

2008

# Lawrence P. Emery, Jennifer J. Emery, Karl H. Seethaler v. Don W. Call, Linda Call : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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LAWRENCE P. EMERY,	)	
JENNIFER J. EMERY, AND	)	
<i>Plaintiffs</i>	)	
	)	
KARL H. SEETHALER,	)	Appellate Case No. 20080228
	)	
<i>Plaintiff/Appellant,</i>	)	District Court No. 030100618
	)	
v.	)	
	)	
DON W. CALL AND LINDA CALL,	)	
	)	
<i>Defendants/Appellees.</i>	)	

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BRIEF OF APPELLEES

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Appeal from the First District Court, Cache County  
The Honorable Gordon J. Low and The Honorable Timothy R. Hansen

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FILED  
UTAH APPELLATE COURTS

SEP 17 2008

## **PARTIES BELOW**

Plaintiffs: Lawrence P. Emery  
Jennifer J. Emery  
Karl H. Seethaler

Defendants: Don W. Call  
Linda Call

All three Plaintiffs/Appellants filed with this Court *Appellants Emerys' Motion to Dismiss Appeal and Appellant Seethaler's Stipulation to Dismissal* and *Appellants Emerys' Memorandum in Support of Motion to Dismiss Appeal*, both of which were dated May 12, 2008.

In an *Order of Dismissal* dated May 20, 2008, this Court dismissed this appeal. However, on May 27, 2008, this Court issued its *Order* dismissing Plaintiffs/Appellants Lawrence P. Emery and Jennifer J. Emery from this appeal.

## **PARTIES ON APPEAL**

Appellant: Karl H. Seethaler

Appellee: Don W. Call and Linda Call

## **REFERENCES TO PARTIES AND CITATIONS TO RECORD**

Plaintiff/Appellant Karl H Seethaler will be referred to herein as “Mr. Seethaler.” Plaintiff Lawrence P. Emery will be referred to herein as “Mr. Emery.”

Defendants/Appellees Don W. Call and Linda Call will be referred to herein as “the Calls.” Mr. Call individually will be referred to as “Mr. Call.”

For the sake of convenience, this Brief of Appellees' will use the same system of citations to the record used in the *Brief of Appellants*.

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## **JURISDICTION OF THE COURT OF APPEALS**

The Calls agree with Mr. Seethaler's statement of jurisdiction.

### **ISSUES PRESENTED FOR REVIEW AND STANDARD OF REVIEW**

The Calls rephrase the issues as follows.

#### **ISSUE NO. 1**

In the long-fought and difficult boundary dispute below, the trial court crafted multiple equitable remedies after taking into account the parties' actions, the circumstances surrounding those actions and the resulting “mess.” Did the trial court abuse its discretion by leaving a cement wall in place and allowing the Calls to use a sliver of real property on their side of the wall even though the sliver of land was on Mr. Seethaler's side of the boundary that the court had previously found to be established by deed and boundary by acquiescence?

#### **ISSUE NO. 2**

Did Mr. Seethaler raise and preserve in the trial court his claim of “irreparable harm”?

#### **ISSUE NO. 3**

Was the trial court's finding of fact in an equitable proceeding that “all parties in this matter acted in good faith and no party acted in bad faith”<sup>1</sup> clearly erroneous because of insufficient evidence to support that finding?

### **STANDARD OF REVIEW**

In this appeal from an equity proceeding, the “trial court's determination of the law is reviewed under a correctness standard;” this Court should “afford no degree of

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<sup>1</sup> Interim Findings 2007, R at 427, ¶ 1.



deference to a trial judge's determination of the law.”<sup>2</sup>

As stated by the Supreme Court in an appeal from an equity proceeding:

A trial court's findings of fact will be upheld unless they are clearly erroneous. **Although legal questions are reviewed for correctness, we “may still grant a trial court discretion in its application of the law to a given fact situation.” We decide how much discretion to give a trial court in applying the law to a particular area by considering a number of factors 'pertinent to the relative expertise of appellate and trial courts in addressing those issues.’** Finally, “a trial court is accorded considerable latitude and discretion in applying and formulating an equitable remedy,” and will not be overturned unless it abused its discretion. (*Emphasis added; citations omitted.*)<sup>3</sup>

Accordingly, as to the Calls' Issue No. 1, the standard of review is “abuse of discretion.” As to the Calls' Issue No. 2, there is no standard of review because Mr. Seethaler did not raise this claim below and the trial court did not rule on it. As to the Calls' Issue No. 3, the standard of review is “clearly erroneous.”

The Calls dispute Mr. Seethaler's third issue (regarding an alleged *de facto* condemnation of his property) and the correctness standard of review that he suggests should be applied. As noted above, **“a trial court is accorded considerable latitude and discretion in applying and formulating an equitable remedy,” and will not be overturned unless it abused its discretion.** (*Emphasis added.*)<sup>4</sup>

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<sup>2</sup> *United States Fuel Co. v. Huntington-Cleveland Irrigation Co.*, 2003 UT 49, ¶ 9, 79 P.3d 945, 948.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

## PRESERVATION OF ISSUES

Mr. Seethaler's claim in his brief that he was “irreparably harmed”<sup>5</sup> by the equitable remedies crafted by the trial court at the November 28, 2006 equity trial was never raised before the trial court – either before or during the equity trial or in the 14 months between the time of the equity trial and the court's issuance of its *Final Judgment and Decree* and plaintiffs' filing of their *Notice of Appeal*.<sup>6</sup> Nor was Mr. Seethaler's third issue – regarding an alleged *de facto right* of condemnation – ever raised before the trial court.<sup>7</sup>

The proceedings below were before the trial court sitting in equity. Accordingly, the issues framed by the Calls were addressed by the court and preserved in the various findings of fact and conclusions of law.<sup>8</sup>

## CITATIONS OF DETERMINATIVE PROVISIONS OF LAW

The Calls agree with Mr. Seethaler that there are no constitutional, statutory or regulatory provisions that are determinative of the appeal or of central importance in this matter.

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<sup>5</sup> *Brief of Appellant*, pp. 15-16, 18-19.

<sup>6</sup> R. at pp. 284-487; 2006 T.; 4/2/2007 T.; 7/9/2007 T.; 11/19/2007 T.

<sup>7</sup> *Id.*

<sup>8</sup> Findings 2005, R. at 195-214; Interim Findings 2007, R. at 437-436; 2008 Final Findings R. at 477-479.

## STATEMENT OF THE CASE

### Nature of the Case

The Calls strenuously object to Mr. Seethaler's misleading assertions in his Statement of the Case that the trial court's various findings of fact “collectively found Calls knowingly built an encroaching wall on Seethaler's property” and that the wall was “knowingly and intentionally built by the Calls on [Mr.] Seethaler's property.”<sup>9</sup> The trial court never made such a finding in any of its 144 separate findings of fact in three different documents and oral findings at the conclusion of trial proceedings.<sup>10</sup> Indeed, these statements are contradicted by the trial court's very first finding of fact in its *Interim Supplemental Findings of Fact and Conclusions of Law*:<sup>11</sup>

1. The Court finds that all parties in this matter acted in good faith and that no party acted in bad faith.

As discussed at some length below, the Calls obtained a survey from a licensed surveyor in November 2001 and proceeded to develop the north end of their parcel (the “Call Property”) in accordance with the boundary set by that survey. Although Mr. Seethaler and the Emery plaintiffs obtained their own survey some seven to eight months afterwards, no one could possibly know where the disputed boundary would ultimately be

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<sup>9</sup> Brief of Appellant, pp. 4, 8.

<sup>10</sup> Findings 2005, R. at 195-214; Interim Findings 2007, R. at 437-436; Final Findings R. at 477-479; T. Vol. III, pp.

<sup>11</sup> Interim Findings 2007, R. at 437.

set until the trial court made that determination on July 1, 2004 at the conclusion of a 2 ½-day bench trial.

### **Course of Proceedings**

In the trial court, Mr. Seethaler was one of three plaintiffs who sued the Calls in this boundary dispute.<sup>12</sup> The other plaintiffs, Lawrence and Jennifer Emery (husband and wife), own two parcels of real property (the “Emery Property”) that adjoin both Mr. Seethaler's real property (the “Seethaler Property”) and the Call Property.<sup>13</sup> The Emerys stayed involved in this case through the *Final Judgment and Decree* issued by the trial court. In addition, the Emerys accepted payments from the Calls of court-awarded damages, joined Mr. Seethaler in submitting the *Notice of Appeal*,<sup>14</sup> and then moved this Court to withdraw from the appeal<sup>15</sup> – which motion was granted.<sup>16</sup>

In their *Complaint*, the plaintiffs brought one tort claim – trespass – and three equitable claims: 1) boundary by acquiescence; 2) prescriptive easement for use of land; and 3) prescriptive easement for drainage.<sup>17</sup> It appears from the transcript of the 2004

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<sup>12</sup> *Complaint*, R at 3-9.

<sup>13</sup> *Id.*

<sup>14</sup> R. at 487.

<sup>15</sup> R at 461- 462, 480-482, R 483; this Court's *Order of Dismissal* dated May 20, 2008.

<sup>16</sup> *Order of Dismissal* dated May 20, 2008.

<sup>17</sup> *Complaint*, R at 3-9.

bench trial that the plaintiffs' trespass claim was limited to seeking damages for six box elder trees that were removed by Mr. Call and two spruce trees on the Emery Property that might have been harmed by the construction of the cement wall and the dumping of additional soil on the Calls' side of the wall.<sup>18</sup>

At the conclusion of a 2 ½-day trial in the summer of 2004, the plaintiffs prevailed on their pleaded claims of: 1) boundary by acquiescence; 2) prescriptive easement for drainage; and 3) trespass (to the extent damages were ultimately awarded for losses related to trees).<sup>19</sup> In addition, the plaintiffs prevailed on one claim not pleaded: 4) boundary by deed and survey.<sup>20</sup> All of the Calls' causes of action in their counterclaim were dismissed by the trial court at the conclusion of the first 2 ½-day trial.<sup>21</sup>

In effect, the trial court bifurcated the case, holding a 2 ½-day bench trial on liability issues and tree damages in the summer of 2004 and conducting equity proceedings on November 28, 2006 and November 19, 2007 to determine remedies for the plaintiffs' equitable claims, including matters related to the boundary dispute, the cement wall and drainage.<sup>22</sup> However, both the November 28, 2006 and November 19,

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<sup>18</sup> T. Vol. III, p. 67.

<sup>19</sup> 2005 Findings, R. at 195-215; 2005 Judgment, R. at 189-194.

<sup>20</sup> *Id.*

<sup>21</sup> 2005 Judgment, R at 194, ¶ 10.

<sup>22</sup> T. Vol. III, pp. 68, 112; 2006 T., p. 2.

2007 equity proceedings also involved the trial court making adjustments to the damages for the two spruce trees on the Emery Property.<sup>23</sup>

### **Disposition in the Court Below**

In the trial court, the issue of the parties' good faith versus bad faith was raised multiple times. During the November 28, 2006 equity proceedings, the trial court stated:<sup>24</sup>

Here's the problem. Both sides suggest that they coached, for lack of a better term, their surveyors. . . . I'm not going to conclude that one survey or another was drawn because somebody suggested that this is where it ought to be. That simply accuses these surveyors of impropriety. I don't think there's any evidence that either of them have been. I think the evidence is that they all did the best job possible and I have to make a decision on which one to rely on.

....

**I will make a finding right now, in anticipation of a final decision, that I find no bad faith on either part in this case.** There's a deplorable lack of communication and I think a fairly deplorable lack of cooperation, but not motivated by any bad faith. I think both parties acted in their self-interest, but I think they did so in good faith.

....

I'm going to make a finding here that neither party acted in what I consider bad faith. I think both parties acted in good faith. There could have been more communication. (*Emphasis added.*)

At the conclusion of nearly five years of litigation between the parties below, the trial court's bottom-line disposition of all the issues was as follows:

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<sup>23</sup> Interim Findings 2006, R. at 439, 441-442, ¶¶ 14, 23-24; Final Findings 2007, R. at 477.

<sup>24</sup> 2006 T., pp. 124, 139, 145.

■ The trial court found in equity “that all parties in this matter acted in good faith and that no party acted in bad faith.”<sup>25</sup>

■ The survey performed by the plaintiff’s surveyor was recorded as “reflecting the property lines and boundaries between the Seethaler and Call property and the Emery and Call property, respectively.”<sup>26</sup>

■ The cement wall constructed by Mr. Call between the Seethaler Property and the Call Property was found at trial to lie on Mr. Seethaler’s side of the boundary line as determined by the plaintiffs’ surveyor and accepted by the trial court to be the correct boundary line.<sup>27</sup>

■ In fashioning equitable remedies, the trial court found that: **“It is not equitable or appropriate to order removal of the cement wall as erected by the Defendants on what has been determined to be the Plaintiffs’ property 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.”**<sup>28</sup> Accordingly, the trial court found that it is **“equitable to leave the property ownership as it is currently, with occupancy of the property from the cement wall south to be by the [Calls].**

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<sup>25</sup> Interim Findings 2007, R. at 437, ¶ 1.

<sup>26</sup> 2007 Interim Judgment, R. at 433; see also 2005 Judgment, R. at 192.

<sup>27</sup> 2005 Findings, R. at 189-194; 2007 Interim Findings, R. at 437-446.

<sup>28</sup> 2007 Interim Findings, R. at 438, ¶ 2 (*emphasis added*).

**Occupancy of the cement wall north shall be by the Plaintiffs (Mr. Seethaler and the Emerys).’’<sup>29</sup>**

■ In accordance with the trial court's equitable remedies, the Calls paid Mr. Seethaler **\$8,900** for use of the 612 square of his property that the trial court found was south of the cement wall but north of the boundary line determined by the plaintiffs' surveyor and accepted by the court.<sup>30</sup>

■ In accordance with the trial court's equitable remedies, the Calls paid Mr. Seethaler an additional **\$500** for 20 years of anticipated property taxes for the 612 square feet of real property south of the cement wall.<sup>31</sup>

■ In accordance with the trial court's equitable remedies, the Calls paid the Emery plaintiffs **\$6,750** for 400 square feet of their property that the trial court found was south of the cement wall but north of the boundary line determined by the plaintiffs' surveyor and accepted by the trial court.<sup>32</sup>

■ In accordance with the trial court's equitable remedies, the Calls paid the Emery plaintiffs an additional **\$400** for 20 years of anticipated property taxes for the 400

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<sup>29</sup> 2007 Judgment, R. at 433; 2007 Findings, R. at 438, ¶ 7(*emphasis added*).

<sup>30</sup> R. at 461; 2007 Interim Judgment at 433; 2007 Interim Findings at 439.

<sup>31</sup> R. at 461; 2007 Interim Judgment at 433; 2007 Interim Findings at 439, 440.

<sup>32</sup> R. at 461; 2007 Interim Judgment at 433; 2007 Interim Findings at 439.



square feet of real property south of the cement wall.<sup>33</sup>

■ Apparently in relation to the plaintiffs' trespass claim, the Calls paid the plaintiffs a total of **\$18,715** for removal of six box elder trees and anticipated damage to two large fir trees.<sup>34</sup>

■ The trial court found that the Calls were responsible for managing drainage of water from the plaintiffs' properties because the trial court determined that the plaintiffs had a prescriptive easement to drain water onto the Call Property.<sup>35</sup> In accordance with the trial court's equitable remedies, the Calls paid the plaintiffs **\$3,384** to build a sump that would handle drainage of water that, before construction of the cement wall, had flowed onto the Call Property.<sup>36</sup>

■ Ruling in equity, the trial court awarded the Emery plaintiffs perpetual use of one parking space on the Calls property to replace the use of one of the Emerys' parking spaces that the trial court found was lost as a result of construction of the concrete wall.<sup>37</sup>

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<sup>33</sup> R. at 461; 2007 Judgment at 433; 2007 Findings at 439, 440.

<sup>34</sup> 2007 Judgment, R. at 216

<sup>35</sup> 2005 Findings, R. at 208, ¶ 103; 2007 Findings, R. at 438, ¶¶ 9-13; 2007 Decree, R. at 433, ¶ 4.

<sup>36</sup> R. at 461; 2007 Judgment at 433; 2007 Findings at 439, ¶ 13.

<sup>37</sup> 2007 Interim Findings, R. at 440, ¶ 19; 2007 Interim Judgment, R. at 433, ¶ 10.

■ As directed by the Court, the Calls paid the plaintiffs' court costs of \$1,218.<sup>38</sup>

■ In total, the Calls have paid the plaintiffs the full \$39,867 awarded by the trial court as damages for the plaintiffs' various claims.<sup>39</sup>

## STATEMENT OF FACTS

1. The parties to this lawsuit own adjoining parcels of real property in Logan, on which are located three different apartment complexes.<sup>40</sup>

2. Since 1988, the Emery plaintiffs have owned two fourplex units that were constructed in the late 1960s and are known as the Island Inn Apartments.<sup>41</sup> Since 1988, Mr. Seethaler has owned a 36-unit apartment complex that was constructed in 1972 and is known as Cambridge Court.<sup>42</sup>

3. In 1993, the Calls began to develop fourplex apartment buildings on the Call Property by obtaining a survey from Wayne Crow (the “Crow Survey”), having a site plan prepared, and obtaining permits from Logan City.<sup>43</sup> At the time, the Call Property

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<sup>38</sup> R. at 461; 2007 Interim Judgment at 433; 2007 Interim Findings at 439.

<sup>39</sup> R. at 216, 461, 483.

<sup>40</sup> 2005 Findings, R. at 197, ¶ 4; T. Vol. I, pp. 62-63.

<sup>41</sup> T. Vol. I at 35, 62-63, 88-89.

<sup>42</sup> 2005 Findings, R. at p. 197, ¶¶ 5,6; T Vol. I, pp. 11, 21,

<sup>43</sup> 2005 Findings, R. at 197, ¶ 10.

was unimproved pasture land and the development of the Calls' apartments was a part-time project for Mr. Call, who was then working as a school teacher.<sup>44</sup> In 1993, Logan City authorized Mr. Call to construct five fourplex apartment units on the Call Property.<sup>45</sup>

4. The 1993 Crow Survey identified an existing fence line as the boundary between the Call Property to the south and the Seethaler Property and Emery Property to the north.<sup>46</sup>

5. In 1994, Mr. Call spoke with Plaintiff Larry Emery and Mr. Seethaler about the Call Property, explaining his development plans and discussing drainage issues.<sup>47</sup>

6. In 1994, the Calls began constructing apartment buildings on the south side of the Call Property – which is on the opposite side of the property from the boundary with the Seethaler Property and the Emery Property.<sup>48</sup>

7. In the fall of 2001, Mr. Call commissioned Lane Smith (“Mr. Smith”) of Knighton and Crow to perform a new survey (the “Smith Survey”) of the Call Property because the 1993 Crow Survey showed the northeast side of the Call Property was approximately 2 feet short of the property described in the metes and bounds description

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<sup>44</sup> T. Vol. I, p. 128; 2006 T., p. 26;

<sup>45</sup> T. Vol. I, pp. 131-132.

<sup>46</sup> 2005 Findings, R. at 197, ¶ 10.

<sup>47</sup> T. Vol. I, p. 38; 2006 T., pp. 25-26, 52-53;

<sup>48</sup> 2005 Findings, R. at 197, ¶ 9;

of the Calls' deed and Mr. Call could not find a survey pin from the Crow Survey on the northwest side of the Call Property.<sup>49</sup>

8. In retaining Mr. Smith to conduct the Smith Survey, Mr. Call did not instruct Mr. Smith to find a particular boundary line on the north side of the Call Property.<sup>50</sup> Rather, Mr. Call noted that the 1993 Crow Survey appeared to follow a fence line on the north side of the Call Property and the Crow Survey left the Call Property with approximately 2 feet less property than was called out in the metes and bounds description of the warranty deed to the Call Property that Mr. Call's mother had executed in favor of the Calls.<sup>51</sup> Mr. Call requested that Mr. Smith find the property lines as set forth in the parties' respective deeds and take any deficiency, if any was found to exist, from the Call Property.<sup>52</sup>

9. In November 2001, Mr. Smith staked out the northern boundary of the Call Property as he had determined it to be from his survey that month.<sup>53</sup> Mr. Smith testified at trial that **the Smith Survey provided the full amount of real property described in the metes and bounds descriptions of the deeds to the parcels** that are affected by this

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<sup>49</sup> T. Vol. I, p. 129, 136; 2006 T., pp. 102-103.

<sup>50</sup> T. Vol. II, pp. 136, 140-156; 2006 T. pp. 103-104.

<sup>51</sup> T. Vol. I, pp. 129, 135 ; T. Vol. II, p. 142.

<sup>52</sup> T. Vol. I, pp. 135-136, T. Vol. II, pp. 142-143; 2006 T., pp. 103-104.

<sup>53</sup> T 11/28/07, p. 26-27, 54

boundary dispute.<sup>54</sup>

10. In November 2001, Mr. Call placed metal fence posts at regular interval along the northern boundary line (between the Call Property on the south and the Emery Property and Seethaler Property on the north) as that boundary had been determined and staked by Mr. Smith.<sup>55</sup>

11. In November 2001, Mr. Call removed the remainder of an old fence that was leaning on his side of the boundary staked by Mr. Smith.<sup>56</sup>

12. There was considerable conflict in the testimony at trial about the location of the old boundary-line cedar fence and whether there was a second, newer fence that had been constructed south (on the Calls' side) of the old fence. On one hand, Mr. Call recalled that in the 1980s his family (which then owned the Call Property) had constructed a new fence south of the original fence, and it was that fence that was incorrectly used in the Crow Survey to determine the boundary line.<sup>57</sup> In addition, Logan City Building Inspector John Chase, concrete contractor Steve Johnson and Mr. Call all testified at trial that there was evidence of old fence posts in the trench Mr. Call dug for

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<sup>54</sup> T. Vol. II, pp. 142-143.

<sup>55</sup> *Id.*

<sup>56</sup> T. Vol. I, pp. 21-22, 24-25, 64,

<sup>57</sup> T. Vol. I, pp.151-156.

the footings for the cement wall at issue.<sup>58</sup> On the other hand, former apartment owner Sherwood Kirby, Mr. Seethaler and Mr. Emery all testified they believed that the dilapidated fence that was removed in November 2001 was the boundary-line fence.<sup>59</sup> Ultimately, the trial court found that “[o]nly one Fence Line existed, and the Crow Survey and Hansen Survey both accurately described the location of that Fence Line.”<sup>60</sup>

13. In November 2001, Mr. Call invited Mr. Seethaler and Mr. Emery to meet with Mr. Call to discuss, based on a Mr. Smith's survey, a discrepancy in the parties' respective deeds as to their boundary line.<sup>61</sup> There is a dispute in the record as to whether Messrs. Seethaler and Emery objected to Mr. Call's description of the boundary line as determined by Mr. Smith; Messrs. Seethaler and Emery testified they objected to the Smith boundary, Mr. Call testified they did not express any concerns before he constructed the cement wall in the spring of 2002.<sup>62</sup> Ultimately, the trial court found that “[t]he Defendants and their predecessors in interest never claimed the Fence Line to be anything other than a boundary line.”<sup>63</sup>

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<sup>58</sup> T. Vol I, pp 151-157 ; T. Vol. II, pp. 119, 122, 125-126, 132-136.

<sup>59</sup> T. Vol I, pp. 14-16, 21, 53-54, 62-65, 106; 2006 T., p. 55

<sup>60</sup> 2005 Findings, R. at 204, ¶ 70.

<sup>61</sup> T. Vol. I, pp. 22, 52, 65, 78, 137-139; 2006 T., pp. 26-29; 54-58.

<sup>62</sup> T. Vol. I, pp. 137-139; 2006 T., pp. 27-28, 54-57, 104-105.

<sup>63</sup> 2005 Findings, p. 201, ¶ 32.

14. As of November 2001, the Seethaler Property had not been surveyed while under Mr. Seethaler's ownership.<sup>64</sup>

15. In late March or early April 2002, Mr. Call constructed a cement wall between the Call Property on the south and the Emery Property on the North.<sup>65</sup>

16. On April 11, 2002 – when he was notified by Messrs. Emery and Seethaler that they believed the cement wall was not on the Call Property and that there were drainage issues that must be resolved – Mr. Call ceased all work on his apartment project at the north side of the Call Property so that he could resolve these issues with Messrs. Seethaler and Emery.<sup>66</sup>

17. Mr. Call arranged a meeting on May 13, 2002 between Mr. Emery, Mr. Seethaler, Mr. Smith and himself to discuss the results of the Smith Survey and the northern boundary of the Call Property.<sup>67</sup>

18. Messrs. Seethaler and Emery delivered to Mr. Call a letter dated May 28, 2002 objecting to Mr. Call proceeding with construction of his apartment project without first obtaining a “Boundary Agreement” with Messrs. Seethaler and Call.<sup>68</sup>

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<sup>64</sup> T. Vol. 1, p. 47.

<sup>65</sup> 2005 Findings, R. at 199, ¶ 19; T. Vol. I, p. 64; 2006 T., pp. 31, 106, 110.

<sup>66</sup> 2006 T., p. 118.

<sup>67</sup> 2006 T., pp. 31-32, 111-112, 116-117.

<sup>68</sup> Plaintiffs' Ex. 23, which is Exhibit E in Addendum to *Brief of Appellant*; T. Vol. I, p. 28.

19. In late June 2002, Mr. Seethaler and Mr. Emery retained Jeff Hansen (“Mr. Hansen”) to perform a survey (the “Hansen Survey”) that would determine the boundary line between the Call Property and their respective parcels.<sup>69</sup> The Hansen Survey was completed on July 15, 2002.<sup>70</sup>

20. Except for receiving loads of fill dirt in June 2002, Mr. Call did not perform any work on his apartment project until September 2002 because he was waiting to resolve the boundary dispute with Messrs. Seethaler and Emery, who never made any proposals or effort to resolve the dispute during the summer of 2002.<sup>71</sup>

21. In the March 2003, Mr. Call constructed the cement wall between the Call Property and the Seethaler Property.<sup>72</sup> Before constructing that portion of the cement wall – which was inside the boundary set by the Smith Survey but outside boundary set by the Hansen Survey – Mr. Call consulted with his then-attorney, Ray Malouf, and officials with the Logan City.<sup>73</sup>

22. On March 31, 2003, the plaintiffs filed their *Complaint* against the Calls.

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<sup>69</sup> 2006 T., pp. 29

<sup>70</sup> 2005 Findings, R. at 198, ¶ 14.

<sup>71</sup> T. 11/ 28/06, pp. 118-127.

<sup>72</sup> T. 11/ 28/06, pp. 129

<sup>73</sup> 2006 T., p.128.



23. The cement wall between the parties' properties serves a dual purpose: it is the base of a fence that will ultimately extend three to six feet above the wall and a retaining wall.<sup>74</sup>

24. At trial, Cache County Surveyor Preston Ward testified that he preferred the methodology used by Mr. Smith in performing the Smith Survey, that is, taking measurements and gathering information from inside the city block where the surveyed property lies, rather than going outside the block.<sup>75</sup> Although not rejecting Mr. Ward's testimony entirely, the trial court minimized its persuasive impact on the court's findings when it accepted the Hansen Survey as the most persuasive survey.<sup>76</sup>

25. It appears from the transcript of proceedings below that the trial court was very concerned about the conduct of the Calls' original counsel, Ray Malouf, in the 2 ½-day trial in the summer of 2004; the trial court went so far as to mention Rule 11 on the first day of the trial.<sup>77</sup>

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<sup>74</sup> 2006 T., pp. 128, 129.

<sup>75</sup> T. Vol. II, pp. 171-178.

<sup>76</sup> 2005 Findings, R. at 206-207, ¶¶ 88-91.

<sup>77</sup> T. Vol. I, pp. 156-157 (The Court: "Sustained. Mr. Malouf, this testimony is not helpful, particularly given our discussion in chambers."), 159 (The Court: "That's inappropriate and in violation of Rule 11."); T. Vol. III, p. 113 (The Court: "I took Mr. Malouf in chambers and discussed with him some substantial concerns that were becoming very obvious, and I suspect counsel's a lot of money every day, and I suggested that resolution be sought at that time.")

## SUMMARY OF ARGUMENT

This is a case in equity revolving around a boundary dispute. The trial court, using its considerable latitude and discretion in equitable matters, fashioned multiple equitable remedies, taking into consideration the facts and circumstances provided to the court during nearly five years of litigation below. This Court should not disturb the trial court's remedies.

Mr. Seethaler failed to present to the trial court – and, hence, preserve – two claims: 1) that he was “irreparably harmed” and 2) that the trial court granted the Calls a *de facto* right of condemnation. Mr. Seethaler further failed to present to the trial court any request for – and any legal basis for – injunctive relief regarding removal of a cement wall constructed by the Calls.

By presenting testimony of a surveyor as to the square footage of a small sliver of land that was on the Calls' side of the cement wall and by presenting the testimony of a property appraiser as to the value of a square foot of the Seethaler Property, Mr. Seethaler invited the money damages he was awarded by the trial court in equity for loss of use of the small sliver of land.

In his challenge to a finding of fact, Mr. Seethaler failed to marshal the evidence in support of the trial court's finding that all the parties acted in good faith and none of the parties acted in bad faith. This Court should not reverse that finding.

## ARGUMENT

### **I. Given its findings on the disputed boundary, the trial court crafted appropriate equitable remedies below.**

The Calls disagree with the trial court's core finding that the Crow Survey and the Hansen Survey are more reliable than the Smith Survey. Accordingly, the Calls disagree with the trial court's ultimate finding that their northern boundary is several feet short of the boundary determined by the Smith Survey.

That said, the most important point the Calls want to make to this Court is that the trial court's findings and rulings under review were made in an **equitable proceeding**. As noted above, the trial court resolved multiple claims – pleaded and unpleaded – by the parties. The litigation below lasted nearly five years, was hard fought, involved multiple issues, and saw the Calls change counsel after the first 2 ½ days of trial. In the end – as so often happens in complicated cases in equity – parties on both sides of the lawsuit left the courthouse feeling aggrieved. The Calls, for example, have paid a total of **\$39,867** in court-awarded damages to Mr. Seethaler and the Emery plaintiffs for damages related to construction of a cement wall on their side of the boundary line determined by the Smith Survey. And Mr. Seethaler – despite having his own counsel draft all of the findings of fact, all of the conclusions of law and the three judgments and decrees issued by the trial court – is appealing one of the many findings of fact and one of the many equitable remedies crafted by the trial court to resolve this dispute.

The second most important point the Calls want to make is that **the trial court fully understood its duties and responsibilities in formulating equitable remedies** in the lawsuit below. The trial court's prelude to its rulings in the equity proceeding on November 28, 2006 began as follows:

**First, this is a case in equity. Equity means what is right and reasonable. What I'm called upon to do as the judge in this case is to decide what is right and reasonable.** When I say right, I don't mean necessarily right under the law, what I mean is right in all of the circumstances considered. Practical, legal, financial, economical and recognizing property rights.

**Property rights are unique.** There's no question about it. There's only so much land in this world and every bit it is unique. Ownership of it is critically important to people. There are substantial, including constitutional, rights addressed by – affecting property rights.

**Having said that, one of the principles in equity is that those who seek equity must do equity.** Allegations on both sides are that some of the parties have acted if in not bad faith, their actions were lacking in good faith. There is a difference between those two in the eyes of the law. Quite frankly, so much occurred here, so much lack of communication, so much self-interest, though not inappropriate self-interest. Things could have been done better but weren't. As a result of that, we have the mess we're in now. *(Emphasis added.)*<sup>78</sup>

Both before and after the prelude, the trial court found that none of the parties had acted in bad faith and that all of the parties had acted in good faith.<sup>79</sup> The court made its next significant ruling in equity on November 28, 2006:

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<sup>78</sup> 2006 T., pp. 144-145.

<sup>79</sup> 2006 T., pp. 124, 139, 145.

**I'll first find that it is not equitable nor judicially appropriate to order removal of that wall. I'm not going to order it. I think that would be inequitable, inappropriate, economically unfeasible and unreasonable in every aspect. (*Emphasis added.*)**<sup>80</sup>

The trial court explained its reasons for leaving the cement wall in place: 1) the high cost of removing and rebuilding the wall; 2) construction of the wall “has not resulted in a loss to [Mr.] Seethaler of any parking”; 3) the City of Logan could have been brought into the lawsuit as a party so the court could adjudicate Mr. Seethaler's rights vis-a-vis the city regarding conforming or non-conforming uses (such as parking), but the city was never made a party; and 4) the wall is more “esthetically pleasing” than the “broken down, tumbled down, dilapidated, deferred maintained fence with junk and garbage and trash accumulating, including vegetation dead and alive.”<sup>81</sup>

The starting point for this Court's analysis of the case law on equitable remedies is found in *Ockey v. Lehmer*:<sup>82</sup>

The availability of a remedy is a legal conclusion that we review for correctness. However, 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.

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<sup>80</sup> 2006 T., p. 146.

<sup>81</sup> 2006 T., pp. 147-150.

<sup>82</sup> *Ockey v. Lehmer*, 2008 UT 37, ¶ 42, 189 P.3d 51, 61.

In the footnote to this quotation from the *Ockey* decision, the Supreme Court cited to *Thurston v. Box Elder County*<sup>83</sup> as “holding that the *availability* of an equitable remedy is reviewed for correctness but that the trial court's *application and formulation* of an equitable remedy is reviewed for abuse of discretion.”

**The fundamental question for this Court, then, is whether the trial court's decisions to (i) leave the cement wall in place, (ii) give the Calls use of a small sliver of land on their side of the wall, and (iii) compensate Mr. Seethaler with money damages are appropriate equitable remedies.**

The Supreme Court in *Hughes v. Cafferty*<sup>84</sup> provides excellent guidance in understanding a court of equity's broad authority to resolve disputes:

**All parties concede this is a case in equity, and equity cases afford courts discretion and latitude in fashioning equitable remedies.** Although the court of appeals could have provided a more comprehensive opinion discussing all of the equities present in this case, it was not required to do so. A court acting in equity is not required to recite its decision in terms of specific factors or to adhere to formulaic tests. Rather, its obligation is to effectuate a result that serves equity given the overall facts and circumstances of the individual case. (*Emphasis added.*)

In the footnote to the above quotation from the *Hughes* decision, the Supreme Court elaborated:<sup>85</sup>

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<sup>83</sup> *Thurston v. Box Elder County*, 892 P.2d 1034, 1040-41 (UT 1995) (*emphasis in original*).

<sup>84</sup> *Hughes v. Cafferty*, 2004 UT 22, ¶ 24, 89 P.3d 148, 153.

<sup>85</sup> *Id.* at fn. 2, *quoting State v. Pena*, 869 P.2d 932, 936 (UT 1994).

Because decisions in equity are based on the overall facts and circumstances of each individual case, it is appropriate to give considerable deference to the trial court:

[I]t is before [the trial] court that the witnesses and parties appear and the evidence is adduced. The judge of that court is therefore considered to be in the best position to assess the credibility of witnesses and to derive a sense of the proceeding as a whole, something an appellate court cannot hope to garner from a cold record.

Finally – in conjunction with its affirmation of the trial court's balancing the equities – the Supreme Court in *Hughes v. Cafferty* contrasted the confines of legal rulings with the flexibility of equitable rulings:<sup>86</sup>

The distinguishing characteristics of legal remedies are their uniformity, their unchangeableness or fixedness, their lack of adaptation to circumstances, and the technical rules which govern their use.... Equitable remedies, on the other hand, are distinguished by their flexibility, their unlimited variety, [and] their adaptability to circumstances.... **[T]he court of equity has the power of devising its remedy and shaping it so as to fit the changing circumstances of every case and the complex relations of all the parties.**<sup>87</sup>

Each case presents unique facts and circumstances. What is relevant or persuasive in one equity decision may be meaningless in another context. “As in much else that pertains to equitable jurisdiction, individualization in the exercise of a discretionary power will alone retain equity as a living system and save it from sterility.” (*Emphasis added.*)<sup>88</sup>

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<sup>86</sup> *Id.* at 2004 UT 22, ¶¶ 26-27, 89 P.3d at 153-154.

<sup>87</sup> Quoting Spencer W. Symons, *Pomeroy's Equity Jurisprudence* § 109 (5th ed.1941).

<sup>88</sup> Quoting *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 167, 59 S.Ct. 777, 83 L.Ed. 1184 (1939).

**II. Mr. Seethaler did not preserve his claim of “irreparable harm,” and he invited the remedy of money damages.**

Mr. Seethaler claims in his brief – for the first time ever – that he has suffered “irreparable harm” because the trial court did not order removal of the cement wall and the “monetary damages awarded by the trial court were not adequate to compensate [Mr.] Seethaler for the irreparable injury he suffered.”<sup>89</sup>

However, Mr. Seethaler did not raise his claim of “irreparable harm” before the trial court.<sup>90</sup> As noted by this Court in *Myrah v. Campbell*:<sup>91</sup> “In order to preserve an issue for appeal, it must be ... sufficiently raised to a level of consciousness before the trial court, and must be supported by evidence or relevant legal authority.”

In addition, Mr. Seethaler should not be heard to complain about receiving money damages for the Calls' use of the small sliver of land on their side of the cement wall.

**Mr. Seethaler himself is the one who produced all the evidence relied upon by the trial court to award such monetary damages.** In the November 28, 2006 equity proceeding, Mr. Seethaler presented the testimony of surveyor Jeff Hansen, who calculated for the trial court the amount of Mr. Seethaler's land on the Calls' side of the cement wall (including the wall): 612 square feet.<sup>92</sup> Then Mr. Seethaler presented the

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<sup>89</sup> *Brief of Appellant*, p. 18.

<sup>90</sup> R. at 1-487; T. Vols. I, II, III; 2006 T.; 4/2/2007 T.; 7/9/2007 T.; 11/19/2007 T.

<sup>91</sup> *Myrah v. Campbell*, 2007 UT App. 168, ¶ 18, 163 P.3d 679, 683.

<sup>92</sup> T. 11/28/06, pp. 43-45



testimony of property appraiser Tom Singleton, who testified to the market value of the small sliver of Mr. Seethaler's land on the Calls' side of the wall: \$8900.<sup>93</sup> Mr. Singleton even testified that he valued the Seethaler Property at \$13 per square foot using a “methodology” he uses for determining the value of this property in a “taking.”<sup>94</sup> Mr. Singleton also testified to the tax rate that would be used to calculate Mr. Seethaler's taxes on the sliver of land: \$21.60 per year.<sup>95</sup>

If Mr. Seethaler did not want the trial court to award money damages for the small sliver of his property on the Calls' side of the wall, he should not have presented evidence leading the court directly to that remedy.

Moreover, “irreparable harm” is a term of art in equity. Regarding “irreparable harm,” The Supreme Court in *Johnson v. Hermes Associates, LTD* stated:<sup>96</sup>

“Irreparable harm,” a term often interchanged with “irreparable injury,” is defined as “a harm that a court would be unable to remedy even if the movant would prevail in the final adjudication.” We have also explained that irreparable injury consists of “wrongs of a repeated and continuing character, or which occasion damages that are estimated only by conjecture, and not by any accurate standard.” A party proves irreparable injury when establishing that “he or she is unlikely to be made whole by an award of monetary damages or

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<sup>93</sup> 2006 T., pp. 64-74.

<sup>94</sup> 2006 T., pp. 65-70.

<sup>95</sup> 2006 T., pp. 74-75.

<sup>96</sup> *Johnson v. Hermes Associates, LTD*, 2005 UT 82, ¶ 18 128 P.3d 1151, 1157, quoting 42 Am.Jur.2d *Injunctions* § 33 (2004); citing 13 *Moore's Federal Practice* § 65.06[2] (3d ed.2005) and *Carrier v. Lindquist*, 2001 UT 105, ¶ 29, 37 P.3d 1112.

some other legal, as opposed to equitable, remedy.... Thus, an injury is irreparable if the damages are estimable only by conjecture and not by any accurate standard.”

Given that Mr. Seethaler himself presented the trial court with all the evidence necessary to calculate reasonably accurate monetary damages for loss of use of 612 square feet of real property along the wall, Mr. Seethaler cannot prove that he is irreparably harmed by leaving the cement wall in place and spending – or investing – the money damages he has already received from the Calls.<sup>97</sup>

**III. Mr. Seethaler's cases do not support his assertion that he is entitled to a different form of equitable relief.**

Mr. Seethaler cites a number of cases in support of his position that he is entitled to different equitable relief than what he was granted below: *Strawberry Electric Service District v. Spanish Fork City*,<sup>98</sup> *Carrier v. Lundquist*,<sup>99</sup> *Systems Concepts, Inc. v. Dixon*,<sup>100</sup> and *Papanikolas Brothers Enterprises v. Sugarhouse Shopping Center Associates*,<sup>101</sup> The problem is, all of these are injunction cases. And **Mr. Seethaler**

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<sup>97</sup> R. 461-462.

<sup>98</sup> *Strawberry Electric Service District v. Spanish Fork City*, 918 P.2d 870 (UT 1996).

<sup>99</sup> *Carrier v. Lundquist*, 2001 UT 105, 37 P.3d 1112.

<sup>100</sup> *Systems Concepts, Inc. v. Dixon*, 669 P.2d 421 (UT 1983)

<sup>101</sup> *Papanikolas Brothers Enterprises v. Sugarhouse Shopping Center Associates*, 535 P.2d 1256 (UT 1975).

**never sought injunctive relief in the court below.**<sup>102</sup> Mr. Seethaler never provided the trial court an opportunity to inquire into whether he would truly suffer irreparable harm if the cement wall were allowed to remain. Indeed, in the year between the construction of the cement wall along the Emery Property and the construction of the cement wall along the Seethaler Property, Mr. Seethaler did not seek injunctive relief – which was an available remedy if Mr. Seethaler indeed thought he would be irreparably harmed.<sup>103</sup> After the plaintiffs filed their *Complaint*, Mr. Seethaler did not seek injunctive relief. Again, this would have been an available remedy. Then, at the November 28, 2006 equity hearing, Mr. Seethaler presented evidence in support of monetary damages.

Even after the November 28, 2006 equity hearing in which the trial court ordered the equitable remedies now under review, Mr. Seethaler did not request the trial court to reconsider and grant him the injunctive relief he is now asking this Court to grant him. There was an additional 14 months of litigation in this matter after the November 28, 2006 equity hearing – including the plaintiffs' *Motion to Enforce Judgment and to Limit Bench Ruling or for Reconsideration*<sup>104</sup> – but that additional litigation involved spruce trees on the Emery Property, not injunctive relief.

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<sup>102</sup> R. at 1-487; T. Vols. I, II, III; 2006 T.; 4/2/2007 T.; 7/9/2007 T.; 11/19/2007 T.

<sup>103</sup> *Hunsaker v. Kersh*, 991 P.2d 67, 69 (“A preliminary injunction is ‘an anticipatory remedy purposed to prevent the perpetration of a threatened wrong or to compel the cessation of a continuing one.’ It further serves to “preserve the status quo pending the outcome of the case.”)(*Citations ommitted.*)

<sup>104</sup> R. at pp. 340-363.

Only on appeal – after seeking and receiving monetary damages from the trial court – does Mr. Seethaler decide that he would prefer a different form of equitable relief, that is, injunctive relief ordering removal of the cement wall because of alleged irreparable harm. By failing to raise the issue below, Mr. Seethaler waived any claim he may have had to injunctive relief, or he at least failed to preserve the issue.<sup>105</sup>

Nevertheless, there is no reason to believe the trial court would have ruled any differently had it applied the “balancing of equities” test now advocated by Mr. Seethaler. As explained by the Supreme Court in *Carrier v. Lundquist*:<sup>106</sup>

Under this test, the district court may *in its discretion* elect not to grant an injunction only “where an encroachment does not irreparably injure the plaintiff; was innocently made; the cost of removal would be disproportionate and oppressive compared to the benefits derived from it, and plaintiff can be compensated by damages.” (*Citations omitted; emphasis in original.*)

The facts of this case would likely satisfy the balancing of equities test in the Calls' favor had the trial court been given the opportunity to apply such a test. First, there was no claim or finding below that Mr. Seethaler would be irreparably harmed by leaving the wall in place. Indeed, the trial court specifically found:<sup>107</sup>

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<sup>105</sup> *Myrah v. Campbell*, 2007 UT App. 168, ¶ 18, 163 P.3d 679, 683.

<sup>106</sup> *Carrier v. Lundquist*, 2001 UT 105, ¶ 31, 37 P.3d 1112, 120-121.

<sup>107</sup> 2006 T., p. 147.

Additionally, the building of the wall and the eventual building of a fence on top of it, which has been anticipated and reflected in the testimony, has not resulted in a loss to Seethaler of any parking. All the spaces are still there.

Second, while the Calls were certainly aware of Mr. Seethaler's boundary concerns as early as April 11, 2002, six months earlier the Smith Survey had established a definitive boundary, which Mr. Smith himself explained to Messers. Seethaler and Emery in the spring of 2002.<sup>108</sup> Only after a year of waiting for a boundary resolution and consulting with his legal counsel and Logan City officials, did Mr. Call go forward with construction of the wall along the Seethaler boundary.<sup>109</sup>

Third, the trial court addressed the issue of cost of removing the wall in its ruling on November 28, 2006:<sup>110</sup>

I'll first find that it is not equitable nor judicially appropriate to order removal of that wall. I'm not going to order it. I think that would be inequitable, inappropriate, economically unfeasible and unreasonable in every aspect. . . .

Whether it's [\$]1900 or [\$]2400 or [\$]18,000 or [\$]19,000 makes little difference. To remove [the wall] and reinstall it for the purposes that Mr. Call wants would be another [\$]15,000 to build the thing again. So you double the cost of that, plus the added cost to remove it, so you're in the area of probably \$30,000. That makes no sense. It is unreasonable and inequitable and I so find.

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<sup>108</sup> 2006 T., p. 31-32, 118,

<sup>109</sup> T. Vol. I, p. 64; 2006 T., pp. 31, 106, 110, 118-129.

<sup>110</sup> 2006 T., p. 146-147.

Finally, the trial court was able to accurately calculate Mr. Seethaler's damages for the Calls' use of the sliver of land, using Mr. Seethaler's own witnesses -- who presumably testified for just that purpose. As to the Calls' occupancy of the sliver of the Seethaler Property, the trial court ruled:<sup>111</sup>

As I said, there's been a loss of land by occupancy now of the defendant, and which will continue to be occupied by him by my decision in equity. That is by the Hansen survey 612 square feet of plaintiff Seethaler land and 400 square feet of plaintiff Emery land. By the Singleton calculations, that's \$8900 in favor of plaintiff Seethaler and \$6750 in favor of plaintiff Emery. I award judgments in those amounts.

. . . .

Now, there's the tax issue which I asked Mr. Singleton about. The taxes on the Seethaler portion of the property now occupied by the defendant is \$21.60 a year. That's expected to increase. But over 20 years that would be \$432. I'm awarding judgment in favor of Seethaler for \$500 for taxes which he'll have to pay against property that he does not have beneficial use of.

It is also important to emphasize that the balancing of equities test on which Mr. Seethaler now hangs his hat does not require the trial court to order removal of the wall even if it had found that the Calls don't satisfy the test: "Where the encroachment is deliberate and constitutes a wilful and intentional taking of another's land, equity may require its restoration, without regard for the relative inconveniences or hardships which may result from its removal."<sup>112</sup>

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<sup>111</sup> 2006 T., p. 156.

<sup>112</sup> *Papanikolas Brothers Enterprises v. Sugarhouse Shopping Center Associates*, 535 P.2d 1256 (UT 1975)(*emphasis added*).

#### **IV. The Calls are not responsible for Mr. Seethaler's parking problems.**

In attempting to prove irreparable harm to this Court, Mr. Seethaler's brief discusses at length Mr. Seethaler's parking problems and aesthetical concerns, which he attributes to the cement wall.<sup>113</sup> A few points should be made. First, regarding his possible loss of parking spaces because of Logan City's road plans, Mr. Seethaler testified:

Q. Still showing a loss of 30 stalls and Mr. Call had nothing to do with that; is that right?

A. Right, he had nothing to do with that. These issues are related to me, but they obviously have a lot of different aspects to them and Mr. Call did not cause this.

Second, the trial court specifically addressed the aesthetics of the cement wall in its ruling:<sup>114</sup>

I would suggest, frankly, given the history of this case, given the photographs I've seen and so forth, that that wall is far more esthetically pleasing than what was there before. There was a broken down, tumbled down, dilapidated, deferred maintained fence with junk and garbage and trash accumulating, including vegetation dead and alive. Nothing had been done to beautify that side of the property. If nothing else this wall does that.

Finally, the plaintiffs began the November 28, 2006 equity proceeding by introducing into evidence Plaintiffs' Exhibit 1, which is an aerial photograph of the

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<sup>113</sup> *Brief of Appellant*, pp. 20-26.

<sup>114</sup> 2006 T., p. 150.

parking situation at Mr. Seethaler's apartments as of the hearing date.<sup>115</sup> As testified to by Mr. Seethaler, there is a black line on Exhibit 1 showing the location of Mr. Seethaler's property line as determined by the Hansen Survey and accepted by the trial court in the summer 2004 trial.<sup>116</sup> As acknowledged by Mr. Seethaler on cross examination, the northern boundary of the Seethaler Property does not even extend to the sidewalk running along the north side of that parcel.<sup>117</sup>

Q. So my point is, Mr. Seethaler, that the north side of your property doesn't even go to the sidewalk as it currently exists; is that right?

A. Umm, very likely. I don't want to say absolutely that I know that to be true, but very possible.

The Calls propose there is a simple explanation for the gap between northern end of the Seethaler Property and the city sidewalk to the north. That is, the Hansen Survey effectively shifted the Seethaler Property to the south, leaving the gap. The original property description of the Seethaler Property as set forth in the *Complaint* provided 300.32 feet along the eastern edge of the Seethaler Property.<sup>118</sup> The Hansen Survey – which was adopted by the trial court and included in the original *Judgment and Decree* issued by the trial court – also provides 300.32 feet along the eastern edge of the

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<sup>115</sup> 2006 T., p. 3-4.

<sup>116</sup> 2006 T., pp. 37-39; *see also* 2005 Judgment, R. at 193, ¶ 5(c) for the new legal description of the Seethaler Property.

<sup>117</sup> 2006 T., p. 39

<sup>118</sup> R. at 4, ¶ 4.



Seethaler Property.<sup>119</sup>

In contrast, Mr. Smith testified at trial that the Smith Survey provided the full amount of real property described in the metes and bounds descriptions of the deeds to the four parcels (two Emery parcels, the Seethaler Property and the Call Property) that are affected by this boundary dispute.<sup>120</sup> Mr. Smith also testified that under the Smith Survey “the deeds fit along the sidewalk on Canyon Road” (to the north of the Seethaler Property) and the “north adjoining deeds . . . could fit within the block.”<sup>121</sup> Finally, Mr. Smith testified that between the Smith Survey and 1993 Crow Survey there is a difference of approximately 2 ½ feet on the eastern boundary between the Seethaler Property and the Call Property.<sup>122</sup> This is the “deficiency” in deeded property that prompted Mr. Call in November 2001 to request the Smith Survey in the first place.<sup>123</sup>

**V. Mr. Seethaler did not marshal the evidence to support his challenge to a key finding of fact that all the parties acted in good faith.**

If Mr. Seethaler wants to successfully challenge the trial court's finding of fact that the parties acted in good faith and none acted in bad faith, then he must marshal evidence in support of that finding:

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<sup>119</sup> 2005 Judgment, R. at 193, ¶ 5(c).

<sup>120</sup> T. Vol. II, pp. 142-143.

<sup>121</sup> T. Vol. II, pp. 154, 156.

<sup>122</sup> T. Vol. II, p. 144.

<sup>123</sup> T. Vol. I, p. 129, 136.

To successfully challenge an ultimate finding of fact, “an appellant must first marshal all the evidence in support of the finding and then demonstrate that the evidence is legally insufficient to support the finding even when viewing it in a light most favorable to the court below.”<sup>124</sup>

Mr. Seethaler did not marshal the evidence in his brief. Rather, he relentlessly maintained the same drumbeat throughout his brief: Bad, bad, bad, bad, bad Mr. Call! However, had Mr. Seethaler marshaled the evidence, he would have recognized, among other evidence presented to the trial court, that:

■ In the fall of 2001, Mr. Call commissioned the Smith Survey, which resulted in the surveyed boundary being staked out in November 2001 – before the old fence was removed and the trench dug for construction of the wall.<sup>125</sup>

■ Mr. Call testified that, in retaining Mr. Smith to conduct the Smith Survey, Mr. Call did not instruct Mr. Smith to find a particular boundary line on the north side of the Call Property.<sup>126</sup> Rather, Mr. Call noted that the 1993 Crow Survey appeared to follow a fence line on the north side of the Call Property and the Crow Survey left the Call Property with approximately 2 feet less property than was called out in the metes and bounds description of the warranty deed to the Call Property that Mr. Call's mother had

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<sup>124</sup> *Parduhn v. Bennett*, 2005 UT 22, ¶ 25, 112 P.3d 495, 502, *quoting Chen v. Stewart*, 2004 UT 82, ¶ 76, 100 P.3d 1177.

<sup>125</sup> T. Vol. I, p. 129, 136; 2006 T., pp. 102-103.

<sup>126</sup> T. Vol. II, pp. 136, 140-156; 2006 T. pp. 103-104.

mother had executed in favor of the Calls.<sup>127</sup> (Which deed was incidentally prepared by the law firm of Mr. Seethaler's counsel, in case there are any concerns about the standard reservations listed in the deed after the property description.)<sup>128</sup> Mr. Call requested that Mr. Smith find the property lines as set forth in the parties' respective deeds and take the deficiency, if any was found to exist, from the Call Property.<sup>129</sup>

■ In November 2001, Mr. Smith staked out the northern boundary of the Call Property as he had determined it to be from his survey that month.<sup>130</sup> Mr. Smith testified at trial that the Smith Survey provided the full amount of real property described in the metes and bounds descriptions of the deeds to the four parcels that are directly affected by this boundary dispute.<sup>131</sup>

■ There was considerable conflict in the testimony at trial about the location of the old boundary-line cedar fence and whether there was a second, newer fence that had been constructed south (on the Calls' side) of the old fence. Mr. Call testified that in the 1980s his family (which then owned the Call Property) had constructed a new fence south of the original fence, and it was that fence that was incorrectly used in the Crow

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<sup>127</sup> T. Vol. I, pp. 129, 135 ; T. Vol. II, p. 142.

<sup>128</sup> The deed is Plaintiffs' Ex. 32; see 2007 Interim Findings, R. 313, ¶ 7.

<sup>129</sup> T. Vol. I, pp. 135-136, T. Vol. II, pp. 142-143; 2006 T., pp. 103-104.

<sup>130</sup> T 11/28/07, p. 26-27, 54

<sup>131</sup> T. Vol. II, pp. 142-143.

Survey to determine the boundary line.<sup>132</sup> In addition, Logan City Building Inspector John Chase, concrete contractor Steve Johnson and Mr. Call all testified at trial that there was evidence of old fence posts in the trench Mr. Call dug for the footings for the cement wall at issue.<sup>133</sup>

■ On April 11, 2002 – when he was notified by Messrs. Emery and Seethaler that they believed the cement wall was not on the Call Property and that there were drainage issues that must be resolved – Mr. Call ceased all work on his apartment project at the north side of the Call Property so that he could resolve these issues with Messrs. Seethaler and Emery.<sup>134</sup>

■ Mr. Call arranged a meeting on May 13, 2002 between Mr. Emery, Mr. Seethaler, Mr. Smith and himself to discuss the results of the Smith Survey and the northern boundary of the Call Property.

■ Except for receiving loads of fill dirt in June 2002, Mr. Call did not perform any work on his apartment project until September 2002 because he was waiting to resolve the boundary dispute with Messrs. Seethaler and Emery, who never made any proposals or effort to resolve the dispute during the summer of 2002.<sup>135</sup>

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<sup>132</sup> T. Vol. I, pp.151-156.

<sup>133</sup> T. Vol I, pp 151-157 ; T. Vol. II, pp. 119, 122, 125-126, 132-136.

<sup>134</sup> 2006 T., p. 118.

<sup>135</sup> T. 11/ 28/06, pp. 118-127.

■ In March 2003, Mr. Call constructed the portion of the cement wall between the Call Property and the Seethaler Property.<sup>136</sup> Before constructing that part of the cement wall – all of which was inside the boundary set by the Smith Survey but outside boundary set by the Hansen Survey – Mr. Call consulted with his then-attorney, Ray Malouf, and officials with the Logan City.<sup>137</sup>

■ Mr. Call offered to help Mr. Seethaler move a storage shed that Mr. Call believed was encroaching on the Call Property.<sup>138</sup>

Accordingly, Mr. Seethaler's challenge to the trial court's finding of fact that all parties acted in good faith should be denied.

**VI. Mr. Seethaler did not preserve his claim of *de facto* condemnation.**

Once again, Mr. Seethaler claims – for the first time ever on appeal – that the trial court granted the Calls a *de facto* right to condemn a sliver of the Seethaler Property. As noted by this Court in *Myrah v. Campbell*:<sup>139</sup> “In order to preserve an issue for appeal, it must be ... sufficiently raised to a level of consciousness before the trial court, and must be supported by evidence or relevant legal authority.”

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<sup>136</sup> T. 11/ 28/06, pp. 129

<sup>137</sup> 2006 T., p.128.

<sup>138</sup> T. Vol. I, p. 48.

<sup>139</sup> *Myrah v. Campbell*, 2007 UT App. 168, ¶ 18, 163 P.3d 679, 683.

In addition, it should be noted that on November 28, 2006 the trial court granted two equitable remedies involving a party using another party's land. As Mr. Seethaler has emphasized, repeatedly, the trial court awarded the Calls occupancy of a small sliver of land south of the cement wall – much like a 20-year lease.<sup>140</sup> At the same time, the trial court awarded the Emery Plaintiffs a “perpetual easement” to one of the parking spaces on the Call Property to compensate for the Emery plaintiffs' loss of a parking space when the wall was constructed.<sup>141</sup>

## CONCLUSION

There is no good legal or equitable reason for this Court to reverse the trial court on any of the findings it made or any of the equitable remedies it granted. This was a difficult case, by any measure. Mr. Seethaler is simply asking this Court to substitute its judgment for that of the trial court, which sat through days of trials and hearings, waded through scores of exhibits, reviewed scores of pages of pleadings, motions and memoranda, and then did the best it could to formulate appropriate and workable equitable remedies.

Another judge might have crafted somewhat different remedies, but that is nearly always the case in equitable proceedings. (Indeed, another judge might have accepted the Smith Survey as being the most accurate and reliable survey and dismissed the plaintiffs'

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<sup>140</sup> 2007 Interim Decree, R. at 433, ¶ 6.

<sup>141</sup> 2007 Interim Findings, R. at 440, ¶ 19; 2007 Interim Decree, R. at 433, ¶ 10.

claims of boundary by acquiescence.) Mr. Seethaler certainly would like to see this Court order removal of the cement wall. The Calls would like to think that had their original lawyer proceeded differently early in this case, there might have been an entirely different result. But it is time to end this litigation and let the parties move on with their lives. Among the many reasons why Utah appellate courts apply the “abuse of discretion” standard to cases:

The abuse of discretion standard recognizes both the district court's ability to balance facts and craft equitable remedies and our hesitation to act as a Monday morning quarterback in such matters.<sup>142</sup>

The judgments and decrees on appeal should be affirmed.

Dated this 7<sup>th</sup> day of September, 2008.

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Attorneys for Appellees

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<sup>142</sup> *Parduhn v. Bennett*, 2005 UT 22, ¶ 23, 112 P.3d 495, 502.

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IN THE UTAH COURT OF APPEALS

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<b>LAWRENCE P. EMERY,</b>	)	
<b>JENNIFER J. EMERY, AND</b>	)	
<i>Plaintiffs</i>	)	
	)	
<b>KARL H. SEETHALER,</b>	)	Appellate Case No. 20080228
	)	
<i>Plaintiff/Appellant,</i>	)	District Court No. 030100618
	)	
v.	)	
	)	
<b>DON W. CALL AND LINDA CALL,</b>	)	
	)	
<i>Defendants/Appellees.</i>	)	

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**ADDENDUM**

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Appeal from the First District Court, Cache County  
The Honorable Gordon J. Low and The Honorable Timothy R. Hansen

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R.L.S. No. 325023

7-16-02  
Date

☐ (D) 0.8' INTO SIDEWALK  
☐ (C) 0.8' INTO SIDEWALK  
☐ (B) 2.0' INTO SIDEWALK

246-02  
R.L.S. No. 325023  
Date

7/16/02

200 NORTH 6

EXISTING FENCE LINE  
EXISTING FENCE POSTS  
EXISTING TBAR POSTS  
EXISTING UTILITY POLE  
EXISTING PROPERTY CO

33.00  
4.55'

REBAR W/CROW CAP  
±4.4' NORTH

REBAR W/CROW CAP  
3.2' NORTH OF CALC'D R-O-W

07-108

06-075-0003

06-075-0004

06-075-0006

06-075-0007

06-075-0008

06-075-0009

06-075-0010

06-075-0011

06-075-0012

06-075-0013

06-075-0014

06-075-0015

06-075-0016

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06-075-0018

06-075-0019

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200 NORTH 6.

EXISTING FENCE LINE  
EXISTING FENCE POSTS  
EXISTING TBAR POSTS  
EXISTING UTILITY POLE  
EXISTING PROPERTY COR