

2010

L. Lane Blackmore v. L&D Development, Inc. : Reply Brief

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca3

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Justin Heideman; Heideman, McKay, Heugly, and Olsen; Patrick J. Ascione; Ascione and Associates; Attorney for Appellees.

Lamar J. Winward; M. Eric Olmstead; David L. Elmont; Barney, McKenna, and Olmstead; Jeffrey Weston Shields; Jerome Romero; Jones, Waldo, Holbrook, and McDonough; Attorneys for Defendants.

Recommended Citation

Reply Brief, *Blackmore v. L and D Development*, No. 20100200 (Utah Court of Appeals, 2010).
https://digitalcommons.law.byu.edu/byu_ca3/2223

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

L. LANE BLACKMORE, et al.,

Plaintiffs/Appellees

v.

L&D DEVELOPMENT, Inc., et al.,

Defendants/Appellants.

Case No. 20100200-CA

Trial Case No. 030501322

REPLY BRIEF OF APPELLANTS

Appeal from an Interlocutory Order of the Fifth Judicial District Court, in and for
Washington County, Trial Judge the Honorable James L. Shumate

JUSTIN HEIDEMAN
HEIDEMAN MCKAY HEUGLY &
OLSEN, LLC
2696 North University Avenue, Suite
180
Provo, UT 84604

PATRICK J. ASCIONE
ASCIONE & ASSOCIATES, LLC
4692 North 300 West, Suite 220
Provo, UT 84604
*Attorneys for Plaintiff-Appellees L.
Lane Blackmore; Blackmore Cannon
Development Company, Inc.; and The
Home Company*

LAMAR J. WINWARD (A3528)
150 North 200 East, Suite 204
St. George, UT 84770
*Attorney for Defendant-Appellants L&D
Development, Inc. and Shadow Canyon Land
Company, LLC*

M. ERIC OLMSTEAD (7591)
DAVID L. ELMONT (09640)
BARNEY McKENNA & OLMSTEAD, P.C.
43 South 100 East, Suite 300
St. George, UT 84771-2710

JEFFREY WESTON SHIELDS (2948)
JEROME ROMERO (5139)
JONES, WALDO, HOLBROOK &
McDONOUGH, P.C.
170 South Main Street, Suite 1500
Salt Lake City, Utah 84101
*Attorneys for Defendant-Appellants Shadow
Glen 420, Inc.; Gemstone Homes, Inc.;
Gemstone Properties, Inc.; Frank Lindhardt;
and Eugene Buckley*

FILED
UTAH APPELLATE COURTS
AUG 08 2011

IN THE UTAH COURT OF APPEALS

L. LANE BLACKMORE, et al.,

Plaintiffs/Appellees

v.

L&D DEVELOPMENT, Inc., et al.,

Defendants/Appellants.

Case No. 20100200-CA

Trial Case No. 030501322

REPLY BRIEF OF APPELLANTS

Appeal from an Interlocutory Order of the Fifth Judicial District Court, in and for
Washington County, Trial Judge the Honorable James L. Shumate

JUSTIN HEIDEMAN
HEIDEMAN MCKAY HEUGLY &
OLSEN, LLC
2696 North University Avenue, Suite
180
Provo, UT 84604

PATRICK J. ASCIONE
ASCIONE & ASSOCIATES, LLC
4692 North 300 West, Suite 220
Provo, UT 84604
*Attorneys for Plaintiff-Appellees L.
Lane Blackmore; Blackmore Cannon
Development Company, Inc.; and The
Home Company*

LAMAR J. WINWARD (A3528)
150 North 200 East, Suite 204
St. George, UT 84770
*Attorney for Defendant-Appellants L&D
Development, Inc. and Shadow Canyon Land
Company, LLC*

M. ERIC OLMSTEAD (7591)
DAVID L. ELMONT (09640)
BARNEY McKENNA & OLMSTEAD, P.C.
43 South 100 East, Suite 300
St. George, UT 84771-2710

JEFFREY WESTON SHIELDS (2948)
JEROME ROMERO (5139)
JONES, WALDO, HOLBROOK &
McDONOUGH, P.C.
170 South Main Street, Suite 1500
Salt Lake City, Utah 84101
*Attorneys for Defendant-Appellants Shadow
Glen 420, Inc.; Gemstone Homes, Inc.;
Gemstone Properties, Inc.; Frank Lindhardt;
and Eugene Buckley*

TABLE OF CONTENTS

| | | |
|-----|---|----|
| I. | ARGUMENT | 1 |
| A. | Appellate Review Of The Memorandum Decision, In The Context Of Reviewing The Trial Court's Implicit Finding Of A Substantial Likelihood Of Success, Is Comfortably Within The Scope Of This Appeal. | 2 |
| B. | Defendants Were Not Required To Marshal The Evidence In Their Opening Brief Because No Findings Of Fact Are Challenged On Appeal—Indeed, The Failure To Address Factual Issues Forms Part Of The Trial Court's Legal Error. | 4 |
| 1. | No Marshaling Was Required Regarding the Memorandum Decision. | 5 |
| 2. | No Marshaling Was Required Regarding the Writ Order. | 6 |
| C. | The Grant Of Partial Summary Judgment In These Circumstances Was Not Sufficient, Of Itself, To Support A Finding Of A Substantial Likelihood Of Success Under Civil Rule 64A. | 8 |
| D. | The Rules Of Civil Procedure Do Not Authorize The Final Transfer Of Property Pursuant To A Prejudgment Writ. | 10 |
| II. | CONCLUSION | 12 |

TABLE OF AUTHORITIES

PAGE

CASES

| | |
|---|------|
| <i>ASC Utah, Inc. v. Wolf Mt. Resorts, L.C.</i> , 2010 UT 65, 245 P.3d 184 | 5, 8 |
| <i>Birch Creek Irrigation v. Prothero</i> , 858 P.2d 990 (Utah 1993)..... | 5 |
| <i>Brickyard Homeowners' Ass'n Management Comm. v. Gibbons Realty Co.</i> , 668 P.2d 535 (Utah 1983) | 12 |
| <i>Buzas Baseball, Inc. v. Salt Lake Trappers, Inc.</i> , 925 P.2d 941 (Utah 1996)..... | 12 |
| <i>In re McNeely</i> , 51 B.R. 816 (Bankr. D. Utah 1985) | 11 |
| <i>Kurth v. Wiarda</i> , 1999 UT App 153, 981 P.2d 417 | 11 |
| <i>Millett v. Clark Clinic Corp</i> , 609 P.2d 934 (Utah 1980) | 10 |
| <i>Novell, Inc. v. Canopy Group, Inc.</i> , 2004 UT App 162, 92 P.3d 768..... | 6 |
| <i>Peirce v. Peirce</i> , 2000 UT 7, 994 P.2d 193..... | 5 |
| <i>United Park City Mines Co. v. Greater Park City Co.</i> , 870 P.2d 880 (Utah 1993)..... | 8 |

STATUTES

| | |
|--------------------------|-------------|
| Utah R. Civ. P. 56 | 5 |
| Utah R. Civ. P. 64 | 9 |
| Utah R. Civ. P. 64A..... | 3, 7, 9, 10 |
| Utah R. Civ. P. 64C..... | 11 |
| Utah R. Civ. P. 64E..... | 10 |

I. ARGUMENT

In their Brief of Appellees (“Opposition Brief”), Plaintiffs make arguments under three headings, paraphrased here as: 1) that the Court should not review the trial court’s Memorandum Decision and Order on Pending Motions (“Memorandum Decision”) (July 10, 2008), R. 3505, granting partial summary judgment, because that decision is outside the scope of this appeal;¹ 2) that the Memorandum Decision provided an adequate basis for finding a substantial likelihood of success on the merits, and thus supported the issuance of a prejudgment writ of attachment;² and 3) that the trial court was authorized to permanently transfer property to Plaintiffs via a prejudgment writ of attachment.³

The substance of Plaintiffs’ first and third arguments largely follow the heading titles given in the Opposition Brief. However, Plaintiffs’ second argument—titled as dealing with the sufficiency of the Memorandum Decision—focuses as much or more on issues of marshaling the evidence than on the sufficiency of the Memorandum Decision. Thus, in this reply brief Defendants have added a fourth subsection, to accommodate the fact that Plaintiffs’ second heading presents two different arguments.

For the reasons set forth in Defendants’ initial brief and below, the trial court’s grant of a prejudgment writ of attachment should be reversed.

¹ See Opposition Brief at 6.

² See *id.* at 8.

³ See *id.* at 10.

A. Appellate Review Of The Memorandum Decision, In The Context Of Reviewing The Trial Court's Implicit Finding Of A Substantial Likelihood Of Success, Is Comfortably Within The Scope Of This Appeal.

In their opening brief, Defendants were candid with the Court about the circumstances of this case that have led to the need for an examination of the Memorandum Decision, notwithstanding the fact that the Memorandum Decision is not directly on appeal. *See* Amended Brief at 17-20. In their Opposition Brief, Plaintiffs argue that because the Memorandum Decision was not appealed within 20 days of its issuance and was not specifically presented by Defendants as an issue in this appeal, the decision “should be considered appropriate and binding for purposes of this Interlocutory Appeal.” *See* Opposition Brief at 6-7.

While Defendants have already conceded that they respectfully request a somewhat broader review of the Memorandum Decision than may be strictly covered under the issues raised on appeal (*see* Amended Brief at 20-21), that is not to say that Defendants are wholly reliant on the Court granting a more liberal review of the Memorandum Decision. One question that lies squarely within the scope of the issues raised on appeal is whether Plaintiffs demonstrated a substantial likelihood of success on the merits sufficient to warrant the issuance of a prejudgment writ of attachment. *See, e.g.,* Petition for Permission to Appeal Interlocutory Order (Mar 9, 2010) at 2 (paragraph 2) and 4 (1st question presented); Amended Brief of Appellants at 1 (statement of issues, issue 1). Moreover, as noted in Defendants’ opening brief, the legal effect of the Memorandum Decision is the only argument Plaintiffs put forward for why they satisfied the substantial-likelihood-of-success requirement for the issuance of a prejudgment writ,

and the only apparent basis the trial court relied upon in granting Plaintiffs' motion for a writ. *See* Amended Brief at 12 (quoting Memorandum in Support of Motion for Prejudgment Writs of Attachment ("Writ Memorandum"), R. 4418; Amended Brief at 13-14 (quoting transcript of oral argument, R. 4561 at 22, ln. 21 through 23, ln. 16; 24, ln. 10-11; Amended Addendum Exhib. 2).

When Defendants specifically raised as an appellate issue Plaintiffs' failure to demonstrate a substantial likelihood of success on the merits under Civil Rule 64A (c)(3) (or rather, the trial court's error in not requiring Plaintiffs to adequately demonstrate a substantial likelihood of success),⁴ Defendants necessarily preserved the ability to attack the adequacy of the single argument Plaintiffs made in support of their attempt to demonstrate a substantial likelihood of success—the effect of the Memorandum Decision. Thus, without stretching the issues raised on appeal, the Court can and should consider the effect of the Memorandum Decision insofar as that decision relates to Plaintiffs' showing (or lack of showing) of a substantial likelihood of success on the merits. Where Defendants have asked the Court to do more, again candidly requesting a review that, strictly speaking, goes beyond the scope of the issues raised in this interlocutory appeal, is in noting that: 1) there has been no previous opportunity to have

⁴ While Defendants recognize that the Court's appellate function is to review the decisions of the trial court rather than the adequacy of a party's submissions made to the trial court, Defendants sometimes refer to the sufficiency of Plaintiffs' efforts below in order to demonstrate what information was placed before the trial court for decision. Given the absence of a clear explanation by the trial court of its bases for decision in the Writ Order, by referring to the failure of Plaintiffs to meet their burden below Defendants hope to show the limitations on what the trial court could have properly relied upon in reaching its conclusions.

appellate review of the Memorandum Decision; and 2) if the Court determines, as Defendants argue, that the Memorandum Decision is incapable of properly supporting a showing of substantial likelihood of success on the merits, having the Court expressly identify any manifest errors would add to the efficiency of the remainder of the underlying litigation and may prevent the compounding of the errors in the Memorandum Decision. Regardless of the Court's willingness to consider the broader effect of the Memorandum Decision, however, the Court should consider the effect of the Memorandum Decision insofar as it relates to the Court's review of the adequacy of Plaintiffs' likelihood-of-success showing before the trial court.

B. Defendants Were Not Required To Marshal The Evidence In Their Opening Brief Because No Findings Of Fact Are Challenged On Appeal—Indeed, The Failure To Address Factual Issues Forms Part Of The Trial Court's Legal Error.

Both in the context of the Memorandum Decision and the context of the Order Granting Plaintiffs' Motion for Prejudgment Writ of Attachment as to L&D Development and Shadow Canyon Land Company and the Estate of Lester Cannon (Feb 26, 2010) ("Writ Order"), R. 4551-52, Plaintiffs argue that Defendants have failed to marshal the evidence and that review by this Court is therefore improper. *See, e.g.*, Opposition Brief at 8-9 ("In this case Defendants have failed to properly marshal evidence thereby essentially preventing this Court from reviewing the facts of this case used in reaching the determination made in the July 10th Memorandum Decision."); *id.* at 10 ("Since Defendants have failed to marshal any evidence to support their affirmative defense claims, waiver argument, and set-off argument, Defendants have placed this Court in a

situation where it simply cannot address those issues. As a result, this Court should sustain the determination made by the trial court and the prejudgment writ of attachment should be deemed valid”). However, neither in the case of the Memorandum Decision nor in the case of the Writ Order have Defendants attacked the trial court’s findings of fact or the sufficiency of the evidence underlying those findings. Instead, Defendants challenge the trial court’s legal conclusions. In such circumstances, no marshaling was required. *See, e.g., ASC Utah, Inc. v. Wolf Mt. Resorts, L.C.*, 2010 UT 65, ¶ 25, 245 P.3d 184, 193 (quoting *Peirce v. Peirce*, 2000 UT 7, ¶ 17 n.4, 994 P.2d 193; *Birch Creek Irrigation v. Prothero*, 858 P.2d 990, 993 n.3 (Utah 1993)).

1. No Marshaling Was Required Regarding the Memorandum Decision.

In the context of the trial court’s Memorandum Decision granting partial summary judgment, marshaling could not conceivably be implicated because the trial court would not have been making any findings of fact about which Defendants could now challenge the sufficiency of the evidence. Given that any factual disputes would prevent the grant of summary judgment, the scenario Plaintiffs envision would never arise under Civil Rule 56. *See* Utah R. Civ. P. 56 (c).

Plaintiffs’ attempt to recast Defendants argument from a legal one into a factual one also fails on a review of what Defendants have actually argued and on a review of what the trial court actually did in issuing the Memorandum Decision. Nowhere in the Opposition Brief do Plaintiffs identify a single factual determination by the trial court with which Defendants take issue. Instead, Plaintiffs vaguely argue that mixed factual and legal issues were involved below, so the Court should be deferential and Defendants

should have marshaled the evidence. *See, e.g.*, Opposition Brief at 8. But what Defendants have actually argued is that once the trial court determined the phrase “at closing,” to be “vague terminology” in the Development Agreement (*see* Memorandum Decision, R. 3505 at 3-4, Amended Addendum Exhib. 6) the court should have concluded that the Development Agreement was facially ambiguous and should have undertaken further analysis to determine party intent before determining whether summary judgment was appropriate. *See, e.g.*, Amended Brief at 21-22. Instead, the trial court interpreted the Development Agreement, as a matter of law, as requiring Defendants to convey the real property some time prior to the time Plaintiffs were required to pay \$50,000. *See id.* (citing Memorandum Decision, R. 3505 at 5, Amended Addendum Exhib. 6). The trial court’s contract interpretation—failing to resolve an observed ambiguity—was erroneous as a matter of law. *See, e.g., Novell, Inc. v. Canopy Group, Inc.*, 2004 UT App 162, ¶ 20, 92 P.3d 768. That legal error of contract interpretation is the focus of the opening brief (as far as error in the Memorandum Decision is concerned) and it did not call for a marshaling of the evidence. *See ASC Utah, Inc.*, 2010 UT at ¶ 25.

2. No Marshaling Was Required Regarding the Writ Order.

The error Defendants ascribe to the Writ Order is similarly focused on the trial court’s conclusions of law (or, in the case of the Writ Order, implicit conclusions). Since the trial court did not clearly identify the bases for granting a prejudgment writ (*see* R. 4561, Amended Addendum Exhib. 2), it might otherwise be at least possible that factual issues may have formed a part of the court’s analysis. In circumstances such as these

where the trial court failed to set out any discernable findings of fact, it would be unfair to fault an appellant for failing to marshal and rebut the evidence in support of such hidden findings. However, even the theoretical possibility of the trial court relying on hidden findings of fact is precluded in this case because the Plaintiffs did not present any factual basis for the trial court to find a substantial likelihood of success on the merits. As noted in Defendants' opening brief, Plaintiffs' entire argument with regard to likelihood of success was to argue the legal effect of the Memorandum Decision. *See* Amended Brief at 12-13. And when Defendants responded by arguing that issues such as set-off and waiver were not addressed in the Memorandum Decision, Plaintiffs persuaded the trial court that such issues were legally swallowed-up in the concept of "primary" or "prior" breach of contract. *See id.* at 13-14.

In circumstances where Plaintiffs' position on likelihood-of-success consisted entirely of a legal argument regarding the impact of the Memorandum Decision, there is no room for a theoretical situation where the trial court relied on factual issues to rule in Plaintiffs' favor. To conclude otherwise would be to conclude that not only did the trial court rely on hidden findings of fact in the Writ Order, but it relied on findings that weren't even presented to it by the parties and thereby absolved Plaintiffs of carrying any burden of proof. *See contra* Utah R. Civ. P. 64A (h) ("The burden is on the plaintiff to prove the facts necessary to support the writ."). These are the necessary conclusions to be reached in order to sustain Plaintiffs' objection that a marshaling of the evidence was required regarding the Writ Order.

Defendants contend that the Writ Order was erroneous because it confused the legal issue of further contract performance, which is excused by a prior breach, with separate equitable considerations such as waiver and estoppel, which are not foreclosed merely by virtue of a prior breach. *See* Amended Brief at 25-26 (quoting *United Park City Mines Co. v. Greater Park City Co.*, 870 P.2d 880, 891 (Utah 1993)). This assignment of legal error does not implicate the Court's marshaling-of-evidence requirements associated with challenging findings of fact. *See ASC Utah, Inc.*, 2010 UT at ¶ 25.

C. **The Grant Of Partial Summary Judgment In These Circumstances Was Not Sufficient, Of Itself, To Support A Finding Of A Substantial Likelihood Of Success Under Civil Rule 64A.**

The limitations on the appropriate scope of the Memorandum Decision are addressed in Defendants' opening brief⁵ and again in section I.B.2 above. Defendants will not further address that issue in their reply brief except in response to Plaintiffs' separate statutory interpretation argument regarding the language of Civil Rule 64A and the impact of that rule as it relates to the Memorandum Decision. Plaintiffs appear to argue that since Rule 64A speaks of a singular "claim" and since Rule 64C allows writs of attachment on contract claims, given the grant of partial summary judgment on Plaintiffs' contract claim it was proper for the trial court to focus exclusively on that contract claim in granting a prejudgment writ; and even in the absence of the trial court finding Plaintiffs substantially likely to succeed on the merits of their case as a whole, it

⁵ *See, e.g.*, Amended Brief at 24-26.

was still appropriate for the trial court to grant a prejudgment writ as to the contract claim. *See* Opposition Brief at 9-10.

If Defendants understand Plaintiffs' argument correctly, the argument ignores the language of Civil Rule 64A(g), wherein one of the bases for challenging the issuance of a prejudgment writ is the claim of a set-off by the defending party. *See* Utah R. Civ. P. 64A(g)(5). A set-off claim could not be appropriately considered if the trial court were not required to consider the entire litigation in context when determining a likelihood of success on the merits. Plaintiffs' argument also ignores the overall intent of the writ rules (as manifest by such matters as the typical requirement of plaintiffs posting security and the possibility of defendants obtaining relief for wrongfully obtained writs),⁶ where overall equity is preserved. A situation where a plaintiff was awarded prejudgment possession of a defendant's cash on the narrow consideration of the likelihood of success of that plaintiff's single contract claim, in a broader multi-claim case, without consideration for whether the plaintiff would ultimately prevail and be entitled to damages in the broader litigation, would render the writ rules absurd. *Cf., e.g., Millett v. Clark Clinic Corp*, 609 P.2d 934, 936 (Utah 1980) ("[S]tatutory enactments are to be so construed as to render all parts thereof relevant and meaningful, and that interpretations are to be avoided which render some part of a provision nonsensical or absurd.") (citations omitted).

Just as it was erroneous for the trial court to conclude as a matter of law that issues such as waiver, estoppel and set-off were eliminated by virtue of finding a "prior" breach,

⁶ *See, e.g.,* Utah R. Civ. P. 64 (b).

it would be erroneous for the trial court to consider the substantial-likelihood-of-success-on-the-merits prong of prejudgment writ analysis without focusing on Plaintiffs' likelihood of success in the broader litigation.

D. The Rules Of Civil Procedure Do Not Authorize The Final Transfer Of Property Pursuant To A Prejudgment Writ.

Finally, Plaintiffs argue that the case law Defendants cited in their initial brief regarding the proper uses of prejudgment writs of attachment only outlines "some of the proper uses of a prejudgment writ" and does not "preclude the actions taken by the trial court in this matter" ordering the immediate transfer of legal title in L&D Development's real property to Plaintiffs and Plaintiffs' immediate, permanent possession of L&D Development's money. *See* Opposition Brief at 10. Plaintiffs' sole argument is that because Civil Rule 64(d) speaks in terms of both prejudgment and post-judgment writs, the language in Rule 64(d)(2) authorizing the delivery of the "property to the plaintiff" must apply to prejudgment writs and must authorize the prejudgment, permanent transfer that the trial court ordered in the Writ Order. *See id.* at 10-11.

Such a "plain language" argument fails to offer any persuasive rationale for reading Rule 64 in such an undifferentiated manner, and fails to account for the fact that what the trial court ordered in this case was indistinguishable from a writ of execution, which is not available as a prejudgment writ.⁷ Plaintiffs' "plain language" argument also

⁷ *See* Utah R. Civ. P. 64E (a) ("A writ of execution is available to seize property in the possession or under the control of the defendant following the entry of a final judgment or order requiring the delivery of property or the payment of money."). *See also* Utah R. Civ. P. 64A (a) (excluding writs of execution from the list of writs available before judgment); Black's Law Dictionary (6th ed.) at 403 (*expressio unius est exclusio*

fails to account for the fact that all of the relevant cases focus on matters such as preserving property as “a provisional remedy” in order to provide “security for the satisfaction of any judgment that [a plaintiff] may recover.” *See In re McNeely*, 51 B.R. 816, 818-19 (Bankr. D. Utah 1985)⁸ (citations omitted). The immediate transfer of legal title accomplished by the Writ Order is simply incompatible with a “contingent lien” interest (*See In re McNeely*, 51 B.R. at 818-19) view of prejudgment writs.

Plaintiffs’ “plain language” argument also fails because it does not take account of all the relevant plain language in the rules. Specifically, writs of attachment are not available (whether prejudgment or post-judgment) when payment of a claim has been secured by a lien on property in this state. *See* Utah R. Civ. P. 64C (b)(3). If a writ of attachment were intended to accomplish the permanent transfer of property such as was ordered in this case, the mere existence of an in-state lien would not defeat the issuance of the writ. A mere lien, after all, is no substitute for immediate ownership. The fact that a writ of attachment may only be issued when there is no in-state lien confirms the interpretation set out in the case law—that writs of attachment are for preserving lien-

alterius is the “maxim of statutory interpretation meaning that the expression of one thing is the exclusion of another.”).

⁸ *See Kurth v. Wiarda*, 1999 UT App 153, ¶ 5-6, 981 P.2d 417 (“When Utah case law is insufficient and the Utah rule to be interpreted is identical or nearly identical to a federal rule, Utah courts will look to federal case law for assistance in interpreting and applying its rules.”) (citing *Buzas Baseball, Inc. v. Salt Lake Trappers, Inc.*, 925 P.2d 941, 947 n.5 (Utah 1996); *Brickyard Homeowners’ Ass’n Management Comm. v. Gibbons Realty Co.*, 668 P.2d 535, 540 (Utah 1983) (identity in language in Utah and federal statutes presumes identity of construction so Utah courts look to federal case law for guidance)).

type interests, providing security for any eventual judgment, rather than skipping ahead to providing an early satisfaction of judgment via execution.

II. CONCLUSION

For the reasons set forth above and in Defendants' opening brief, the trial court erred in granting the Writ Motion both because (1) the Memorandum Decision was clearly erroneous in disregarding the ambiguity in the Development Agreement and concluding that Plaintiffs were entitled to summary judgment notwithstanding that ambiguity. As a result of such error, the Memorandum Decision cannot form an appropriate basis to find that Plaintiffs met their burden of establishing a substantial likelihood of success on the merits of their underlying claims. And (2), the express, internal limitations on the scope of the Memorandum Decision render it incapable of forming an appropriate basis to find a substantial likelihood of success because it did not address such issues as waiver, estoppel, affirmative defenses generally, set-offs, and damages. Separately, the trial court erred in granting immediate possession of and title to the property at issue in the Writ Motion.

Therefore, Defendants respectfully request that the Court reverse the Writ Order with instructions on remand that (1) the Memorandum Decision cannot form the basis for establishing a likelihood of success on the merits, both due to the clear error reflected in the ordering of summary judgment on an ambiguous contract, and due to the limitations on the appropriate scope of the Memorandum Decision which render it a manifest injustice to use the Memorandum Decision in such a way as to prevent the L&D Development defendants from litigating their affirmative defenses; and (2) that any pre-

judgment writ of attachment may not operate as a transfer of possession and title of property to the Plaintiffs, but rather must only provide a contingent lien interest in the property as set out in the Utah Rules of Civil Procedure.

RESPECTFULLY SUBMITTED: August 8, 2011.



M. ERIC OLMSTEAD (7591)

DAVID L. ELMONT (09640)

BARNEY McKENNA & OLMSTEAD, P.C.

43 South 100 East, Suite 300

St. George, UT 84771-2710

*Attorneys for Defendant-Appellants Shadow
Glen 420, Inc.; Gemstone Homes, Inc.;
Gemstone Properties, Inc.; Frank Lindhardt;
and Eugene Buckley*

CERTIFICATE OF SERVICE


I hereby certify that two (2) true and correct copies of the foregoing REPLY BRIEF OF APPELLANTS were caused to be served upon the following by depositing the same in the U.S. Mail, postage prepaid, this 8th day of August, 2011.

LaMar Winward
150 North 200 East, # 204
St. George, UT 84770
(counsel for Petitioners)

Justin Heideman
Heideman McKay Heugly & Olsen, LLC
2696 North University Avenue, Suite 180
Provo, UT 84604
(counsel for Plaintiff-Respondents)

Patrick J. Ascione
Ascione & Associates, LLC
4692 North 300 West, Suite 220
Provo, UT 84604
(counsel for Plaintiff-Respondents)

Jerome Romero
Jones Waldo Holbrook & McDonough
1500 Wells Fargo Plaza
170 South Main Street
Salt Lake City, UT 84101
(counsel for Petitioners)



David L. Elmont