IN THE UTAH COURT OF APPEALS

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| Karl H. Seethaler, Lawrence P. Emery, and Jennifer J. Emery, Plaintiffs and Appellant, v. Don W. Call and Linda Call, Defendants and Appellees. | MEMORANDUM DECISION (Not For Official Publication) Case No. 20080228-CA F I L E D (March 5, 2009) 2009 UT App 64 |

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First District, Logan Department, 030100618
The Honorable Gordon J. Low
The Honorable Timothy R. Hansen

Attorneys: Miles P. Jensen, Logan, for Appellant
Marty E. Moore, Logan, for Appellees

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Before Judges Bench, Davis, and Billings.[1]

DAVIS, Judge:

Appellant Karl H. Seethaler argues that the trial court, sitting in a proceeding in equity, abused its discretion by awarding money damages in lieu of ordering the removal of a cement wall built on Seethaler's property. Specifically, Seethaler contends that the trial court misapplied the balancing of equities test because it failed to consider the irreparable harm caused by leaving the cement wall in place and erroneously concluded that Appellees Don W. and Linda Call (the Calls) acted in good faith.[2] We affirm.

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[1]The Honorable Judith M. Billings, Senior Judge, sat by special assignment pursuant to Utah Code section 78A-3-102 (2008) and rule 11-201(6) of the Utah Rules of Judicial Administration.

[2]Seethaler also argues that the trial court essentially granted the Calls a de facto private right of condemnation. This issue was inadequately briefed. Accordingly, we do not address it. See State v. Lee, 2006 UT 5, ¶ 23, 128 P.3d 1179 (refusing to consider the merits of an issue that had been inadequately briefed).

"[A] trial court is accorded considerable latitude and discretion in applying and formulating an equitable remedy, and [it] will not be overturned unless it [has] abused its discretion." Ockey v. Lehmer, 2008 UT 37, ¶ 42, 189 P.3d 51 (second and third alterations in original) (internal quotation marks omitted). On appellate review "[w]e will not disturb a trial court's judgment granting or refusing an injunction[3] unless the court abused its discretion or the judgment rendered is clearly against the weight of the evidence." Strawberry Elec. Serv. Dist. v. Spanish Fork City, 918 P.2d 870, 881 (Utah 1996) (first alteration in original) (internal quotation marks omitted); see also Carrier v. Lindquist, 2001 UT 105, ¶ 26, 37 P.3d 1112. "We review the [trial] court's decision [whether] to apply a balancing of equities test for abuse of discretion." Carrier, 2001 UT 105, ¶ 29. Whether the trial court erred in its application of the balancing of the equities test is also reviewed for abuse of discretion. See Papanikolas Bros. Enters. v. Sugarhouse Shopping Ctr. Assocs., 535 P.2d 1256, 1259 (Utah 1975).[4]

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[3]The Calls contend that Seethaler never sought an injunction below and that the issue is therefore not preserved for appeal. We disagree. Although Seethaler did not use the word "injunction" in his original complaint, he specifically asked the trial court to order removal of the cement wall. Accordingly, the issue was preserved.

[4]After the parties submitted their initial briefs to this court, the Calls filed a letter of supplemental authority pursuant to rule 24(j) of the Utah Rules of Appellate Procedure. See Utah R. App. P. 24(j). The letter cited cases in support of issues not raised in the Calls' original brief, which cases stand for the proposition that under the acceptance-of-the-benefits doctrine, "if a judgment is voluntarily paid, which is accepted, and a judgment satisfied, the controversy has become moot and the right to appeal is waived." Turville v. J&J Props., LC, 2006 UT App 305, ¶ 44, 145 P.3d 1146 (internal quotation marks omitted). The Calls thus argue for the first time in a "supplemental authority" letter that when the Seethalers accepted payment of the trial court's monetary judgment, they waived their right to appeal the judgment.

As a general rule, "the existence of an actual controversy is an essential requisite to appellate jurisdiction[ and] it is not the province of appellate courts to decide moot questions." In re Fabian A., 941 A.2d 411, 414 (Conn. App. Ct. 2008). An issue on appeal is moot when "'the requested judicial relief cannot affect the rights of the litigants.'" State v. Sims, 881

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P.2d 840, 841 (Utah 1994) (quoting Burkett v. Schwendiman, 774 P.2d 42, 44 (Utah 1989)). Moreover, even if the parties do not raise the issue of mootness in their present appeal, "we consider it sua sponte because mootness implicates the court's subject matter jurisdiction. It is, therefore, a threshold matter to resolve." See In re Fabian A., 941 A.2d at 414 n.4. "'When an issue is moot, judicial policy dictates against our rendering an advisory opinion.'" State v. Vicente, 2004 UT 6, ¶ 3, 84 P.3d 1191 (quoting Sims, 881 P.2d at 841). Accordingly, an appellate court will dismiss the case rather than issuing an advisory opinion. See Cingolani v. Utah Power & Light Co., 790 P.2d 1219, 1221 (Utah Ct. App. 1990). For the following reasons, however, we believe that the Calls' argument that the Seethalers waived the right to appeal under the acceptance-of-the-benefits doctrine is analytically distinct from the more traditional mootness doctrine that would require us to dismiss the case for lack of an actual controversy.

Under rule 37 of the Utah Rules of Appellate Procedure, "[i]t is the duty of each party at all times during the course of an appeal to inform the court of any circumstances which have transpired subsequent to the filing of the appeal which render moot one . . . of the issues raised." Utah R. App. P. 37(a) (emphasis added). Thus, the plain language of rule 37 contemplates that the circumstances rendering an issue moot occur after the filing of the appeal. For example, a party might appeal the revocation of his driver license only to have the license reinstated while the appeal is pending. Under those facts, a circumstance "transpired subsequent to the filing of the appeal," id., which renders the issue moot because "the requested judicial relief cannot affect the rights of the litigant[]." Sims, 881 P.2d at 841 (internal quotation marks omitted); cf. Church of Scientology of Cal. v. United States, 506 U.S. 9, 12 (1992) ("[I]f an event occurs while a case is pending on appeal that makes it impossible for the court to grant any . . . relief . . . to a prevailing party, the appeal must be dismissed [as moot]." (emphasis added) (internal quotation marks omitted)).

Instead of raising a traditional mootness advisory, the Calls instead seek to introduce a completely new argument, i.e., that the Seethalers waived their right to appeal the monetary judgment because they accepted the court-ordered payments from the Calls, some of which occurred as early as 2005--three years prior to the filing of the present appeal. Clearly, acceptance of these payments did not occur while the case was pending appeal. This situation is therefore distinguishable from the case where an event subsequent to the filing of the appeal would
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The Utah Supreme Court "has set forth the circumstances in which a [trial] court may, at its discretion, apply a balancing of equities test instead of issuing a mandatory injunction." Carrier, 2001 UT 105, ¶ 31. Pursuant to this four-part test, the trial court may choose to not grant an injunction "only where [(1)] an encroachment does not irreparably injure the plaintiff; [(2) an encroachment] was innocently made; [(3)] the cost of removal would be disproportionate and oppressive compared to the benefits derived from it; and [(4) the] plaintiff can be compensated by money damages." Id. (internal quotation marks omitted).[5]

Seethaler discusses at length the facts and holding of Carrier v. Lindquist, 2001 UT 105, 37 P.3d 1112, a Utah Supreme Court case that discusses the irreparable injury prong of the balancing of equities test. The Carrier court defines irreparable injury as "[w]rongs of a repeated and continuing character, or which occasion damages that are estimated only by conjecture, and not by any accurate standard . . . . Irreparable injury justifying an injunction is that which cannot be adequately compensated in damages." Id. ¶ 26 (alteration and first omission in original). Seethaler contends that the only adequate equitable remedy is removal of the cement wall because he suffered irreparable injury, that is, the cement wall is continuing in nature and he cannot be compensated by money damages. Beyond his discussion of the facts of Carrier, however, Seethaler fails to provide any meaningful review of the irreparable injury he will actually suffer if the cement wall remains in place. Instead, Seethaler states that the trial court failed to consider the "'inconvenience, extra cost, and hardship'" occasioned by leaving the cement wall in place, that

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require us to sua sponte address a mootness issue--even if the parties had not raised it--and dismiss the appeal. Rather, we think that the Calls should have presented their acceptance-of-the-benefit/waiver arguments in their original briefing but simply failed to do so. Using rule 24(j) as a mechanism to introduce this new argument was improper.

[5]Although it is somewhat unclear from the briefing, Seethaler apparently takes issue with the trial court's determinations as to the first, second, and fourth elements of the balancing of the equities test.

he cannot be compensated by money damages,[6] that failure to remove the wall has resulted in a loss of parking space for his apartment building,[7] and that leaving the wall in place poses serious aesthetic problems. But the trial court specifically found that "the wall had a negligible effect on the Seethaler property and that the parking problems . . . [were] not caused by [the] Calls, but by Logan City's anticipated road construction." Moreover, the trial court also specifically ruled from the bench that the cement wall was more "[a]esthetically pleasing" than the "broken down, . . . d[i]lapidated . . . fence with junk and garbage and trash accumulating." Seethaler has not challenged these factual findings on appeal or properly marshaled the evidence in support of those findings as is required for such a challenge.[8] See Chen v. Stewart, 2004 UT 82, ¶ 20, 100 P.3d 1177. As a result, we accept the trial court's findings in that regard. See Beesley v. Harris, 883 P.2d 1343, 1349 (Utah 1994). We therefore conclude that Seethaler has not demonstrated irreparable harm justifying an injunction, nor has he shown that

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[6]Seethaler also contends that the trial court arrived at the money damages award by conjecture and speculation. This argument is unavailing. Indeed, Seethaler presented testimony of property appraiser Tom Singleton regarding the value of the land impacted by the encroachment as well as the cost of future property taxes for the affected parcel. We note that providing such expert testimony does not, as suggested by the Calls, foreclose an individual from requesting injunctive relief, nor does it constitute a waiver of the right to seek such a remedy. We determine that in this context, however, Seethaler's argument that the trial court speculatively arrived at the money damages award is without merit in light of the appraisal evidence he presented at trial.

[7]Notably, neither party to this appeal provided this court with a clear map showing the disputed property boundaries. Instead, we were referred to aerial photographs and several different surveys, all of which were unhelpful to our analysis.

[8]The trial court also found that "[i]t is not equitable or appropriate to order removal of the cement wall[] . . . because it is economically unfeasible and unreasonable to require removal of the wall and because of the cost to rebuild the wall a few feet away." Seethaler has not challenged this finding or marshaled the evidence in support of it. Accordingly, we accept the trial court's finding that the removal of the wall is also economically unfeasible. See Beesley v. Harris, 883 P.2d 1343, 1349 (Utah 1994).

the trial court abused its discretion by awarding money damages in lieu of an injunction.

Regarding the second factor of the balancing of equities test--i.e., whether the encroachment was innocently made--Seethaler contends that the trial court erred in finding that the Calls acted in good faith and, therefore, the trial court improperly applied the balancing of equities test. See generally Carrier, 2001 UT 105, ¶ 31 ("[T]he benefit of the doctrine of balancing the equities . . . is reserved for the innocent defendant, who proceeds without knowledge or warning that he is encroaching upon another's property rights." (omission in original) (internal quotation marks omitted)). Specifically, Seethaler contends that the trial court erred in finding that the Calls acted in good faith because they knowingly and intentionally constructed the cement wall on property that they knew--both subjectively and objectively--was not theirs.

> A finding of [good] faith is a mixed question of law and fact that turns on a factual determination of a party's subjective intent. The wide variety of circumstances that might support a finding of such intent requires that we give a trial court relatively broad discretion in concluding that [good] faith has been shown.

Valcarce v. Fitzgerald, 961 P.2d 305, 315-16 (Utah 1998) (citations and internal quotation marks omitted).

In his opening brief, Seethaler asserts that the trial court's good faith determination is a legal conclusion based on the facts, yet he claims in his reply brief that he has no duty to marshal the evidence in support of the trial court's good faith determination.[9] We disagree. "Even where [Seethaler] purport[s] to challenge only the legal ruling, . . . if a determination of the correctness of a court's application of a legal standard is extremely fact-sensitive, [Seethaler has] a duty to marshal the evidence." See Chen, 2004 UT 82, ¶ 20. Seethaler's failure to marshal the evidence in support of the trial court's good faith determination is therefore fatal to his

[9]In the alternative, Seethaler suggests that he should not be required to marshal the evidence because any attempt to do so would be based on conjecture.

legal argument because we presume the trial court's findings are valid. See Beesley, 883 P.2d at 1349.

Affirmed.

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James Z. Davis, Judge

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WE CONCUR IN THE RESULT:

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Russell W. Bench, Judge

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Judith M. Billings,
Senior Judge