

1992

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

Utah Court of Appeals

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Priority No. 15

# PETITION FOR REHEARING

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Clerk of the Court

IN THE COURT OF APPEALS  
OF THE STATE OF UTAH

\* \* \* \* \*

HI-COUNTRY ESTATES HOMEOWNERS	)	
ASSOCIATION, a Utah Corporation,	)	
	)	
Plaintiff/Appellant,	)	Case No. 9230450-CA
	)	
vs.	)	
	)	
BAGLEY & COMPANY, <u>et al.</u> ,	)	Priority Classification
	)	No. 16
Defendants/Appellees.	)	

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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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PETITION FOR REHEARING

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Pursuant to Rule 35 of the Utah Rules of Appellate Procedure, Appellee Foothills Water Company ("Foothills") respectfully petitions the Utah Court of Appeals for a rehearing with respect to the Court's decision dated September 22, 1993.

#### BACKGROUND

This proceeding was initiated by Appellant Hi-County Estates Homeowners Association (the "Association") seeking review of an Order by Judge Pat B. Brian of the Third Judicial District Court of Salt Lake County, quieting title to a disputed water system in the name of Foothills. On September 22, 1993, this Court issued an opinion which: (1) affirmed the district court's initial conclusion that the Association holds legal title to the water right, lots and system; (2) remanded the matter for the district court to issue a quiet title order in the Association's favor with no contingencies; (3) affirmed the district court's conclusion that Appellant Bagley & Company is not entitled to any damages; (4) affirmed the district court's conclusion that Foothills' claim for slander of title be dismissed; (5) reversed the district court's order denying summary judgment on the issue of compensation; (6) reversed the district court's order regarding the validity of the well lease agreement; and (7) reversed the court's order regarding distribution of water to outsiders, acknowledging that the Public Service Commission ("PSC") has jurisdiction over that issue. See Slip Opinion, at 18-19. In reaching these conclusions, however, the Court made several legal and factual errors which require a rehearing on these matters.

## ARGUMENT

### **I. THIS COURT ERRED IN DECIDING SEVERAL IMPORTANT ISSUES CONCERNING THE REGULATION OF UTILITIES AND THE JURISDICTION AND POWER OF THE PUBLIC SERVICE COMMISSION THAT WERE NOT BRIEFED OR ARGUED BY THE PARTIES**

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. Issues of this nature are quite complex in general, and even more complex in the context of this particular case. Thorough briefing is necessary, therefore, to adequately examine these issues. This is particularly true in light of the fact that this Court ordinarily does not address issues involving the Public Service Commission because appellate jurisdiction over such matters is expressly reserved for the Utah Supreme Court. See Utah Code Ann. § 78-2-2(3)(e)(i) (Supp. 1993) (stating that "[t]he Supreme Court has appellate jurisdiction, including jurisdiction of interlocutory appeals, over . . . final orders and decrees in formal adjudicative proceedings originating with . . . the Public Service Commission . . . ."); Utah Code Ann. § 78-2a-3(2)(a) (Supp. 1993) (stating that "[t]he Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over . . . the final orders and decrees resulting from formal adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceedings of the agencies, except the Public Service Commission . . . .") (emphasis added).

In this case, the Court decided several issues involving the jurisdiction and power of the Public Service Commission without the

benefit of the necessary briefing and argument. Indeed, these issues were the subject of little, if any, briefing or argument. This lack of briefing and argument was due to the fact that these issues were addressed only tangentially, if at all, by the trial court and, therefore, were not the focus of the trial court's decision. Consequently, this Court erred in several important respects with regard to its decisions involving the jurisdiction and power of the Public Service Commission. These errors are discussed more fully below.

**II. THIS COURT ERRED IN AFFIRMING THE DISTRICT COURT'S INITIAL CONCLUSION THAT THE ASSOCIATION HOLDS LEGAL TITLE TO THE WATER RIGHT, LOTS AND SYSTEM**

As noted above, in its September 22, 1993 Opinion, this Court affirmed the district court's initial conclusion that the Association holds legal title to the water right, lots and system. In this regard, the court stated

The parties stipulated that, prior to 1985, title to the water right and to the water tank lots 'could still be considered to be in the name of Zion's Bank or Hi-County Estates, Inc.' Given this stipulation, and given that quit-claim deeds were executed in favor of Homeowners Association by the principals of Hi-County Estates, Inc. on behalf of those entities, and by trust officers of the bank, the court did not err in concluding that Homeowners Association held legal title to the water right, lots, and system.

Slip Opinion, at 10. The court's holding in this regard, however, fails to recognize that the quit-claim deeds either do not refer to the water system or expressly exclude the water lines and other utilities. In other words, despite the fact that the deeds either do not contain, or expressly exclude, any intent to convey an interest in the water system, the Court held that these deeds



effectively transferred ownership in the system. In this regard, the Court's opinion runs contrary to established precedent which holds that a purchaser of property acquires only the rights which the seller intends to transfer, Johnson v. Bell, 666 P.2d 309, 312 (Utah 1983), and that where an instrument such as a deed is executed without any intent to transfer the grantor's present interest in the subject property, that instrument is ineffective and should be invalidated by the court. Baker v. Pattee, 684 P.2d 632, 635 (Utah 1984). Furthermore, despite the fact that Foothills raised several other questions regarding the validity of the quit-claim deeds, this Court did not address these questions by examining the record and making determination as to the validity of these deeds. Rather, the Court appears to have simply assumed that the deeds were valid and concluded that the deeds provided an adequate basis for the district court's conclusion that the Association held legal title to the water right, lots, and system. The Court's action in this regard constitutes error.

**III. THIS COURT ERRED IN REVERSING THE DISTRICT COURT'S CONTINGENT QUIET TITLE ORDER AND REMANDING THE MATTER FOR THE DISTRICT COURT TO ISSUE A QUIET TITLE ORDER IN THE ASSOCIATION'S FAVOR WITH NO CONTINGENCIES**

As noted above, this Court reversed the district court's contingent quiet title order and remanded the matter for the district court to issue a quiet title order in the Association's favor with no contingencies. In so doing, the Court stated that "we find no legal justification or authority for the court setting . . . a contingency on Homeowners Association's quiet title." Slip Opinion, at 10. The Court's holding in this regard simply is not

accurate. Indeed, allowing the Association to obtain title without reimbursing Foothills for the value of its good faith improvements runs counter to well-established principles of equity which provide that a court may order one party to pay restitution to the second party if the second party has paid for or improved the property which the first party owns or claims to own. Sidney Stevens Implement Co. v. Hintze, 67 P.2d 632 (Utah 1937). As it is now written, the Court's opinion appears to allow the Association to obtain title to the water system without providing any vehicle by which Foothills can obtain reimbursement for nearly \$100,000 worth of improvements made to the system by Foothills. Consequently, the Court's opinion appears to facilitate an inequitable result by allowing the Association to be unjustly enriched at the expense of Foothills.

**IV. THIS COURT ERRED IN REVERSING THE DISTRICT COURT'S ORDER DENYING SUMMARY JUDGMENT ON THE ISSUE OF COMPENSATION**

On page 15 of its Opinion, the Court held: (1) that the PSC's determination regarding the amount Foothills could recover for its improvements is binding; and (2) that the district court erred in not granting summary judgment in favor of the Association on the issue of compensation. The Court's ruling in this regard confuses the issue of value for purposes of determining the rates to be charged by Foothills to its customers and the issue of fair market value for purposes of unjust enrichment. Even conceding, for purposes of argument, that in all collateral actions or proceedings, final orders and decisions of the PSC are conclusive, it must be remembered that in order for such conclusive effect to attach,

the PSC order or decision at issue must have specifically decided the issue identical to that at stake in the subsequent litigation. Schaer v. State by and through Utah Dep't of Transp., 657 P.2d 1337 (Utah 1983); Wilde v. Mid-Century Ins. Co., 635 P.2d 417 (Utah 1981).

In this case, all the PSC determined was that before the costs of investments made in the system could be included in the rate base upon which Foothills' water rates would be computed, Foothills would be required to prove that these costs had not been recovered by the developers through the sale of lots. The PSC<sub>3</sub> did not in any way determine the overall value of the system, the value of any improvements made to the system, or the amount of compensation necessary to avoid unjust enrichment of the Association at the expense of Foothills. Indeed, Foothills is aware of no authority, and the Court's opinion does not cite any authority, that grants the PSC the authority to make such a determination. Thus, the Court erred by holding that a PSC determination on one issue, that of valuation for purposes of rate making, has a preclusive effect on another separate and independent issue, that of fair compensation for purposes of unjust enrichment, on which the PSC did not, and cannot, pass.

**V. THIS COURT ERRED IN REVERSING THE DISTRICT COURT'S ORDER REGARDING THE VALIDITY OF THE WELL LEASE AGREEMENT**

Addressing the issue of the validity of the well lease agreement, this Court stated:

Given 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 Opinion, at 17. The Court's holding in this regard misunderstands the PSC's prior determinations regarding the well lease agreement and unlawfully extends the PSC's jurisdiction.

The Court's opinion assumes that the PSC invalidated the well lease agreement. This is simply not the case. The PSC merely prohibited Foothills from passing on the entire cost of the agreement to its customers. Thus, if anything, the PSC recognized the well lease agreement as a valid encumbrance.

Additionally, the Court's opinion unlawfully extends the jurisdiction of the PSC. The Court properly notes that the PSC has jurisdiction to determine the value of utility assets within the State of Utah for purposes of rate making. Utah Code Ann. § 54-4-21 (1992). The Court's opinion, however, does not confine the PSC to issues of valuation for purposes of rate making. Rather, it extends the PSC's jurisdiction by allowing it to determine issues of ownership. Indeed, the well lease and water line extension are property rights and the Court's opinion allows the PSC to eliminate Foothills' ability to exercise the legal rights associated with property ownership and does so without citing any statutory authority. In sum, the Court's opinion incorrectly allows the PSC to cut-off Foothills' property rights and interests conferred by the well lease agreement.

Furthermore, the Court purports to render the lien included in the well lease agreement invalid. In this regard, all the parties

to the well lease agreement are not parties to this action. Thus, the Court's opinion, in essence, disposes of property rights of parties not involved in, and not represented in, this action.

**VI. THIS COURT ERRED IN REVERSING THE DISTRICT COURT'S ORDER REGARDING DISTRIBUTION OF WATER TO OUTSIDERS AND ACKNOWLEDGING THE PUBLIC SERVICE COMMISSION'S JURISDICTION OVER THAT ISSUE**

The last holding of the Court in its opinion was that the trial court erred in issuing an order requiring the Association to allow Foothills to transport water through its system to customers outside the subdivision. Slip Opinion, at 18. In this regard, the Court stated that the issue of whether a utility is entitled to provide water to a group of customers falls within the jurisdiction of the PSC. Id. In light of the facts of this case and the Court's holding, however, these two statements are internally inconsistent.


Although the Court quieted title in the Association, Foothills continues to have an interest in servicing customers outside the boundaries of the Association's subdivision. The Association asserts ownership to the system only within that subdivision. The Association, however, is not a utility and, therefore, the PSC has no jurisdiction over the Association. Consequently, Foothills is now obligated to service customers without its own water system and without any oversight on the part of the PSC to insure that the entity which owns the water system serves those customers. In other words, because Foothills no longer owns the water system and because the Association is not subject to regulation by the PSC,

there is no consideration of how Foothills' customers will be served.

**CONCLUSION**

Based on the foregoing, Foothills respectfully requests that this Court grant its petition for a rehearing. The undersigned counsel for Foothills hereby certifies that this Petition is presented in good faith and not for delay.

Dated this 13<sup>th</sup> of October, 1993.

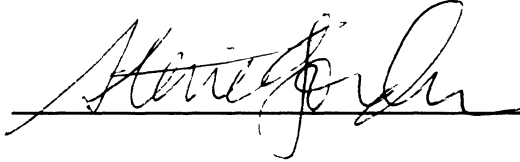
  
\_\_\_\_\_  
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Water Company

CERTIFICATE OF SERVICE

I hereby certify that on this 13<sup>th</sup> day of October, 1993,  
I caused to be mailed, first class, postage prepaid, a true and  
correct copy of the foregoing PETITION FOR REHEARING, to:

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