

2008

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

Utah Court of Appeals

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Jan. 29, 2009

IN THE UTAH COURT OF APPEALS

LAWRENCE P. EMERY,
JENNIFER J. EMERY, AND

Plaintiffs

KARL H. SEETHALER,

Plaintiff/Appellant,

v.

DON W. CALL and LINDA CALL,

Defendants/Appellees,

REPLY BRIEF OF APPELLANT

Appeal No. 20080228

District Court No. 030100618

REPLY BRIEF OF APPELLANT

APPEAL OF ORIGINAL, INTERIM, AND FINAL FINDINGS OF FACT AND
CONCLUSIONS OF LAW AND JUDGMENTS AND DECREES
ENTERED BY THE FIRST JUDICIAL DISTRICT COURT OF CACHE COUNTY,
STATE OF UTAH, THE HONORABLE GORDON J. LOW AND TIMOTHY R.
HANSEN PRESIDING

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ARGUMENT

I. THE TRIAL COURT’S LEGAL CONCLUSION THAT CALLS ACTED IN GOOD FAITH SHOULD BE REVERSED

Good faith is a conclusion of law, not a fact finding.

Seethaler is challenging the trial court’s legal determination that both parties acted in good faith. Because Seethaler is not challenging any of the fact findings, he has not failed in his marshaling obligation. Utah R. App. P. Rule 24(a)(9) provides in relevant part: “A party challenging a fact finding must first marshal all record evidence that supports the challenged finding.”

Utah courts have held that a good faith determination is a conclusion of law. *See Markham v. Bradley*, 2007 UT App 379, P12 (Utah Ct. App. 2007) (stating a breach of covenant of good faith and fair dealing is a legal determination reviewed for correctness); *Campbell v. State Farm Mut. Auto. Ins. Co.*, 2001 UT 89 (Utah 2001) (where an insurer breaches its good-faith duties to pay third-party claims, the appellate court is asked to settle a question of law, and therefore reviews the trial court’s ruling for correctness); *Smith v. Batchelor*, 934 P.2d 643, 646 (Utah 1997) (trial courts good faith/ bad faith determination is a conclusion of law); *Cox v. Krammer*, 2003 UT App 264, P7 (Utah Ct. App. 2003) (determination of whether motion brought in bad faith is a determination of law and specific findings of fact must support the good faith/ bad faith determination); *Rohan v. Boseman*, 2002 UT App 109, P40 (Utah Ct. App. 2002) (bad faith determination included as a conclusion of law).

Utah case law holds, “[t]he marshaling obligation only arises after a party challenges the sufficiency of the evidence to support ... a district court's ruling containing specific findings of fact.” *Smith v. Four Corners Mental Health Ctr., Inc.*, 2003 UT 23, P16 (Utah 2003). Further, “[c]hallenges to a trial court's legal determinations... do not require an appellant to marshal the evidence.” *Wardley Better Homes & Gardens v. Cannon*, 2002 UT 99, P14 (Utah 2002).

In sum, good faith is a legal determination that does not invoke the marshaling requirement. While the good faith of Call was characterized wrongly as a Finding of Fact (Interim Findings, 2007 R. at 437 ¶1), its incorrect designation does not change the clear requirement that it is a Conclusion of Law and should have been so designated. Seethaler is only challenging the trial court’s legal determination that the Calls acted in good faith. Seethaler is not challenging any of the findings of fact that led the trial court to this determination. Thus, the marshaling of evidence in this case is not required, as per Utah R. App. P. Rule 24(a)(9).

Even if this court determines that Appellant should have marshaled the evidence, it would be inappropriate for this Court to refuse to hear this challenge because any attempt at marshaling the evidence would be based on pure conjecture.

Because the trial court precluded Seethaler’s counsel from presenting evidence to establish the Calls’ bad faith, it would be inequitable and inappropriate for this Court to refuse to hear this appeal on failure to marshal grounds. An Appellant’s duty to marshal the evidence requires the Appellant to marshal all of the facts used to support a trial court’s

finding and then show that these facts cannot possibly support the conclusion reached by the trial court. *Bluffdale Mt. Homes, LC v. Bluffdale City*, 2007 UT 57, P52 (Utah 2007). See also *Utah County v. Butler*, 2008 UT 12, P11 (Utah 2008). However, in instances where the court has no principled basis to sustain its factual findings, marshaling is not required because “the findings are so inadequate that they cannot be meaningfully challenged as factual determinations.” *Woodward v. Fazzio*, 823 P.2d 474, 477 (Utah Ct. App. 1991); see also *Mountain States Legal Found. v. Pub. Serv. Comm’n*, 636 P.2d 1047, 1051-52 (Utah 1981).

As provided in the Brief of Appellant, the trial court precluded Seethaler’s counsel from presenting evidence to establish that Call failed to exercise good faith or, in other words, that Call exercised bad faith. (2006-T. at 138). During Seethaler counsel’s attempt to establish bad faith, the trial court interrupted the cross-examination of Appellee Don Call and, on the spot, entered a bench finding that neither party acted in bad faith. (2006-T. at 138). The trial court found “both parties acted in their self-interest, but ... did so in good faith.” (2006-T. at 138). The trial court then precluded further testimony on the issue. (2006-T. at 138).

To attempt to marshal the evidence relied upon by the trial court judge in his conclusion that both parties acted in good faith would be purely speculative. The trial court’s decision on the issue was one of haste made before the parties had even rested. This makes it difficult to marshal the evidence because the trial court discounted this determination (during

the good faith/bad faith determination, the trial court stated “bad faith, good faith, [and] improper motives” have no application to this case (2006-T at 138)) and prevented Seethaler from presenting evidence on the issue.

Even if it is found the marshaling requirement is generally appropriate in an appeal of a trial court’s determination of good faith, the fact that the trial court felt this determination was irrelevant to the case before it and, as a result, made its determination without allowing evidence to be presented on the issue, shows that the trial court did not rely on a principled basis in making this determination. Therefore, marshaling is not required.

The Brief of Appellant marshals what evidence was presented on the good faith/bad faith determination; Brief of Appellee adds no material evidence to the issue.

The Brief of Appellant provided all the relevant Findings of Fact entered by the trial court that may have been relevant to the court’s good faith/bad faith determination. The Record contains testimony that led to the Findings of Fact entered by the trial court that was not included in the Brief of Appellant, as pointed out in Brief of Appellee; however, inclusion of all testimony on the matter would be better served by providing this court with the Record itself, rather than re-typing each instance where the testimony may have had any influence on one of the court’s rulings. (For example, 2006-T at 5, lines 9-17; at 7, lines 18-25; at 8, lines 1-18; 2006-T at 28, lines 8-10; T. Vol 1 at 82, line 25; at 83, lines 1-7; at 88, lines 12-14; at 98, lines 2-9.) As mentioned, all relevant findings that were based on this testimony were included in the Brief of Appellant, and because no Findings of Fact that

served as the basis for to the good faith/bad faith determination are contested by Seethaler, this court was provided with all essential information needed to make an informed decision.

Seethaler's Brief of Appellant makes it clear that, based on the evidence provided and the subsequent facts determined by said evidence, there was no reasonable basis for concluding that the Calls acted in good faith.

Additionally, "a party is required to marshal the evidence supporting the Commission's factual findings and to show that, despite the supporting facts, and in light of conflicting or contradictory evidence, the findings are not supported by substantial evidence." *Ball v. Pub. Serv. Comm. (In re Questar Gas Co.)*, 2007 UT 79, P39 (Utah 2007). In the case at hand, according to the aforementioned rule of *Ball v. Pub. Serv. Comm. (In re Questar Gas Co.)*, it would be Seethaler's duty to show that, despite the supporting facts and in light of conflicting or contradictory evidence, the finding that Call acted in good faith is not supported by substantial evidence. However, the findings entered by the court are devoid of supporting facts to marshal. There was no critical evidence left out of Brief of Appellant.

Even if this court determines that Seethaler did not properly marshal the evidence, Seethaler asks that this Court exercises its discretion in this matter and makes its own determination as to whether there was sufficient evidence to support the conclusion that the Calls acted in good faith, as this issue is central to determining whether the equitable ruling was appropriate.

As stated in *Utah County v. Butler*, 2008 UT 12, P12 (Utah 2008). "... the reviewing court retains discretion to consider independently the whole record and determine if the

decision below has adequate factual support.” In deciding whether or not to review the factual findings the court stated:

Because the Butlers' failure to marshal is particularly egregious, we would ordinarily decline to review the factual findings of the lower court under these circumstances. But because we decide this case in tandem with two companion cases... we choose to exercise our discretion and review the merits of the Butlers' arguments regarding continuous use in order to elucidate this standard by applying it to specific facts.

Id. (emphasis added)

Seethaler's alleged failure to marshal the evidence is not egregious. Seethaler did not attempt to shield any evidence from the purview of this Court, nor did it willfully neglect its responsibility to marshal the evidence. Seethaler identified the trial court's findings of fact that led to the trial court's abrupt conclusion that both parties acted in good faith. (2006-T at 138, lines 10-23).

The Supreme Court of Utah stated the requirement, purpose, and scope of the marshaling requirement as follows:

The marshaling requirement is not a limitation on the power of appellate courts. Rather, it is a tool pursuant to which the appellate courts impose on the parties an obligation to assist them in conducting a whole record review. It is not, itself, a rule of substantive law. Consequently, parties that fail to marshal the evidence do so at the risk that the reviewing court will decline, in its discretion, to review the trial court's factual findings. The reviewing court, however, retains discretion to consider independently the whole record and determine if the decision below has adequate factual support.

Martinez v. Media-Paymaster Plus/Church of Jesus Christ of Latter-Day St.s, 2007 UT 42, P20 (Utah 2007). Seethaler asks, in the event there is any question Seethaler has met the

marshaling requirement, that this Court review the trial court's decision and evaluate and ultimately reverse the good faith determination.

The Utah Supreme Court has intentionally refrained from limiting a reviewing court's discretion by mandating a particular remedy if a party fails to meet the marshaling requirement. *Id.* at P21.

II. IT IS PROPER FOR THIS COURT TO CONSIDER ON APPEAL BOTH THE APPROPRIATENESS OF THE MONETARY DAMAGE AWARD AND THE DE FACTO CONDEMNATION RESULT

The claim that the trial court erred in awarding monetary damages rather than ordering that the encroaching wall be removed was preserved at the trial court level.

Seethaler asked that the court order the encroaching wall be removed from his property, gave the court an opportunity to rule on the issue, and, thus, the issue of whether the trial court erred in granting monetary relief, rather than the requested injunctive relief, was preserved for appeal. This court has consistently held, “[g]enerally, in order to preserve an issue for appeal, the issue must be presented to the trial court in such a way that the trial court has an opportunity to rule on that issue.” *Pratt v. Nelson*, 2007 UT 41, P15 (Utah 2007).

Three factors generally are used to help determine whether the trial court had an opportunity to rule on an issue: “(1) the issue must be raised in a timely fashion; (2) the issue must be specifically raised; and (3) a party must introduce supporting evidence or relevant legal authority.” *Id.*

In their Brief of Appellee, the Calls argue in two different subsections that during trial Seethaler never asked that the encroaching wall be removed from Calls' property and, consequently, that the issue of whether the monetary damages awarded by the trial court was the appropriate remedy was not preserved. The Calls further argue that the cases cited by Seethaler are "injunction cases" and "Mr. Seethaler never sought injunctive relief in the court below" and that "Mr. Seethaler did not preserve his claim of 'irreparable harm.'" However, it is clear from the record, Brief of Appellant, and Brief of Appellee, that the aforementioned issues, although perhaps not couched in the exact vernacular of "injunctive relief" and "irreparable harm," were raised, considered, and ruled upon by the trial court, thus, preserving them as final and appealable issues.

Words of the trial court are cited in the Brief of Appellee regarding the trial court's ruling on the appropriateness of ordering the removal of the encroaching wall as follows:

"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..."

Thus, it is clearly recognized by both parties that this was an issue that was actively litigated, presented, and argued before the trial court. (T. Vol. 3 at 68 lines 22-24 and 69 line 1; T. Vol. 3 at 70 lines 15-18) (Transcript of pretrial hearing Nov. 1, 2006 at 2, lines 23-24 at 3, lines 22-23; 2006-T at 142, lines 11-20.) At the pretrial for the November 28, 2006 hearing, Calls never objected to the discussion with respect to Seethaler wanting the wall removed. Calls never asserted the claim to remove the wall was outside the pleadings or

otherwise. (Transcript of PreTrial Hearing, November 2, 1006 at 5, lines 17-25; at 6, lines 4-5, at 7, lines 19-25.)

The Brief of Appellant is full of evidence presented and rulings relevant to the court's decision of whether Seethaler was irreparably harmed and whether or not to order the encroaching wall to be removed. Seethaler testified extensively how he was irreparably harmed by the encroaching wall, (See Brief of Appellant – pp.20-26) and, consequently, why monetary damages would not be sufficient. Seethaler stated, among other things, that the successful operation of his rental business requires the use of and access to the several hundred feet of property taken by the Calls; that the Calls' land-grab will burden his efforts in providing parking to prospective tenants; that allowing the wall to remain in place will unnecessarily burden the maneuverability about the rental premises; that plans to redesign his parking area will be severely limited by the encroaching wall; that to landscape adjacent to the parking area will now be impossible and these problems cannot and will not be cured solely by a monetary award. (T. Vol. I at 27, lines 6-7; 17-25; at 28, lines 1-2; at 109, lines 15-25.)

The issue of whether monetary damages or injunctive relief requiring the removal of the wall was the appropriate remedy was raised in a timely fashion, and the trial court did, in fact, make a ruling on that issue. (T. Vol. 3 at 68, lines 22-25; at 69, line 1; at 70, lines 15-18.) (Transcript of Objection Hearing, April 14, 2005 at 36, lines 8-22.) That the words "irreparable injury" may not have been used is irrelevant, because the issue of what to do

with the wall – removal or damages – was briefed, “pretrialed,” evidenced and decided.

There is no more that Seethaler could have done to preserve this issue.

Even if this Court determines these issues were not adequately preserved, Utah courts hold:

When a party fails to preserve an issue for appeal, the issue will be addressed only if 1) the appellant establishes that the district court committed "plain error," 2) "exceptional circumstances" exist, or 3) in some situations, if the appellant raises a claim of ineffective assistance of counsel in failing to preserve the issue. To prevail under plain error review, a defendant must demonstrate that 1) an error exists; 2) the error should have been obvious to the trial court; and 3) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome.

State v. Low, 2008 UT 38, P19 (Utah 2008). The trial court’s decision to award monetary damages, rather than issue an injunction mandating the removal of the wall, was a plain error because of Seethaler’s un rebutted testimony of irreparable injury unless the wall was removed. (2006-T at 9, lines 5-25; at 10, lines 1-9; at 12, lines 9-25; at 13, lines 1-23; at 14, lines 1-8, 14-17; at 16, lines 20-24; at 18, lines 6-12; at 41, lines 2-4.)

Black’s Law Dictionary defines an injunction as “[a] court order commanding or preventing an action.” It continues, “[t]o get an injunction, the complainant must show that there is no plain, adequate, and complete remedy at law and that an irreparable injury will result unless the relief is granted.” An irreparable injury consists of “wrongs of a repeated and continuing character.” *Johnson v. Hermes Assocs., LTD*, 2005 UT 82, ¶ 18, 128 P.3d 1151, 1157; *see also* Brief of Appellee, p. 26-27.

The encroaching wall was a permanent structure and, absent an injunction requiring its removal, would continue to remain on and burden Seethaler's property, thus causing an irreparable injury. Requiring the wall's removal was the only appropriate remedy. The parties spent extensive time presenting evidence of the cost of building the wall and of the cost of removing the wall, clearly placing the issue before the trial court of removal of the wall.

Additionally, the Calls argue that by presenting evidence that was used by the trial court to award the monetary damages, Seethaler waived his right to appeal the choice of remedy. He did not. Seethaler, from the beginning, sought to have the wall removed. Much testimony was devoted at the trial court to showing why monetary damages were not sufficient to compensate Seethaler for the wrongful taking of his property. Seethaler did not seek a monetary reward, because he realized the lasting effect of the wall on his property is immeasurable in monetary terms. Seethaler simply provided the evidence that was used by the trial court in determining the monetary award as a secondary and alternative remedy, but that does not condone or waive the right to appeal the trial court's decision. The monetary damages award was not desirable and resulted in a *de facto* condemnation of Seethaler's property.

In sum, from the beginning, Seethaler asked the trial court to command the Calls to remove the encroaching wall from his property, i.e., Seethaler sought injunctive relief. Seethaler spent a large portion of the trial discussing why monetary damages would not

suffice to remedy him of the continuing intrusion of the encroaching wall on his property. Seethaler wants his property back, even if this Court determines that he must pay, from his own pocket, the expenses to remove the encroaching wall. The trial court had an opportunity to rule on this issue, and exercised that opportunity by erroneously determining that monetary damages were appropriate.

This court should hear the claim that the trial court's judgment results in de facto condemnation.

While the label “de facto condemnation” may not have been used in the pleadings, that is the label appropriately attached to the result of the trial court’s decision. The trial court awarded all rights of ownership (except title) to the disputed property to Calls and directed payment to Seethaler for the purported value of that property. That is a taking by Call for a private use – nothing more, nothing less.

While Seethaler asked to have his property returned, Seethaler had to give the trial court some evidence of value and damages in the event the trial court did not return possession of the property to Seethaler. That in no way waives or relinquishes Seethaler’s right to appeal the trial court decision as in error. It was only after the trial court made its decision on possession of the Seethaler property that it could be characterized as a “taking,” which it was.

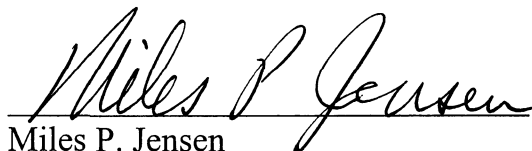
CONCLUSION

In light of the foregoing, Seethaler respectfully requests that this Honorable Court determine the trial court erred in awarding monetary damages rather than ordering Calls to

remove the encroaching wall and restoring possession of the property to Seethaler, erred in determining the Calls acted in good faith, and erred by granting Calls a private right of condemnation. As a matter of equity, the encroaching wall must be removed from Seethaler's property and Seethaler should be restored to possession of his deeded property and the rights appurtenant to ownership of that property.

DATED this 17th day of November, 2008.

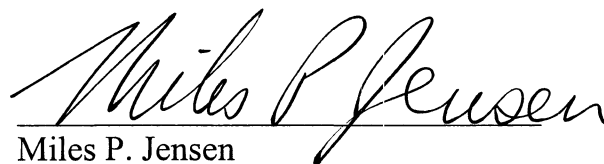
OLSON & HOGGAN, P.C.

A handwritten signature in cursive script, reading "Miles P. Jensen", written over a horizontal line.

Miles P. Jensen
Attorneys for Plaintiff/Appellant
Karl H. Seethaler

CERTIFICATE OF HAND DELIVERY

I hereby certify that on this 17th day of November, 2008, I caused to be hand delivered, one (1) original and seven (7) copies of the foregoing **REPLY BRIEF OF APPELLANT**, to the Utah Court of Appeals at 450 South State P.O. Box 140210, Salt Lake City, Utah 84114 and hand delivered two (2) true and correct copies of the foregoing **REPLY BRIEF OF APPELLANT**, to Marty Moore, Bearnson & Peck, 399 North Main, Suite 300, Logan, Utah 84321.


Miles P. Jensen