

2010

# L. Lane Blackmore v. L&D Development, Inc. : Brief of Appellant

Utah Court of Appeals

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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

AMENDED 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

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UTAH APPELLATE COURTS

MAY 31 2011

**IN THE UTAH COURT OF APPEALS**

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Gemstone Properties, Inc.; Frank Lindhardt;  
and Eugene Buckley*

### **ADDITIONAL PARTIES**

No additional parties remain in the action below that are not set forth in the caption and identification of parties represented by counsel above. Although the Estate of Lester E. Canon, The Lester E. and Donna J. Cannon Family Trust, the Estate of Birthe Marie Cannon, and Russell J. Gallian (in his capacity as Trustee of The Lester E. and Donna J. Cannon Family Trust) were named in Plaintiffs' Complaint and, unlike other named entities and individuals, have not been dismissed, such persons have not been formally served process and the trial court has found such persons not to be parties to the case.

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## **I. STATEMENT OF JURISDICTION**

The Utah Supreme Court had jurisdiction over this matter pursuant to Utah Code Ann. § 78A-3-102(3)(j). The Utah Court of Appeals has jurisdiction over this matter pursuant to Utah Code Ann. § 78A-4-103(2)(j).

## **II. STATEMENT OF ISSUES**

**Issue 1:** Did the trial court err in implicitly finding “a substantial likelihood that the plaintiff will prevail on the merits of the underlying claim” as was necessary in order for the court to grant a pre-judgment writ of attachment. *See* Utah R. Civ. P. 64A(c)(3). To the extent the trial court made factual determinations in granting Plaintiffs’ motion for a prejudgment writ (“Writ Motion”), such determinations are subject to the “clearly erroneous” standard of review. *See, e.g., Jeffs v. Stubbs*, 970 P.2d 1234, 1240 (Utah 1998) (“we uphold a trial court’s findings of fact unless they are ‘clearly erroneous.’”) (citing *Drake v. Industrial Comm’n of Utah*, 939 P.2d 177, 181 (Utah 1997)). To the extent the trial court made conclusions of law in granting the Writ Motion, such conclusions are subject to the correction-of-error standard of review. *See id.*, 970 P.2d at 1240 (citing *MacKay v. Hardy*, 896 P.2d 626, 630-31 (Utah 1995)). Although the trial court did not expressly set out the factual and legal bases for its order granting the Writ Motion, the only basis upon which the trial court appeared to rely in implicitly finding a substantial likelihood of success was the legal impact of the court’s prior Memorandum Decision and Order on Pending Motions (Jul. 10, 2008) (“Memorandum Decision”) granting partial summary judgment in favor of Plaintiffs. *See, e.g.,* Record (“R”) 4561, Transcript (Jan. 19, 2010) at 22-24, a true and correct copy of which is attached as

Addendum Exhib. 2. Thus, this issue raises solely a question of law subject to the correction-of-error standard.

This issue was preserved for appeal by the Memorandum in Opposition to Plaintiffs' Motion for Prejudgment Writ of Attachment submitted by Defendants on October 19, 2009 ("Writ Opposition"), and by arguments made by counsel in oral argument on the Writ Motion. A true and correct copy of the Writ Opposition is attached hereto as Addendum Exhib. 3. Defendants argued in the Writ Opposition that Plaintiffs had failed to demonstrate a substantial likelihood of success on the merits of their underlying claims. *See* R 4465, Addend. Exhib. 3 at 7-9. Similarly, in oral argument on the Writ Motion, Defendants argued such things as "[t]his case contains multiple parties, contains multiple claims, and I think the Court was very careful in drafting that partial summary judgment because it left open the issues of waiver, the issues of affirmative defenses, the issues of set off, on [sic] that the Court has already mentioned today." *See* R 4561, Addend. Exhib. 2 at p. 14, ln. 10-14; *see also, e.g., id.* R 4465, at p. 17, ln. 1-9; p. 21, ln. 1-18.

**Issue 2:** Did the trial court err in allowing Plaintiffs "immediate possession of all monies" and "immediate, sole, and exclusive legal title" to the real property at issue in granting the prejudgment writ. *See* 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 ("Writ Order"), issued by the trial court on February 26, 2010. A true and correct copy of the Writ Order is attached hereto as R 4551-4552, Addendum Exhib. 4. This issue raises the question of whether the trial court erred in

interpreting Rules 64, 64A and 64C so as to allow the transfer of Defendants' property to Plaintiffs on a pre-judgment writ of attachment. As such, it raises a question of law subject to the correction-of-error standard of review. *See, e.g., Brown v. Glover*, 2000 UT 89, ¶ 15, 16 P.3d 540 (“[T]he interpretation of a rule of procedure is a question of law that we review for correctness.”) (citing *Ostler v. Buhler*, 1999 UT 99, ¶ 5, 989 P.2d 1073).

This issue was preserved for appeal by Defendants' objection to Plaintiffs' proposed order granting the Writ Motion (a proposed order submitted by Plaintiffs after a bench order finding in Plaintiffs' favor on whether a writ should issue and directing Plaintiffs to submit a proposed order granting the Writ Motion), as more fully set out in the transcript of oral argument on the issue of the appropriateness of Plaintiffs' proposed order (Feb. 25, 2010). In that oral argument, Defendants argued matters such as “Your Honor, their motion for a pre-judgment writ of attachment is to attach those, not to give them to [Plaintiffs]. The writ of attachment is simply to secure their position so the assets are not dissipated or utilized during the pendency of the action. It doesn't give them title. It doesn't give them ownership. It simply attaches them.” *See* R 4561, Addend. Exhib. 2 at p. 3, ln. 2-7; *see generally, id.* at p. 3-4.

### **III. DETERMINATIVE PROVISIONS**

Statutes or rules that are or may be determinative or of central importance to this appeal are as follows, and are attached as Addendum Exhib. 1: Rules 64, 64A and 64C of the Utah Rules of Civil Procedure.

#### **IV. STATEMENT OF CASE**

##### **A. Nature of the Case**

The underlying litigation in this case is a multi-claim, multi-party commercial dispute surrounding the development of certain real property in Washington County, Utah. Numerous claims and parties have been involved in the case, which began in 2003 and still may require substantial effort before readiness for trial. As a brief background, Plaintiffs have asserted contract and related claims against (among others) Defendants L&D Development, Inc. and Shadow Canyon Land Company, LLC, arising out of a development agreement (“Development Agreement”) entered on August 21, 2002. A true and correct copy of the Development Agreement is attached as Addendum Exhib. 5. After development of the property failed to move forward and certain financial obligations had become delinquent, L&D Development, Inc. approached Defendant Shadow Glen 420, Inc. in order to sell the real property at issue. Shadow Glen 420, Inc. thereafter purchased the majority of the property, and Plaintiffs have thus asserted various tort claims against Shadow Glen 420, Inc., Gemstone Homes, Inc., Gemstone Properties, Inc., Frank Lindhardt, and Eugene Buckley, arising out of such Defendants’ alleged involvement in taking over the development of the property Plaintiffs had originally contracted to develop pursuant to the terms of the Development Agreement.

As to the specific portion of the underlying litigation now on appeal, in late 2009 and early 2010 Plaintiffs sought and obtained a prejudgment writ of attachment against Defendants L&D Development, Inc. and Shadow Canyon Land Company, LLC. Pursuant to the terms of the Writ Order, Plaintiffs essentially obtained all of the money

and real property still held by such Defendants—not just a lien interest in and protection of such assets, but an order declaring that possession and legal title to such assets belong to Plaintiffs.

The dispute now before this Court is 1) whether a prejudgment writ should have been granted at all; and 2) whether, in the course of granting a writ, the trial court should have ordered the money and real property to be transferred to Plaintiffs rather than simply being protected and preserved pending the final outcome of the litigation.

**B. Course of Proceedings**

**1. Partial Summary Judgment.**

Although it is not directly on appeal, the Memorandum Decision of the trial court granting partial summary judgment in favor of the Plaintiffs in 2008 is the predicate decision that eventually led to the issuance of the Writ Order. The purported legal effect of the Memorandum Decision was the only source of support argued by Plaintiffs for why they were substantially likely to succeed on the merits of their underlying claims (under Rules 64, 64A and 64C), and similarly the summary judgment decision was the only identifiable legal basis upon which the trial court relied in granting the Writ Motion. Therefore, given its centrality to the issuance of the Writ Order and the fact that Defendants believe the Memorandum Decision to have been clearly erroneous and operating as a manifest injustice insofar as it was applied to the Writ Order, Defendants set out herein the course of proceedings leading to the grant of partial summary judgment.

In January 2008, Plaintiffs filed a cross-motion for summary judgment “on the issue of whether Defendants . . . breached material terms of the Development Agreement.” *See* R 3505, Memorandum Decision, Addend. Exhib. 6 at 1 (quotation omitted). A true and correct copy of the Memorandum Decision is attached hereto as Addendum Exhib. 6. In addressing Plaintiffs’ motion for partial summary judgment, the trial court’s analysis was “limited to the issue of breach of contract, leaving for later resolution other claims and the propriety of the remedies sought.” *See id.* at 2. Further, given that the contract-interpretation question was raised in a motion for summary judgment, the Memorandum Decision did not focus on findings of fact but instead essentially consisted of a legal interpretation of the Development Agreement.

The trial court granted partial summary judgment in favor of Plaintiffs on the issue of breach of the Development Agreement, finding that the relevant Defendants<sup>1</sup> materially breached the contract by failing to convey the real property at issue to a joint development entity and that such breach “predated [the due date of certain taxes] and any associated breach by Plaintiffs and excused subsequent performance by the latter. . . . Plaintiffs are therefore entitled to summary judgment on the issue of whether Defendants breached material terms of the development agreement.” *See* R 3505, Addend. Exhib. 6 at 5. However, again, at the same time the trial court concluded that “[o]ther claims in the complaint and the extent of damages remain for resolution.” *See id.*

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<sup>1</sup> As noted in section IV.A. above, only certain of the Defendants were party to the Development Agreement addressed in the Memorandum Decision. However, because the careful distinction among Defendants does not appear important to the arguments raised in this brief, for the most part the general term “Defendants” is used when discussing the breach of contract conclusions in the Memorandum Decision.

Defendants sought reconsideration of the Memorandum Decision on the ground that the trial court erroneously interpreted the Development Agreement in a manner inconsistent with the court's own finding of ambiguity on a key provision requiring a "closing" to take place, at which closing Plaintiff L. Lane Blackmore was to make a \$50,000 payment. *See generally* R 4418-4456, Memorandum of Points and Authorities in Support of Motion for Reconsideration (Sept. 11, 2008) ("Motion for Reconsideration"), a true and correct copy of which is attached hereto as Addendum Exhib. 7. Defendants' Motion for Reconsideration of the Memorandum Decision was denied.

## **2. The Writ Motion.**

In October 2009 Plaintiffs filed the Writ Motion, seeking attachment of real property and cash held by Defendants L&D Development, Inc., Shadow Canyon Land Company, LLC and by a non-party, the Cannon Family Trust. The Writ Motion relied entirely on the effect of the Memorandum Decision in arguing that the Plaintiffs had a substantial likelihood of success on the merits of their underlying claims, stating in relevant part that "[t]his Court has already ruled that Defendants Cannon, L&D Development, and Shadow Canyon Land Company breached the contract . . . ." and that "[b]ased on [the Court's rulings in the Memorandum Decision], Plaintiff has already prevailed on the merits of this case and is entitled to the requested relief." *See* R 4418-4456 Memorandum in Support of Motion for Prejudgment Writs of Attachment ("Writ Memorandum") (Oct. 1, 2009) at 6, a true and correct copy of which is attached hereto as Addendum Exhib. 8.

In opposing the Writ Motion, Defendants argued that Plaintiffs had not met their burden to show a substantial likelihood of success on the merits, in part because “[t]his case contains multiple parties, contains multiple claims, and I think the Court was very careful in drafting that [Memorandum Decision] because it left open the issues of waiver, the issues of affirmative defenses, the issues of set off, on that the Court has already mentioned today.” *See* R 4561, Addend. Exhib. 2 at p. 14, ln. 10-14.

Specifically on the issue of waiver, Defendants argued that regardless of whether the Memorandum Decision found a breach of the Development Agreement, factual disputes remained as to whether Plaintiffs had waived their right to pursue a breach of contract claim by virtue of the later conduct of Plaintiff Lane Blackmore. *See id.* at p. 17, ln. 1-9. In response to this argument the following exchange occurred between the trial court and counsel for the Plaintiffs:

THE COURT: What about waiver?

MR. HEIDEMAN: Your Honor, very simple. The Court actually had this extensively briefed prior to issuing its partial summary judgment motion, and the case law that was given to the Court at that time addresses that issue specifically.

When a primary breach occurs there is no requirement for any further performance and no waiver can issue because no performance is required. So by – as a – it would be a legal fiction. It would be a legal impossibility for Mr. Blackmore to waive any right to which – after a primary breach has occurred because all subsequent performance is excused and terminated.

THE COURT: And primary breach triggers that row of dominoes.

MR. HEIDEMAN: That’s correct. That’s the (inaudible) of breach doctrine, and we went through that ad nauseam in the



original. Counsel's argument is just simply – it just simply ignores that black letter law. To get up and argue that there's anything that goes beyond or survives beyond that initial moment in time just ignores the simple fact that it cannot by law – it just cannot exist. There cannot be a waiver because there is no requirement to perform.

\* \* \*

THE COURT: [addressing further argument on waiver argument interposed by the trustee of the Trust] I see your point, Counsel, but Mr. Heideman, I agree with you. You may take your pre-judgment writ.

*See id.* at p. 22, ln. 21, through p. 23, ln. 16; p. 24, ln. 10-11.

### **3. The Writ Order.**

At the conclusion of oral argument on the Writ Motion, the trial court issued a bench order granting the motion and directing Plaintiffs' counsel to prepare a proposed order.

Plaintiffs submitted such a proposed order as directed. However, rather than merely providing for the attachment of the affected real property and cash pending the conclusion of the litigation as the relevant rules provide, Plaintiffs' proposed order provided that "Plaintiff is awarded immediate possession of all money's held in either [L&D Development or Shadow Canyon Land Company] up to the amount \$150,000.00" and that "Plaintiff is awarded immediate, sole, and exclusive legal title in Lot 108, Shadow Canyon Phase 1, Hurricane, Utah 84737." *See* Plaintiffs' Proposed Order, a true and correct copy of which is attached hereto as Addendum Exhib. 9.

Defendants objected to the terms of the Proposed Order and the Court held a hearing on Defendants' objections on February 25, 2010. As set forth in the transcript,

Defendants argued at the hearing that the Proposed Order impermissibly transferred title of the attached property to Plaintiffs, when pursuant to Rules 64A and 64C of the Utah Rules of Civil Procedure a successful movant for a pre-judgment writ of attachment is only entitled to a contingent lien interest in the property, pending resolution of the case. *See* R 4554, Transcript (Feb. 25, 2010) at p. 3-4, a true and correct copy of which is attached hereto as Addendum Exhib. 10.

Notwithstanding Defendants' objections, the trial court allowed the relevant language of the Proposed Order to stand, and therefore the Writ Order as entered includes identical language awarding Plaintiffs "immediate possession of all monies . . . up to the amount of \$150,000.00" and "immediate, sole, and exclusive legal title in Lot 108 . . . ." *See* R 4465, Addend. Exhib. 4 at 2.

**C.     Disposition Below**

The effect of the Writ Order was initially stayed by the trial court pursuant Defendants' ex parte motion. After oral argument on the appropriateness of a stay pending appeal, and the submission by Plaintiffs of another proposed order going beyond what had been ordered from the bench—this time an order granting a nominal stay but terminating that stay in the event this Court determined to grant an interlocutory appeal—Defendants sought a stay from this Court. By order dated July 20, 2010, this Court stayed the effect of the Writ Order during the pendency of the appeal.

**D.     Statement of Facts**

On August 21, 2002, Plaintiffs L. Lane Blackmore and Blackmore Cannon Development Company entered into the Development Agreement with defendants L and

D Development, Inc. and Shadow Canyon Land Company, LLC. *See* R 3505, Memorandum Decision, Addend. Exhib. 6 at 2.

Under the terms of the Development Agreement, Plaintiff L. Lane Blackmore was obligated, among other things, to “pay to Shadow Canyon the sum of Fifty Thousand Dollars (\$50,000.00) at closing.” *See id.* at 2.

Blackmore did not make the \$50,000 payment required under the Development Agreement. *See id.* at 3-4.

In January 2008, Plaintiffs filed a cross-motion for partial summary judgment “on the issue of whether Defendants . . . breached material terms of the Development Agreement.” *See id.* at 1 (quotation omitted). The trial court’s analysis of the cross-motion was expressly “limited to the issue of breach of contract, leaving for later resolution other claims and the propriety of the remedies sought.” *See id.* at 1-2. Similarly, the court observed that “[o]ther claims in the complaint and the extent of damages remain for resolution.” *See id.* at 5.

The term, “at closing,” was found by the trial court to be “vague terminology of the Development Agreement . . . .” *See id.* at 3-4. But notwithstanding this finding, and notwithstanding the fact that it made no attempt to define the parties’ meaning of the term “at closing,” the trial court determined in the Memorandum Decision that Defendants materially breached the contract and that such breach “predated [the due date of certain taxes] and any associated breach by Plaintiffs and excused subsequent performance by the latter. Moreover, no identifiable ‘closing’ occurred under the terms of the Development Agreement that would have triggered Blackmore’s duty to make the

\$50,000 payment. Plaintiffs are therefore entitled to summary judgment on the issue of whether Defendants breached material terms of the development agreement.”

*See id.* at 5. Again, however, at the same time the trial court concluded that “[o]ther claims in the complaint and the extent of damages remain for resolution.” *See id.*

In their answers to the original complaint filed in the underlying dispute, and throughout the seven-plus subsequent years of litigation, Defendants have asserted the defenses of estoppel, waiver, laches, unclean hands, and similar affirmative defenses. *See, e.g.,* Answer of Defendant L&D Development, Inc. (Oct. 24, 2003) at 3.<sup>2</sup> All such defenses, and all claims and defenses involving all other substantive issues and all remaining parties—the sole exception being the “primary breach” of the Development Agreement addressed in the Memorandum Decision—remain unresolved and await either trial or dispositive motion.

In October 2009, Plaintiffs filed the Writ Motion, seeking a pre-judgment writ of attachment against certain real property and cash held by Defendants and by a non-party, the Cannon Family Trust. The Writ Motion relied entirely on the effect of the Memorandum Decision in arguing that the Plaintiffs had a substantial likelihood of success on the merits of their underlying claims, stating in relevant part that “[t]his Court has already ruled that Defendants Cannon, L&D Development, and Shadow Canyon Land Company breached the contract . . . .” and that “[b]ased on [the Court’s rulings in

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<sup>2</sup> Defendants believe that the preservation of these defenses will be undisputed, and therefore in an effort to minimize exhibits do not include these pleadings in their Addendum. In the event Plaintiffs contest the preservation of these defenses, Defendants will supplement the record in order for the Court to be able to reach a determination on that issue.

the Memorandum Decision], Plaintiff has already prevailed on the merits of this case and is entitled to the requested relief.” *See* Writ Memorandum, Addend. Exhib. 8 at 6.

In opposing the Writ Motion, Defendants argued that Plaintiffs had not met their burden to show a substantial likelihood of success on the merits, in part because “[t]his case contains multiple parties, contains multiple claims, and I think the Court was very careful in drafting that [Memorandum Decision] because it left open the issues of waiver, the issues of affirmative defenses, the issues of set off, on [sic] that the Court has already mentioned today.” *See* R 4561, Tran. (Jan. 19, 2010), Addend. Exhib. 2 at p. 14, ln. 10-14.

In response to Defendants’ waiver argument given at the January 19, 2010 hearing, the following exchange took place between the trial court and counsel for the Plaintiffs:

THE COURT: What about waiver?

MR. HEIDEMAN: Your Honor, very simple. The Court actually had this extensively briefed prior to issuing its partial summary judgment motion, and the case law that was given to the Court at that time addresses that issue specifically.

When a primary breach occurs there is no requirement for any further performance and no waiver can issue because no performance is required. So by – as a – it would be a legal fiction. It would be a legal impossibility for Mr. Blackmore to waive any right to which – after a primary breach has occurred because all subsequent performance is excused and terminated.

THE COURT: And primary breach triggers that row of dominoes.

MR. HEIDEMAN: That’s correct. That’s the (inaudible) of breach doctrine, and we went through that ad nauseam in the

original. Counsel's argument is just simply – it just simply ignores that black letter law. To get up and argue that there's anything that goes beyond or survives beyond that initial moment in time just ignores the simple fact that it cannot by law – it just cannot exist. There cannot be a waiver because there is no requirement to perform.

\* \* \*

THE COURT: [addressing further argument on waiver argument interposed by the trustee of the Cannon Trust] I see your point, Counsel, but Mr. Heideman, I agree with you. You may take your pre-judgment writ.

*See id.* at p. 22, ln. 21, through p. 23, ln. 16; p. 24, ln. 10-11.

In submitting their Proposed Order granting the Writ Motion, rather than merely stating that the affected property was to be attached pending the resolution of the case on the merits, Plaintiffs provided an order stating that “Plaintiff is awarded immediate possession of all money’s held in either [L&D Development or Shadow Canyon Land Company] up to the amount \$150,000.00” and that “Plaintiff is awarded immediate, sole, and exclusive legal title in Lot 108, Shadow Canyon Phase 1, Hurricane, Utah 84737.” *See Proposed Order, Addend. Exhib. 9 at 2.*

Defendants objected to the terms of the Proposed Order and the trial court held a hearing on Defendants’ objections on February 25, 2010. As set forth in the transcript of that hearing, Defendants argued that the Proposed Order impermissibly transferred title of the attached property to Plaintiffs, when pursuant to Rules 64A and 64C of the Utah Rules of Civil Procedure a successful movant for a pre-judgment writ of attachment is only entitled to a contingent lien interest in the property, pending resolution of the case. *See R 4554, Addend. Exhib. 10 at 3-4.*

Notwithstanding Defendants' objections, the trial court allowed the relevant language of the Proposed Order to stand, and therefore the Writ Order includes identical language awarding "immediate possession of all monies . . . up to the amount of \$150,000.00" and "immediate, sole, and exclusive legal title in Lot 108 . . . ." *See* R 4551 – 4552, Addend. Exhib. 4 at 2.

## **V. SUMMARY OF ARGUMENT**

The Writ Order was erroneous in at least two respects. First, the Writ Order implicitly relied on the Memorandum Decision as the sole basis for finding a substantial likelihood of success on the merits (as required for the issuance of a prejudgment writ of attachment), when (a) the Memorandum Decision was clearly erroneous in its interpretation of the Development Agreement, and therefore could not support a likelihood-of-success determination; and (b) even if the Memorandum Decision were not erroneous, its legal effect would still be insufficient to act as the sole source of support for a likelihood-of-success determination, given the fact that the Memorandum Decision left unresolved such matters as waiver, set-off, affirmative defenses generally, claims and defenses involving other parties, and damages.

Second, the Writ Order was erroneous in its treatment of Defendants' property. Specifically, the trial court erred in granting immediate possession and ownership of Defendants' money and real property rather than in merely attaching such property to preserve it pending a final resolution of the case on the merits.

## VI. ARGUMENT

### A. The Memorandum Decision Provided An Insufficient Basis To Reach A Determination That Plaintiffs Had Met Their Burden To Demonstrate A Substantial Likelihood Of Success On The Merits Of Their Underlying Claims.

Pursuant to Rule 64A of the Utah Rules of Civil Procedure, before a prejudgment writ could properly issue Plaintiffs were required to show “a substantial likelihood that the plaintiff will prevail on the merits of the underlying claim”. *See* Addend. Exhib. 1, Utah R. Civ. P. 64A(c)(3). Both in their Writ Memorandum and in the hearing on the Writ Motion, Plaintiffs entire argument with regard to likelihood-of-success consisted of the assertion that because the trial court had granted summary judgment on the issue of Defendants’ breach of contract, “Plaintiff [sic] has already prevailed on the merits of this case and is entitled to the requested relief.” *See, e.g.*, R 4418 – 4456, Addend. Exhib. 8 at 6; *see also* R 4561, Tran. (Jan. 19, 2010), Addend. Exhib. 2 at p. 4, ln. 24 through p. 4, ln. 5; p.23, ln. 1-16.

The trial court made no express conclusion as to the basis for determining that a likelihood of success on the merits had been shown, and indeed made no express conclusion that there was in fact a likelihood of success; but given the requirement that such a showing be made by Plaintiffs under rule 64A, given the fact that the purported legal effect of the Memorandum Decision is the only thing Plaintiffs argued, and given the reality that the Writ Order was issued, the trial court must have determined that the Memorandum Decision was sufficient to support a conclusion that Plaintiffs were substantially likely to prevail on the merits of their underlying claims. *See, e.g., id.* at p.



24, ln. 10-11 (THE COURT: “I see your point, Counsel, but Mr. Heideman, I agree with you. You may take your pre-judgment writ.”).

This determination regarding the Memorandum Decision is erroneous in at least two respects. First, the Memorandum Decision was clearly erroneous in its conclusion, as a matter of law, that Defendants breached the Development Agreement. As a result, the Memorandum Decision cannot support a showing of a likelihood of success. Second, even if the Memorandum Decision were not erroneous, the scope of its terms and effect did not go far enough to support Plaintiffs’ assertion that, simply by virtue of the existence of the Memorandum Decision, Plaintiffs are likely to succeed on the merits of their underlying claims. The Memorandum Decision left undecided the vast majority of disputes in this matter, including claims and defenses involving other parties, set-offs, damages, and whether Plaintiffs waived their breach of contract claim by virtue of their actions following Defendants’ purported breach.

In such circumstances, the trial court erred in issuing the Writ Order. Plaintiffs failed to demonstrate a substantial likelihood of success on the merits and the Writ Motion should have been denied.

**1. Consideration of the Adequacy of the Memorandum Decision Is Appropriate Insofar as that Decision Is the Sole Source of Support for Plaintiffs’ Likelihood-of-Success Argument, and Insofar as This Is the First Suitable Appellate Opportunity to Consider any Clear Error in the Memorandum Decision.**

Defendants acknowledge at that outset of their argument about error in the Memorandum Decision that 1) the Memorandum Decision granting Plaintiffs partial summary judgment is not directly on appeal in this matter; and 2) given the fact that they

had already lost the motion for partial summary judgment (including their Motion for Reconsideration), Defendants considered it futile and potentially antagonizing to argue again before the trial court that the Memorandum Decision was in error and so incapable of appropriately supporting a likelihood-of-success determination. Defendants did not, therefore, directly address the errors they perceived in the Memorandum Decision when arguing against the Writ Motion before the trial court. Defendants did, of course, argue about the limited scope of the Memorandum Decision (i.e., that Plaintiffs were incorrect in arguing that the excusal of contractual performance also meant that Plaintiffs could not have waived any prior contract claims), but such argument was rejected.

Nevertheless, given the fact that the legal effect of the Memorandum Decision forms the entirety of Plaintiffs' likelihood-of-success argument, Defendants consider it appropriate to raise the clear error they perceive in the Memorandum Decision at this time. Put simply, if a likelihood-of-success determination ultimately rests on an erroneous summary-judgment determination, it would be efficient and appropriate for this Court to consider and identify any clear error so that no further attempt is made on remand to again use the erroneous summary-judgment determination in support of another attempt at a pre-judgment writ. Otherwise, if the peripheral errors surrounding the Writ Order are corrected but the erroneous heart of the likelihood-of-success analysis remains, Plaintiffs may feel invited to pursue another writ on the same underlying legal basis.

Further, this appeal is the first suitable appellate opportunity to address the error in the Memorandum Decision. This is so because an order granting partial summary

judgment on a single aspect of a case would not normally be the appropriate subject of an immediate appeal. *See, e.g., Loffredo v. Holt*, 2001 UT 97, ¶ 14, 37 P.3d 1070 (“We stress that the final judgment rule does not stand for the proposition that the lower court need only resolve the majority of the claims for us to entertain the case. Rather, it requires that all claims, including requests for attorney fees, be decided in order for a decision to be appropriately appealed to this court. Strict compliance with this principle is necessary to preserve the interests of judicial economy.”) (quotation and citations omitted). Moreover, given the express limits on its scope contained within the Memorandum Decision itself, prior to the expansive use to which Plaintiffs have put that decision in their Writ Motion, Defendants had insufficient cause for alarm to seek the extraordinary step of pursuing an interlocutory appeal. Specifically, while the Memorandum Decision clearly constituted the law of the case as to the initial issue of breach of contract, it did not address the further critical issues such as whether Plaintiffs waived any claim for relief arising from that breach due to the conduct of L. Lane Blackmore. *See, e.g., R 3505*, Memorandum Decision, Addend. Exhib. 6 at 2, 5 (no analysis of waiver; instead trial court’s analysis of the cross-motion for summary judgment expressly “limited to the issue of breach of contract, leaving for later resolution other claims and the propriety of the remedies sought. \* \* \*. Other claims in the complaint and the extent of damages remain for resolution.”).

Given the previously limited scope of the Memorandum Decision, the unexpected, expansive use by Plaintiffs leads to a manifest injustice when applied to the Writ Motion, which—combined with the clear error contained in the Memorandum Decision—renders

it appropriate for this Court to review the Memorandum Decision. There are numerous factual disputes going toward the issue of waiver and similar affirmative defenses which have otherwise been preserved for trial. *See generally, e.g.*, R 3851 – 4014, Defendants’ Memorandum of Points and Authorities in Opposition to Plaintiff’s Motion for Partial Summary Judgment on the Issue of Bona Fide Purchaser Status of Shadow Glen, 420, Inc. (Nov. 19, 2008) at 2-33 (containing approximately 30 pages addressing factual disputes, including numerous issues of fact relevant to the question of Plaintiffs’ waiver). Until Plaintiffs presented the novel argument in the Writ Motion that because a “primary breach” excuses further contractual performance it also nullifies any possibility that a plaintiff could waive her contract claims,<sup>3</sup> Defendants had no notice that the Memorandum Decision could lead the trial court to effectively treat Plaintiffs’ case against L& D Development and Shadow Canyon Land Company as having already been successfully concluded—as indicated by the court’s decision to immediately award Defendants’ assets to Plaintiffs.

Therefore, while the Memorandum Decision has not been directly appealed, this Court can and should identify any clear errors in the Memorandum Decision insofar as such errors affect that decision’s further use in any renewed attempt by Plaintiffs at obtaining a pre-judgment writ or insofar as the Memorandum Decision would work a manifest injustice if allowed to operate so as to preclude Defendants from presenting

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<sup>3</sup> *See, e.g.*, Writ Memorandum, Addend. Exhib. 8 at 6 (“This Court has already ruled that Defendants Cannon, L&D Development, and Shadow Canyon Land Company breached the contract . . .” and that “[b]ased on [the Court’s rulings in the Memorandum Decision], Plaintiff has already prevailed on the merits of this case and is entitled to the requested relief.”).

their waiver and other affirmative defenses at trial. In the present circumstances of a complicated, multi-party case, the identification at this time of clear error in the Memorandum Decision may also assist the efficiency of the trial (at a minimum, by avoiding later re-trial) and in any eventual final appeal of the case.

**2. The Memorandum Decision Was Manifestly Erroneous in Determining, as a Matter of Law, that Defendants Committed a “Primary Breach” of the Development Agreement.**

As noted above, Plaintiffs’ novel assertion regarding the Memorandum Decision is that due to the trial court’s finding of a “primary breach” of contract, “Plaintiff [sic] has already prevailed on the merits of this case and is entitled to the requested relief.” (i.e., a pre-judgment writ of attachment). *See* R 4418 – 4456, Addend. Exhib. 8 at 6. Given the error in the Memorandum Decision, however, that decision cannot appropriately support a likelihood-of-success determination.

The trial court’s “primary breach” determination consisted of the conclusion that the Development Agreement required Defendants to convey the real property into the joint development entity prior to any obligation of Plaintiffs to do such things as pay overdue taxes and \$50,000. *See* Memorandum Decision, Addend. Exhib. 6 at 5. The operative language of the Development Agreement cited by the court included the provision that “in exchange for his fifty percent (50%) interest in [the development entity], [L. Lane] Blackmore shall do the following: . . . Pay to Shadow Canyon the sum of Fifty Thousand Dollars (\$50,000) at closing.” *See id.* at 2.

The term “at closing” was critical, and Defendants argued that the term meant a typical real-estate escrow closing wherein the parties would mutually and simultaneously

conclude their obligations to one another. *See, e.g.*, R 3677 – 3681, Motion for Reconsideration, Addend. Exhib. 7 at 2-6. Of course Plaintiffs argued a different meaning of “at closing.” However, for purposes of this appeal it suffices to observe that the trial court expressly called the “at closing” language, “the vague terminology of the Development Agreement . . . .” *See* R 3505, Memorandum Decision, Addend. Exhib. 6 at 3-4. This, combined with the fact that the Memorandum Decision contained no legal conclusion as to any plain-language meaning of “at closing” and the absence of any analysis of the issue, was tantamount to an acknowledgment by the trial court that the Development Agreement was ambiguous.

The finding of an ambiguous contract, in turn, required the trial to undertake additional analysis before concluding that no genuine issues of fact existed and that judgment as a matter of law was appropriate, particularly on such a central issue as the identification of when the parties’ obligations were due to one another. *See, e.g., Novell, Inc. v. Canopy Group, Inc.*, 2004 UT App 162, ¶ 20, 92 P.3d 768 (“If the language within the four corners of the contract is unambiguous, the parties’ intentions are determined from the plain meaning of the contractual language, and the contract may be interpreted as a matter of law. However, if the language of the contract is ambiguous such that the intentions of the parties cannot be determined by the plain language of the agreement, extrinsic evidence must be looked to in order to determine the intentions of the parties.”).

Instead of concluding that the ambiguity it found in the Development Agreement precluded summary judgment or undertaking factual analysis of party intent, however, the court merely observed that “no identifiable ‘closing’ occurred under the terms of the

Development Agreement that would have triggered Blackmore's duty to make the \$50,000 payment." *See* Memorandum Decision, Addend. Exhib. 6 at 5. The court then proceeded to determine as a matter of law, but without analysis of the Development Agreement or extrinsic evidence, that Defendants' obligation to convey the real property preceded any obligation by Plaintiffs to pay the \$50,000. Thus, the trial court determined that any later breach by Plaintiffs was excused due to the "prior" or "primary" breach of Defendants. *See id.*

The trial court's failure to follow the legal consequences of its own acknowledgment of ambiguity was pointed out by Defendants in their Motion for Reconsideration of the Memorandum Decision. *See, e.g.,* R 3677 – 3681, Addend. Exhib. 7 at 5-6. Nevertheless, the trial court rejected that motion and allowed its partial summary judgment determination to stand. Whether or not the Memorandum Decision should stand as the law of the case for other purposes, however, the clear error of entering partial summary judgment on the issue of contract interpretation notwithstanding an acknowledged ambiguity in the contract under review, should render the Memorandum Decision legally insufficient to form the sole basis of an appropriate finding that Plaintiffs have shown a substantial likelihood of prevailing on their underlying claims. As a result, the granting of the Writ Motion and issuance of the Writ Order was erroneous. When the error in the Memorandum Decision is compounded by the over-broad application of that decision so as to effectively render Plaintiffs' case against L&D Development and Shadow Canyon Land Company successfully concluded, a manifest injustice results. In such circumstances, even though the Memorandum Decision is not

directly on appeal, this Court should identify the error in the Memorandum Decision and provide instructions about the appropriate limitations of that decision's use for future application in the litigation.

**3. Aside from any Errors in the Memorandum Decision, the Scope of that Decision Was Too Narrow to Form the Sole Basis for Finding a Likelihood of Success on Plaintiffs' Underlying Claims.**

Even apart from any errors in the Memorandum Decision, its scope was insufficiently broad to form the sole source of support for a likelihood-of-success finding. That is, again, notwithstanding the trial court's determination to grant summary judgment on the issue of "primary breach," the court observed that "[o]ther claims in the complaint and the extent of damages remain for resolution" and that the court's analysis was "limited to the issue of breach of contract, leaving for later resolution other claims and the propriety of the remedies sought." *See* R 3505, Memorandum Decision, Addend. Exhib. 6 at 1-2, 5.

Thus, the mere fact that the trial court found a breach of contract on summary judgment does not of itself mean that Plaintiffs are substantially likely to succeed on the merits of their claims. A party could lose the right to recover damages for breach of contract if through waiver, failure to mitigate, estoppel, laches, etc. (all of which have been pled and all of which remain undecided), the non-breaching party did something to prohibit it from recovering. Further, there may be set-offs to take into consideration (as have, again, been pled and remain undecided in this case), that would ultimately lead to a party not being found the "prevailing party" even if it did succeed in proving some of its affirmative claims. Finally, even to make a *prima facie* case for breach of contract before



considering affirmative defenses, the plaintiff must demonstrate damages. *See, e.g., Bair v. Axiom Design, L.L.C.*, 2001 UT 20, ¶ 14, 20 P.3d 388 (“The elements of a prima facie case for breach of contract are (1) a contract, (2) performance by the party seeking recovery, (3) breach of the contract by the other party, and (4) damages.”).

As alluded to in section VI.A.1. above, in arguing the Writ Motion Defendants asserted that matters such as waiver, set-off, and affirmative defenses in general had yet to be decided, and that no likelihood-of-success could be found until such issues were addressed. *See* R 4561, Addend. Exhib. 2 at p. 14, ln. 10-14. Plaintiffs’ only response was that the trial court’s Memorandum Decision also resolved issues such as waiver by virtue of the legal effect of the court’s finding of a prior breach by Defendants. *See, e.g., id.* at p. 22, ln. 21, through p. 23, ln. 16. The trial court necessarily accepted this argument. Otherwise, the Writ Order would not have been issued. *See, e.g., id.* at p. 24, ln. 10-11.

The argument that a prior breach eliminates any possibility of waiver, however, erroneously conflated two different concepts. While it may well be that a prior breach excuses further contractual performance by the non-breaching party, this has nothing to do with the separate issue of whether a non-breaching party should be found to have waived a claim for breach of contract, should be estopped from asserting a breach, etc. The “primary breach” issue deals with excusing further performance duties by the non-breaching party under the contract. Issues of waiver, estoppel, and the like, deal with things such as a voluntary relinquishment of known contract claims that may have arisen, equitable considerations that may prevent a party from asserting a breach of contract, etc.

*Cf., e.g., United Park City Mines Co. v. Greater Park City Co.*, 870 P.2d 880, 891 (Utah 1993) (implicitly accepting the possibility of waiver/estoppel preventing the assertion of contract claims, but reversing summary judgment because “[f]actual questions remain as to whether the elements of waiver can be made out and whether the elements of estoppel are present.”).

Put simply, Plaintiffs relied wholly on the legal effect of the Memorandum Decision for their initial likelihood-of-success argument, and relied wholly on it again in seeking to rebut Defendants’ arguments about unresolved issues, such as affirmative defenses, preventing a finding of likelihood of success. In neither case did the Memorandum Decision actually resolve the issue. In the first case, the Memorandum Decision left open issues such as other claims and damages that would be necessary to address before a likelihood of success could be found. In the second case, the Memorandum Decision was a non sequitur as to affirmative defenses—it may have determined “primary breach,” but it said nothing about whether the Plaintiffs’ later actions caused them to lose the right to pursue relief for the prior breach. If the mere finding of a prior breach were sufficient to eliminate such affirmative defenses, the defenses would effectively cease to exist—all that would be necessary is a decision of which party breached first, and any further claims of waiver, estoppel, and the like, would be eliminated.

In such circumstances, the Plaintiffs presented nothing that would have supported the trial court’s conclusion that the Plaintiffs had a substantial likelihood of prevailing on the merits of their underlying claims. Likewise, the Writ Order contained no finding or

conclusion that would appropriately support a determination that the Plaintiffs were substantially likely to succeed on their underlying claims. As a result, the Writ Order was erroneous under Civil Rule 64A(c)(3) and should be reversed.

**B. The Trial Court's Decision To Immediately Award The Property To Plaintiffs Pursuant To A Prejudgment Writ Was Erroneous Under Civil Rules 64, 64A, And 64C.**

As argued in the petition for appeal in this matter, the language of the Order awarding the Plaintiffs “immediate possession of all monies . . . up to the amount of \$150,000.00” and “immediate, sole, and exclusive legal title in Lot 108 . . .” (*see* R 4551 – 4552, Addend. Exhib. 4 at 2) effectively operates as a pre-judgment writ of execution—a remedy that does not exist under the rules governing prejudgment writs. The decision by the trial court to accept Plaintiffs’ improper Proposed Order in this regard was an error of law, and should be reversed. *See Brown v. Glover*, 2000 UT 89, ¶ 15, 16 P.3d 540 (“[T]he interpretation of a rule of procedure is a question of law that we review for correctness.”) (citing *Ostler v. Buhler*, 1999 UT 99, ¶ 5, 989 P.2d 1073)).

The purpose of a pre-judgment writ of attachment is to preserve 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)<sup>4</sup> (citing *Bristol v. Brent*, 36 Utah 108, 103 P. 1076, 1079 (1909); *Jesse v. Birchell*,

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<sup>4</sup> *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

198 Or. 393, 257 P.2d 255, 257, 37 A.L.R.2d 952 (1953)). Thus, “[a]n attachment proceeding is essentially a proceeding for the purpose of establishing a lien to aid in the collection of an unsecured debt . . .” and a plaintiff who obtains such a pre-judgment writ “acquires an inchoate or contingent lien in the property attached.” See *McNeely*, 51 B.R. at 818-19 (citing *Bank of Ephraim v. Davis*, 581 P.2d 1001 (Utah 1978); *Jensen v. Eames*, 519 P.2d 236, 238 (Utah 1974); *Hilton Brothers Motor Co. v. District Court*, 25 P.2d 595, 595-96 (Utah 1933)).

Under the terms of the Writ Order, aside from the appellate stay there is nothing preventing Plaintiffs from immediately transferring or otherwise disposing of the cash and real property. The Writ Order thus operates in a manner allowing Plaintiffs to obtain final relief before the conclusion of their lawsuit, and in the event Defendants are ultimately successful in defending the underlying case, there may be no effective recourse for obtaining the return of the property “attached” by the terms of the Writ Order. A prejudgment writ of attachment is intended to preserve property to ensure its availability to satisfy an eventual judgment. The trial court’s decision to grant Plaintiffs immediate possession and legal title of the property was inconsistent with the language and purposes of Rules 64, 64A and 64C, and thus constitutes legal error. As a result, the Writ Order should be reversed.

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federal statutes presumes identity of construction so Utah courts look to federal case law for guidance)).

## VII. CONCLUSION

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 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: May 31, 2011.



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## CERTIFICATE OF SERVICE

I hereby certify that two (2) true and correct copies of the foregoing BRIEF OF APPELLANTS were caused to be served upon the following by depositing the same in the U.S. Mail, postage prepaid, this 31<sup>st</sup> day of May, 2011.

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