

1992

# Hi-Country Estates Homeowners Association v. Bagley and Company : Response to Petition for Rehearing

Utah Court of Appeals

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Val R. Antczak; Parsons Behle and Latimer; Ralph J. Marsh; Backman Clark and Marsh; Attorneys for Appellees.

Larry R. Keller; Keller and Lundgren; Attorney for Appellant.

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DOCKET NO. 920450 IN THE UTAH COURT OF APPEALS

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HI-COUNTRY ESTATES HOMEOWNERS	:	
ASSOCIATION, a Utah corporation,	:	
	:	Case No. 920450-CA
Plaintiff, Appellant	:	
and Cross-Appellee,	:	
v.	:	
BAGLEY & COMPANY, et al.,	:	Priority Classification
	:	No. 15
Defendants, Appellees	:	
and Cross-Appellants.	:	

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ON APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT OF  
SALT LAKE COUNTY, HONORABLE PAT B. BRIAN, PRESIDING

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RESPONSE TO PETITION FOR REHEARING

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LARRY R. KELLER #1785  
KELLER & LUNDGREN, L.C.  
Attorney for Plaintiff/Appellant  
Hi-Country Estates  
Homeowners Association  
257 Towers, Suite 340  
257 East 200 South - 10  
Salt Lake City, Utah 84111

VAL R. ANTCZAK  
PARSONS BEHLE & LATIMER  
Attorney for Appellee  
Foothills Water Company  
201 South Main Street #1800  
P.O. Box 11898  
Salt Lake City UT 84147-0898

RALPH J. MARSH  
BACKMAN CLARK & MARSH  
Attorney for Bagley & Company  
and Gerald H. Bagley  
68 South Main #800  
Salt Lake City UT 84101

**FILED**  
Utah Court of Appeals

NOV 12 1993

  
Mary T. Noonan  
Clerk of the Court

IN THE UTAH COURT OF APPEALS

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HI-COUNTRY ESTATES HOMEOWNERS :  
ASSOCIATION, a Utah corporation, :  
Plaintiff, Appellant : Case No. 920450-CA  
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LARRY R. KELLER #1785  
KELLER & LUNDGREN, L.C.  
Attorney for Plaintiff/Appellant  
Hi-Country Estates  
Homeowners Association  
257 Towers, Suite 340  
257 East 200 South - 10  
Salt Lake City, Utah 84111

VAL R. ANTCZAK  
PARSONS BEHLE & LATIMER  
Attorney for Appellee  
Foothills Water Company  
201 South Main Street #1800  
P.O. Box 11898  
Salt Lake City UT 84147-0898

RALPH J. MARSH  
BACKMAN CLARK & MARSH  
Attorney for Bagley & Company  
and Gerald H. Bagley  
68 South Main #800  
Salt Lake City UT 84101

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COMES NOW Plaintiff, Appellant and Cross-Appellee Hi-Country Estates Homeowners Association (hereafter "Homeowners"), by and through its attorney, Larry R. Keller, Esq., and hereby responds to the Petition for Rehearing filed by Defendant/Appellee Foothills Water Company (hereafter "Foothills") as follows:

**STATEMENT OF ADDITIONAL RELEVANT FACTS**

The relevant facts involved in this case were carefully outlined in detail in Appellant's initial brief. Additional relevant facts were added in Appellant's Consolidated Reply Brief and Cross-Appellee's Brief. The Court is referred to those statements of relevant facts, as such will not be repeated here. However, certain additional facts need to be brought to the Court's attention:

1. After a full briefing and oral argument in the Utah Court of Appeals, the Court of Appeals issued its Opinion in this matter on September 22, 1993. That opinion was a unanimous decision written by the Honorable Regnal W. Garff, Judge. The opinion ruled in Appellant Homeowner Association's favor on every single issue. The Court stated in its "Conclusion":

In conclusion we (1) affirm the district court's initial conclusion that Homeowners Association holds legal title to the water right, lots and system; (2) remand for the court to issue a quiet title order in Homeowners Association's favor with no contingencies; (3) affirm the court's conclusion that Bagley is not entitled to any damages; (4) affirm the court's conclusion that Foothills Water Company's claim for slander of title be dismissed; (5) reverse the court's order denying summary judgment on the issue of compensation, acknowledging the PSC's order that the amount of \$16,334.99 is includable in the rate base;

(6) reverse the district court's order regarding the validity of the well lease agreement; and (7) reverse the court's order regarding distribution of water to outsiders, acknowledging the PSC's jurisdiction over that issue.

Slip Op. at 18, 19.

2. Foothills petitioned the Utah Court of Appeals for Rehearing pursuant to the provisions of Rule 35 of the Utah Rules of Appellate Procedure on October 13, 1993. It should be noted that Appellees Bagley & Company and Gerald H. Bagley declined to petition this Court for rehearing, and so the Court's decision is final as to those parties.

3. This Court issued an Order dated October 29, 1993, by way of letter from Mary T. Noonan, Clerk of the Court, as follows:

Pursuant to Rule 35, Rules of Utah Court of Appeals, and at the specific request of the Court, you are requested to file a response to the Petition for Rehearing filed by the Appellee herein. Your response need not include issues II and III. Your response brief and seven copies should comply with the requirements of Rule 35, and be filed on or before November 12, 1993.

4. With the exception of Points II and III in Foothills' Petition for Rehearing, Homeowners submits its Response herein, pursuant to the provisions of Rule 35 of the Utah Rules of Appellate Procedure, and as ordered by this Court.

**ARGUMENT**

**POINT I**

**FOOTHILLS FAILS TO IDENTIFY THE "IMPORTANT ISSUES" IT  
COMPLAINS ABOUT, MAKING A SUBSTANTIVE RESPONSE TO ITS  
POINT I IMPOSSIBLE.**

In Point I of its Petition for Rehearing, Foothills alleges that this Court, in its September 22, 1993 Opinion, decided several issues concerning the regulation of utilities and the jurisdiction and power of the Public Service Commission (hereafter "PSC") improperly. However, Foothills fails to identify specifically the issues it claims were decided inappropriately. Homeowners cannot possibly respond to this point due to the vague state in which it is presented.

While Homeowners can guess and speculate that the issues referred to in this point are actually issues IV, V and VI of Foothills' Petition for Rehearing, such speculation is inappropriate. Therefore, it is requested that this point be summarily dismissed as being vague and unclear.

A couple of statements made in this point can, however, be responded to. First, Foothills claims that the issues decided by the Court of Appeals are "quite complex and general, and even more complex in the context of this particular case." Foothills does not suggest to the Court why the issues in question are "more complex in the context of this particular case." Homeowners believe this statement is false and inaccurate and should be disregarded by the Court.



Foothills goes on in this Point to imply that this Court does not have sufficient knowledge of PSC matters to decide these "complex" issues; and points out that normally the Utah Supreme Court is given exclusive appellate jurisdiction of matters involving the PSC. While it is generally true that the Supreme Court hears PSC matters, it has been brought to the attention of Homeowners that the Utah Supreme Court has recently decided to "pour over" several categories of cases involving PSC appeals to the Utah Court of Appeals. Apparently, the Utah Supreme Court does not think PSC matters are too "complex" for this Court to decide.

Foothills argues that this Court decided several issues without the benefit of the necessary briefing and argument. This assertion is absolutely false! While it is true that Foothills, in its "Consolidated Initial Brief of Foothills Water Company," chose to spend only a few pages on the very important issues involving valuation of public utilities and the Utah statutes associated therewith; and little time on the PSC's power to deal with the well lease agreement, it must be presumed that this was by choice of Foothills' counsel. In its initial brief, Homeowners argued extensively in over 20 pages that the issues now decided in Homeowners' favor by this Court regarding the power and jurisdiction of the PSC should have been decided in its favor by the trial court. In its "Consolidated Reply Brief and Cross-Appellee's Brief," Homeowners argued in great detail that the PSC orders regarding the valuation of the water system should have

been adopted by the trial court. Homeowners argued that the matter of valuation of public utilities was exclusively within the jurisdiction of the PSC, and that the 1977 well lease agreement had been determined by the PSC to be "grossly unreasonable." Homeowners argued that the determinations of the PSC regarding the well lease agreement should have been adopted by the trial court.

In this Court's Opinion of September 22, 1993, this Court adopted Homeowners' arguments. See Slip Op. at pp. 12-18. This Court cited statutes which had been cited by Homeowners in their briefs, as well as reviewing additional statutes which apply to the PSC and its powers and authority. The Opinion was well-reasoned and went into much detail.

Foothills, as a matter of conscious choice on its part, apparently decided not to fully brief and argue the valuation issues and the issues related to the exclusive jurisdiction of the PSC with regard to the 1977 well lease agreement. Such fact should not be considered as a basis for this Court to revisit its September 22, 1993 Opinion. If the matter was not thoroughly briefed from Foothills' point of view, and Foothills now assigns that fact as error, Foothills invited the error and should not be rewarded for its failure to provide the thorough briefing that it claims is necessary for this court to decide these issues. Merriam v. Merriam, 799 P.2d 1172 (Utah App. 1990).

Failure to adequately brief could be raised by any losing party in an appellate situation. All parties briefed these

issues within the limits laid down by the rules governing this Court. If Foothills wanted more briefing space, it could have requested it, but it did not.

Finally, if Foothills now wants to raise new issues after losing this appeal, it should be estopped from doing so on rehearing. Lockhart Co. v. Anderson, 646 P.2d 678 (Utah 1982). In Lockhart, the Supreme Court said:

A losing party cannot use a petition for rehearing "to present to this court a new theory or contention which was neither in the record as it was before this court nor in the arguments made." Swanson v. Sims, 51 Utah 485, 498, 170 P. 774, 778 (1918). Rehearing is denied.

646 P.2d at 681.

## POINT II

### THIS COURT DID NOT ERR IN REVERSING THE DISTRICT COURT'S ORDER DENYING SUMMARY JUDGMENT ON THE ISSUE OF COMPENSATION.

As it did in its initial consolidated brief, Foothills argues in Point IV of its Petition for Rehearing that the purpose of U.C.A. § 54-4-21 is to determine the value of public utility assets only for the purpose of setting rates and not for any other purpose.

Homeowners responded to this argument in its "Appellant's Consolidated Reply Brief and Cross-Appellee's Brief on pp. 36-40; and argued from various cases, including Utah Power & Light Company v. Public Service Commission, 122 Utah 284, 249 P.2d 951 (1952), and the clear meaning of the statute, that U.C.A. § 54-4-21 provides exclusive jurisdiction to the PSC to value

assets of public utilities for all purposes, not just for rate-making purposes. U.C.A. § 54-7-19(1)(d)(ii) makes the PSC's determination conclusive (not even rebuttable) evidence before any court.

It is interesting to note that in its Petition for Rehearing, Foothills does not cite any new cases, and has never cited a case for its argument in Point IV of its Petition for Rehearing, but simply suggests that the decision of this Court stating that the trial judge should have granted summary judgment on the valuation issue is simply wrong. This Court should be able to make short work of this argument.

### POINT III

#### THIS COURT DID NOT ERR IN REVERSING THE DISTRICT COURT'S ORDER REGARDING THE VALIDITY OF THE WELL LEASE AGREEMENT.

Foothills argues in Point V of its Petition for Rehearing that this Court's opinion "incorrectly allows the PSC to cut-off Foothills' property rights and interests conferred by the well lease agreement." No new cases are cited and no arguments different from those made in the original briefs filed by Foothills are contained in this Point in the Petition for Rehearing.

This Court simply adopted the position taken by Homeowners as being accurate and correct. Homeowners argued that the matter was within the exclusive jurisdiction of the PSC and had previously been determined by the PSC on March 17, 1986 in its Report and Order (See Addendum 2 to Appellant's Initial Brief). Homeowners argued that the PSC had found that the 1977 well lease

agreement was "'grossly unreasonable'" and that it had the effect of "'showering virtually limitless benefits on Jessie Dansie and the members of his immediately family.'" The PSC further found that the agreement made Bagley personally responsible to fulfill the terms and conditions of the lease; and found it unjust and unreasonable to expect Foothills' 63 active customers to support the entire burden of the well lease agreement. Slip Op. at 16, 17. Foothills now has the remedy of suing Bagley if it is aggrieved by the well lease agreement; but this Court has now said Foothills cannot stick its customers (Homeowners) with this grossly unreasonable agreement that they never participated in forming.

This Court then properly held that the matter was indeed within the exclusive jurisdiction of the PSC, and the trial judge should have accepted the PSC's determination. Slip Op. pp. 16-17.

This Court finally and accurately concluded that "[G]iven the PSC's jurisdiction to determine whether a public utility may be so encumbered, and given the PSC's March 17, 1986 order requiring Foothills Water Company to obtain PSC approval to obtain any extension of the well lease agreement, we reverse the district court's order insofar as it pertains to the validity of the well lease agreement." Slip Op. pg. 17. See also, U.C.A. § 54-4-26.

Finally, Homeowners argued that the well lease agreement expired on its face in 1987 and that Foothills Water Company

could not enforce this agreement at the present time due to its expiration. In footnote 6, this Court specifically notes that the well lease agreement expired in 1987 and Foothills never returned to the PSC to receive approval to extend it. Even more important, this Court states in the footnote: "The record shows that even though the lease provided that the parties could extend it, they did not do so." See Slip Op. at 17. See U.C.A. § 54-4-26. No further briefing of this issue should be allowed. Foothills made its best arguments and lost.

#### POINT IV

#### THIS COURT DID NOT ERR IN REVERSING THE DISTRICT COURT'S ORDER REGARDING DISTRIBUTION OF WATER TO OUTSIDERS.

Foothills asserts in Point VI of its Petition for Rehearing that the decision of this Court holding that Homeowners should receive a quiet title order from the District Court without the contingency of being required to allow Foothills to transport water to its customers outside the boundaries of Hi-Country Estates Subdivision, Phase I, was in error. Once again, Foothills cites no authority whatsoever on this point, but simply makes the bold statement that somehow the Court's holding was "internally inconsistent." Try as we may, Homeowners cannot see how the opinion of this Court on this issue is internally inconsistent. Whether Homeowners is a utility or not a utility is not the issue. Foothills is a utility regulated by the PSC. It holds a Certificate of Convenience and Necessity issued by the PSC for a certain service area. It will continue to be responsi-

ble to provide water services to its service area until such time as it is decertified by the PSC. Therefore, the PSC has the exclusive power and jurisdiction to make certain that all present customers of Foothills Water Company continue to be served until some other company is certified by the PSC to take its place, or until such other company has requested an exemption from regulation by the PSC. It could, for instance, order Foothills to lease assets from Homeowners to continue to provide service, if necessary. The point is: it is up to the PSC to deal with the issue, not the Third District Court.

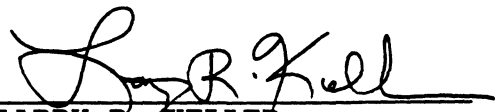
Frankly, Homeowners suggest to the Court that this point (made on pp. 8-9 of Foothills' Petition) is so vague, and lacks such detail, that it is virtually impossible to respond to it in any other way than it has. Homeowners believe that this point should be summarily dismissed by this Court.

#### CONCLUSION

The undersigned counsel has filed many appellate briefs as petitioner, respondent, intervenor, and amicus in numerous cases in his 22 years of practice. However, it must be said that never before has the undersigned been required to respond to issues submitted by another party, where the claims of error are so vague and lacking in detail as is Foothills' Petition for Rehearing before this Honorable Court. Homeowners has done its best to respond. Homeowners strongly urge this Court to review the previous briefs in this matter. It can readily be seen that all of the issues raised in the Petition for Rehearing have been

adequately briefed and were appropriately decided by this Court in its 19-page Opinion. This Court took great time and went into great detail to decide these issues, and it would be a great tragedy if the Court were now inclined to go back and revisit those issues based upon the vague and insufficient Petition for Rehearing filed by Foothills. It is respectfully requested that Foothills' Petition for Rehearing be summarily denied.

RESPECTFULLY SUBMITTED this 12th day of November, 1993.

  
LARRY R. KELLER,  
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that I caused two true and correct copies of the foregoing to be mailed, by first class postage prepaid, this 12 day of November, 1993 to:

Val R. Antczak, Esq.  
PARSONS BEHLE & LATIMER  
PO Box 11898  
Salt Lake City UT 84147-0898

Ralph J. Marsh, Esq.  
BACKMAN, CLARK & MARSH  
68 South Main #800  
Salt Lake City UT 84101

