extend, modify, or reverse existing law. Plaintiff's appeal is necessarily frivolous. Defendant is therefore entitled to recover attorneys fees resulting from Plaintiff's frivolous appeal pursuant to rules 33 and 40 of the Utah Rules of Appellate Procedure.

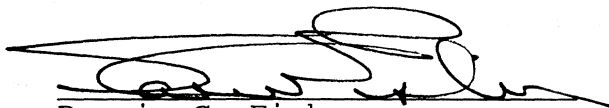
CONCLUSION

Although unrecognized by Defendant in this matter, the proper standard of review when attacking factual findings of a trial court is a clearly erroneous standard which is applied after marshalling the evidence. The standard of review when attacking an equitable remedy is an abuse of discretion standard. Under either standard, Defendant cannot prevail on appeal. Defendant has failed to marshal the evidence, and the correctness of the findings of the trial court is presumed. Review of the marshalled evidence (which was marshalled by Plaintiff), demonstrates that Defendant did not prove fraud at the trial level by clear and convincing evidence. Further review clearly indicates that the elements of fraud were unsatisfied at the trial level, and that the trial court decision should be affirmed.

Defendant's arguments regarding encroachment are equally flawed. Defendant failed to cite any legal authority, or to make any legal argument regarding the remedy selected by the trial court. Even if the remedy had been properly briefed, there is no demonstration that the court abused its discretion in fashioning this equitable remedy. Review of Defendant's brief, and the motion to strike filed by Plaintiff makes it clear that Defendants' appeal is frivolous and that attorney's fees should be awarded and the judgment of the trial court affirmed.

DATED THIS 25th day of September, 1996.

FISHER, SCRIBNER, & STIRLAND P.C.

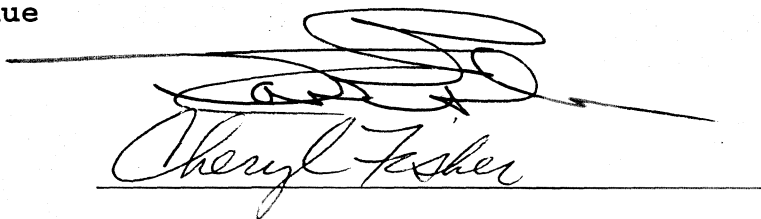


Darwin C. Fisher
Donald E. McCandless
Attorneys for Plaintiff/Appellee

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing, postage prepaid, to the following this 25th day of September, 1996:

RICHARD D. BRADFORD
BRADFORD, BRADY & RASMUSSEN, P.C.
389 North University Avenue
Provo, Utah 84601



APPENDIX 1

being fully advised herein, and having issued an order of default against Defendant Eric Orton, the Court now finds in favor of the Plaintiff and against the Defendants and hereby makes the following Findings of Fact and Conclusions of Law which constitutes the decision of the Court herein.

FINDINGS OF FACTS

1. Plaintiff Jack Perry is a resident of Utah County, State of Utah.
2. Defendants Verl A. Jensen and Margene H. Jensen are husband and wife and are residents of Utah County, State of Utah.
3. Defendant C & A Construction, Inc. is a corporation organized under the laws of the State of Utah having its principal place of business in Utah County, State of Utah.
4. Most of the events forming the basis of the causes of action occurred in Utah County, State of Utah.
5. In March 1988, Defendants Jensen purchased the real property located at 900 N. and 900 E., City of Provo, County of Utah, State of Utah.
6. Plaintiff Perry acquired the apartment complex known as the Robert E. Lee Apartments located at 876 E. 900 N., city of Provo, State of Utah, on September 30, 1988.
7. The Perry property abuts the Jensen property on the West and South boundary lines of the Jensen property.

8. The Jensen property has been sold and resold a number of times in the last fifteen years. Multiple mistakes in the property descriptions on the deeds and in the surveys had created uncertainty as to the actual location of the boundary line between the parties' properties. These errors in property descriptions have been resolved by the Court in its Summary Judgment dated November 23, 1993.

9. Defendants' Jensen contracted with C & A Construction, Inc. to build an eight-plex apartment building on the Jensen property.

10. In May 1989, construction began on the 8-plex apartment building.

11. Defendants Jensen did not perform a survey when they purchased the property in March 1988, nor did they perform a survey prior to the commencement of construction.

12. A survey of the Jensen property was performed in 1985 by Dudley and Associates.

13. The Dudley survey in 1985 fixed the West boundary line of the Jensen property abutting the foundation of the buildings on the Perry property.

14. Perry challenged the location of the West boundary line of the Jensen property as determined by the 1985 Dudley survey.

15. As a result of the dispute between Perry and Jensen as to the actual location of the West boundary line of the Jensen property, the City of Provo required the Jensens to perform a survey in May 1989 shortly after construction on the 8-plex began.

16. Glen Calder, at the request of Jensen, performed a survey of the Jensen property in May 1989.

17. Glen Calder using the same legal description as Dudley used in 1985, fixed the West boundary line of the Jensen property abutting the foundation of Perry's apartments.

18. Jensen then hired Dudley and Associates to perform another survey.

19. The Dudley survey also set the West boundary line abutting the foundation of Perry's building.

20. Perry hired Robert Gunnell to perform a survey.

21. The Gunnell survey placed the west property line approximately 6.5 feet from the foundation of Perry's building.

22. The Provo City building department, after the west boundary lines had been established approximately six feet from the Perry building foundation, issued a permit on June 9, 1989.

23. On July 10, 1989, Perry obtained a restraining order stopping construction by Jensen.

24. On July 10, 1989, Defendants obtained an order setting aside the restraining order.

25. Defendants were not delayed in the construction of their apartment building by the obtaining of the restraining order by Plaintiff.

26. The construction of the 8-plex was completed within a reasonable time.

27. During the construction process, the Defendants Jensen made changes to the plans for the condominiums that caused the delay in locating long-term financing for the project.

28. Defendants Jensen were not hindered in obtaining a construction loan by any of the actions of Perry.

29. Defendants Jensen completed the 8-plex and received a certificate of occupancy on September 1, 1989.

30. Defendants were not delayed or hindered in completion of the 8-plex by any conduct or actions of Perry.

31. There is no evidence that the Defendants Jensen suffered severe emotional distress as a result of the actions of Perry.

32. The hives suffered by Defendant Margene Jensen were the result of stress which may have been caused by a number of factors but cannot be said to have been proximately caused by the conduct and/or actions of the Plaintiff.

33. There is no evidence that Plaintiff intentionally entered into conduct with the purpose of causing the Defendants emotional distress.

34. During construction, the Defendants trespassed on the Plaintiff's property for which the Plaintiff should be compensated in the sum of \$1.00 (One Dollar).

35. Defendants removed shrubbery, trees and topsoil from the Plaintiff's property. Plaintiff is not entitled to damages for loss of trees, shrubs or other landscaping because Plaintiff cannot establish a value for the items allegedly removed.

36. There is no evidence that Plaintiff made any fraudulent statements to Defendants or to anyone else.

37. There is no evidence that Plaintiff engaged in fraudulent conduct toward Defendant or anyone else.

38. The footings of the Defendants Jensens retaining wall extends onto the Plaintiffs property.

CONCLUSIONS OF LAW

1. There is no actual or approximate causal link between the conduct of Plaintiff and the emotional distress and hives claimed by Defendants Jensen.

2. Plaintiff is entitled to a judgment of No Cause against the Defendants on their cause of action for fraud.

3. Plaintiff is entitled to a judgment of No Cause against the Defendants on their cause of action for intentional infliction of emotional distress.

4. Plaintiff is entitled to a judgment of No Cause against the Defendants on their cause of action for damages for the delay in completion of the 8-plex.

5. Plaintiff is entitled to a Judgment requiring the Defendants to remove the wall on Defendant Jensen's south boundary line.

6. Plaintiff and Defendant are to pay their own attorneys fees and costs.

DATED this 5 day of ~~May~~ ^{June}, 1995.

BY THE COURT:


RAY M. HARDING, JUDGE

SUBMITTED BY:



DARWIN C. FISHER

NOTICE TO DEFENDANT'S ATTORNEY

TO: RICHARD BRADFORD

You will please take notice that the undersigned, Attorney for Plaintiff, will submit the above and foregoing Findings of Fact and Conclusions of Law to the Honorable Ray M. Harding for his signature, upon the expiration of five (5) days from the date of this Notice, plus three (3) days for mailing, unless written objection is filed prior to that time, pursuant to Rule 4-504 of the Rules of Judicial Administration of the State of Utah.

DATED this 15 day of May, 1995.


Darwin C. Fisher
Attorney for Plaintiff

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing instrument on this

17 day of May, 1995 by first-class U.S. mail, postage prepaid, to the following:

Richard Bradford
389 North University Avenue
Provo, Utah 84606


Secretary

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APPENDIX 2

FILED IN
4TH DISTRICT COURT
STATE OF UTAH
UTAH COUNTY
Jun 6 2 23 PM '95
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Darwin C. Fisher, Bar No. 1080
J. Grant Moody, Bar No. 6282
FISHER, SCRIBNER, MOODY & STIRLAND, P.C.
Attorneys for Plaintiff
2696 North University Ave. ,Suite 220
Provo, Utah 84604
Telephone: (801) 375-5600

MICROFILMED 6/17/1995

IN THE FOURTH DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

JACK PERRY,)	
)	AMENDED
)	JUDGMENT
Plaintiff,)	
)	
vs.)	
)	Civil No. 900400148
VERL A. JENSEN, MARGENE H.)	
JENSEN, C & A CONSTRUCTION, INC.)	
and ERIC ORTON,)	
)	
)	Judge Ray M. Harding
Defendants.)	

THE ABOVE ENTITLED and numbered cause came on regularly for trial on March 23-24, 1994, the Honorable Ray M. Harding presiding. The parties having waived a jury, the matter was tried to the Court with Darwin C. Fisher appearing as attorney for Plaintiff Jack Perry and Richard Bradford appearing as attorney for Defendants.

After hearing the allegations and proofs of the parties and the arguments of counsel and being fully advised herein, and having entered its Findings of Fact and Conclusions of Law and

having directed that judgment be entered in accordance therewith,

NOW THEREFORE, by reason of the law and findings it is, ORDERED, ADJUDGED
AND DECREED:

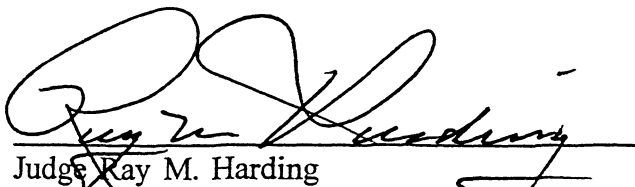
1. Plaintiff is awarded judgment dismissing each of the claims set forth in Defendant's
Counterclaim.

2. Plaintiff is awarded judgment against Defendants in the amount of \$1.00 (One
Dollar) for trespass.


3. Plaintiff is awarded judgment against Defendants requiring Defendants to remove
the footings of Defendant's retaining wall on Defendant's south property line, or in the
alternative pay to the Plaintiff an amount agreed upon by both parties for the encroachment of
Defendant's footings onto Plaintiff's property.

DATED this 5 day of ~~May~~ ^{June}, 1995.

By the Court:


Judge Ray M. Harding

Submitted by:


Darwin C. Fisher



NOTICE TO DEFENDANT'S ATTORNEY

TO: RICHARD BRADFORD

You will please take notice that the undersigned, Attorney for Plaintiff, will submit the above and foregoing Judgment to the Honorable Ray M. Harding, for his signature, upon the expiration of five (5) days from the date of this Notice, plus three (3) days for mailing, unless written objection is filed prior to that time, pursuant to Rule 4-504 of the Rules of Judicial Administration of the State of Utah.

DATED this 17th day of May, 1995.

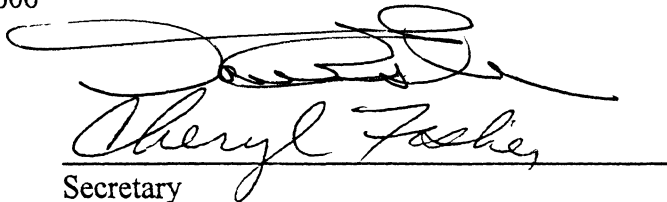


Darwin C. Fisher
Attorney for Plaintiff

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing instrument on this 17 day of May, 1995 by first-class U.S. mail, postage prepaid, to the following:

Richard Bradford
389 North University Avenue
Provo, Utah 84606



Secretary