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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH, WEST JORDAN DEPARTMENT

HI-COUNTRY ESTATES HOMEOWNERS ASSOCIATION; a Utah Corporation, Plaintiff, v. BAGLEY & COMPANY, et al., Defendants.	**MOTION FOR ENTRY OF AN ORDER IMPLEMENTING COURT OF APPEALS' DECISION** Case No. 020107452 Judge: Andrew Stone
FOOTHILLS WATER COMPANY, a Utah Corporation; J. RODNEY DANSIE; THE DANSIE FAMILY TRUST; BOYD W. DANSIE; RICHARD P. DANSIE; JOYCE M. TAYLOR; and BONNIE R. PARKIN, Defendants and Counterclaimants, v. HI-COUNTRY ESTATES HOMEOWNERS ASSOCIATION, a Utah Corporation, Counterclaim Defendants.	

The Foothills Water Company, J. Rodney Dansie, The Dansie Family Trust, Boyd W. Dansie, Richard P. Dansie, Joyce M. Taylor, and Bonnie R. Parkin (collectively "the Dansies") submit this motion requesting this Court to enter an order implementing the decision of the Court of Appeals in this matter. This motion is supported by an accompanying memorandum.

DATED this 26th day of July, 2012.

J. Thomas Bowen, Attorney for
Foothills Water Company, J. Rodney
Dansie, The Dansie Family Trust,
Boyd W. Dansie, Richard P. Dansie, Joyce
M. Taylor, and Bonnie R. Parkin

CERTIFICATE OF MAILING

I hereby certify that on this 25th day of July, 2012, I caused to be mailed, a true and correct copy of the foregoing **MOTION FOR ENTRY OF AN ORDER IMPLEMENTING COURT OF APPEALS' DECISION** by placing the same in United States Mail, first class, postage prepaid to the following:

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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH, WEST JORDAN DEPARTMENT

HI-COUNTRY ESTATES HOMEOWNERS ASSOCIATION, a Utah Corporation, Plaintiff, v. BAGLEY & COMPANY, et al., Defendants.	**MEMORANDUM IN SUPPORT OF MOTION FOR ENTRY OF AN ORDER IMPLEMENTING COURT OF APPEALS' DECISION** Case No. 020107452 Judge: Andrew Stone
FOOTHILLS WATER COMPANY, a Utah Corporation; J. RODNEY DANSIE; THE DANSIE FAMILY TRUST; BOYD W. DANSIE; RICHARD P. DANSIE; JOYCE M. TAYLOR; and BONNIE R. PARKIN, Defendants and Counterclaimants, v. HI-COUNTRY ESTATES HOMEOWNERS ASSOCIATION, a Utah Corporation, Counterclaim Defendants.	

The Foothills Water Company, J. Rodney Dansie, The Dansie Family Trust, Boyd W. Dansie, Richard P. Dansie, Joyce M. Taylor, and Bonnie R. Parkin submit the following memorandum in support of their motion for an order from this Court implementing the Court of Appeals decision in this matter.

FACTS

This case involves a long standing dispute between Hi-Country Estates Homeowners Association ("Association") and Foothills Water Company, a Utah corporation, J. Rodney Dansie, The Dansie Family Trust, Boyd W. Dansie, Richard P. Dansie, Joyce M. Taylor, and Bonnie R. Parkin (the "Dansies") relating to the delivery of water and the utilization of a water system in the Hi-Country Estates development located in southwest Salt Lake County. The focus of this motion and the proposed order begins with the decision of the Court of Appeals in this matter in 2008.[1] In ¶ 12, footnote 2 of that opinion, the Court stated that the Dansies "shall have the right to receive up to five (5) residential hook-ups onto the water system on the Dansie property for members of his immediate family without any payment of hook-up fees and shall further have the right to receive up to twelve million (12,000,000) gallons of water per year from the combined water system at no cost for culinary and yard use . . . ." In spite of this language, the Court of Appeals affirmed Judge Brian's order and the final judgment in this matter dated January 5, 2006, wherein he had determined that the Dansies had to pay various costs for

[1] *Hi-Country Estates Homeowners Ass'n v. Bagley & Co.*, 2008 UT App 105, 182 P.3d 417 (copy attached as Exhibit A).

transporting the water through the Association's system and for the connections. The Supreme Court denied certiorari, and the matter was returned to the District Court and assigned to Judge Roth due to Judge Brian's retirement. The Dansies asked Judge Roth to modify Judge Brian's final ruling to reflect the Court of Appeals' language in ¶ 12 of its opinion. Judge Roth refused to do so based upon his belief that he had no such authority since the Court of Appeals had affirmed Judge Brian's order in all respects. Judge Roth noted, however, that there was an apparent inconsistency between the Court of Appeals' statements in ¶ 12 and its reference to footnote 2 that the Well Lease is enforceable as written, and Judge Brian's order that required the Dansies to pay for transfer fees and costs based upon a defunct 1986 PSC order. The Dansies appealed Judge Roth's decision. On July 29, 2011, the Court of Appeals filed an Amended Memorandum Decision[2] which affirmed its 2008 decision that the Dansies were entitled to receive free water and clarified that decision. The Court stated, "Thus our affirmance of paragraph 3 of the Final Judgment must be understood as being limited to its historical context and not as 'adjudicat[ing] the rights of the parties or the enforceability of the Well Lease going forward.' To be clear, the effect of the Final Judgment, as affirmed and explained in our 2008 opinion and in the above Amended Memorandum Decision, is that the Dansies are, going forward, entitled to their contractual rights to free water and free hook-ups unless the

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[2]*Hi-Country Estates Homeowners Ass'n v. Bagley & Co.*, 2011 UT App 252, *cert denied*, 260 P.3d 192 (UTAH 2011) (copy attached as Exhibit B).

PSC intervenes and determines otherwise." The Supreme Court again denied certiorari, and the case was remanded to this Court.

The file in this matter does not clearly reflect the present status of the dispute between the parties. It only contains Judge Brian's Final Judgment and Judge Roth's Order. The Dansies submit that it would be appropriate for this Court to enter the proposed order clarifying that, as the Court of Appeals stated, Judge Brian's "final judgment" does not exclude the Dansies from the clear language of the agreement and that they are entitled to free water and free hook-ups absent PSC intervention. In addition, the Dansies presently have no order for this Court to enforce if the Association refuses their demand that free water be provided.[3]

DATED this 25th day of July, 2012.

J. Thomas Bowen, Attorney for Foothills Water Company, J. Rodney Dansie, The Dansie Family Trust, Boyd W. Dansie, Richard P. Dansie, Joyce M. Taylor, and Bonnie R. Parkin

[3]The Dansies have made a demand on the Association for the free water, but thus far it has been ignored.

EXHIBIT A

UTAH COURT OF APPEALS OPINION

MARCH 27, 2008

IN THE UTAH COURT OF APPEALS

----ooOoo----

Hi-Country Estates Homeowners Association, a Utah corporation,

Plaintiff,

v.

Bagley & Company, a Utah corporation; J. Rodney Dansie; and Gerald Bagley,

Defendants.

Foothills Water Company, a Utah corporation; J. Rodney Dansie; The Dansie Family Trust; Richard P. Dansie; Boyd W. Dansie; Joyce M. Taylor; and Bonnie R. Parkin,

Counterclaimants, Appellants, and Cross-appellees,

v.

Hi-Country Estates Homeowners Association, a Utah corporation,

Counterclaim Defendants, Appellees, and Cross-appellants.

OPINION
(For Official Publication)

Case No. 20060139-CA

F I L E D
(March 27, 2008)

2008 UT App 105

Third District, West Jordan Department, 020107452
The Honorable Pat B. Brian

Attorneys: Raymond J. Etcheverry and Angie Nelson, Salt Lake City, for Appellants and Cross-appellees
Dale F. Gardiner, Salt Lake City, for Appellees and Cross-appellants

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in the Association. Defendants also counterclaimed for enforcement of the Well Lease.

¶4 In June 1985, Bagley created Foothills and began to manage the water system through this entity. Toward the end of the year, Bagley transferred all interest and stock in Foothills to Dansie; and the following January, Bagley assigned to Foothills all of his rights related to the water system. Also in June 1985, Foothills applied to the Public Service Commission (the PSC) to operate the water system as a public utility; and the PSC granted a certificate of convenience and necessity. The following year, the PSC held rate-setting hearings and determined that, notwithstanding the terms of the Well Lease, in order for the Dansies to obtain their free water, they would need to pay the pro-rata costs for power, chlorination, and water testing.

¶5 Title in the water system was eventually quieted in the Association. In 1994, shortly after the Association assumed control of the water system, the Association disconnected the water lines to the Dansie property when the Dansies allegedly refused to pay the costs required by the 1986 PSC order. The Dansies thereafter built a temporary water system to service their property and claimed breach of contract based on the severance of the water systems. In 1996, the PSC revoked the water system's status as a public utility.

¶6 After nearly twenty years of district court determinations, appeals by the parties, and remands by appellate courts, trial on the remaining issues was held in early 2005. The trial court then issued a Final Judgment on those remaining issues on January 5, 2006, which (1) ruled that the Well Lease was an enforceable contract and was not, as the Association had argued, void because of public policy or unconscionability; (2) dismissed the Dansies' breach of contract claims because the Dansies refused to pay the costs set forth by the 1986 PSC order and because the Dansies had failed to prove damages that were proximately caused by the separation of the water systems or to mitigate their alleged damages; and (3) refused to award attorney fees the Dansies claimed under the terms of the Well Lease. A separate order was signed on the same day, fixing an award amount of $16,334.99 to Foothills for improvements made to the water system between the years 1981 and 1985, the court having previously determined in a separate memorandum decision that Foothills was entitled to such an award.

¶7 The Dansies appeal the dismissal of their breach of contract claims, arguing that they did offer to pay the necessary costs and that they did prove damages caused by the severing of the water systems. Further, the Dansies argue that the trial court should have granted them attorney fees under the terms of the

¶ 46, 44 P.3d 781 (citing Warner v. DMG Color, Inc., 2000 UT 102, ¶ 21, 20 P.3d 868).

ANALYSIS

I. Public Policy

¶12 The Association argues that the Well Lease is void as a matter of public policy. Specifically, the Association argues that the provisions for free water and water connections violate "the public policy that a water company may not charge unreasonable, preferential, or discriminatory rates." As support for this argument, the Association points to sections of the Utah Code which provide that charges by a public utility be "just and reasonable," Utah Code Ann. § 54-3-1 (2000), and that a public utility may not be preferential in its treatment of persons and entities, see id. § 54-3-8(1) (Supp. 2007). The Association further relies on the 1986 PSC order, arguing that the order determined the Well Lease to be "'grossly unreasonable.'" But the Association is no longer a public utility, and thus, neither these statutes nor the PSC order is currently applicable to the Association.[2] And we do not see any indication that the public

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2. In addressing the breach of contract claim, the trial court determined that the Association was required to provide the water "only upon payment of [the Dansies'] pro rata share of the Association's cost for power, chlorination, and water testing," and that the Association was required to provide the water connections "only if [the Dansies] pa[id] the Association for those connections at the Association's usual charge for such connection." The court reasoned that such payment by the Dansies was required because "[t]he 1986 PSC Order prohibits the Well Lease from affecting the rates paid by . . . the association members."

On February 5, 1996, the PSC revoked the status of the water system as a public utility. Therefore, from that point forward, the PSC did not have jurisdiction over the water system, see Utah Code Ann. § 54-4-1 (2000), and the 1986 PSC order was no longer binding. Thus, we now interpret the Dansies' rights and obligations under the Well Lease according to its plain language, which, as amended, states:

> Dansie shall have the right to receive up to five (5) residential hook-ups on to the water system on the Dansie property for members of his immediate family without any payment of hook-up fees and shall further have the right to receive up to 12 million (12,000,000)

(continued...)

1028, 1043 (Utah 1985) ("Ordinarily the fairness of a contract should be determined in light of the circumstances as they existed at the time of the making . . . . Unconscionability cannot be demonstrated by hindsight." (internal quotation marks omitted)); Bekins Bar V Ranch v. Huth, 664 P.2d 455, 461 (Utah 1983) ("The determination of whether a contract is unconscionable is usually made with respect to the conditions that existed at the time the contract was made, and without regard for the parties' subsequent conduct and dealings."). The Association's only argument concerning the circumstances in 1977 is that the Association did not need water from the Dansie well. But the Association concedes that at the time the Well Lease was entered into, Bagley and Dansie had plans for a future subdivision, which may have been the primary reason for the Well Lease. Thus, Bagley did receive a potentially valuable benefit under the contract and, without more facts regarding the circumstances in 1977, we cannot say there is necessarily "an overall imbalance in the obligations and rights imposed by the bargain"[3] or that the terms are "so one-sided as to oppress or unfairly surprise an innocent party." Bekins Bar V Ranch, 664 P.2d at 462 (internal quotation marks omitted). Thus, we decline to declare the Well Lease void due to unconscionability.[4]

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3. An imbalance in the obligations and rights of the parties is only one factor to be used in determining unconscionability. See Bekins Bar V Ranch v. Huth, 664 P.2d 455, 461-62 (Utah 1983). A simple imbalance in the contract terms, without more, does not invalidate a contract. See id. at 459 ("With a few exceptions, it is still axiomatic in contract law that persons dealing at arm's length are entitled to contract on their own terms without the intervention of the courts for the purpose of relieving one side or the other from the effects of a bad bargain. Parties should be permitted to enter into contracts that actually may be unreasonable or which may lead to hardship on one side." (citation and internal quotation marks omitted)).

4. The Association also argues that the Well Lease is unconscionable as applied to it because it was never a party to the Well Lease and is not a successor or an assign of Bagley. Although we see nothing in the record to indicate that the Association was ever a party to the Well Lease, the Association has failed to preserve this argument. We have reviewed the record references supplied by the Association, but we see no place where this argument was preserved. See State v. Brown, 856 P.2d 358, 361 (Utah Ct. App. 1993) ("Utah courts require specific objections in order to bring all claimed errors to the trial court's attention to give the court an opportunity to correct the errors if appropriate. . . . An oblique reference to an issue in

(continued...)

(Utah 1987) (quoting United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948)).

¶19 The Dansies' argument regarding damages essentially reargues the facts that were before the trial court. "However, a party challenging a trial court's factual finding must do more than merely reargue the evidence supporting his or her position; rather, the party is required to first marshal the evidence in support of the finding." Sigg v. Sigg, 905 P.2d 908, 913 n.7 (Utah Ct. App. 1995) (citing Shepherd v. Shepherd, 876 P.2d 429, 432 (Utah Ct. App. 1994)); see also Reid v. Mutual of Omaha Ins. Co., 776 P.2d 896, 899 (Utah 1989) ("To mount a successful challenge to the correctness of a trial court's findings of fact, an appellant must first marshal all the evidence supporting the finding and then demonstrate that the evidence is legally insufficient to support the findings even in viewing it in the light most favorable to the court below.").

> The process of marshaling is . . . fundamentally different from that of presenting the evidence at trial. The challenging party must temporarily remove its own prejudices and fully embrace the adversary's position; [the challenging party] must play the devil's advocate. In so doing, appellants must present the evidence in a light most favorable to the trial court and not attempt to construe the evidence in a light favorable to their case. Appellants cannot merely present carefully selected facts and excerpts from the record in support of their position. Nor can they simply restate or review evidence that points to an alternate finding or a finding contrary to the trial court's finding of fact.

Chen v. Stewart, 2004 UT 82, ¶ 78, 100 P.3d 1177 (citations and internal quotation marks omitted).

¶20 In their brief, the Dansies simply set forth the evidence supporting their position, provide the opposition's response to that evidence, and argue that the latter was not credible. Such does not meet the "rigorous and strict" marshaling requirement. Id. ¶ 79. Further, the determination of credibility is for the fact finder, and our review on appeal is much more limited. See 438 Main St. v. Easy Heat, Inc., 2004 UT 72, ¶ 75, 99 P.3d 801 ("When reviewing a district court's findings of fact on appeal, we do not undertake an independent assessment of the evidence presented during the course of trial and reach our own separate findings with respect to that evidence. Rather, we endeavor only

CONCLUSION

¶24 We affirm the trial court's holding that the Well Lease is an enforceable contract, being neither void as against public policy nor unconscionable. We further affirm the dismissal of the Dansies' breach of contract claims; specifically, we affirm the trial court's determination that the Dansies did not prove damages proximately caused by the separation of the water systems. As to the issue regarding the amount awarded as reimbursement for improvements, we see no error in the trial court's reliance on the PSC finding and affirm this award. Finally, because the Dansies did not ultimately prevail on their breach of contract claims and because their claim for reimbursement was not brought under the Well Lease, attorney fees are not appropriate below or on appeal. We therefore affirm the trial court on all issues.

James Z. Davis, Judge

¶25 WE CONCUR:

William A. Thorne Jr.,
Associate Presiding Judge

Gregory K. Orme, Judge

I, the undersigned, Clerk of the Utah Court of Appeals, do hereby certify that the foregoing is a full, true and correct copy of an original document on file in the Utah Court of Appeals. In testimony whereof, I have set my hand and affixed the seal of the Court.

Lisa Collins
Clerk of the Court
By _____
Deputy Clerk
May 28th, 2008
Date

EXHIBIT B

AMENDED MEMORANDUM DECISION

JULY 29, 2011

IN THE UTAH COURT OF APPEALS

----ooOoo----

Hi-Country Estates Homeowners Association, a Utah corporation,

Plaintiff,

v.

Bagley & Company, et al.,

Defendants.

Foothills Water Company, a Utah corporation; J. Rodney Dansie; Dansie Family Trust; Richard P. Dansie; Joyce M. Taylor; and Bonnie R. Parkin,

Counterclaimants and Appellants,

v.

Hi-Country Estates Homeowners Association, a Utah corporation,

Counterclaim Defendant and Appellee.

AMENDED MEMORANDUM DECISION[1]

Case No. 20090433-CA

FILED
(July 29, 2011)

2011 UT App 252

Third District, West Jordan Department, 020107452
The Honorable Stephen L. Roth

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1. This Amended Memorandum Decision supersedes the Amended Memorandum Decision in Case No. 20090433-CA issued on January 27, 2011.

interpret the Dansies' rights and obligations under the Well Lease according to its plain language." *Id.* ¶ 12 n.2. We also affirmed the trial court's order that the Well Lease was not unconscionable. *See id.* ¶ 15. And we affirmed the trial court's denial of the Dansies' breach of contract claims relating to the severing of the water systems. *See id.* ¶ 16. We did so under the rules of appellate procedure, holding that in challenging on appeal the trial court's factual findings on damages, the Dansies had failed to marshal the evidence as required by rule 24(a)(9) of the Utah Rules of Appellate Procedure. *See id.* ¶ 20; *see also* Utah R. App. P. 24(a)(9). We also affirmed the trial court's judgment in favor of the Dansies in the sum of $16,334.99. *See Hi-Country Estates*, 2008 UT App 105, ¶ 21. Finally, we affirmed the trial court's denial of attorney fees. *See id.* ¶ 22. Our opinion concluded, "We therefore affirm the trial court on all issues." *Id.* ¶ 24. The Utah Supreme Court denied cross-petitions for certiorari.

¶4 After remittitur, the Dansies filed a motion with the trial court to modify the Final Judgment to conform to footnote 2 of our opinion as they understood it. The Association resisted the motion, and the trial court denied it. The Dansies appeal. We conclude that our 2008 opinion appropriately resolved the issues before us under relevant principles of appellate review. Furthermore, the trial court properly read our opinion as a complete affirmance.

¶5 "The mandate rule dictates that pronouncements of an appellate court on legal issues in a case become the law of the case and must be followed in subsequent proceedings of that case. The mandate rule . . . binds both the district court and the parties to honor the mandate of the appellate court." *Utah Dep't of Transp. v. Ivers*, 2009 UT 56, ¶ 12, 218 P.3d 583 (omission in original) (citation and internal quotation marks omitted). "The lower court must implement both the letter and the spirit of the mandate, taking into account the appellate court's opinion and the circumstances it embraces." *Id.* (internal quotation marks omitted).

¶6 For reasons we explain below, we do not believe the language in footnote two of our opinion conflicts with our ultimate order. Nevertheless, to the extent a real or apparent conflict exists in a judicial opinion, the opinion's "directions" control. *See Amax Magnesium Corp. v. Utah State Tax Comm'n*, 848 P.2d 715, 718 (Utah Ct. App. 1993) ("Where the language used in the body of an appellate opinion conflicts with directions on remand, the latter controls."), *rev'd on other grounds*, 874 P.2d 840 (Utah 1994). And the only directions in our 2008 opinion indicate that we are affirming the trial court on all issues. The opening paragraph of that opinion states, "Counterclaim Plaintiffs . . .

had "determined that the Dansies had failed to prove damages proximately caused by the alleged breach." *Id.* We resolved this issue on the element of damages, "affirm[ing] the dismissal of the breach of contract claims based on this failure to prove damages." *Id.* We properly did so on the ground that the Dansies had not "adequately marshal[ed] the evidence." *Id.* ¶ 20. Resolving the claim on the element of damages made it unnecessary for us to address whether a breach of the contract had been otherwise established. *See id.* ¶ 20.

¶9 Our 2008 opinion thus resolved all outstanding issues in favor of the trial court's order. It explicitly resolved all issues enumerated in the concluding paragraph. *See id.* ¶ 24. Any remaining challenges to the trial court's order, whether or not we addressed them on the merits, were also necessarily resolved in favor of the trial court's order. *See Piacitelli v. Southern Utah State Coll.*, 636 P.2d 1063, 1065 (Utah 1981) (noting that a final order, "unless reversed on appeal, is res judicata and binding upon [the] parties"). Finally, any challenges to prior trial court rulings that the parties might have appealed, but did not, were at that point waived. *See DeBry v. Cascade Enters.*, 935 P.2d 499, 502 (Utah 1997) (failing to raise issues ripe for appeal results in waiver of the right to raise them at a later time).[3]

¶10 The opinion made no attempt to resolve future issues that might arise between the parties, including future claims of damages against the Association for future breaches of the Well Lease. The opinion did establish that, so long as the PSC does not exercise jurisdiction over the water system, the rights of the parties are as set forth by the plain language of the Well Lease. The Association contends that this can never happen, because as soon as it delivers a drop of water to the Dansies at no cost as required by the Well Lease, the PSC will exercise jurisdiction and require payment.

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3. Notwithstanding our 2008 opinion stating that we affirmed the trial court "on all issues," the Dansies did not file a petition for rehearing. The Association filed a petition for rehearing on a question unrelated to the instant appeal. *See* Utah R. App. P. 35(a) (permitting the filing of a petition for rehearing within fourteen days after the entry of an appellate decision drawing the court's attention to "points of law or fact which the petitioner claims the court has overlooked or misapprehended"). We denied that petition.

enjoy free hook-ups and free water under the Well Lease because the PSC would necessarily re-exert jurisdiction and prevent it. Rather, we noted that "statutes can be amended; regulations can be repealed; administrative policies and attitudes can change." *Id.*

¶14 Thus, our affirmance of paragraph 3 of the Final Judgment must be understood as being limited to its historical context and not as "adjudicat[ing] the rights of the parties or the enforceability of the Well Lease going forward." To be clear, the effect of the Final Judgment, as affirmed and explained in our 2008 opinion and in the above Amended Memorandum Decision, is that the Dansies are, going forward, entitled to their contractual rights to free water and free hook-ups unless the PSC intervenes and determines otherwise. Given these observations, the petition for rehearing is denied.

J. Frederic Voros Jr., Judge

¶15 I CONCUR:

Gregory K. Orme, Judge

DAVIS, Presiding Judge (dissenting):

¶16 The lead opinion recognizes the rule that a trial court is constrained to implement the spirit, and not only the letter, of our prior mandate. *See supra* ¶ 5 (citing *Utah Dep't of Transp. v. Ivers*, 2009 UT 56, ¶ 12, 218 P.3d 583). However, in assessing whether the trial court correctly implemented our prior mandate, the lead opinion does exactly the opposite, essentially focusing only on form and not on substance. This elevation of form over substance results in an outcome contrary to that intended in our prior

damages resulting from the 1994 separation of the water systems. *See id.* ¶ 16 (stating that the Dansies' breach of contract claims "were based on the Association severing the two water systems"); *id.* ¶ 17 (noting that the trial court had dismissed the contract claims because the Dansies "failed to prove any damages proximately caused by the separation of the two water systems"); *id.* ¶ 20 (affirming dismissal of breach of contract claims based on "failure to prove damages proximately caused by the alleged breach"); *id.* ¶ 24 (concluding that we affirmed the breach of contract claims because "the Dansies did not prove damages proximately caused by the separation of the water systems"). And we emphasized that when addressing such breach of contract claims, reliance on the 1986 PSC Order was appropriate because "the PSC did have jurisdiction over the Association at the time the alleged breach occurred," that is, the 1994 severance of the water systems. *Id.* ¶ 16. However, neither this section of our opinion nor the restated affirmance on this issue in our concluding paragraph addressed the alleged breach of contract due to the Association's continuing refusal to provide the benefits as set forth in the Well Lease even after PSC jurisdiction had ended. And our affirmance on the breach of contract claims due to separation of the water systems simply cannot be used to infer our affirmance of breach of contract claims that addressed the current obligations of the parties.[2] *Cf. Messick v. PHD Trucking Serv., Inc.*, 678 P.2d 791, 795 (Utah 1984) ("[P]laintiff's reliance upon this Court's former mandate . . . is entirely out of context here. A close examination of our former opinion, and specifically the subject mandate, reveals that the mandate was directed toward the question of what *method* (pay schedule) rather than *rate* of compensation was to be used with regard to plaintiff's driving.").

¶19 Instead, the only portion of our prior opinion that addressed the breach of contract claims requesting specific performance was footnote 2, which stated as follows:

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2. Of course, the breach of contract claims requesting specific performance could not have been disposed of based upon our affirmance of the trial court's determination that the Dansies had failed to adequately prove damages. *See generally South Shores Concession, Inc. v. State*, 600 P.2d 550, 552 (Utah 1979) ("'The right to specific performance is essentially an exceptional one, and a decree for such relief is given *instead of damages* only when by this means a court can do more perfect and complete justice.'" (emphasis added)).

Again, the case law is clear that context is important and that we may not simply rely on individual words when interpreting an appellate mandate. *See, e.g., Coombs v. Salt Lake & Fort Douglas Ry. Co.*, 11 Utah 137, 39 P. 503, 506 (1895) (""The mandate and opinion, taken together, although they use the word, "reversed," amount to a reversal only in respect to the accounting, and to a modification of the decree in respect to the accounting, and to an affirmance of it in all other respects.'" (quoting *Gaines v. Rugg*, 148 U.S. 228, 238 (1893))).

¶20 The lead opinion states that our language in footnote 2 was not a partial reversal but was simply an explanation that we were not considering PSC directives when assessing the contract for enforceability. *See supra* ¶ 7. But the footnote language does not simply state that we are not considering the PSC directives, but that we are not considering those directives *because* the PSC Order is no longer binding and the parties are now to be governed by the unmodified language of the Well Lease. The language employed in footnote 2 gives no hint of being limited to our consideration of the Well Lease's validity but, rather, quite definitively states that "the 1986 PSC order was no longer binding [after February 5, 1996,]" and that "we now interpret the Dansies' rights and obligations under the Well Lease according to its plain language." *Hi-Country Estates*, 2008 UT App 105, ¶ 12 n.2. The footnote also states, "[T]he Association is no longer a public utility, and thus, neither [statutes regulating public utilities] nor the PSC order is currently applicable to the Association." *Id.* ¶ 12. Thus, the footnote language establishes the current inapplicability of the PSC Order and the resulting current obligations of the parties, and is not merely setting up some hypothetical situation under which we would evaluate the validity of the Well Lease.[3]

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3. The Dansies are caught, the Association insists, in a Catch-22 that renders the promise of free water a perpetual mirage: because the Dansies are not members of the Association, as soon as the Association delivers a drop of water to them at no cost, it falls under the jurisdiction of the PSC. Once under PSC jurisdiction, the Association can no longer deliver water to them at no cost. In support of their argument, the Association points to language from a trial court memorandum decision issued prior to the Final Judgment. However, this memorandum decision was not brought to our attention by either party during the prior appeal. Furthermore, I am not convinced that the language from the memorandum decision is as unequivocal as the Association believes. The memorandum decision addressed the Association's Motion for Partial

(continued...)

¶ 10. However, the lead opinion refuses to give such determination any effect because it was not reiterated in the opinion's concluding paragraph. *See supra* ¶ 9 ("[Our prior opinion] explicitly resolved all issues enumerated in the concluding paragraph. Any remaining challenges to the trial court's order, whether or not we addressed them on the merits, were also necessarily resolved in favor of the trial court's order." (citation omitted)). I think such an approach is in direct violation of the requirement that we consider our whole opinion when assessing whether the trial court implemented our prior mandate, *see Frost v. Liberty Mut. Ins. Co.*, 813 S.W.2d 302, 304-05 (Mo. 1991) ("On remand, proceedings in the trial court should be in accordance with both the mandate and the result contemplated in the opinion. It is well settled that the mandate is not to be read and applied in a vacuum. The opinion is part of the mandate and must be used to interpret the mandate . . . ." (omission in original) (citations and internal quotation marks omitted)); *Warren v. Robison*, 21 Utah 429, 61 P. 28, 30 (1900) ("[W]here an appeal is taken from a judgment of an inferior court entered under a mandate of the appellate court, the latter tribunal will construe its own mandate *in connection with its opinion*, to determine whether the inferior court proceeded in accordance therewith." (emphasis added)). The mandate rule applies to "pronouncements of an appellate court on legal issues in a case," *Utah Dep't of Transp. v. Ivers*, 2009 UT 56, ¶ 12, 218 P.3d 583 (internal quotation marks omitted), and is not limited to only those pronouncements found within the concluding paragraph of an appellate opinion.[5]

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4. (...continued)
and my colleagues that we definitively addressed the issue, I cannot fault the Dansies for failing to file a petition for rehearing to alert us to the fact that such pronouncement was not included in our concluding paragraph. Indeed, it is quite possible that our oversight was not apparent to the Dansies before the time had passed for filing a petition for rehearing. Furthermore, it is entirely appropriate to challenge a trial court's implementation of an appellate court mandate though a new appeal.

5. Of course, to the extent that there is an inconsistency between statements made in the appellate court's opinion and its ultimate mandate, the mandate controls. *See Amax Magnesium Corp. v. Utah State Tax Comm'n*, 848 P.2d 715, 718 (Utah Ct. App. 1993) ("Where the language used in the body of an appellate opinion conflicts with directions on remand, the latter controls."), *rev'd on other grounds*, 874 P.2d 840 (Utah 1994). However, as the Association points out, "[a] court should be hesitant to conclude that there is an inconsistency and should make every effort to reconcile the body of the

(continued...)

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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH, WEST JORDAN DEPARTMENT

HI-COUNTRY ESTATES HOMEOWNERS ASSOCIATION, a Utah Corporation,

Plaintiff,

v.

BAGLEY & COMPANY, et al.,

Defendants.

FOOTHILLS WATER COMPANY, a Utah Corporation; J. RODNEY DANSIE; THE DANSIE FAMILY TRUST; BOYD W. DANSIE; RICHARD P. DANSIE; JOYCE M. TAYLOR; and BONNIE R. PARKIN,

Defendants and Counterclaimants,

v.

HI-COUNTRY ESTATES HOMEOWNERS ASSOCIATION, a Utah Corporation,

Counterclaim Defendants.

[PROPOSED] ORDER

Case No. 020107452
Judge: Andrew Stone

Based upon the 2008 and 2011 opinions of the Utah Court of Appeals[1] in this matter, IT IS ORDERED that the Dansies are, going forward, entitled to their contractual right under the Well Lease Agreement to free water and free hook-ups unless the PSC intervenes and determines otherwise.

DATED this ___ day of July, 2012.

By the Court:

_____

Andrew Stone, District Judge

[1] *Hi-Country Estates Homeowners Ass'n v. Bagley & Co.*, 2008 UT App 105, 182 P.3d 417; *Hi-Country Estates Homeowners Ass'n v. Bagley & Co.*, 2011 UT App 252, *cert denied*, 268 P.3d 192 (UTAH 2011).

CERTIFICATE OF MAILING

I hereby certify that on this 25th day of July, 2012, I caused to be mailed, a true and correct copy of the foregoing **[PROPOSED] ORDER** by placing the same in United States Mail, first class, postage prepaid to the following:

J. Craig Smith
Smith Hartvigsen, PLLC
215 So. State Street, Suite 600
Salt Lake City, UT 84111

Vicki A. Gunnerson
Legal Secretary

CERTIFICATE OF MAILING

I hereby certify that on this 25th day of July, 2012, I caused to be mailed a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF MOTION FOR ENTRY OF AN ORDER IMPLEMENTING COURT OF APPEALS' DECISION** by placing the same in United States Mail, first class, postage prepaid to the following:

J. Craig Smith
Smith Hartvigsen, PLLC
215 So. State Street, Suite 600
Salt Lake City, UT 84111

Vicki A. Summerson
Legal Secretary