

# In the United States Bankruptcy Court

## for the Northern District of Iowa

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PAUL M. KAPUSTYNSKI and  
JACQUELINE S. KAPUSTYNSKI

*Debtor(s).*

Bankruptcy No. 97-40327XM

Chapter 7

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BERNARD WAGNER and SANDRA  
WAGNER EUGENE WAGNER and  
MAGDALENE WAGNER

*Plaintiff(s)*

Adversary No. 97-9125M

vs.

PAUL M. KAPUSTYNSKI and  
JACQUELINE S. KAPUSTYNSKI

*Defendant(s)*

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### DECISION

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Bernard and Sandra Wagner and Eugene and Magdalene Wagner seek to except from discharge their claims against the debtors. Trial was held February 24, 1998 in Mason City. J. Mathew Anderson appeared for the Wagners. Scott Buchanan appeared for the Kapustynskis. This is a core proceeding under 28 U.S.C. § 157(b)(2)(I).

Wagners' claims arise from the unauthorized cutting of timber from their land. Trees were cut by a logger under a contract with Kapustynskis who are adjoining landowners. Wagners claim that Kapustynskis arranged for the cutting of the trees knowing they belonged to Wagners. Kapustynskis say that the cutting of Wagners' trees was either accidental on their part or that the logger alone is responsible for the wrongful cutting.

#### I.

Paul and Jacqueline Kapustynski live on an acreage near Osage. Their property is approximately 39 acres. In late fall 1995, a stranger knocked on their door and asked to look at their property for the purpose of making an offer to buy trees. Later that day, the stranger offered \$5,000 in cash for 200 trees. Paul Kapustynski (Kapustynski) told him he would think about it.

Rather than take that offer, Kapustynski called Gary Beyer, the District Forester for the Iowa Department of Natural Resources. He asked him for help in timber management including the marketing of their timber. Beyer said he could not work with them until spring, but he recommended the names of several timber consultants. From those recommended, Kapustynski contacted Bill Haywood. Haywood is a forestry contractor who operates a business known as Forest Improvement Services. His work includes selling trees, planning timber areas, and killing, planting, harvesting and maintaining trees.

Haywood was asked to determine if Kapustynskis had enough trees for a timber sale. Haywood met with Kapustynski at the acreage on December 20, 1995. He asked Kapustynski if he had a map of his property. Kapustynski said he did but that he could not find it. Haywood made a second trip to Kapustynskis on December 27. He took with him an aerial map of the area which he had obtained from the Agricultural and Crop Stabilization Service, now known as Farm Services Agency (FSA). At the second meeting, Kapustynski told Haywood that he had found his plat map. He offered it to

Haywood, but Haywood said he preferred to work with the FSA map, as this was standard practice in the forestry business.

He showed Kapustynski the map (Exhibit 2)<sup>(1)</sup> (see also Exhibit D) and asked Kapustynski to identify his property. Haywood said that Kapustynski drew lines marking the northern and eastern boundaries of the property. The lines were parallel to lines already on the map. Kapustynski said he recalls pointing out his property to Haywood, but does not remember drawing the lines. Nonetheless, Kapustynski admits that the property area he pointed out was a large dark area with the letters "NC" in the center. I find from the evidence that Kapustynski pointed out to Haywood land which in the northeast corner included four acres of the Wagners' property. Haywood had no independent knowledge of what property Kapustynski owned, and he did not try to confirm the ownership of what Kapustynski had shown him.

Immediately after meeting with Kapustynski, Haywood went to look at his trees and to mark those suitable for sale. He used a compass and the map to help locate the land that Kapustynski had identified as his. He located the land and then marked marketable trees with blue paint. He marked each tree at the base and also further up the trunk. The base-marking was to identify, after the cutting, trees sold under the contract. Haywood kept a record of what he marked. From the record, he prepared a Timber Sale Bid Notice (Exhibit 13). It identified each offered tree by species, numbers of trees, estimated board foot per tree and total board foot per species.

The notice stated that Paul Kapustynski was the landowner. It gave the sale location as the "SW 1/4, Sec. 29, Osage Twp., Mitchell Co., IA" and said that the "Woodland extends east from the Kapustynski residence at 3530 Noble Ave." It lists the trees offered for sale as follows:

55 burr oak
55 hard maple
22 basswood
3 red elm
1 ash
<u>1</u> hackberry
137 total

The notice told potential bidders that the sale trees were marked with blue paint. It also made this comment: "Very accessible logging. Access to woodland through the farm yard. Generally level terrain." Included with the bid notice was a map of the sale area (Exhibit 2). It included Wagners' property.

Haywood mailed the notice to 20 prospects. Five sent bids to Kapustynski. The high bidder was Iowa Forest Products at \$7,700.00. The person who filed the successful bid was Lyle (Skip) Bunston, Jr. Prior to submitting the bid, Bunston had gone to Kapustynski's property to see the trees. Kapustynski directed him to an area to the east of a horse corral fence which was to the north and east of his house.

Although Haywood notified Bunston that Iowa Forest Products was the successful bidder, Bunston prepared a contract for sale between Kapustynski and Wieland & Sons Lumber Co. (Exhibit 15). He took the contract and a check for \$7,700.00 to Kapustynski on February 8, 1996. The contract contained a provision that "[t]he boundary lines be clearly marked and explained to logging crews by Seller before cutting begins." *Id.* Logging was to be completed by March 1, 1997. *Id.* Kapustynski deposited the check in his account, paid Haywood a six per cent commission and spent the remainder of the money.

Haywood had asked Kapustynski to find out if his neighbor to the north were interested in selling some hard maples. Haywood wrote to Bunston and told him that Kapustynski was going to give Haywood the neighbor's name so Haywood could try to negotiate the sale of additional hard maples to Bunston. Kapustynski later told Haywood that the neighbor was not interested in a sale.

There are differing points of view as to the meaning and importance of Haywood's effort to find out if the neighbor wanted to sell trees. The implication by Wagners, as I understand it, is that Kapustynski was to contact them about the sale of additional hard maples. They say Kapustynski did not contact them but said that he did. Kapustynski agrees he

never contacted Wagners. Kapustynski said he thought Haywood meant a neighbor named Bill Clark, so he contacted Clark and learned he was not interested. From the evidence, I cannot find that Haywood meant the Wagners. He did not know the name of the neighbor (see Exhibit 14). Exhibit 14 shows that Haywood was interested in the sale of additional hard maples from the "north portion of the hard maple woods." Based on the testimony, Exhibit 14 and a map of the area (Exhibit 2), I do not find that Kapustynski lied about contacting his neighbor.

In March 1996, Gary Beyer completed a Forest Stewardship Plan for Kapustynskis (Exhibit E). He mailed it to them in late March. To prepare it, he had walked 30 acres he thought were owned by Kapustynskis. He divided the 30 acres into four stands of timber. Stand 1 contained 15 acres and included hard maple trees. It was to the north and east of Kapustynskis' house. He walked the area after Haywood had marked trees for harvest but before the cutting. He noted that "[t]he majority of merchantable trees are marked for harvest."

Stand 2 was identified as four acres located east of stand 1 and north of stand 3. It contained hard maples and basswoods, and Beyer noted that "[t]he majority of larger trees have been marked for harvest." This was the four acres owned by Wagners.

It appears from the report that stands 3 and 4 contained no trees marked by Haywood for sale. These stands aggregated 11 acres.

Beyer covered in the plan the land identified by Kapustynski as his on an ASCS/FSA map which Beyer had brought with him to Kapustynskis' home. Beyer selected the FSA map because it was readily available and its use was normal practice.

Beyer testified that the main purpose of an FSA map is to show farm-program land. There was testimony in this case as to whether the FSA maps (see Exhibits A, C, D, 2 and 7) show or are intended to show property lines. I find that the evidence is insufficient that such maps indicate or are intended to indicate property lines or property ownership. It appears from examining them that they are intended to identify crop land and that various areas of crop-growing land are identified to FSA programs and perhaps to producers by identification numbers. I cannot determine from looking at any one of them that they portray property lines or property ownership.

Kapustynski received the stewardship plan, but he did not read it. He said he did not read it because at the time he received it, he was not ready to implement it.

Bunston began harvesting the trees in December 1996. He had tried once earlier, but could not do so because of inclement weather. He hired Dale Bunston, his uncle, to do the cutting. He took Dale to the Kapustynskis. To get to the trees, the loggers drove into the property on the southerly of two east-west drives and through two gates on Kapustynskis' property. To get to the best hard maples, they had to go through a third fence. It was that fence that separated Kapustynskis' and Wagners' properties.

Lyle Bunston asked Kapustynski if they could open the fence to carry out the hard maples from what was actually Wagners' property. Bunston was referring to the four-acre area that belonged to Wagners in the northeast portion of the sale area. Bunston wanted to open up the fence because the logger's machines would be dragging 40-60 foot long trees, and they did not want to tear up the fence. They wanted a wide area to drive through, and the gate was narrow, only 10 to 12 feet wide.

Bunston said that Kapustynski said "no," not to take down the fence, but rather to "pull the post" in front of the gate, and take the logs out through the gate. Although this was not Bunston's preference, he accommodated Kapustynski. The post which was pulled was on the Kapustynski side of the gate which was in the wire fence which separated Kapustynskis' and Wagners' properties. The post prevented the gate from being opened. When it was pulled, Bunston could swing the gate open to the Kapustynski side (see Exhibit 8). As a consequence of having to pull the logs through the narrow gate, Dale Bunston said he had to make wide turns behind the gate so that they could pull logs straight through the gate without damaging it.

Kapustynski says that the conversation regarding the pulling of the post referred to a different gate. He says that during the conversation with Bunston, he was referring to the second gate, the one into the corral. Kapustynski says the corral

has an electric fence and gate. A yellow stake is used to support the continuance of the electric wire across the gate area. Kapustynski says the stake holds the electric fence as it passes across the gate area so that it can be connected to the electric fence on the other side of the gate. He said that was what he was talking about when he told Bunstons to pull something and open the gate. He says he was referring to the yellow stake.

Bunston disagrees that the corral gate was the subject of their conversation. Bunston says that gate was no problem to the logging operation, as it was a wide gate and that the logs would have already been cut and loaded on trucks when taken through that gate. He says there were no posts in front of the first two gates on the property, only a post in front of the gate leading to what he now knows is Wagners' land.

Getting into Wagners' four acres was critical. The best trees were on Wagners' property. They were the hard maples. They were the most valuable trees in the sale. Haywood says that without the hard maples from Wagners' property, Kapustynski would not have had enough lumber for a bid sale. Haywood says there were very few of the valuable hard maples on the Kapustynskis' property.

It took the loggers about two weeks of intermittent work to finish the logging. Bunston said they cut 126 trees, 11 less than he had purchased. He said often they cut less than they buy because owners put low quality trees in the sale, and it is not worth it to cut them. The harvest was completed in December 1996.

Bernard and Sandra Wagner live on a farm adjacent to Kapustynskis and one and one-half miles to the east. They own the 230-acre farm as joint tenants with Bernard's brother Eugene and his wife Magdalene. Prior to this incident, Kapustynskis and Wagners had never met.

Bernard Wagner discovered on April 2, 1997 that their trees had been cut. He called the sheriff. Deputy Sheriff Gary Torney came out and talked with Bernard and Sandra Wagner. Torney talked to Paul Kapustynski that day. He learned from him that Kapustynski had had some logging done, and that he had been paid for selling trees. Torney communicated that information to Bernard and Sandra Wagner on April 2. Torney told Wagners that he would get back to them.

On April 27 or 28, 1997, Bernard and Sandra Wagner, Paul and Jacqueline Kapustynski, Deputy Sheriff Torney and Lyle Bunston met and looked at the area where trees had been taken from Wagners' property. Bill Haywood also may have been present, as may have been Mark Webb, a forestry appraiser. The testimony was not consistent on the dates of gatherings in the woods nor as to who was present. It is sufficient to say that at the meeting when stumps were counted, Bernard and Sandra Wagner were there, as were Kapustynskis, Bunston and the deputy. Bernard Wagner counted stumps. Bunston also counted. Bunston was looking for stumps of trees taken by him. He looked for fresh cut stumps and believed he could identify what he had taken by the age of the stumps and the style of cut made by his uncle. He counted 68 fresh stumps on Wagners' property and 58 on Kapustynskis'. Some stumps had no blue paint, but Bunston says that is not uncommon as they cut some trees as low as they can, and that can be below the paint marking. The group was there about two hours. Counting was not easy. Not only was there undergrowth, but remaining tree branches and limbs from harvested trees also obscured stumps. No one else counted. Kapustynski says he asked Deputy Torney to count, but he refused saying it was a "civil matter."

Bunston testified that at the time, Kapustynski said he had not been back into those woods before. No one presented any direct evidence that Kapustynski had been to the area of his property where his land abutted the Wagners' land. He did not go with Haywood when he marked the trees. He did not go with Bunston when he looked at the markings or when he did the logging. He did not go with Beyer when he looked at the property for the stewardship plan. Dale Bunston said that once during the logging operation he saw small tractor tracks at the work site, and he also saw that Kapustynski had a yard tractor. Dale Bunston did not see Kapustynski at the site. Wagners argue that Kapustynski is not being truthful on his knowledge of the property lines and that this is evidence that he intentionally sold Wagners' trees. As evidence of his lying, they point to the conversation between Kapustynski and Bunston on the pulling of the post. As stated earlier, Bunstons say that only the gate into Wagners' property had a post in front of it and that Kapustynski knew that when he told them to pull it to get the trees out of that area. As previously stated, Kapustynski denies he was talking about that gate, and he denies that prior to this incident he had ever been on the part of his property beyond the cattle yard and the small pond which are located to the southeast of the Wagner area.

Kapustynski decided to take his own stump count. With his wife and their friend Julie Hase, they counted stumps, spraying them with white paint as they counted and recording the count in a notebook. They covered Kapustynskis' property three times. Kapustynski said they counted about 10 fresh stumps with no blue paint on them. He said each time their count differed. Julie Hase said the same. The count ranged from 125 to 135 stumps. Kapustynski said they covered 20-25 acres, but also said it was 30-35 acres. The Stewardship Report indicates it should have been only 15 acres.

From his count, Kapustynski argues that he received no money from Wagners' trees, that the stumps on his property are enough to make up his contract amount. He says that Bunston, not he, took Wagners' trees. I do not find Kapustynski's evidence sufficiently reliable to find that Bunston cut trees in an area beyond that covered by Kapustynski's direction to Haywood.

Wagners had an appraisal done on the trees taken from their property. They retained Mark Webb, a consulting forester, to provide them with an estimate of the value of the trees cut from their land. Webb used Bunston's tally and information from Haywood on measurements. He walked the area and examined the stumps. He estimated the heights of the trees based on stump sizes, and he used a Scribner Tree Scale to estimate timber volume in board feet (see Exhibit 3). It was his opinion that the value of the trees taken in the December cutting was \$6,224.00. Based on his testimony and appraisal, I find that the hard maples cut from Wagners' land by Bunston in December 1996 had a fair market value to the property owners of \$6,224.00.

Kapustynskis filed their joint chapter 7 petition on February 12, 1997. When Wagners met Kapustynskis in the woods in late April, Kapustynskis did not mention the bankruptcy. Bernard and Sandra did not learn of the bankruptcy until they received notice on May 4 that they had been added as creditors in the case. Sandra made an appointment with their local attorney in Osage. She took the notice to him on May 8<sup>th</sup> or 9<sup>th</sup>. He recommended that they see an attorney who practiced in bankruptcy. He referred them to Anderson. Sandra made an appointment with Anderson. Before seeing him, all four Wagners discussed that Kapustynskis had filed bankruptcy. Sandra saw Anderson sometime between May 12<sup>th</sup> and 15<sup>th</sup> on behalf of all the Wagners. They retained Anderson to represent them. Although Eugene and Magdalene were not added to the schedule of creditors and never received official notice of the case, they had knowledge of the case sometime between May 4 and May 15. None of the Wagners received notice of the claims filing deadline. That had been served on creditors prior to the addition of Bernard and Sandra as creditors. None received initial notice of the case which included the deadline for filing complaints to determine dischargeability of certain types of debt. The deadline for filing dischargeability complaints under § 523 of the Code was May 9, 1997 (case file no. 97-40327XM, docket no. 5).

At the beginning of June, Wagners authorized Anderson to file the complaint which initiated this proceeding. It was filed June 23, 1997. The complaint seeks exception of Wagners' claims from Kapustynskis' discharges. Discharge from dischargeable debts was granted July 2, 1997.

Deputy Torney continued his investigation. He finished it in late May or early June 1997. On July 2, 1997, after consultation with the Mitchell County attorney, he filed a criminal complaint against Paul Kapustynski. Kapustynski was tried and acquitted.

## II.

Wagners' complaint as amended (docket nos. 1 and 25) seeks exception of Wagners' claim from Kapustynskis' discharges under 11 U.S.C. §§ 523(a)(3), (4) and (6). Section 523(a)(4) excepts from discharge claims for larceny. Section 523(a)(6) excepts claims for willful and malicious injury. The deadline in this case for filing complaints under §§ 523(a)(4) and (6) was May 9, 1997. The deadline was set by the clerk pursuant to Fed.R.Bankr.P. 4007(c). Wagners missed the deadline in filing their complaint. They seek extension of the time for asserting such claims by invoking § 523(a)(3)(B).

The latter Code section states:

A discharge under section 727 ... of this title does not discharge an individual debtor from any debt ... neither listed nor scheduled under section 521(l) of this title, with the name, if known to the debtor, of the

creditor to whom such debt is owed, in time to permit ... if such debt is of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim and timely request for a determination of dischargeability of such debt under one of such paragraphs, unless such creditor had notice or actual knowledge of the case in time for such timely filing and request.

11 U.S.C. § 523(a)(3)(B).

I have separately determined in Kapustynskis' case that Wagners may not participate in the trustee's distribution of assets because they failed to file a timely claim although they had actual knowledge of the case in time to file a timely claim. They had filed their complaint for this adversary proceeding before the claims deadline. Based upon the facts presented in the adversary proceeding, I find that Wagners had actual notice of the Kapustynskis' bankruptcy case in time to file a timely claim.

I find now that Wagners did not have notice or actual knowledge of the Kapustynskis' bankruptcy case in time to permit the timely filing of a request for a determination of dischargeability of the debt under §§ 523(a)(4) or (6). Bernard and Sandra Wagner learned of the case on May 4. Sandra promptly made an appointment with their lawyer in Osage. She saw him on May 8 or 9, and he referred her to Anderson whom she met with between May 12<sup>th</sup> and 15<sup>th</sup>. The deadline for dischargeability complaints under §§ 523(a)(4) and (6) was May 9. Bernard and Sandra had only four days from receiving the notice to file their complaint. Eugene and Magdalene may not have had that much time. I find that Wagners acted reasonably promptly upon receiving notice of the filing, but that they did not receive notice in time to permit a timely filing of a dischargeability complaint. Manufacturers Hanover v. Dewalt (In re Dewalt), 961 F.2d 848, 851 (9<sup>th</sup> Cir. 1992).

It must be asked, what effect does it have on Wagners' complaint that they had notice of the case in time to file a timely claim but not in time to file a timely complaint? I conclude it does not prevent them from pursuing a timely complaint under § 523(a)(3)(B). I construe § 523(a)(3)(B) to mean that in an asset case, a creditor (with a claim under § 523(a)(2), (4), or (6)) must be listed, or must have notice or actual knowledge of the case, in time to permit timely filing of not just a proof of claim but also a complaint to determine dischargeability. Failure to protect either creditor right through adequate notice permits a request under § 523(a)(3). In re Padilla, 84 B.R. 194, 196 (Bankr. D. Colo. 1987). Wagners in this case did not have notice or knowledge of the case in time to permit timely filing of both, only the proof of claim. Their failure to file a timely claim should not prevent them from requesting a determination of nondischargeability under §§ 523(a)(4) and (6). If they had had knowledge or notice in time to file both, they could have filed only the complaint. I construe § 523(a)(3) as creditor protective. In an asset case, if a creditor is not listed or scheduled, or does not have notice or actual knowledge of the case in time to permit timely filing of a proof of claim, the claim is nondischargeable, and it is unlikely that the type of claim matters. But if, as here, the creditor had time to file a timely proof of claim and does not, it cannot succeed under § 523(a)(3) unless it proves that its claim is of a kind described in § 523(a)(2), (4), or (6). Wagners had knowledge of the case in time to permit the timely filing of a proof of claim. They did not file timely claims. Thus, in order to obtain judgment that their claims are nondischargeable, they must prove, as they assert, that they have claims under §§ 523(a)(4) or (6). As stated by one treatise:

In effect, the penalty for failure to schedule such a debt is not nondischargeability but is the loss of the 60-day limitations period applicable in such dischargeability determination actions and possibly the loss of the debtor's right to exclusive federal jurisdiction of dischargeability determinations under section 523(a)(2), (a)(4), (a)(6), and (a)(15).

4 Collier on Bankruptcy ¶ 523.09[1] (15<sup>th</sup> ed. rev. 1997); accord In re Humar, 163 B.R. 296, 299 (Bankr. N.D. Ohio 1993).

### III.

Wagners allege larceny of their trees by Kapustynskis under § 523(a)(4). "Larceny is the wrongful taking and carrying

away of property of another with intent to convert said property to one's use without the consent of the owner." Werner v. Hofmann (In re Hofmann), 144 B.R. 459, 464 (Bankr. D. N.D. 1992), aff'd, 161 B.R. 998 (D. N.D. 1993), aff'd, 5 F.3d 1170 (8<sup>th</sup> Cir. 1993).

Wagners also allege willful and malicious injury to their property by debtors. 11 U.S.C. § 523(a)(6). Our Circuit has said that in considering exceptions to discharge for willful and malicious injuries, the court must separately analyze the elements of "willfulness" and "malice." Barclays American/ Business Credit, Inc. v. Long (In re Long), 774 F.2d 875, 880 (8<sup>th</sup> Cir. 1985). "[W]hat is required for nondischargeability is a deliberate or intentional injury, not merely a deliberate or intentional act.... [T]his means a deliberate or intentional invasion of the legal rights of another, because the word 'injury' usually connotes legal injury (*injuria*) in the technical sense, not simply harm to a person." Geiger v. Kawaaauhau (In re Geiger), 113 F.3d 848, 852 (8<sup>th</sup> Cir. 1997), aff'd, 118 S.Ct. 974 (1998). But debtor must also "act with malice by intending or fully expecting to harm the ... interests of the creditor...." In re Long, 774 F.2d at 882. To be malicious, the action must be "targeted at the creditor ... at least in the sense that the conduct is certain or almost certain to cause ... harm." Id. at 881. The term "malice" applies "only to conduct more culpable than that which is in reckless disregard of creditors' economic interests and expectancies, as distinguished from mere legal rights.... [K]nowledge that legal rights are being violated is insufficient to establish malice, absent some additional aggravated circumstances...." Id. "[D]ebts arising from recklessly or negligently inflicted injuries do not fall within the compass of § 523(a)(6)." In re Geiger, 118 S.Ct. at , 1998 WL 85302 at \*5.

#### IV.

Wagners must prove the elements of these exceptions by preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991).

To prove something by the preponderance of the evidence is to prove that it is more likely true than not true. It is determined by considering all of the evidence and deciding which evidence is more believable. If, on any issue in the case, the evidence is equally balanced, [the fact finder] cannot find that the issue has been proved.

Manual of Model Civil Jury Instructions for the District Courts of the 8<sup>th</sup> Circuit, § 3.04 (1997).

#### V.

There is no evidence that Jacqueline Kapustynski wrongfully converted Wagners' trees or that she willfully and maliciously injured the Wagners. Furthermore, I find the evidence insufficient to show by a preponderance that Paul Kapustynski intentionally converted the trees or willfully and maliciously injured the Wagners.

I have no doubt that Paul Kapustynski caused the forester and the loggers to trespass on Wagners' property and wrongfully take the trees. But I am unable to find that he did so with malice. He was negligent, perhaps even reckless, in his conduct. He knew he was about a business that had permanent, irreversible and material effects--cutting mature, valuable trees. He knew he did not have complete or even adequate knowledge of his property and his property lines. He knew his property was finite and that he had neighbors. In directing the forester to mark the trees and, therefore, the loggers to cut them, he was working with an unfamiliar map, one which on its face did not purport to show property lines. He knew the forester and logger were relying on him regarding ownership. He did not check on or verify the work of the forester in marking the trees with paint, and he did not check on the progress of the loggers.

He sent loggers out to cut valuable timber when he knew that his knowledge of the exact area of the cutting was limited and incomplete. His negligence led to his intentional cutting of Wagners' trees. Under the law of trespass, I have no doubt that he would be liable to Wagners. See Restatement (Second) of Torts, § 158 comment j (causing entry of a third person), § 164 (intrusions under mistake), § 165 (intrusions resulting from negligent or reckless conduct) (1965). Trespass is an intentional tort. Kapustynski intended that the trees on Wagners' property be cut.

But I am not able to find from a preponderance of the evidence that he maliciously pointed to the Wagners' four acres in directing Haywood to "his property," in other words, that he knowingly targeted Wagners. Wagners argue that the evidence supports such a finding because Kapustynski's testimony is on its face unbelievable and because Kapustynski has lied on critical points. They argue that the court should reject Kapustynski's assertion that he had never been on the property and thus was not knowledgeable as to his property lines. By rejecting his testimony as a lie, it is an easy leap to find that he knew exactly what he was doing in directing the forester to Wagners' property, where he knew the best trees were located.

I find Kapustynski's actions odd. I find it odd that he would buy a 39-acre property and never traverse it during more than two years of ownership. I find it odd that he would decide to sell trees from the property, retain the forester, but not be interested in what the forester marked for sale. If it were I, I would have accompanied Haywood to the woods to see what the trees and area were like and to see what the forester marked for sale. If I had not gone with Haywood when he marked the trees, I certainly would have later checked his work. I might well have accompanied Bunston to the trees when he came to see them to formulate his bid. I would have checked on the loggers as they worked. I would hope that, being uncertain of the map and of my own property and property lines, I would not have been so cavalier in pointing out my property to one who was going to mark trees for cutting in reliance on my directions.

But although I may not have acted the way Kapustynski did, and I expect most people would not have so acted, I cannot find his actions so unbelievable as to find that they did not take place. Wagners say there is support for such a finding. They contend that Kapustynski's testimony on these points is not only inherently unbelievable, but that he has been shown to be lying. They point to his conversation with Bunston about pulling the post to get through the gate. That shows, they say, that he had knowledge of the property, he knew where the trees were to be cut, and he directed Haywood, and therefore Bunston, to the location of Wagners' trees, not out of ignorance or negligence, but purposefully. They point out Kapustynski's "lie" to Haywood about contacting his neighbor to the north. I have in the findings set out the opposing versions of Bunston's conversation with Kapustynski on the location of the fence and gate. I find the facts on the point inconclusive in showing Kapustynski knew to which fence and gate Bunston was referring. Wagners' second point is that Kapustynski lied when he said he was never on the property before the days of the meeting with Wagners because tire tracks showed he had been there with his garden tractor. Even if Dale Bunston were correct that during the logging Kapustynski had been to the logging site on his tractor, standing alone it does not show he knowingly sent the logger to Wagners' property to cut Wagners' trees for his sale. Last, I have indicated that the evidence is inconclusive that Kapustynski lied about contacting Wagners about selling trees to Bunston.

I find that the evidence is insufficient to prove that Kapustynskis' taking of Wagners' trees was larceny or a malicious injury. Accordingly, the complaint will be dismissed.

Kapustynskis have filed a counterclaim against Wagners for violating the automatic stay in bringing a criminal complaint against them. The evidence is insufficient to support their claim against Wagners. When Wagners discovered their trees were missing, they contacted the sheriff's office. The deputy sheriff made a criminal investigation not halted by the stay and made his own determination that criminal charges be filed. Kapustynskis have not clearly shown what actions Wagners took after May 4 that may have violated the stay. At most, they continued to confer with the deputy sheriff on a valid criminal investigation. I find no effort to collect a debt. Kapustynskis have failed to prove Wagners willfully violated 11 U.S.C. § 362(a).

## ORDER

IT IS ORDERED that the Wagners' complaint against Paul and Jacqueline Kapustynski is dismissed.

IT IS FURTHER ORDERED that Kapustynskis' counterclaim against Wagners is dismissed. Judgment shall enter accordingly.

SO ORDERED THIS DAY OF MARCH 1998.

William L. Edmonds  
Chief Bankruptcy Judge

I certify that on I mailed a copy of this order and a judgment by U.S. mail to Scott Buchanan, J. Mathew Anderson and U. S. Trustee.

1. Exhibit 2, when presented to Kapustynski, did not have the species location designations that it now shows. These were added later by Haywood and used to show prospective bidders the location of types of trees. At the time Haywood showed Kapustynski the map, it was more similar to Exhibit D.