SUMMARY
October 27, 2022

2022COA125

Nos. 20CA2132 & 21CA0135, *Ute Water v. Fontanari* — Real Property — Easements — Unreasonable Interference; Breach of Contract; Damages

A division of the court of appeals considers whether a utility company that has an easement to place a pipeline on the property of another may recover the expenses it incurs to relocate the pipeline after the property owner's unreasonable interference with the easement places the pipeline at risk. The division holds that, under the circumstances, the utility company may recover such expenses because the property owner's actions and refusal to compromise with the utility company made relocation of the pipeline reasonable, necessary, and foreseeable.

COLORADO COURT OF APPEALS **2022COA125**

Court of Appeals Nos. 20CA2132 & 21CA0135
Mesa County District Court No. 15CV30590
Honorable Jane A. Tidball, Judge

Ute Water Conservancy District,

Plaintiff-Appellee,

v.

Rudolph Fontanari, Jr.; Ethel C. Fontanari; and Rudolph Fontanari, Jr. and Ethel Carol Fontanari Revocable Trust,

Defendants-Appellants.

JUDGMENT AFFIRMED

Division VI
Opinion by JUDGE LIPINSKY
Berger and Hawthorne*, JJ., concur

Announced October 27, 2022

Driscoll Law, LLC, Jeffrey L. Driscoll, Fruita, Colorado, for Plaintiff-Appellee

Lewis Roca Rothgerber Christie LLP, Kendra N. Beckwith, Denver, Colorado, for Defendants-Appellants

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2022.

¶ 1 Without utility easements, homes and businesses would lack access to critical services such as power, telecommunications, internet, and water. Through easements, utilities obtain the right to place their transmission lines on private property situated between their facilities and their customers. *See Wright v. Horse Creek Ranches*, 697 P.2d 384, 387 (Colo. 1985) (explaining that an easement "confers upon the holder of the easement an enforceable right to use property of another for specific purposes"); *Lazy Dog Ranch v. Telluray Ranch Corp.*, 965 P.2d 1229, 1234 (Colo. 1998) ("An easement is a right conferred by grant, prescription or necessity authorizing one to do or maintain something on the land of another 'which, although a benefit to the land of the former, may be a burden on the land of the latter.'" (quoting *Barnard v. Gaumer*, 146 Colo. 409, 412, 361 P.2d 778, 780 (1961))).

¶ 2 This case concerns the remedies available to a water utility when a landowner whose property is burdened by easements for the utility's water transmission line takes actions that place the transmission line at risk. We hold that, under the circumstances of this case, the trial court did not err by awarding relocation damages to the utility after finding that the landowner's actions made

relocation of the transmission line reasonable, necessary, and foreseeable.

¶ 3 Defendants, Rudolph Fontanari, Jr. (Mr. Fontanari), Ethel C. Fontanari, and Rudolph Fontanari, Jr. and Ethel Carol Fontanari Revocable Trust (collectively, the Fontanari defendants), appeal the trial court's judgment in favor of plaintiff, Ute Water Conservancy District (Ute Water), on Ute Water's breach of contract claim. We affirm.

I. Background Facts and Procedural History

¶ 4 The trial court found the following relevant facts. Ute Water provides water to approximately 80,000 customers in a 250-square-mile service area in western Colorado. Ute Water's main transmission pipeline (the pipeline) delivers approximately two-thirds of the total volume of water to Ute Water's customers. If the pipeline were disabled, hospitals, fire stations, schools, and hundreds of residences throughout the service area would lose access to water.

¶ 5 The pipeline crosses, among other properties, two parcels of land owned by the Fontanari defendants (the parcels): a 121-acre parcel (the road parcel) and a 1.3-acre parcel (the residential

parcel). The residential parcel includes a "residence pad" adjacent to the houses located on the parcel. (According to the parties' pleadings, Mr. Fontanari and Ethel C. Fontanari own the road parcel and Rudolph Fontanari, Jr. and Ethel Carol Fontanari Revocable Trust owns the residential parcel.)

¶ 6 In 1980, the Fontanari defendants' predecessors-in-interest executed two conveyance instruments (the conveyance instruments) granting Ute Water two perpetual easements and construction easements on the parcels (the easements). The easements granted Ute Water the right to construct and maintain the pipeline on the parcels. The easements burden the road parcel (the Mid-Continent easement) and the residential parcel (the Lamb easement).

¶ 7 Exhibit A to each conveyance instrument provides a metes and bounds description of the specific property burdened by the easements and states that the easements include "all streets, roads or highways abutting said lands." The conveyance instruments specify that the property owner reserves the right to "use and occupy said premises for any purpose consistent with the right and privileges" granted to Ute Water. In addition, the conveyance instrument for the Mid-Continent easement authorizes the property

owner "to construct and maintain a roadway on the surface" of such easement.

¶ 8 Ute Water constructed the pipeline in 1981. At the time of its construction, the portion of the pipeline on the parcels (the Fontanari portion) was located approximately four feet under a private road on the road parcel. The Fontanari portion crossed the residential parcel at two points and covered 846 feet of the pipeline.

¶ 9 Mr. Fontanari expanded the residence pad on the residential parcel by adding fill from a nearby hillside. He widened the pad by 35 feet and lengthened it by 120 feet. After the expansion, the pad encroached onto the road parcel and increased the depth of the pipeline under the road parcel by approximately twelve feet. The expansion also covered areas that Ute Water needed to access the pipeline.

¶ 10 In 2014, Mr. Fontanari began developing the private road to accommodate the transportation of heavy equipment to and from a mine that he owns. Over the next two to three years, Mr. Fontanari placed concrete culvert pipes on top of the road (approximately four feet above the pipeline) and added between 10.22 and 11.79 feet of

fill to increase the depth of, and to level, the road. The added fill covered approximately 300 feet of the length of the pipeline.

¶ 11 In total, Mr. Fontanari's alterations impacted approximately 350 feet of the Fontanari portion. Before making the alterations, he neither contacted Ute Water to determine the boundaries of the easements or the location of the pipeline, nor sought a court's permission to proceed with the alterations.

¶ 12 Ute Water learned of the alterations in 2014. It discovered that the alterations impacted its access to the pipeline, increased the likelihood of damage to the pipeline, and made the detection and location of leaks more difficult. Moreover, the alterations prevented Ute Water from safely and timely accessing the pipeline for routine maintenance or emergency repairs.

¶ 13 Ute Water filed a lawsuit against the Fontanari defendants under theories of declaratory relief, injunctive relief, negligence, nuisance, and trespass. The trial court dismissed Ute Water's negligence, nuisance, and trespass claims on the grounds that they were barred by the economic loss rule. Ute Water then filed an amended complaint containing a new breach of contract claim and reasserting the claims for declaratory and injunctive relief.

¶ 14 After several failed attempts at settlement during the pendency of the lawsuit, Ute Water constructed a new section of the pipeline that bypassed the parcels and stopped using the Fontanari portion. Ute Water then severed the Fontanari portion from the pipeline and plugged each end of the Fontanari portion with concrete. At trial, Ute Water requested an award of damages in the amount of the expenses it incurred in relocating the pipeline away from the parcels.

¶ 15 Following a bench trial, the trial court entered judgment in favor of Ute Water on its breach of contract claim. In its post-trial order, the court rejected the Fontanari defendants' arguments that Ute Water had failed to substantially perform its contractual obligations under the conveyance instruments and that Ute Water had abandoned the easements. Notably, the court found — and the Fontanari defendants do not contest on appeal — that the Fontanari defendants unreasonably interfered with the easements. The court entered judgment in favor of Ute Water and against the Fontanari defendants in the amount of $557,790.31 and awarded Ute Water its relocation expenses. Because Ute Water had already relocated the pipeline, the court determined that its claims for a

declaratory judgment and injunctive relief were moot and denied them.

II. Analysis

¶ 16 The Fontanari defendants contend that the trial court erred by (1) entering judgment in favor of Ute Water even though the case was moot. They additionally assert that, even if the case was not moot, the court erred by (2) finding that Ute Water had not abandoned the easements; (3) entering judgment in favor of Ute Water on its breach of contract claim; (4) awarding Ute Water damages in the amount of the expenses it incurred to relocate the pipeline; and (5) awarding Ute Water its costs. We address these contentions in turn.

A. Mootness

¶ 17 The Fontanari defendants assert that the trial court erred by entering judgment in favor of Ute Water because Ute Water's breach of contract claim was moot. According to the Fontanari defendants, as the court found in denying Ute Water's claim for declaratory relief, there was no justiciable controversy because Ute Water had relocated the pipeline. The Fontanari defendants contend that the relocation of the pipeline meant that Ute Water abandoned the

easements and, therefore, Ute Water could not pursue a claim for breach of the conveyance instruments. We disagree.

¶ 18 "Mootness is a jurisdictional prerequisite that can be addressed at any stage during the proceedings." *Diehl v. Weiser*, 2019 CO 70, ¶ 9, 444 P.3d 313, 316. "A case is moot when a judgment, if rendered, would have no practical legal effect upon the existing controversy." *Van Schaack Holdings, Ltd. v. Fulenwider*, 798 P.2d 424, 426 (Colo. 1990).

¶ 19 In its order, the court considered Ute Water's breach of contract claim, determined that Ute Water had proved such claim, and found that its damages caused by the Fontanari defendants' breach of contract were $557,790.31. Later in the order, when the court turned to Ute Water's claim for declaratory relief, it noted that, because "the Court has found that [the Fontanari defendants] breached the easements and has awarded damages to Ute Water" and because "Ute Water has relocated its pipeline off the Fontanari property," there is "not any actual justiciable controversy before the Court." The court did not find that, by relocating the pipeline, Ute Water had abandoned the easements. To the contrary, the court

expressly found that Ute Water had *not* abandoned the easements, as we discuss *infra* Part II.B.3.

¶ 20 The court made the statement that there was no "actual justiciable controversy" solely in the context of Ute Water's claim for declaratory relief; the statement did not generally apply to Ute Water's other claims. The court made clear that its ruling on Ute Water's breach of contract claim had fully resolved the parties' dispute and, therefore, Ute Water had not articulated what a declaration that Ute Water's easements were superior to the Fontanari defendants' rights in the parcels would be or "what it would accomplish."

¶ 21 Ute Water had the right to plead "alternative or . . . several different types" of relief. C.R.C.P. 8(a); *see also* C.R.C.P. 57(a) (a claim for declaratory relief may be asserted "whether or not further relief is or could be claimed"). Because the court resolved the parties' dispute by ruling in favor of Ute Water on its claim for breach of contract, it was not necessary for the court also to grant Ute Water relief on its alternative claim for declaratory relief.

¶ 22 The court's determination that Ute Water's claim for declaratory relief was moot did not mean that its ruling on Ute

Water's breach of contract claim, which appeared a few pages earlier in the court's order, was also moot. The Fontanari defendants' mootness argument fails to acknowledge that the court's ruling on the breach of contract claim, and not the relocation of the pipeline alone, mooted Ute Water's declaratory judgment claim. It defies logic to suggest that a ruling on a claim retroactively moots that very claim because the ruling resolved the parties' dispute. Under the Fontanari defendants' reasoning, a court's resolution of a claim could never stand because such ruling would retroactively moot the claim and make it nonjusticiable.

¶ 23 Thus, we conclude that Ute Water's claim for breach of contract was not moot.

B. Abandonment of an Easement

¶ 24 The Fontanari defendants contend that the trial court erred by finding that Ute Water had not abandoned the easements when it relocated the pipeline away from the parcels and plugged the Fontanari portion with concrete. The Fontanari defendants also argue that the court further erred when it applied the law to this finding. We discern no error.

1. Standard of Review

¶ 25 Whether the owner of the dominant estate abandoned its easement is a question of fact. *See Allen v. Nickerson*, 155 P.3d 595, 601 (Colo. App. 2006). ("The property burdened by the easement is customarily known as the 'servient estate,' while the property benefited by the easement is called the 'dominant estate.'" *Lazy Dog Ranch*, 965 P.2d at 1234.) "We review findings of fact for clear error, meaning that we won't disturb such findings if there is any evidence in the record supporting them." *Woodbridge Condo. Ass'n v. Lo Viento Blanco, LLC*, 2020 COA 34, ¶ 24, 490 P.3d 598, 606, *aff'd*, 2021 CO 56, 489 P.3d 735. "However, our use of the clear error standard of review is premised upon the trial court's having correctly applied the law in making its findings of fact, and we review de novo the trial court's application of the law." *Phoenix Cap., Inc. v. Dowell*, 176 P.3d 835, 841 (Colo. App. 2007).

2. Applicable Law

¶ 26 "To establish an abandonment of an easement, it must be shown by the party asserting the abandonment that there were affirmative acts manifesting an intention on the part of the owner of the dominant estate to abandon the easement." *Allen*, 155 P.3d at

601 (quoting *Gjovig v. Spino*, 701 P.2d 1267, 1269 (Colo. App. 1985)). The party asserting the abandonment "must present clear, unequivocal, and decisive evidence" of such affirmative acts. *Sinclair Transp. Co. v. Sandberg*, 2014 COA 76M, ¶ 58, 350 P.3d 924, 934.

3. The Trial Court Did Not Clearly Err by Finding that Ute Water Had Not Abandoned the Easements

¶ 27 In considering whether Ute Water had abandoned the easements, the court explained that "[t]he issue is not whether an easement is being actively used, rather, the issue is whether the easement holder evidences an intent to abandon the easement." The Fontanari defendants bore the burden of presenting clear, unequivocal, and decisive evidence that Ute Water had abandoned the easements. *See id.*

¶ 28 The trial court found that Ute Water had not abandoned the easements:

> Although the original pipeline has been disconnected and plugged, the evidence at trial showed that the pipeline could be activated again in the future. . . . The Easements are close to the treatment plant where the water originates and Ute Water could utilize the Easements in the future. . . .

¶ 29 As the court noted, Ute Water's Operations Supervisor testified that "the concrete could be removed from the [Fontanari portion] and alternatively the [Fontanari portion] could be disconnected and a new line could be hooked up." Ute Water's General Manager said that "Ute Water has not abandoned the Easements and Ute Water intends to hold the Easements for possible future use." In total, three witnesses testified that Ute Water could use or replace the Fontanari portion in the future. Two of those witnesses explained that Ute Water had plugged the Fontanari portion to avoid contamination and to "[e]nsure that any ground water doesn't follow along that open pipeline and start to carry surface material with it that might result in settlement."

¶ 30 The Fontanari defendants direct us to the testimony of two of Ute Water's witnesses who said, in effect, that Ute Water abandoned the easements when it relocated the pipeline. But as the Fontanari defendants correctly note, "[t]he [abandonment] doctrine emphasizes actions, not after-the-fact statements of intent or explanation." *See Allen*, 155 P.3d at 601; *Gjovig*, 701 P.2d at 1269. Nonetheless, even if we were to consider those witnesses' statements in determining whether the trial court clearly erred by

finding that Ute Water did not abandon the easements, we acknowledge that Ute Water's General Manager conversely testified that Ute Water was "going to maintain the easement[s]."

¶ 31 In addition, the Fontanari defendants contend that the trial court misapplied the law by placing too much weight on Ute Water's statement that it intended to maintain the easements and by disregarding its affirmative acts of relocating the pipeline and sealing the Fontanari portion with concrete at each end. But while the court acknowledged Ute Water's expressed intent in maintaining the easements for potential future use, the court also cited Ute Water's evidence regarding the feasibility of using or replacing the Fontanari portion in the future. Such evidence directly implicated whether or not Ute Water's "affirmative acts manifest[ed] an intention . . . to abandon the easement." *Allen*, 155 P.3d at 601 (quoting *Gjovig*, 701 P.2d at 1269). The court therefore did not rely exclusively on Ute Water's expressed intent to maintain the easements; the court also properly considered whether Ute Water's actions demonstrated an intent to abandon the easements. *See id.*; *Gjovig*, 701 P.2d at 1269.

¶ 32 The Fontanari defendants bore the burden of establishing that Ute Water unequivocally abandoned the easements. *See Sinclair Transp. Co.*, ¶ 58, 350 P.3d at 934. As the trial court found, the Fontanari defendants failed "to present clear, unequivocal and decisive evidence that Ute Water has abandoned the Easements." The record confirms that the Fontanari defendants fell short of meeting their burden of proving that Ute Water had abandoned the easements.

¶ 33 Because of the conflicting testimony on abandonment presented at trial, coupled with the evidence that Ute Water could use or replace the Fontanari portion in the future, we conclude that the trial court did not clearly err by finding that Ute Water had not abandoned the easements. *See Woodbridge Condo. Ass'n*, ¶ 24, 490 P.3d at 606.

C. Breach of Contract

¶ 34 The Fontanari defendants also assert that the trial court erred by entering judgment in favor of Ute Water on its breach of contract claim because Ute Water abandoned the easements and materially breached the conveyance instrument for the Mid-Continent easement by constructing "approximately 36% of [the pipeline]

wholly outside the metes and bounds of [the Mid-Continent easement]." As explained above, we reject the Fontanari defendants' assertion that Ute Water abandoned the easements. In addition, we disagree with the Fontanari defendants' assertion that Ute Water materially breached the conveyance instrument for the Mid-Continent easement.

1. Standard of Review

¶ 35 "[T]he conveyance of easements through instruments is rooted in contract law." *McMahon v. Hines*, 697 N.E.2d 1199, 1205 (Ill. App. Ct. 1998). "While the interpretation of a written contract is a question of law to be determined by the court, whether there has been a breach of contract is a question of fact" to be determined by the fact finder. *State Farm Mut. Auto. Ins. Co. v. Goddard*, 2021 COA 15, ¶ 28, 484 P.3d 765, 772. "We review the trial court's factual findings under a clear error standard, but review its legal conclusions de novo." *Kroesen v. Shenandoah Homeowners Ass'n*, 2020 COA 31, ¶ 55, 461 P.3d 672, 682.

2. Applicable Law

¶ 36 "The extent of an expressly created easement (i.e., the limits of the privileges of use authorized by the easement) is determined by

interpreting the conveyance instrument." *Lazy Dog Ranch*, 965 P.2d at 1235. Here, we must interpret the conveyance instrument for the Mid-Continent easement to determine whether the trial court erred by ruling that Ute Water substantially performed under that document. *See Coors v. Sec. Life of Denver Ins. Co.*, 112 P.3d 59, 64 (Colo. 2005) ("Under contract law, a party to a contract cannot claim its benefit where [the party] is the first to violate its terms.").

¶ 37 "The primary goal of contract interpretation is to determine and effectuate the intent and reasonable expectations of the parties." *Copper Mountain, Inc. v. Indus. Sys., Inc.*, 208 P.3d 692, 697 (Colo. 2009). "To determine the intent of the parties, [we] give effect to the plain and generally accepted meaning of the contractual language." *Id.* We interpret a contract "in its entirety" and "seek[] to harmonize and to give effect to all provisions so that none will be rendered meaningless." *Pepcol Mfg. Co. v. Denver Union Corp.*, 687 P.2d 1310, 1313 (Colo. 1984).

¶ 38 "[A] party attempting to recover on a claim for breach of contract must prove the following elements: (1) the existence of a contract; (2) performance by the plaintiff or some justification for

nonperformance; (3) failure to perform the contract by the defendant; and (4) resulting damages to the plaintiff." *W. Distrib. Co. v. Diodosio*, 841 P.2d 1053, 1058 (Colo. 1992) (citations omitted). Because the Fontanari defendants concede the existence of the conveyance instruments, and because we address damages in the next section of this opinion, we limit our analysis in this section to whether the parties performed under the terms of the conveyance instruments.

¶ 39 "The 'performance' element in a breach of contract action means 'substantial' performance." *Id.* "A party has substantially performed when the other party has substantially received the expected benefit of the contract." *Stan Clauson Assocs., Inc. v. Coleman Bros. Constr., LLC*, 2013 COA 7, ¶ 9, 297 P.3d 1042, 1045. "Failure to substantially perform constitutes a breach of contract." *Id.*

3. The Trial Court Did Not Err by Concluding that Ute Water Substantially Performed Under the Conveyance Instrument for the Mid-Continent Easement

¶ 40 The Fontanari defendants assert that the trial court erred by (1) holding that the conveyance instrument for the Mid-Continent easement allowed Ute Water to construct the Fontanari portion

outside the metes and bounds description of the Mid-Continent easement and (2) finding that Ute Water had not breached the conveyance instrument for the Mid-Continent easement by placing the Fontanari portion outside that metes and bounds description.

¶ 41 As noted above, one of the Fontanari defendants' predecessors-in-interest granted Ute Water a perpetual easement on the road parcel. That easement — the Mid-Continent easement — burdens not only the property specifically identified in exhibit A to the conveyance instrument, but also, as exhibit A states, "all streets, roads[,] or highways abutting said lands."

¶ 42 The trial court found, and the parties did not disagree, that, in certain areas, the pipeline was "outside the metes and bounds of the easement south of the driveway of the Residence Parcel." The Fontanari defendants argued that, for this reason, Ute Water failed to substantially comply with the terms of the conveyance instrument for the Mid-Continent easement and is therefore barred from pursuing its breach of contract claim. The court disagreed with the Fontanari defendants' argument and concluded that the language of exhibit A to the conveyance instruments did not limit

the property burdened by the easements to that described by the metes and bounds.

¶ 43 The trial court found that the Fontanari defendants' predecessor-in-interest and Ute Water

> intended to allow the pipeline to be constructed in the private road owned by [the Fontanari defendants' predecessor-in-interest], which both encompasses and abuts the metes and bound[s] path. This afforded Ute Water the ability to deviate slightly from the metes and bounds path, to take into account the terrain through which the pipeline was passing, but yet remain within the overall fifty foot wide road . . . .

¶ 44 We agree with the trial court's interpretation of the conveyance instrument for the Mid-Continent easement. Under the plain language of the conveyance instrument, the Mid-Continent easement extends to all roads abutting the metes and bounds description in exhibit A to the conveyance instrument. The record reflects that, at the time the conveyance instruments were executed, a fifty-foot-wide private road abutted the metes and bounds description.

¶ 45 At trial, the Fontanari defendants argued that this language referred to a nearby public road and, therefore, the parties did not

intend to allow Ute Water to construct the Fontanari portion under the existing private road. However, because Ute Water already possessed the statutory authority to construct transmission pipelines underneath public roads, *see* § 37-45-118(1)(d)(I), C.R.S. 2022, there was no need for the Fontanari defendants' predecessor-in-interest to grant Ute Water an easement on a public road.

¶ 46 We therefore conclude that the parties intended to allow Ute Water to construct the pipeline under the private road that encompassed and abutted the metes and bounds description. This allowed Ute Water to deviate slightly from the description to take the terrain into account when constructing the Fontanari portion, so long as that portion remained within the fifty-foot-wide road. As the court explained, this interpretation gives effect to all parts of the conveyance instrument, and not simply the metes and bounds description, as the Fontanari defendants argue. *See Pepcol Mfg. Co.*, 687 P.2d at 1313.

¶ 47 The parties' surveys admitted into evidence at trial support the trial court's finding that Ute Water "constructed its pipeline in substantial compliance with both the Lamb and Mid-Continent Easements and therefore satisfied its obligations under both

Easements." Each party's survey shows that Ute Water constructed the Fontanari portion either within the metes and bounds description or under the abutting road.

¶ 48 Moreover, there is no evidence that Ute Water interfered with the Fontanari defendants' rights set forth in the conveyance instrument for the Mid-Continent easement. *See Lazy Dog Ranch*, 965 P.2d at 1238 ("[T]he owner of the easement may make any use of the easement (including maintenance and improvement) that is reasonably necessary to the enjoyment of the easement, and which does not cause unreasonable damage to the servient estate or unreasonably interfere with the enjoyment of the servient estate."). The Fontanari defendants do not contest the trial court's finding that

> [t]here is no evidence that Ute Water objected to, much less interfered with, [the Fontanari defendants'] use of the surface of the road in the Mid-Continent Easement prior to [Mr.] Fontanari commencing [his] alterations in late 2014. The evidence is undisputed that the approximately four feet of cover which [previously] existed over the pipeline was more than sufficient to withstand [the Fontanari defendants'] transport of mining vehicles on the road. . . . Ute Water had no objection to [the Fontanari defendants], or [their]

> predecessor, Mid-Continent, using the road for mining traffic with the original level of cover.

¶ 49 For these reasons, we conclude that the trial court did not clearly err by finding that Ute Water substantially performed under, and therefore did not breach, the conveyance instrument for the Mid-Continent easement.

¶ 50 In addition, because the Fontanari defendants do not contest the trial court's finding that they unreasonably interfered with Ute Water's use and enjoyment of the Mid-Continent easement, we hold that the trial court did not clearly err by finding that the Fontanari defendants breached the conveyance instruments and by entering judgment in favor of Ute Water on its breach of contract claim. *See Upper Platte & Beaver Canal Co. v. Riverview Commons Gen. Improvement Dist.*, 250 P.3d 711, 716 (Colo. App. 2010) ("[A]n easement holder's right to be free from interference with use and enjoyment does not derive from 'the breach of a duty recognized in tort law.'" (quoting *Robinson v. Colo. State Lottery Div.*, 179 P.3d 998, 1003 (Colo. 2008))).

D. Award of Damages

¶ 51 The Fontanari defendants contend that the trial court misapplied the law by awarding Ute Water breach of contract damages in the amount of the expenses it incurred to relocate the pipeline. The Fontanari defendants also argue that the trial court erred by awarding damages to Ute Water because Ute Water failed to demonstrate that the Fontanari defendants' breach caused it to incur the expenses associated with the relocation. We disagree.

1. Standard of Review

¶ 52 "The trial court 'has the sole prerogative to assess the amount of damages, and its award will not be set aside unless it is manifestly and clearly erroneous.' However, whether the district court misapplied the law when determining the measure of damages presents a question of law that we review de novo." *In re Estate of Chavez*, 2022 COA 89M, ¶ 52, ___ P.3d ___, ___ (quoting *Lawry v. Palm*, 192 P.3d 550, 565 (Colo. App. 2008)).

2. Applicable Law

¶ 53 In a breach of contract action, the prevailing party typically can seek to recover "general" and "special" damages. *See Giampapa v. Am. Fam. Mut. Ins. Co.*, 64 P.3d 230, 237 n.3 (Colo.

2003); *Core-Mark Midcontinent Inc. v. Sonitrol Corp.*, 2016 COA 22, ¶¶ 32-33, 370 P.3d 353, 360. "'General damages' are those that flow naturally from the breach of contract, whereas 'special' or 'consequential damages' are other foreseeable damages within the reasonable contemplation of the parties at the time the contract was made." *Giampapa*, 64 P.3d at 237 n.3. "[T]he measure of damages is the amount it takes to place the plaintiff in the position it would have occupied had the breach not occurred." *Acoustic Mktg. Rsch., Inc. v. Technics, LLC*, 198 P.3d 96, 98 (Colo. 2008).

¶ 54 "All contract damages, whether general or special, . . . are recoverable only if the damages were the foreseeable result of a breach at the time the contract was made." *Giampapa*, 64 P.3d at 240. "The requirement is objective," *Denny Constr., Inc. v. City & Cnty. of Denver*, 199 P.3d 742, 751 (Colo. 2009), focusing on whether "the defendant knew or should have known that these damages would probably be incurred by the plaintiff" if the defendant breached the parties' contract, *Giampapa*, 64 P.3d at 240 (quoting CJI-Civ. 4th 30:35 (2002)).

3. A Utility Company May Recover as Breach of Contract Damages the Expenses it Incurred to Relocate Its Pipeline if

the Owner of the Servient Estate Unreasonably Interfered with the Easement for the Pipeline

¶ 55 The Fontanari defendants contend that the trial court erred by awarding relocation damages to Ute Water for its breach of contract claim. According to the Fontanari defendants, damages in the amount of the expenses of relocating a pipeline are not available for claims alleging unreasonable interference with a utility easement for a water transmission pipeline. The Fontanari defendants specifically argue that (1) Colorado law only affords injunctive, declaratory, and restorative relief for these types of claims; (2) the trial court's cited authority does not support an award of relocation damages; and (3) awards of relocation damages promote self-help measures, which the law disfavors.

¶ 56 We agree with the Fontanari defendants that Colorado law affords "injunctive, declaratory, and restorative relief" for unreasonable interference with an easement. *See, e.g.*, *Rinker v. Colina-Lee*, 2019 COA 45, ¶ 88, 452 P.3d 161, 174 (affirming a mandatory injunction to unblock the interference with the easement); *Roaring Fork Club, L.P. v. St. Jude's Co.*, 36 P.3d 1229, 1238 (Colo. 2001) ("Declaratory judgments are a familiar

mechanism in easement disputes."); *Upper Platte*, 250 P.3d at 715 ("[W]here an easement has been unilaterally altered, restorative relief is . . . available.").

¶ 57 We also agree with the Fontanari defendants that "[d]amages are inadequate in easement cases because land is unique" and damages cannot compensate for actual use of unique property. *Rinker*, ¶ 82, 452 P.3d at 173. For this reason, "[c]ourts usually grant the easement owner injunctive relief when it is desired and when the defendant's conduct in fact interferes with the easement rights." *Upper Platte*, 250 P.3d at 715 (quoting 1 Dan B. Dobbs, *Law of Remedies* 784-85 (2d ed. 1993)).

¶ 58 While the Fontanari defendants' cited authorities describe the types of remedies a court *may* grant for unreasonable interference with an easement, they do not address the types of damages a court *cannot* award for breaches of an easement conveyance instrument. Indeed, none of the cited authorities, nor any other authority of which we are aware, holds that a court cannot award relocation damages under the circumstances presented in this case. *See id.* at 717 (explaining that there are "two possible remedies when an easement has been altered: damages for trespass or an equitable

resolution of the competing interests"); *see also Roaring Fork Club*, 36 P.3d at 1238 ("For [the defendant's] trespass [to the plaintiff's easement], the trial court is entitled to fashion a remedy at law or in equity.").

¶ 59 Equitable relief and breach of contract damages are not mutually exclusive where the owner of a servient estate takes actions that materially impact the value of the easement, particularly a utility easement needed to deliver vital services to tens of thousands of people. An equitable remedy is appropriate to address "competing uses between two interested owners." *Roaring Fork Club*, 36 P.3d at 1235. That is because "[a]n equitable solution maximizes the usage both owners seek for their respective properties. This doctrine, however, does not apply where either owner seeks unreasonable uses." *Id.*

¶ 60 Thus, in cases such as this, where the owners of the burdened property do not dispute that they unreasonably interfered with the easement, the court need not attempt to reconcile the parties' competing interests by granting equitable relief. Instead, the court may "fashion a remedy at law" that compensates the injured party

for its damages caused by the unreasonable interference. *Id.* at 1238.

¶ 61 We reject the Fontanari defendants' argument that the authorities cited in the trial court's order do not support an award of relocation damages to Ute Water. The trial court determined that Ute Water was entitled to an award of damages based on the reasoning of three out-of-state cases: *Mississippi River Transmission Corp. v. Wachter Construction, Inc.*, 731 S.W.2d 445 (Mo. Ct. App. 1987); *Mid-America Pipeline Co. v. Lario Enterprises, Inc.*, 942 F.2d 1519 (10th Cir. 1991); and *Cox v. East Tennessee Natural Gas Co.*, 136 S.W.3d 626 (Tenn. Ct. App. 2003). Although none of those cases expressly holds that a court may award relocation damages, none of them holds that a court cannot award such damages.

¶ 62 Moreover, in *Mississippi River Transmission Corp.*, the court affirmed an award of relocation damages under substantially similar facts to those presented here. 731 S.W.2d at 446-47, 450. The plaintiff held an easement granting it the right to construct a buried natural gas pipeline on the defendant's property. *Id.* at 446. The pipeline supplied a "substantial portion of the natural gas sold in the St. Louis area" by a utility. *Id.* The defendant subsequently

built improvements that "rais[ed] the amount of fill over the pipeline to a level of from thirteen to nineteen and one-half feet." *Id.*

¶ 63 The plaintiff presented evidence that the construction of the improvements increased the risk to the public from the operation of the pipeline, placed additional stress on the pipeline, and made it more difficult to monitor the pipeline and locate leaks. *Id.* After the parties were unable to reach a settlement, the plaintiff rerouted a new pipeline around the defendant's property. *Id.*

¶ 64 The plaintiff sued the defendant to recover the damages it incurred in relocating the pipeline. *Id.* The trial court found that the defendant's alterations "could potentially halt the St. Louis Line's supply of gas," which would interfere with the plaintiff's ability to fulfill its federal and state statutory duties. *Id.* at 447. Because "no reasonably prudent operator of a natural gas transmission pipeline would operate under such conditions," the court awarded the plaintiff its damages in relocating the pipeline. *Id.* The appellate court affirmed the judgment. *Id.* at 450.

¶ 65 These cases do not preclude an award of relocation damages to Ute Water. Thus, we cannot say that the court erred by determining that it had the ability to award money damages in this

case. *See also Pac. Gas & Elec. Co. v. San Mateo County*, 43 Cal. Rptr. 450, 454 (Dist. Ct. App. 1965) ("The court applied the proper measure of damages under the circumstances here, namely the cost of relocation of the [gas] main.").

¶ 66 We next turn to the Fontanari defendants' argument that an award of relocation damages would be improper because it would promote self-help measures, which the law disfavors. While we acknowledge that the law disfavors self-help measures, we conclude that the record supports the trial court's finding that, under the circumstances of this case, "Ute Water's only viable alternative was to reroute the pipeline."

¶ 67 In *Roaring Fork Club*, the supreme court explained that, instead of resorting to self-help measures,

> the best course is for the burdened owner and the benefitted owner to agree to alterations that would accommodate both parties' use of their respective properties to the fullest extent possible. Barring such an agreement, we do not support the self-help remedy that [the burdened owner] exercised here. When a dispute arises between two property owners, the court is the appropriate forum for the resolution of that dispute and — in order to avoid an adverse ruling of trespass or restoration — the burdened owner should

> obtain a court declaration before commencing alterations.

36 P.3d at 1237-38.

¶ 68 Initially, we note that *Roaring Fork Club* does not bar a burdened estate owner from engaging in self-help measures. *See id.* at 1237 (explaining that the "best course" — but not the only course — is for the burdened estate owner to seek a declaratory judgment before making alterations to the servient estate). Rather, *Roaring Fork Club* cautions against the use of such measures "to avoid an adverse ruling of trespass or restoration." *Id.* Thus, *Roaring Fork Club* does not foreclose self-help measures if a party is willing to live with the potential legal consequences of its actions. And *Roaring Fork Club* does not stand for the proposition that an owner of a dominant estate that resorts to self-help when the owner of the servient estate unreasonably interferes with an easement is precluded from obtaining a damage award. *See id.* at 1238 (holding that, even though the burdened owner took self-help measures, "the trial court is entitled to fashion a remedy at law or in equity").

¶ 69 Moreover, the two cases involving awards of relocation damages cited in the trial court's order — *Mississippi River*

Transmission Corp. and *Pacific Gas* — discussed the particular importance of protecting utility easements. *See Miss. River Transmission Corp.*, 731 S.W.2d at 447, 450 (affirming the trial court's findings that the defendant's acts "could potentially halt the . . . supply of gas" to the utility's customers, which would "interfere[] with [the plaintiff's] ability to fulfill its obligations under federal and state law and would greatly reduce the margin of safety originally designed into the pipeline"); *Pac. Gas*, 43 Cal. Rptr. at 453 (considering the "inconvenience to [the] plaintiff's consumers and danger to the public"). In these cases, interference with the easement by the owner of the servient estate necessitated the decision of the owner of the dominant estate to relocate the pipeline, not just on the dominant estate owner's behalf, but also on the public's behalf. *See Miss. River Transmission Corp.*, 731 S.W.2d at 447, 450; *Pac. Gas*, 43 Cal. Rptr. at 453.

¶ 70 For these reasons, we hold that a court has the discretion to award relocation damages when the owner of the servient estate breaches the conveyance instrument for a utility easement by unreasonably interfering with the easement.

4. The Trial Court Did Not Err by Awarding Relocation Damages to Ute Water

¶ 71 The Fontanari defendants argue that the trial court erred by awarding Ute Water relocation damages because Ute Water failed to demonstrate that the Fontanari defendants' breach of the conveyance instruments caused such damages. We disagree.

¶ 72 The trial court awarded Ute Water $557,790.31 in relocation damages after concluding that "the relocation of the pipeline was reasonable[,] . . . necessary[,] and foreseeable under the circumstances of this case." As noted above, the Fontanari defendants do not dispute the trial court's conclusion that they unreasonably interfered with Ute Water's use and enjoyment of the easements. For this reason, and contrary to the Fontanari defendants' assertions, the trial court was not required to attempt to reconcile the parties' competing interests through equitable relief in lieu of awarding money damages to Ute Water. *See Roaring Fork Club*, 36 P.3d at 1235.

¶ 73 In support of the award of relocation damages, the trial court found that

> [t]he evidence is overwhelming that Ute Water could not timely, safely[,] and economically

> conduct routine repairs or maintenance, much less emergency repairs due to [Mr.] Fontanari's alterations. Likelihood of damage to the pipeline was increased and detection of leaks was made more difficult. Further, Ute Water would not be able to conduct such operations within the boundaries of the Easements, due to [Mr.] Fontanari's earth moving. [Mr.] Fontanari failed to obtain Ute Water's consent, or court approval, prior to commencing these major earth-moving operations on the Residence Parcel and the Road Parcel.

¶ 74 The court also found that Mr. Fontanari's alterations could negatively impact the public:

> [A]lthough Ute Water has backup tanks for emergency use, these tanks must be available for any failure, not only a failure on the Fontanari property. Such tanks would only be able to service customers for a day, or less, depending on the time of year. Consequently[,] water service to fire departments, hospitals, schools[,] and consumers could be seriously compromised during any of these maintenance or repair operations. . . .
>
> . . . .
>
> The nearly sixteen feet of cover now over the [Fontanari portion] places the integrity of the pipeline at the outermost allowable limit. . . . Since the [pipeline] is a major artery essential for public and private water services, the interruption of service under these circumstances could potentially be catastrophic. . . . The significantly increased endangerment to the main transmission line

> for the entire delivery system is not a risk a prudent utility provider could ignore.

¶ 75 Finally, the court found that relocating the pipeline became necessary when Mr. Fontanari refused to negotiate a resolution of the dispute with Ute Water:

> [W]hile the lawsuit was pending, but after [Mr.] Fontanari had completed [the] fill activities, the parties spent over a year attempting to come to an informal resolution. . . . The parties were unable to reach a resolution. . . . [I]n order for Ute Water to safely access the pipeline in areas where the road fill and hillside alterations were made, Ute Water would be required to slope back [Mr.] Fontanari's alterations and work well outside the fifteen foot easement. . . . This was not acceptable to [Mr.] Fontanari and he was unwilling to enlarge the easement.

The court explained that "[d]ue to [Mr.] Fontanari's unwillingness to consider modification of [the] alterations, and [his] unwillingness to increase the size of the Easements, Ute Water's only viable alternative was to reroute the pipeline." Significantly, the Fontanari defendants "did not present any persuasive evidence that alternatives to relocation were available, feasible or cost effective."

¶ 76 The court's findings are supported by evidence in the record. Thus, they are not clearly erroneous, *see Woodbridge Condo. Ass'n*, ¶ 24, 490 P.3d at 606, and we adopt them in analyzing whether the

trial court applied the proper measure of damages, *see Colo. Ins. Guar. Ass'n v. Sunstate Equip. Co.*, 2016 COA 64, ¶ 128, 405 P.3d 320, 343.

¶ 77 We hold that the court did not err by awarding relocation damages to Ute Water after concluding that Mr. Fontanari's actions made relocation of the pipeline reasonable, necessary, and foreseeable. Mr. Fontanari's unilateral actions endangered the water supply to approximately 80,000 customers of Ute Water, including hospitals, fire stations, and schools. If Mr. Fontanari's actions caused the pipeline to fail, Ute Water's remaining distribution system could not provide water services to its customers. Ute Water therefore had no choice but to find a solution that ensured it could continue to supply water to its customers. *See* § 37-45-102(3)(c), C.R.S. 2022 (providing that the conservation and development of water resources is "deemed to be a public use essential for the public benefit"); *see also Miss. River Transmission Corp.*, 731 S.W.2d at 447, 450; *Pac. Gas*, 43 Cal. Rptr. at 453. We cannot say that, under the circumstances, Ute Water's decision to relocate the pipeline was unreasonable. Ute Water's actions were necessary to protect the pipeline.

¶ 78 Although Mr. Fontanari was not required under the conveyance instruments to consent to the relocation of the pipeline or to enlargement of the easements, the Fontanari defendants cannot avoid the consequences of their unreasonable interference with the easements. Mr. Fontanari's actions left Ute Water with no choice but to relocate the pipeline. Ute Water's response to Mr. Fontanari's recalcitrance was foreseeable to the Fontanari defendants: They knew about the location of the pipeline, its purpose, and its importance to Ute Water's customers. Consequently, the Fontanari defendants knew, or at least should have known, that Ute Water would be forced to relocate the pipeline if Mr. Fontanari remained unwilling to take the actions necessary to protect the pipeline. *See Giampapa*, 64 P.3d at 237. Such special damages are a permissible remedy for this type of breach of the conveyance instrument for a utility easement. *See id.* at 237 n.3.

¶ 79 We also disagree with the Fontanari defendants' contention that the award of relocation damages was improper because "they do not give Ute Water the benefit of its bargain." Contrary to the Fontanari defendants' assertion, Ute Water entered into the conveyance instruments for the easements to facilitate the

distribution of water services to its customers without interference, not merely to obtain the right to construct the Fontanari portion on the parcels. Mr. Fontanari's actions defeated the principal reason for Ute Water's acquisition of the easements. Thus, Ute Water's relocation of the pipeline put it "in the position it would have occupied had the breach not occurred," *Acoustic Mktg. Rsch.*, 198 P.3d at 98 — the ability to transport water to its customers without interruption through a safe pipeline.

¶ 80 The Fontanari defendants further challenge the amount of damages that the trial court awarded to Ute Water, although they do not contest the trial court's finding that Ute Water's relocation damages totaled $557,790.31. Because the trial court found that Mr. Fontanari's alterations "disturbed [only] roughly 40% of the total length of Ute Water's pipeline traversing" the parcels, the Fontanari defendants argue that the total award must be reduced by sixty percent. But the Fontanari defendants do not provide any authority supporting their argument. "We do not consider bald factual or legal assertions presented without argument or development." *Cikraji v. Snowberger*, 2015 COA 66, ¶ 21 n.3, 410 P.3d 573, 578 n.3; *see* C.A.R. 28(a)(7)(B) (providing that

arguments in the appellant's brief "*must* contain . . . citations to the authorities . . . on which the appellant relies") (emphasis added). In any event, Mr. Fontanari's actions jeopardized the operation of the entire pipeline because a failure anywhere in the pipeline had the potential to stop the flow of water to Ute Water's customers.

¶ 81 Accordingly, we conclude that the trial court did not err by awarding Ute Water relocation damages in the amount of $557,790.31.

E. Costs

¶ 82 The Fontanari defendants assert that the trial court erred by awarding Ute Water its costs because "Ute Water should not have prevailed (and cannot prevail) in this action."

¶ 83 Ute Water contends that the Fontanari defendants failed to preserve this issue because they "did not contest that [Ute Water] was the prevailing party." We disagree. While the Fontanari defendants did not specifically contest in their response to Ute Water's bill of costs that Ute Water was the prevailing party, the Fontanari defendants consistently argued throughout the case that Ute Water could not prevail on any of its claims. *See Berra v. Springer & Steinberg, P.C.*, 251 P.3d 567, 570 (Colo. App. 2010)

("Because [the defendant's] closing argument essentially presented to the trial court the sum and substance of the argument it now makes on appeal, we consider that argument properly preserved for appellate review.").

¶ 84 Because Ute Water prevailed on its breach of contract claim, the trial court had the discretion to award reasonable costs to Ute Water pursuant to C.R.C.P. 54(d). *See Archer v. Farmer Bros. Co.*, 90 P.3d 228, 230-31 (Colo. 2004) ("When a case involves many claims, some of which are successful and some of which are not, it is left to the sole discretion of the trial court to determine which party, if any, is the prevailing party and whether costs should be awarded."); C.R.C.P. 54(d) (providing that "reasonable costs shall be allowed as of course to the prevailing party"). And because the Fontanari defendants do not challenge the amount of costs the court awarded to Ute Water, we do not consider whether the amount of such costs was unreasonable.

¶ 85 We therefore conclude that the trial court did not abuse its discretion by awarding Ute Water its costs.

F. Extinguishment

¶ 86 Following oral argument in this case, we ordered the parties to submit supplemental briefs explaining whether, as a matter of law, an easement is necessarily extinguished when a landowner who unreasonably interfered with a utility easement for a pipeline satisfies a money judgment for the expenses of relocating the pipeline. We specifically sought the supplemental briefing to determine whether the Fontanari defendants' payment in full of the money damages awarded to Ute Water would result in an inequitable result: Ute Water would receive recompense for constructing a new pipeline that bypassed the Fontanari defendants' property while continuing to reserve the right to use the original pipeline.

¶ 87 But the Fontanari defendants did not argue in their supplemental brief that payment of the damages awarded to Ute Water would extinguish the easements. Rather, the Fontanari defendants reasserted their contention that Ute Water abandoned the easements and is not entitled to recover relocation damages. As we explain in Part II.B above, the trial court did not clearly err by finding that Ute Water did not abandon the easements.

¶ 88 We decline to consider the status of the easements upon the Fontanari defendants' satisfaction of Ute Water's money judgment because they do not ask us to grant them relief in the event they pay the judgment in full. We are not required to grant relief that no party has requested. *See Kingsley v. Kingsley*, 716 S.W.2d 257, 260 (Mo. 1986) ("Although on denying the relief asked for upon a motion, the court . . . may grant alternative relief, it is not bound to do so if no party asks for it." (quoting 56 Am. Jur. 2d *Motions, Rules, and Orders* § 26 (1971))); *Woman's Hosp. v. Sixty-Seventh St. Realty Co.*, 192 N.E. 302, 307 (N.Y. 1934) (holding that the lower court "might have granted alternative relief, but it was not bound to do so when no party asked for it").

III. Conclusion

¶ 89 The judgment is affirmed.

JUDGE BERGER and JUDGE HAWTHORNE concur.