

2007

Lawrence Brown, Marilyn Brown, Joseph Sorenson, and Kathleen Sorenson, individuals v. The Division of Water Rights of the Department of Natural Resources of the State of Utah, Jerry D. Olds, in his capacity as the Utah State Engineer, and James A. McIntyre, an individual : Reply Brief

Utah Court of Appeals

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Recommended Citation

Reply Brief, *Brown v. The Division of Water Rights*, No. 20070474 (Utah Court of Appeals, 2007).
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FILED
UTAH APPELLATE COURTS
MAR 25 2008

IN THE UTAH COURT OF APPEALS

LAWRENCE BROWN, MARILYN BROWN, :
JOSEPH SORENSON, and KATHLEEN :
SORENSON, individuals, :

Plaintiffs/Appellants, :

V. :

Court of Appeals No. 20070474

District Court No. 060920127

THE DIVISION OF WATER RIGHTS of THE :
DEPARTMENT OF NATURAL RESOURCES :
of the STATE OF UTAH, JERRY D. OLDS, in :
his capacity as the Utah State Engineer, and :
JAMES A. McINTYRE, an individual, :

(ORAL ARGUMENT REQUESTED)

Defendants/Appellees. :

**On Appeal from an Order of Dismissal by the Third Judicial District,
The Honorable Glenn K. Iwasaki**

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INTRODUCTION

McIntyre does not dispute Plaintiffs' principal argument on appeal, *i.e.*, that potential injury or the increased risk of injury constitutes "injury-in-fact" for standing purposes. As stated by the Seventh Circuit, although an injury may be "probabilistic," "even a small probability of injury is sufficient to create a case or controversy" and thus give rise to standing. *Village of Elk Grove v. Evans*, 997 F.2d 328, 329 (7th Cir. 1993). Instead, McIntyre demands that Plaintiffs plead standing – including injury-in-fact and causation – with great specificity. But that is clearly not the law in Utah where notice pleading applies as much to standing as to the elements of a claim. Plaintiffs have pleaded more than enough to establish standing.

After rushing ahead and building his bridge despite the pendency of this lawsuit, McIntyre also insists this Court is barred from reviewing the correctness of the trial court's ruling because the case is now moot. That is wrong for various reasons, including that it would reward parties for ignoring on-going legal proceedings and insulate erroneous trial court rulings from appellate review. Central to McIntyre's mootness argument is the false assertion that Plaintiffs stood idly by while he built his bridge. In fact, Plaintiffs sought a TRO as soon as they noticed construction activities, but the trial court denied relief. The reality is that, rather than seek an extension for his permit or other appropriate relief to preserve his permit rights, McIntyre ran the risk that he would not prevail and that the bridge would have to be removed. If that happens, he has only himself to blame. Moreover, the Complaint seeks any other legal or equitable relief that

can remedy Plaintiffs' injuries. Even assuming the bridge had to stay, that would not preclude other legal or equitable remedies. This appeal is by no means moot.

McIntyre repeatedly confuses the minimal requirements for pleading standing with the more substantial requirements for prevailing on the merits. For purposes of standing, the allegations in the Complaint and attached exhibits are more than sufficient. Whether Plaintiffs can ultimately establish the merits of their claims is an issue for further proceedings in the trial court, not a matter of standing.

**REPLY TO APPELLEE'S STATEMENT OF FACTS
AND PROCEDURAL ASSERTIONS**

There are no factual disputes in this appeal, nor can there be. As he must, McIntyre "concedes that for motion to dismiss purposes, all the factual allegations of Appellants' complaint are taken as true." Brief of Appellee ("Aplee Br.") at 8. He also "concedes" the Statement of Facts set forth in the opening brief. *Id.* at 4.

McIntyre seeks to supplement these undisputed facts by asserting a few of his own. He helpfully highlights the Secor Report's conclusion that his bridge "'increases the risk'" of "'further erosion and potential property damage.'" *Id.*, ¶ 3. But then he makes the irrelevant assertion that Plaintiffs do not own property directly adjoining the west bank of the creek or on the first level flood plain. *Id.*, ¶ 1. As reiterated below, the issue is potential property damage from McIntyre's actions, be it direct or indirect, not whether Plaintiffs are adjoining property owners or in the direct path of a flood. Although it may be true that the "flooding and erosion" would not be to Plaintiffs' properties in the first instance, the Complaint specifically alleges that "[s]uch an event

will cause significant erosion and damage to the Plaintiffs and other property owners adjacent to the bridge.” Record on Appeal (“R.”) 5-6. Where one property depends on another for lateral support, flooding and erosion to one can easily affect the other. The Complaint includes such allegations. R. 4-6.

McIntyre notes that the permit had an expiration date of October 11, 2007 (Aplee Br. at 4, ¶ 2), a fact he uses to suggest he had no choice but to proceed to build his bridge (*id.* at 1). Yet the permit also states that the “expiration date [could] be extended, at the State Engineer’s discretion, by submitting a written request outlining the need for the extension and the reasons for the delay in completing the proposed stream alteration.” *Id.*, Add-A, ¶ 1. Nothing in the record indicates that McIntyre requested such an extension pending the outcome of this litigation.

McIntyre also asserts that the deck of the bridge is designed to be lifted off during spring flooding. *Id.* at 4, ¶ 4. That may be true, but there’s no assurance that it will or even can be removed in time to avoid the alleged risks – flash floods do not announce themselves ahead of time. Whether a removable deck can adequately mitigate the alleged risks is a merits question for further factual development in the trial court, not an issue of standing.

McIntyre states that construction of the bridge “openly and obviously proceeded without Appellants seeking to enjoin it” while the Motion to Dismiss was being briefed. *Id.* at 2. Quite the contrary, on March 22, 2007, Plaintiffs learned that McIntyre had commenced construction activities. R. 166. There is no suggestion in the record that McIntyre engaged in any construction activities prior to that date or that Plaintiffs had

any notice thereof. The very next day, March 23, 2007, Plaintiffs filed a Motion for Temporary Restraining Order and Preliminary Injunction. R. 159. After an *in camera* hearing that same day, the trial court denied the motion. R. 212. The court did not make findings of fact or conclusions of law based on the TRO hearing. The minute entry denying the motion merely states, “There is no irreparable harm.” *Id.* The court directed McIntyre to prepare an appropriate order, but none appears in the record. *Id.*

Finally, McIntyre asserts that the trial court “relied upon the facts adduced at the March 23, 2007 [TRO] hearing during the April 16, 2007 [Motion to Dismiss] hearing which is at issue here.” Aplee Br. at 5. That is not accurate. The only reference to the facts “adduced” at the TRO hearing included in the record of the April 16 hearing is that the trial court “got the lay of the land” at the TRO hearing (and hence was familiar with the case), not that it relied on prior factual findings to reach its decision on the Motion to Dismiss. R. 252, at p. 3 lns. 9-18.

ARGUMENT

A. The Allegations in the Complaint Must be Presumed True; Notice Pleading Applies to Standing; the Attached Exhibits are Part of the Complaint.

McIntyre freely concedes that the allegations in the Complaint must be taken as true, but then refuses to acknowledge the implications of that concession. Utah is a notice pleading state where detailed pleading is unnecessary to state a viable cause of action. “[U]nder Utah’s liberal notice pleading requirements, all that is required is that the pleadings be sufficient to give fair notice of the nature and basis of the claim asserted and a general indication of the type of litigation involved.” *Fishbaugh v. Power & Light*,

969 P.2d 403, 406 (Utah 1998). Rule 8 of the Utah Rules of Civil Procedure says a complaint “shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief; and (2) a demand for judgment for the relief to which he deems himself entitled.” Utah R. Civ. P. 8(a) (emphasis added). Nothing more is required to state a claim.

These minimal requirements apply equally to issues of standing – that is, there are no heightened pleading requirements for standing. *See Utah Chapter of the Sierra Club v. Utah Air Quality Bd.*, 2006 UT 74, ¶32, 148 P.3d 960 (allegations of standing are “all that is required at this phase”). Moreover, it is well established that “[w]hen reviewing a trial court’s grant of a motion to dismiss, [the appellate court] accept[s] the factual allegations in the complaint as true and consider[s] them and all reasonable inferences to be drawn from them in a light most favorable to the plaintiff.” *Trillium USA, Inc. v. Board of County Commissioners*, 2001 UT 101, 37 P.3d 1093 (citations and quotation marks omitted; emphasis added).

Accordingly, “[a]t the pleading stage, general factual allegations of injury resulting from the defendant’s conduct may suffice [to establish standing], for on a motion to dismiss, [the court] presume[s] that general allegations embrace those specific facts that are necessary to support the claim.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). By contrast, McIntyre’s argument improperly demands extremely detailed pleading regarding standing. As demonstrated below, Plaintiffs’ allegations on standing are more than sufficient to survive a motion to dismiss.

McIntyre also fails to appreciate the role of an exhibit to a complaint, such as the Secor Report. By rule, “[a]n exhibit or pleading is a part [of the complaint] for all purposes.” Utah R. Civ. P. 10(c) (emphasis added).

McIntyre quotes *Girard v. Appleby*, 660 P.2d 245 (Utah 1983), for the proposition that while an exhibit attached to a complaint “may be considered as a part of a pleading to clarify or explain the same, an exhibit to a pleading cannot serve the purpose of supplying necessary material averments, and the content of the exhibit is not to be taken as part of the allegations of the pleading itself.” *Id.* at 248; *see* Aplee Br. at 8. However, McIntyre’s suggestion that *Girard* precludes reference to the Secor Report to flesh out some of the standing details is incorrect. In *Girard*, the complaint raised a single claim. The plaintiff contended that an attachment to the complaint was sufficient to raise other claims that were not pleaded in the complaint. 660 P.2d at 248. The Utah Supreme Court refused to allow an attachment to substitute for the basic allegations necessary to plead a claim. While *Girard* might bar Plaintiffs from attempting to rely on the Secor Report to state a claim for, say, nuisance when the Complaint makes no such allegation, that is not how Plaintiffs seek to use it here. Just as *Girard* allows, the Secor Report was attached to the Complaint to “clarify and explain” the claims and allegations already pleaded. Thus, it is entirely appropriate for this Court to consider the Secor Report in determining whether Plaintiffs have adequately alleged standing. In any event, as explained next, the allegations in the Complaint alone are sufficient to plead standing.

B. The Complaint Sufficiently Alleges Injury-in-Fact to Establish Standing.

McIntyre's standing argument is noticeably thin on supporting case law. He concedes that Plaintiffs have "correctly set forth the analysis necessary to determine whether a party has standing." Aplee Br. at 7. McIntyre quotes the Utah Supreme Court's statement in *Washington County Water Conservancy Dist. v. Morgan*, 2003 UT 58, 82 P.3d 1125, that to establish standing a plaintiff must "'show that he has or would suffer a distinct and palpable injury that gives rise to a personal stake in the outcome.'" Aplee Br. at 8 (quoting *Morgan*, 2003 UT, ¶17) (citations omitted; McIntyre's emphasis omitted). The "distinct and palpable injury" language is just another way of saying that the plaintiff would suffer an injury-in-fact, while the "personal stake" language underscores that a principal concern of the standing inquiry is to ensure that courts do not adjudicate general or ideological grievances best addressed through the political branches. *See Jenkins v. Swan*, 675 P.2d 1145, 1148-49 (Utah 1983); Brief of Appellants at 7-9.

McIntyre asserts that Plaintiffs failed to allege a distinct and palpable injury. Aplee Br. at 8-10. That is simply false. Plaintiffs' Complaint clearly satisfies Rule 8(a) with respect to standing. The relevant portions of the Complaint state as follows:

19. The approved bridge will be in violation of Utah Code Annotated § 73-3-29(4)(b) in that it will diminish the stream's ability to conduct high water flows and thereby increase the risk and danger of flooding, and in the event flooding occurs, the surrounding stream environment will be unnecessarily and adversely affected.

20. Construction of the proposed bridge and access ramps will alter the stream's channel, and thereby diminish the natural channel's

ability to conduct high water flows, heighten the potential for damming, and thereby increase the risk of flooding in the surrounding areas.

21. As observed in the Spring of 1984, the location of the bridge is already in an area of high flood risk. The approved bridge, if constructed will only enhance the already high flood risk and danger to the Plaintiffs and other surrounding properties and landowners.

22. In the event flooding occurs due in whole or in part to the construction of the proposed bridge, the natural stream environment will be adversely affected and potentially destroyed by the invading flood waters.

23. In conjunction with Plaintiffs' Request for Reconsideration, Plaintiffs submitted a Hydrological Evaluation prepared by Secor International. *See* Secor Report, attached as Exhibit "F."

24. The Secor Report demonstrates that the approved bridge design provides for a one-foot clearance over a high water mark of 526 cubic feet per second. On June 1, 1984, the flow through Little Cottonwood Creek exceeded 70% of the design water height flow (a water depth of 6.58 feet, or a water flow of 898 cubic feet per second). Water flow like that experienced in 1984 would flow over, and significantly increase the stress on, the bridge as approved.

25. The Secor Report also demonstrates that if flows similar to those in 1984 are experienced in the stream channel (as altered by construction of the approved bridge), the erosion could cause the stream banks to overflow and inundate the first level flood plain on both sides of the stream in the vicinity of the bridge. Such an event will cause significant erosion and damage to the Plaintiffs and other property owners adjacent to the bridge.

R. 4-6 (emphasis added).

Taken as true, these allegations – and all reasonable inferences drawn from them – establish that McIntyre's bridge will alter the natural stream flow, increase the risk of damming and flooding, and, if such flooding occurs, "cause significant erosion and damage to the Plaintiffs and other property owners adjacent to the bridge." Thus, the Complaint specifically alleges a particularized injury-in-fact – damage to both of the

Plaintiffs' properties as a result of erosion and flooding caused or exacerbated (it doesn't matter which) by McIntyre's bridge.¹ This alone is more than sufficient to satisfy the notice-pleading requirements of Rule 8(a). Even if such allegations are deemed general (they are actually quite specific), as noted already, "[a]t the pleading stage . . . [the court] presume[s] that general allegations embrace those specific facts that are necessary to support the claim." *Lujan*, 504 U.S. at 561. There is no requirement that a plaintiff plead with specificity each link in a chain of events that ultimately results in injury. It is enough to allege that the defendant has caused or will cause injury to the plaintiff or his property. Nothing more is required to demonstrate that a plaintiff has a "personal stake" in the litigation rather than a nonjusticiable generalized grievance.

McIntyre misunderstands the requirement that a plaintiff must have a "particularized" injury to have standing. He treats the requirement as some sort of heightened pleading standard – that a plaintiff must plead an injury-in-fact with particularity, much as fraud must be pleaded with particularity under Rule 9(b). But when courts say that plaintiffs must plead a "particularized" injury for standing purposes, they mean only that the injury must be unique (particular) to the plaintiffs and not a "general interest [t]he[y] share[] in common with members of the public at large." *Jenkins*, 675 P.2d at 1149. As noted in the opening brief, Plaintiffs here are not

¹ McIntyre attempts to draw a distinction between the potential risks to the Sorensens' and Browns' properties. Aplee Br. at 8-10. However, the Complaint alleges injury to the properties of the "Plaintiffs," a term that includes both families. That the Browns might face a greater risk than the Sorensens does not alter the standing analysis or suggest the Sorensens lack standing. Both face risks from McIntyre's bridge and thus both have a personal stake in the litigation giving rise to standing.

analogous to “roving environmental ombudsm[e]n seeking to right environmental wrongs wherever [t]hey find them,” but rather are “real person[s] who own[] real home[s] . . . in close proximity” to Little Cottonwood Creek, the proposed bridge, and the threatened flooding and erosion. *Friends of the Earth, Inc. v. Gaston Copper*, 204 F.3d 149, 157 (4th Cir. 2000). Plaintiffs have pleaded a “particularized” injury.

Even if the Complaint’s allegations weren’t enough, Plaintiffs also attached the Secor Report to their Complaint, which provides some additional detail regarding Plaintiffs’ injury-in-fact:

Building the proposed bridge . . . could create a channel constriction – a point in the channel which would, under high flow conditions, provid[e] an opportunity for typical debris, vegetation/trees, rocks, and any other urban materials to catch, backing up water. If the stream flow is backed up, inundation of the 1st level flood plane on both sides of the stream channel is at significant risk.

The Brown Residence is located on the river terrace, directly above the escarpment along the west side of the Creek. With the instabilities observed in and around the escarpment, as well as the settlement cracks, further erosion at the escarpment may increase the risks for significant property damage. As proposed, construction of the bridge could increase the potential for further escarpment erosion and therefore, increase the potential for significant property damage or worse.

R. 64 (emphasis added).

McIntyre argues that Plaintiffs are in no danger of “flooding” because “neither of the Appellants live in the first level flood plane as does McIntyre.” Aplee Br. at 9. But direct “flooding” is not the injury Plaintiffs allege. As set forth in the Complaint and the

Secor Report, it is the erosion and consequent loss of lateral support caused by flooding that seriously threaten Plaintiffs' properties.

McIntyre also asserts that "in Appellants' response to McIntyre's motion to dismiss they failed to inform the court below of the nature of the damage which might befall their property if McIntyre were to construct a bridge. Appellants simply relied upon the allegations of their complaint." Aplee Br. at 9. Of course, on a motion to dismiss, relying on the allegations in the pleadings is entirely proper. *See Valley Colour, Inc. v. Beuchert Builders, Inc.*, 944 P.2d 361, 362 (Utah 1997) ("[T]he purpose of a rule 12(b)(6) motion is to challenge the formal sufficiency of the claim for relief, not to establish the facts or resolve the merits of the case.") (internal quotation marks and brackets omitted).² Moreover, McIntyre fails to cite any case law requiring that a plaintiff plead a detailed explanation of the "nature" of alleged property damage – and indeed there is none because Utah is a notice-pleading state where detailed allegations are not required at the pleading stage. But regardless, the assertion is false. Plaintiffs' memorandum in opposition to the Motion to Dismiss could not have been clearer about the nature of the alleged injury:

[T]he construction of the bridge has the potential of causing significant damage to the Plaintiffs. While the Plaintiffs' properties are not located on the 1st level flood plane, flooding of the first level will cause further erosion of the escarpment, increasing the potential "for significant property damage or worse." [The escarpment] provides lateral support to the Browns' home. . . . [E]rosion to the west bank escarpment has already

² Such assertions are consistent with McIntyre's tack throughout his brief, which is to act as though he prevailed on the merits and that Plaintiffs somehow failed to submit evidence to support their claims. Because this was a motion to dismiss, Plaintiffs had no duty to put forth evidence of standing. They merely had to allege it, as they amply did.

caused significant settlement and signs of collapse to occur on the Browns' property, and in their home. Accelerated erosion resulting from flooding on the 1st level flood plane caused by flow restriction of the proposed bridge, as explained by Secor, will result in additional settlement, collapse and ultimately the destruction of the Browns' property. Correspondingly, the Sorensen property is also situated above and adjacent to the property lying directly in the first level flood plane. Damage to that property will undermine the lateral support to the Sorensen property. Simply put, a flood on the 1st level flood plane will impair the integrity of the property providing lateral support to the Plaintiffs' homes.

R. 130-31 (emphasis added).

McIntyre argues that Plaintiffs have suffered no injury because the escarpment is already eroding and has been for a long time but has never collapsed. Aplee Br. at 10. McIntyre's argument (notably without support in the record) is irrelevant. The point is that McIntyre's bridge increases the risk and danger of flooding and erosion – a fact McIntyre has conceded for purposes of this appeal. As Plaintiffs amply demonstrated in their opening brief, "increased risk . . . constitutes cognizable harm." *Friends of the Earth, Inc. v. Gaston Copper*, 204 F.3d 149, 160 (4th Cir. 2000); *see also Sutton v. St. Jude Medical S.C. Inc.*, 419 F.3d 568, 573-74 (6th Cir. 2005) ("[C]ourts have long recognized that an increased risk of harm . . . is an injury-in-fact."). McIntyre's brief makes no attempt to refute the numerous cases Plaintiffs cited to support this point. If on remand McIntyre wants to put on expert testimony to try to show that the risk to Plaintiffs' properties is minimal because this escarpment has never collapsed, he will be free to do so, just as Plaintiffs will be free to put on contrary evidence. But the magnitude of the risk is an issue for the merits, not a question of standing.

C. Plaintiff's Complaint Pleads Causation.

McIntyre also contends that Plaintiffs have “failed to establish any causal connection between the stream alteration permit and increased injury to property.” Aplee Br. at 11. Just to be clear, Plaintiffs have no duty to “establish” a causal connection at this point as a matter of evidence – allegations in the pleadings and reasonable inferences are enough. Plaintiffs have “alleged that they could prove causation, and that is all that is required at this phase.” *Sierra Club*, 2006 UT, ¶32. Here, the causal connection between the asserted injury and the permit is obvious: The permit allows the building of the bridge, which increases the risk of flooding, erosion, and property damage. No permit means no bridge, which means no increased risk of property damage. The Utah Supreme Court in *Sierra Club* held that nothing more is required. *See id.* (“Because the Executive Secretary [was] responsible for denying or granting permits for the construction and operation of the plant, his decision to grant the order is directly connected to the construction and operation of the plant and to any resulting harms.”).

D. McIntyre Improperly Argues the Merits.

Plaintiffs have adequately alleged an injury-in-fact and causation and therefore have standing. The burden McIntyre seeks to impose at the pleading stage to “establish” standing is not part of Utah jurisprudence. In reality, McIntyre’s arguments are not about defective pleadings but rather about the merits of this case. Throughout this case, McIntyre has confused the injury-in-fact necessary to establish standing with the proof necessary to prevail on the merits. (This problem is particularly evident in McIntyre’s Reply Memorandum in support of his Motion to Dismiss. R. 146-51.)

It is critical for courts to maintain the line between the minimal requirements – both at the pleading and fact stages – for standing and the burden of establishing the right to recover on a claim. Failure to distinguish between these separate inquiries would result in every claim provisionally determined by the trial court to be a losing claim being dismissed for lack of standing.

The Tenth Circuit in *Initiative and Referendum Institute v. Walker*, 450 F.3d 1082 (10th Cir. 2006) (en banc), emphasized this important point. In *Walker*, six wildlife and animal advocacy groups sued alleging that Utah’s super-majority requirement for wildlife initiatives chilled their First Amendment free-speech rights. On the merits of the issue, the court called the claim “farfetched.” *Id.* at 1093. “Although the First Amendment protects political speech incident to an initiative campaign, it does not protect the right to make law, by initiative or otherwise.” *Id.* at 1099. In other words, the plaintiffs had suffered no First Amendment injury because the right they asserted was not protected. Nevertheless, the Court held that the plaintiffs had standing:

For purposes of standing, the question cannot be whether the Constitution, properly interpreted, extends protection to the plaintiff’s asserted right or interest. If that were the test, every losing claim would be dismissed for want of standing. Take, for example, *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam). . . . The *Buckley* Court held, in effect, that there is no First Amendment right to make unlimited campaign contributions. Under the Defendants’ theory, one might say that a would-be campaign benefactor has no “legally protected interest” in making unlimited campaign contributions, and that the Supreme Court should have tossed the case on standing grounds. But that would put the merits cart before the standing horse. The First Amendment claim in this case differs from that in *Buckley* only because it is more farfetched. But its far-fetchedness is a question to be determined on the merits. For purposes of standing, we must assume that Plaintiffs’ claim has legal validity. . . . [¶] [W]here the plaintiff presents a nonfrivolous legal challenge, alleging an injury to a

protected right such as free speech, the federal courts may not dismiss for lack of standing on the theory that the underlying interest is not legally protected.

Id. at 1092-93 (internal citations omitted).

So it is here. McIntyre may argue that Plaintiffs' claim is "farfetched" – that there is very little chance that his bridge will cause flooding or that flooding could ever erode lateral support to Plaintiffs' properties. He may argue that the law does not protect against these risks until they actually occur, as he asserted below. R. 252. But these are merits arguments. Does the law protect against the risk of flooding and erosion? How imminent or great must that risk be? How imminent is that risk in this case? These are among the factual and legal questions that constitute the merits of this case. They are not matters of standing. The trial court erred – and McIntyre seeks to perpetuate that error on appeal – in conflating the standing inquiry with the merits of the case.

E. Plaintiffs' Claims are Redressable and not Moot.

McIntyre argues this case is moot because the permit has expired and he has already built his bridge. *Aplee Br.* at 12-13. This Court has already denied McIntyre's motion to dismiss this appeal on mootness grounds.³ McIntyre has failed to satisfy his heavy burden of demonstrating mootness. *See Northwest Env'tl. Defense Ctr. v. Gordon*, 849 F.2d 1241, 1244 (9th Cir. 1988) ("The burden of demonstrating mootness is a heavy one."). He offers essentially no legal support and barely a page of argument to support

³ On September 4, 2007, McIntyre filed a Suggestion of Mootness (essentially a motion to dismiss the appeal) with this Court. Plaintiffs responded on September 19, 2007, demonstrating that the appeal is not moot. This Court denied the motion on September 25, 2007.

his position – no binding or persuasive case authority is cited. *See State v. Bishop*, 753 P.2d 439, 450 (1988) (“A reviewing court is entitled to have the issues clearly defined with pertinent authority cited and is not simply a depository in which [a] party may dump the burden of argument and research.”) (internal quotation marks and brackets omitted).

At any rate, McIntyre’s mootness argument is contrary to the law. “An issue on appeal is considered moot when the requested judicial relief cannot affect the rights of the litigants.” *State v. Sims*, 881 P.2d 840, 841 (Utah 1994) (internal quotation marks omitted). This case is not moot because this Court and/or the trial court have power to restore the status quo by ordering the bridge removed. “It has long been established that where a defendant with notice in an injunction proceeding completes the acts sought to be enjoined the court may by mandatory injunction restore the status quo.” *Porter v. Lee*, 328 U.S. 246, 251 (1946); 13A Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction 2d* § 3533.3, at 278-79 (1984) (A case is not moot if the court has the “ability to undo the effects of conduct that was not prevented by the time of the decision.”).

For example, in *Columbus Board of Zoning Appeals v. Wetherald*, 605 N.E.2d 208 (Ind. App. 1992), the Board of Zoning Appeals denied a variance to the plaintiff. The plaintiff prevailed on appeal to the trial court and proceeded to construct and open his restaurant while the case was before the appellate court. The plaintiff argued that the case had become moot, but the appellate court disagreed:

[C]ontrary to [plaintiff’s] contention, the appeal is not moot. . . . We cannot sanction [plaintiff’s] construction pending appeal as creating mootness; otherwise, those seeking variances for construction purposes could

circumvent zoning requirements by simply constructing in accordance with permits issued, although final resolution of the propriety of such variances was still pending on appeal. [Plaintiff] proceeded to build at his own peril prior to a final resolution of the variance issues.

Id. at 210 (emphasis added).

It is difficult to imagine how the law could be otherwise, since a different rule would reward litigation delay tactics and often preclude appellate courts from addressing the correctness of trial court decisions. If the permit was improperly issued in this case, then construction of the bridge was illegal from the beginning and McIntyre could be ordered to remove the bridge.

McIntyre has not argued (much less demonstrated) that the circumstances of this case are so materially changed since its inception that meaningful relief can no longer be granted. McIntyre himself says the bridge can be easily removed from its footings, so impossibility is not an issue. Aplee Br. at 11. Among the factors courts consider to determine whether material changes in circumstances render relief moot are: (1) the relative fault or blameworthiness of the defendant in completing a project against which a permanent injunction is sought, (2) whether the plaintiff sought some form of temporary or preliminary injunctive relief in order to preserve the status quo during the pendency of the litigation, and (3) the varied interests likely to be affected and the potential hardships likely to be caused if the defendant is required to undo the project. *Wells v. Lodge Properties, Inc.*, 976 P.2d 321, 324-25 (Colo. App. 1998). McIntyre meets none of these factors.

First, the fault here plainly lies with McIntyre. He chose to construct the bridge while this litigation was pending and with full knowledge that he might lose and thus have to remove his bridge. Yet he had no compelling reason for charging ahead and should not be rewarded for doing so. The bridge serves no purpose besides allowing McIntyre and his wife easier access to the portion of their property that sits on the other side of Little Cottonwood Creek. R. 113. Delaying the construction and maintaining the status quo until resolution of this case would have been a minor inconvenience at best.

McIntyre notes that the permit had an expiration date. However, McIntyre could have requested a stay from the Court to prevent that date from running, but he chose not to. Moreover, the Division of Water Rights of the Department of Natural Resources along with the Utah State Engineer are defendants in this case. By law they have the right to grant an extension of the permit. *See* Utah Code Ann. § 73-3-12. The permit itself states that an extension can be granted. R. 38. There is no evidence McIntyre sought such an extension. In contrast, what “fault” could possibly be attributed to Plaintiffs? McIntyre says, “Notably, the Appellants never sought any relief requiring the dismantling of the bridge. That issue was never before Judge Iwasaki, nor can it be here.” Aplee Br. at 13. This is a red herring. Once the trial court determined that Plaintiffs lacked standing, they had no basis for requesting that the bridge be dismantled. And once it was built, the situation became no different than it is now.

Second, Plaintiffs did try to stop construction of the bridge by seeking temporary injunctive relief. Plaintiffs moved for a temporary restraining order the day after

McIntyre began building the bridge. R. 159, 166 ¶¶ 14-15. McIntyre opposed and the trial court denied the motion.

Third, as to the varied interests affected, Plaintiffs are concerned about the preservation and structural integrity of their homes. McIntyre has no interest of comparable weight. If on remand Plaintiffs can prove that McIntyre's bridge does in fact place their properties at risk, then the equities would weigh strongly in their favor.

Finally, McIntyre ignores the fact that Plaintiffs have requested relief beyond enjoining construction of the bridge or revocation of the permit. Plaintiffs have requested "such other and further legal and equitable relief as this Court deems appropriate under the circumstances." R. at 8. "[E]quity cases afford courts discretion and latitude in fashioning equitable remedies." *Hughes v. Cafferty*, 2004 UT 22, ¶24, 89 P.3d 148. Courts may fashion injunctions appropriate to the circumstances. *See id.* ¶26 ("Equitable remedies . . . are distinguished by their flexibility, their unlimited variety, and their adaptability to circumstances.") (internal quotation marks and brackets omitted).

One equitable remedy (the best in Plaintiffs' view) would be to order the bridge removed and the status quo restored, but that is not the only possible remedy. The trial court might also enter a more limited injunction. McIntyre says he has built a bridge that can be easily removed in times of flooding. Aplee Br. at 11. He rhetorically asks why, "when faced with such flooding of his own home and property, [he] would sit by idly." *Id.* But a flash flood may occur before he has time to remove the bridge, or the equipment to do so may not be available. He could be on vacation when the flood comes. And so on. If warranted, a more targeted injunction could order McIntyre to remove the

bridge during high flood-risk seasons rather than relying on McIntyre's voluntary assurance that he will remove the bridge when a flood is actually occurring.

The point is that, even assuming *arguendo* the trial court were not inclined to order the bridge removed to restore the status quo (obviously Plaintiffs' preferred remedy), this case would remain a live controversy because the court may fashion other equitable remedies to protect Plaintiffs' interests. "[I]n deciding a mootness issue, the question is not whether the precise relief sought at the time the application for an injunction was filed is still available. The question is whether there can be *any* effective relief." *Northwest Envtl. Defense Ctr. v. Gordon*, 849 F.2d 1241, 1244-45 (9th Cir. 1988) (case not moot where plaintiffs asked court "to grant such other equitable relief as it deemed necessary"). The trial court on remand will have many avenues of effective relief to consider. This case is far from moot.

F. Plaintiffs Had No Duty to Marshal the Evidence on Appeal from an Order Granting a Motion to Dismiss.

Throughout the arguments over the standing issue, both in the trial court and on appeal, McIntyre has failed to fully appreciate that the pleadings control at this stage of the litigation: there is no evidence to evaluate, only allegations that must be assumed true. Although conceding the facts in the Complaint (Aplee Br. at 8), McIntyre repeatedly argues as if this appeal were from the granting of a motion for summary judgment or denial of a post-trial motion rather than a motion to dismiss. Consistent with his confusion, McIntyre's final argument faults Plaintiffs for failing to "marshal the

evidence” by not including in the record a transcript of the *in camera* TRO hearing.⁴ This argument is entirely misplaced.

The “marshalling” requirement in Rule 24(a)(9) of the Rules of Appellate Procedure states that “[a] party challenging a fact finding must first marshal all record evidence that supports the challenged finding.” (Emphasis added.) Marshalling is often required when the appellant is challenging a verdict after trial or a finding of fact after an evidentiary hearing. But it is never necessary when appealing an order granting a motion to dismiss where no fact-finding occurs (or can occur) because the allegations in the pleadings are taken as true. Naturally, the court below made no factual findings in its Memorandum Decision on the Motion to Dismiss (R. 214-19) or in its Order of Dismissal (R. 220-21). Nor did it make any appealable factual findings at the TRO hearing; and in any case, this is not an appeal from that denial.⁵

In short, no “fact finding” exists to challenge and there is no record evidence to marshal. The marshalling requirement has no application to this appeal.

⁴ McIntyre does not claim a transcript was even available. Aplee Br. at 14, n.2.

⁵ The denial of a temporary restraining order is subject to a discretionary interlocutory appeal, *see* Utah R. App. P. 5(a), but whether or not a TRO was properly granted or denied is typically moot by the time the case goes up on full appeal because the merits of the case will have been decided. At that point, the appeal will be from the final judgment – usually either granting or denying a permanent injunction – and not from the granting or denial of the TRO. The final relief, whether granted or denied, obviously supersedes the interim relief that was sought to temporarily preserve the status quo while fighting over the merits. It is irrelevant that Plaintiffs did not appeal the denial of the TRO.

CONCLUSION

The district court erred when it ruled that Plaintiffs lack standing to bring this action. This Court should reverse the district court's order of dismissal and remand the case for further proceedings on the merits.

DATED this 25th day of March, 2008.

KIRTON & McCONKIE

A handwritten signature in black ink, appearing to read "Benson L. Hathaway, Jr.", written over a horizontal line.

Benson L. Hathaway, Jr.

Alexander Dushku

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CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of March, 2008, I mailed two true and correct copies of the **REPLY BRIEF**, postage prepaid, to the following:

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