

[REDACTED]

record, we find no abuse of discretion. The trial court improperly considered the likelihood that Luce would testify truthfully; this determination was for the jury to make, as the trier of fact, after hearing Luce's testimony. *Belknap Textiles, Inc. v. Belknap Industries, Inc.*, 121 N.H. 28, 30, 424 A.2d 1141, 1142 (1981). However, the court properly determined that the defendant did not take available steps to assure the witness's attendance at trial. Where the defendant has had ample opportunity to subpoena a witness but fails to do so, we find no abuse of discretion in the trial court's denial of the defendant's motion to continue. *State v. Barham*, 126 N.H. 631, 640, 495 A.2d 1269, 1276 (1985).

*Affirmed.*

All concurred.

[REDACTED]

Grafton  
No. 84-600

KLEM KAMINSKI

v.

MORTIMER L. FISCH & a.

December 5, 1985

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

*Sulloway, Hollis & Soden*, of Laconia (*John P. Chandler* on the brief and orally), for the plaintiff.

*Thomas M. Pancoast*, of Littleton, by brief and orally, for the defendants.

PER CURIAM. The principal issue in this appeal is whether the trial court was correct in granting a nonsuit at the close of the plaintiff's case. We conclude that the trial court erred and, therefore, reverse and remand.

The plaintiff, Klem Kaminski, and the defendants, Mortimer L. Fisch and Adele Fisch, are adjoining landowners. In September 1982, the defendants built a garage on a part of their own property which abutted the plaintiff's property. During construction of the garage, the plaintiff became concerned that the garage, as constructed, would encroach on his property. He notified the builder of his concern and hired a land surveying firm to determine whether there was an encroachment. In a letter dated October 20, 1982, the surveyors notified the plaintiff that "[i]n our opinion, the northwest corner of the newly constructed garage on the Fisch property to your east encroaches three tenths (.3) feet on to your property."

Relying on this, the plaintiff filed actions seeking injunctive relief and damages for trespass. The Trial Court (*Johnson, J.*) issued a pre-trial order directing the appointment of a master to determine the boundary line in dispute and to rule on the issue of estoppel, if appropriate. Following presentation of the plaintiff's evidence, the defendants moved that the action be dismissed and/or for a nonsuit. The Master (*Robert E. Hinchey, Esq.*) thereafter recommended that the defendants' motion for dismissal be granted on the ground that the plaintiff had failed to make out a prima facie case. Further, the master recommended that the defendants be awarded costs and counsel fees because he thought that the suit was frivolous, capricious, and an unwarranted harassment of the defendants. The master's recommendations were approved by the court. A second Master (*Lowie C. Elliot, Esq.*) recommended that plaintiff's motion to reconsider and for rehearing be denied and that defendants' cross-motion to dismiss the damages action be granted, and both recommendations were approved by the court.

We are not concerned here with reviewing the master's findings of fact, because he specifically declined to make any such findings. Rather, he simply stated that he was nonsuiting the plaintiff for failure to make out a prima facie case. Although the master had been directed to make factual findings relative to the boundary line between the parties' properties, he chose to dispose of the case at the close of the plaintiff's evidence without ever making any factual findings.

In reviewing his action, therefore, we must determine whether the master's ruling granting the motion for nonsuit was erroneous as a matter of law. See *Claridge v. N.H. Wetlands Bd.*, 125 N.H. 745, 748, 485 A.2d 287, 289 (1984) (citing *Summit Electric, Inc. v. Pepin*

