

2006

Hi-Country Estates Homeowners Association v. Bagley & Company : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

HI-COUNTRY ESTATES HOMEOWNERS
ASSOCIATION, a Utah Corporation, ,

Plaintiff,

vs.

BAGLEY & COMPANY, a Utah corporation,
J. RODNEY DANSIE, and GERALD
BAGLEY,

Defendants,

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

Counterclaimants and Appellants,

vs.

HI-COUNTRY ESTATES HOMEOWNERS
ASSOCIATION, a Utah Corporation, et al.,

Counterclaim Defendant and Appellee.

Appeal No. 20060139

District Court No. 020107452

**REPLY BRIEF OF APPELLANTS FOOTHILLS WATER COMPANY, J.
RODNEY DANSIE, THE DANSIE FAMILY TRUST, RICHARD P. DANSIE,
BOYD W. DANSIE, JOYCE M. TAYLOR AND BONNIE PARKER**

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INTRODUCTION

In its brief, Counterclaim Defendant and Appellee High-Country Estates Homeowners Association (“the Association”) desperately attempts to explain why the Well Lease does not or cannot mean what it plainly says, despite the undeniable fact that its validity has been affirmed by the trial court, this Court and the Utah Supreme Court. The trial court, after hearing all of the evidence presented at trial and carefully considering the Association’s arguments, correctly concluded that the Well Lease was neither unconscionable nor violative of any public policy. The trial court’s decision is supported by overwhelming evidence and is therefore not erroneous. This Court should accordingly preclude the Association from continuing to deprive the Dansies of their right to water as explicitly set forth in the Well Lease.

Likewise, the trial court acted well within its discretion in awarding the Dansies judgment in the amount of \$16,334.99 for improvements made to the Association’s Water System. This judgment was based on sound evidence and authority that unequivocally demonstrates its reasonableness.

Unfortunately, however, the trial court’s Order is not free of error, as it erroneously concluded that the Well Lease requires the Dansies to obtain water only upon payment of their pro rata transportation fee, despite the undeniable fact that the Well Lease expressly provides otherwise. This conclusion is neither supported nor justified by the Orders of the Public Service Commission and the Utah Supreme Court. Quite to the contrary, it is undisputed that the Water System was decertified as a public utility in 1996, rendering any Public Service Commission Order relied on the by trial court for its

Order irrelevant. Likewise, enforcing the terms of the Well Lease will not subject the Water System to the jurisdiction of the Public Service Commission, as such enforcement would simply add the Dansies to the list of users and nonmembers pursuant to specific contracts, a category of users recognized by the Public Service Commission as not violative of any exemption status.

Because the trial court erred in holding that, as a prerequisite to obtaining water pursuant to the specific terms of the Well Lease, the Dansies must first pay their pro rata share of the transportation costs, the Association breached the Well Lease by severing the two Water Systems. The Association does not dispute that it severed the Water System. Rather, it would have this Court believe that its actions resulted in no damages to the Dansies. Such argument belies credulity. Certainly severing the Water System caused damages to the Dansies. The Association simply disputes the amount of damages sustained, and the Dansies' actions in response. However, the Association's argument is without merit, as there is ample evidence in the record of the Dansies' damages resulting from the Association's actions in severing the Water System. Likewise, contrary to the Association's argument, such damages were certainly foreseeable at the time the Well Lease was executed and the Dansies' actions in constructing a temporary water system satisfied their duty to mitigate. The Association's arguments are therefore not well taken.

ARGUMENT

I. THE TRIAL COURT CORRECTLY DETERMINED THAT THE WELL LEASE IS NEITHER UNCONSCIONABLE NOR VIOLATIVE OF ANY PUBLIC POLICY.

In its January 5, 2006 Order, the trial court correctly concluded that “[t]he Well Lease is not void as against public policy. Specifically, the Well Lease is not void based on Utah Code Ann. §§ 54-3-8(1) and 54-3-1, the PSC’s 1986 Order, or the unconscionability doctrine.” R. at 001766. The Association’s arguments to the contrary are without merit.

Utah law provides parties with substantial latitude to contract freely:

With a few exceptions, it is still axiomatic in contract law that “persons dealing at arms’ length are entitled to contract on their own terms without the intervention of the Courts for the purpose of relieving one side or the other from the effects of a bad bargain. Parties ‘should be permitted to enter into contracts that actually may be unreasonable or which may lead to hardship on one side.’ ‘Although courts will not be parties to enforcing flagrantly unjust agreements, it is not for the courts to assume the paternalistic role of declaring that one who has freely bound himself not perform because the bargain is not favorable.

Bekins Bar V Ranch v. Huth, 664 P.2d 455, 459 (Utah 1983) (internal citations omitted).

In order for a contract to be voided as unconscionable, a court must find that “no decent, fair-minded person would view the ensuing results without being possessed of a profound sense of injustice.” *Resource Management Co. v. Westin Ranch & Livestock Co., Inc.*, 706 P.2d 1028, 1041 (Utah 1985). Likewise, for a contract provision to be considered unenforceable or void as against public policy expressed in a statutory provision, a court “must determine (1) what the terms of the contract are; (2) what the statute prohibits; and

(3) whether the statute or public policy demands that the contract be deemed unenforceable.” *Peterson v. Sunrider Corp.*, 2002 UT 43, ¶ 27.

The Association contends that the trial court erred, and that the Well Lease is void because it is unconscionable and violates the public policy of certain utility regulations set forth in Utah Code Ann. Title 54, Article XI of the Utah Constitution, and the 1986 Order of the Public Service Commission (“1986 Order”). Each argument lacks merit. As set forth below, the trial court correctly concluded that (1) the evidence presented at trial demonstrated that the Well Lease was reasonable, provided substantial benefits to the Association and is therefore not unconscionable; (2) the Water System is not a public utility and the provisions of Title 54 are therefore inapplicable; and (3) the PSC had no jurisdiction to determine the validity of the Well Lease and its findings. Furthermore, this Court has already determined that the Well Lease does not violate public policy. Accordingly, the trial court’s decision upholding the validity of the Well Lease should be affirmed.

A. The Well Lease Is Not Unconscionable.

In a vain attempt to avoid its obligations under the Well Lease, the Association argues that the trial court erred in failing to conclude that the terms of the Well Lease are unconscionable. For example, the Association argues that it did not need the water from Dansie Well No. 1, that the Dansies’ ten year obligation to lease the well expired long ago, that the value of the Well Lease to the Dansies was at least \$263,607.00, while the value to the Association customers was \$7,000.00, and that the Well Lease requires a perpetual obligation for subsidized water. Br. of Appellee at p. 33. Thus, the Association

argues that these terms represent such “a gross imbalance in the obligations and rights under the Lease, it is unconscionable and should be invalidated” *Id*. The Association’s arguments are not well taken and do not satisfy the strict standards for establishing unconscionability. As stated by the Utah Supreme Court:

The determination of whether a contract is unconscionable is usually made with respect to the conditions that existed at the time the contract was made, and without regard for the parties’ subsequent conduct and dealings. . . . Furthermore, analysis of the relevant interests to be evaluated may be promoted by distinguishing between substantive considerations, which focus on the terms of the contract and procedural considerations, which refer to the relative positions of the parties and circumstances surrounding the execution of the contract.

Bekins, et al v Huth, et al, 644 P.2d 455, 461. The *Bekins* Court set forth the factors that bear on unconscionability:

(1) the use of printed form or boilerplate contracts drawn skillfully by the party in the strongest economic position, ... (2) excessive price or interest; (3) phrasing clauses in language that is incomprehensible to a layman or that divert his attention from the problems raised by them or the rights given up through them, (4) an overall imbalance in the obligations and rights imposed by the bargain, (5) exploitation of the underprivileged, unsophisticated, uneducated and the illiterate, ... (6) contract terms so one-sided as to oppress or unfairly surprise an innocent party, ... and (7) lack of opportunity for meaningful negotiation.

Id at 461-462.

The record fails to contain evidence sufficient to support these criteria. As set forth in the testimony of Rodney Dansie at trial, when the Well Lease was executed in 1977, the Dansie Well offered the only substantial and reliable water source available to

the Association. The Dansies and the Well Lease thereafter provided that reasonable and reliable source of water for the Association until the Association chose to remove itself from the Dansie Well. Tr. at 100:12-:24 (Rodney Dansie). Further, the Association spent thousands of dollars to drill its own alternate well and rework that well in efforts to make the water supply from that well viable and sufficient for the Association's needs. Tr. at 1012:18-015:22, 1016:17-1024:19 & Trial Exs. 259 & 243. The Well Lease saved the Association from that substantial expense until the Association voluntarily chose to incur it.

Likewise, Rodney Dansie and other homeowners testified that the Dansies made available a Dansie water tank to supplement water storage for the Association's system and that the Dansies invested tens of thousands of dollars of their own money to repair and upgrade the Association's water system during the term of the Well Lease. Tr. at 121:14-18 & 209:20-210:16 (Rodney Dansie); 430:15-433:25 (Tyler); Trial Exs. 5 & 176; 479:14-24 (Richard Dansie). While the benefits of the Well Lease became less visible to the Association in later years, and as other sources of water became more available to the Association, the evidence demonstrates that the benefits of the Well Lease in its early years were essential to the Association. Indeed, for many years the members of the Association enjoyed the benefits of the Well Lease without complaint or objection. The record accordingly demonstrates no shocking unfairness that would support any basis for invalidating the Well Lease as unconscionable.¹

¹ Jessie Dansie apparently anticipated the possibility that the operators of the Water

After hearing the evidence and weighing the credibility of the witnesses, the trial court thus correctly determined that:

There were insufficient facts established at the evidentiary hearing for the Court to provide a meaningful review of the unconscionability of the Well Lease. For example, the Court must view the conditions that existed at the time the Well Lease was executed without regard for the parties' subsequent conduct and dealings. Few facts were established about the conditions that existed at the time the Well Lease was executed. Furthermore, there were few facts established regarding the procedural considerations of the Well Lease, meaning the relative positions of the parties and the circumstances surrounding the execution of the contract. The sliding scale consideration of unconscionability requires this Court to have more facts to fully consider the Association's claim.

R. at 1897. Based on the foregoing, the trial court's decision upholding the validity of the Well Lease should be affirmed.

B. The Well Lease Does Not Violate The Public Policy In The Utah Statutes or Constitution.

As correctly determined by the trial court, there is no evidence that any of the terms of the Well Lease violate any statutory provisions or that the public policy would demand that such provisions be unenforceable.

Even though the Water System is no longer public, the Association argues that section 54-3-1 of the Utah Code, which requires public utilities to set "just and

System might establish an alternate supply of water, would sever the lines between the Dansie well and the water system, and the line to the Dansie properties, leaving the Dansie family without water, as occurred in this case. To prevent his family from being left without water, Jessie Dansie provided in the Well Lease that water rights to the Dansie family would continue even if from another water source. The fact that the Association has developed an alternate source of water is therefore not a basis for depriving the Dansies of their contractual rights.

reasonable” charges and fees for its produces and commodities renders the Well Lease provision entitling the Dansies to 12 million gallons of water per year unenforceable. The Association further contends that section 54-3-8(1), which prohibits public utilities from granting “any preference or advantage to any person,” “results in a preference to the Dansies with concomitant disadvantage to the Association’s rate payers.” Br. of Appellee at p. 31. The Association’s reliance on Title 54 is misplaced.

First, Utah Code Ann. § 54-2-1(15)(a) defines a public utility as any “water corporation” that delivers to “the public generally” or to a corporation that is a public utility. The Dansies are neither the general public nor a public utility. Rather, the Water System ceased to be a public utility in 1996. (Trial Ex. 44)². At that time, the PSC and the statutes governing the conduct of public utilities ceased to have any jurisdiction over the Association and its Water System. While the orders of the PSC under Title 54 may have insulated the Association from the requirements of the Well Lease during the period that the Association’s Water System was a regulated public utility, that protection ceased when the Water System ceased to be a public utility. Accordingly, a private contract between the Dansies and the Association allowing the Dansies to transport water through the Water System would not change the Association’s exempt status.

The Association also makes a “catch 22” argument by contending that “if the Association’s Water System serves Dansie customers, it necessarily loses its public

² The February 5, 1996 Order, concludes that the water system was “organized as a non-profit, mutual water company” that “serves some non-members under contract, it does not offer service to the public at large” and therefore decertified the Association’s water system. R. 001119-1121.

utility status.” Br. of Appellee at 31. This argument likewise misses the point. Utah regulates those public utilities that afford services to the public generally. Companies that offer their services only to their members or owners are not treated as public utilities, even if they also provide services on a limited basis under private contracts to other parties. The Association primarily provides water to its members. Prior to and since 1996, however, the Association has provided water to other individuals under contract, including residents of adjacent subdivisions and the Bureau of Land Management. The Well Lease is simply one more private contractual relationship under which the Association is obligated to transport water belonging to the Dansies.

Correctly applying this analysis, the trial court concluded, “[c]learly Title 54 does not apply in this case and the terms of the Well Lease are not prohibited by Title 54. Although the water system operated as a public utility for a short time, for over twenty plus years the water system has operated as a private water system that has not served the public at large. Rather, the Association’s water system is limited to its members and the few non-members under contract.” R. at 1892.

The trial court also correctly held that the public policy embodied in Title 54 could not render the Well Lease invalid, reasoning, “[w]hen the Well Lease was first executed, the Dansie’s well was the only reliable water source available to the Association. The two private parties negotiated the Well Lease at arms length. The Court would be assuming a paternalistic role by declaring the Well Lease void as a matter of public policy embodied in Title 54. Just because the Association previously contracted to give

more than it now desires to give in the Well Lease does not make the Well Lease void as a matter of public policy.” R. at 1893.

Article XI, section 5(b) of the Utah Constitution likewise has no application. That section confers upon municipalities the power “[t]o furnish all local public services, to purchase, hire, construct, own, maintain and operate, or lease public utilities local in extent and use. . .” The Association’s contention that the Well Lease “facially frustrates” the policy of safe and efficient management of water resources because the Association “wants to turn its Water System over to a governmental entity, but cannot do so if the Well Lease is binding,” misses the mark. Br. of Appellee at p. 32. As the trial court correctly concluded, “The Association does not show that private water systems are prohibited by the Utah Constitution or statute, therefore, this argument is unsupported and has no merit.” R. at 1892, n.1.

C. The Findings Of The PSC Are Not Relevant To The Enforceability Of The Well Lease.

The Association’s reliance on the 1986 PSC Order for its argument that that the Well Lease violates public policy is likewise misplaced. In the 1986 Order in question, the PSC purported to find the Well Lease unenforceable and against public policy. The Association’s argument, however, ignores the limited jurisdiction of the PSC and the specific ruling of the Utah Supreme Court in this litigation. As the trial court correctly recognized, “[t]he Utah Supreme Court made it clear that the PSC had authority to determine what contractual expenses should or should not be passed on to rate payers, but could not determine the validity or invalidity of contracts, like the Well Lease. The

findings of the PSC with respect to expenses that may be passed on to the class of ratepayers that the PSC is charged with protecting operate in a wholly different environment than the free contractual arena that exists outside the regulation of public utilities.” R. at 1894.

As previously and conclusively determined by the Utah Supreme Court, the “PSC did not have jurisdiction to invalidate the 1977 Well Lease Agreement as long as that agreement did not impact the rates paid by the Homeowners Association” and “ordinary contracts unrelated to [its rate making authority] are outside of the purview of the PSC jurisdiction.” 901 P.2d 1017, 1023 (Utah 1996).

The Utah Supreme Court acknowledged that the PSC had jurisdiction, in the context of setting rates for public utilities, to determine what contractual expenses should or should not be passed on to rate payers. The Supreme Court made clear, however, that the PSC could not reach beyond its rate-making function to determine the validity or invalidity of contracts. Public utilities have monopoly powers to provide services or goods to the public. In return, those public utilities are subjected to regulation of the services and charges they may impose by the PSC in order to prevent abuses of the monopoly power granted to those utilities. Outside the context of the utilities, however, the State does not confer such monopoly powers and the presumption is that freedom of contract will govern the relationship of the parties. Thus, the finding of the PSC with respect to expenses that may be passed on to the class of rate payers that the PSC is charged with protecting operate in a wholly different environment than the free contractual arena that exists outside the regulation of public utilities.

After hearing and considering all of the evidence presented at trial, the trial court thus correctly determined that, “the Well Lease involved private parties dealing at arms length regarding a private water system. The Court will not impose the PSC’s policy that rates by nondiscriminatory on private parties contracting regarding a private water system.” R. at 1895.

D. This Court Has Already Declined To Find That The Well Lease Violates Public Policy.

This Court addressed the issue of the enforceability of the Well Lease on grounds of public policy in its 1996 decision. *See Hi-Country Estates v. Bagley & Co.*, 928 P.2d 1047 (Utah App. 1996). The Association’s argument to the contrary is therefore without merit. The procedural context by which this issue reached this Court is significant to fully appreciate this Court’s comments. In the early 1990s, the trial court found the Well Lease to be unenforceable based on the PSC’s ruling to that effect. That decision was appealed to this Court, which affirmed the trial court’s decision. *See Hi-Country Estates v. Bagley & Co.*, 863 P.2d 1 (Utah App. 1993). That decision, was, in turn, appealed to the Utah Supreme Court, which held that the PSC had no jurisdiction to determine the enforceability of the Well Lease, and the Supreme Court then remanded the case back to this Court. *See Hi-Country Estates v. Bagley & Co.*, 901 P.2d 1017, 1023 (Utah 1996).

This Court then addressed the question of whether the public policy made the Well Lease unenforceable in the context of a specific ruling on that issue by the Utah Supreme Court. Quite to the contrary of the Association’s contention, the question of whether the Well Lease was valid under public policy was thus squarely before this

Court, which had before it a full record, including the Well Lease and the findings of the PSC. In that context, this Court noted that it could make “a legal determination, independent of the PSC’s conclusions, that the terms of the agreement are unreasonable as applied to the Homeowners Association, and refuse to enforce the agreement on grounds of public policy.” *Hi-Country Estates v. Bagley & Co.*, 928 P.2d 1047, 1052 (Utah Ct. App. 1996). This Court, however, declined to do so, and likewise declined to remand this issue to the trial court for any further determination. *Id.* This Court’s ruling accordingly constitutes a final finding that the Well Lease does not violate public policy.

E. The Well Lease Is Binding On The Association As An Assign Or Sucesssor.

Finally, the Association argues that it is not bound by the terms of the Well Lease because it is not a “successor or assign” to the Well Lease. Br. of Appellee at pp. 29-30. The Association, however, never raised this issue below, and therefore failed to preserve the issue for appeal. Accordingly, the Association has waived this argument, and this Court should refuse to hear the Association’s argument on this point:

In order to preserve an issue for appeal, the issue must be presented to the trial court in such a way that the trial court has an opportunity to rule on that issue. This requirement puts the trial judge on notice of the asserted error and allows for correction at that time in the course of the proceeding. For a trial court to be afforded an opportunity to correct the error (1) the issue must be raised in a timely fashion, (2) the issue must be specifically raised, and (3) the challenging party must introduce supporting evidence or relevant legal authority. Issues that are not raised at trial are usually deemed waived.

438 Main Street v. Easy Heat, Inc., 2004 UT 72, ¶ 51, 99 P.3d 801 (emphasis added) (internal quotations and citations omitted). *See also Strawberry Elec. Service Dist. v. Spanish Fork City*, 918 P.2d 870, 880 (Utah 1996) (declining to address argument because it was raised for first time on appeal); *Bangerter v. Poulton*, 663 P.2d 100, 102 (“It is axiomatic that defenses and claims not raised by the parties in the trial cannot be considered for the first time on appeal.”). The Association never made any argument, or presented any factual evidence or legal authority at the trial court that it was not a successor or assign to the Well Lease, and that it should therefore not be bound by its terms.³ Likewise, the Association has provided this Court with no circumstances, let alone exceptional circumstances, that would justify the Association’s failure to raise this issue below. Therefore, this Court should disregard the Association’s argument about whether it was a successor or assign.

Even if this Court were to hear the Association’s argument, despite their failure to raise the issue in the trial court, the Association’s argument is nonetheless without merit.

³ Tellingly, this issue was not even included in the parties’ stipulation of the remaining issues for trial. Indeed, as the Association has recognized in its brief, the parties stipulated to what issues would be addressed at trial, including: (1) whether the Well Lease Agreement is void as against public policy; (2) whether the Dansies agreed to the chlorination, pumping, testing and transportation costs of transporting their water through the Associations’ water system; (3) if the Dansies did agree, what are the costs of transporting the water; and (4) what damages did the Dansies sustain because the Association refused to transport the water. R. 1555-54. Conspicuously absent from this list is any mention of whether Association is an “assign” or “successor” and whether it should be bound by the Well Lease if it is not. Certainly the questions of whether the Well Lease is void as unconscionable or against public policy are very different from the question of whether the Association is not bound by the Well Lease because it is not a successor or assign.

The Well Lease is binding on Bagley's "successors or assigns," and the Association therefore argues that because it did not succeed to Bagley's interest through "inheritance, assignment or the like," the Association is not subject to the Well Lease. Br. of Appellee at pp. 29-30. The Association's sole legal authority for this argument derives from two cases from this Court, both of which actually contradict the Association's argument. For example, in *Oquirrh Associates v. First National Leasing Co.*, 888 P.2d 659, 661 (Utah Ct. App. 1994), the plaintiff sold a piece of real property to the defendants on an installment contract. Thereafter, the defendants assigned their interest in the property to a third party by quitclaim deed. After the defendants defaulted on the monthly payments, the plaintiff foreclosed on the property, obtained a judgment, and sold the property to itself at a sheriff's sale. *Id.* After failing to collect on the judgment from the defendants, the plaintiff attempted to collect from the third party, arguing that by accepting the quitclaim deed from the defendants, the third party assumed the defendants' obligations as a "successor" under the contract. *Id.* at 663.

This Court held that the third party was not liable for the defendants' obligations to the plaintiff, finding that while the third party "became a successor to the [defendants'] *property interest*," they were not successors to the *contract* between the [defendants] and [plaintiff]. *Id.* (emphasis added). However, this Court noted that a quitclaim deed is a deed of conveyance that passes whatever title, interest or claim that the grantor has in the property. *Id.* Therefore, upon accepting the deed, the third party "obtained the [defendants'] interest in the property *subject to any existing encumbrances against that interest*." *Id.* (emphasis added). Similarly in *West v. Case*, 2006 UT App. 325, ¶ 21, 142

P.3d 576, this Court found that a party not a signatory to a real estate purchase contract was not a successor or assign to the contract, but still had an *in rem* obligation to transfer the property to the purchasers upon their fulfilling of their obligations under the contract. These cases therefore demonstrate that although a successor in title to property may not be a successor to a previous contract, the successor in title still takes the property subject to all existing encumbrances on the land.

Here, the Association took title to the Water System subject to the Well Lease. In earlier litigation, this Court affirmed the trial court's decision to quiet title to the Water System in favor of the Association based on a series of quitclaim deeds granting the parties' respective interests in the water system to the Association. *See Hi-County Estates v. Bagley*, 863 P.2d 1, 4-5 (Utah Ct. App. 1993). Upon receiving the property, the Association therefore took whatever interest in the property the grantors had, "subject to any existing encumbrances." *See Oquirrh*, 888 P.2d at 663. The Association thus cannot receive by quitclaim deed a greater interest than what was held by the grantor. *See id.* As discussed herein, this Court has declared the Well Lease to be a valid encumbrance on the Water System. Because the Water System was encumbered by the Well Lease at the time the Association took title to the property by way of quitclaim deed, the Association took the Water System subject to the Well Lease. Accordingly, the Associations' argument that it is not subject to the lease because it is not a "successor or assign" is without merit.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN AWARDING THE DANSIES \$16,334.99 FOR IMPROVEMENTS TO THE WATER SYSTEM.

The Association contends that the trial court's reliance on the PSC finding for its award of \$16,334.99 to the Dansies for improvements to the Water System is problematic because "it is not certain whether the improvements were for the period 1981-1985 and whether Foothills recovered some or all of the improvements through water rates." Br. of Appellee at 35. The Association is mistaken, as the evidence clearly demonstrates that the trial court acted well within its discretion awarding the Dansies this amount. As explained by the trial court in its January 5, 2006 Order, "[t]he findings of the Public Service Commission in its Final Report and Order dated March 17, 1986, constitute the only credible evidence before the Court regarding the value of improvements to the Water System between 1981 and 1985." R. at 001756. Accordingly, the trial court concluded that "Foothills is entitled to recover the sum of \$16,334.99 as reimbursement for improvements to the Water System between 1981 and 1985." *Id.* at p 5-6. At the hearing on this matter, the trial court further explained as follows:

The Court has *carefully considered* the question [of the value of the improvements between 1981-1985], *and it has been discussed at length over a long, long period of time involving a number of settings.* And the Court finds that the only credible evidence on which the Court can make a decision on the value of the improvements, the only credible admissible evidence on that issue, is the finding of the Public Service Commission. And it provides the Court with the best indication of the value of those improvements on what review and consideration the Public Service Commission made on that issue.

R. at 001866, pp. 51-52 (emphasis added). Such a finding was certainly within the trial's court discretion and the trial court's award of \$16,334.99 in favor of the Dansies should accordingly be affirmed. *See Lysenco v. Sawaya*, 1999 UT App. 31, ¶ 6, 973 P.2d 445 ("We review the trial court's decision to award damages under a standard which gives the court *considerable discretion*, and will not disturb its ruling absent an abuse of discretion. Furthermore, because the adequacy of a damage award is a factual question, we will not reverse the trial court's findings unless they are clearly erroneous.") (emphasis added) (internal citations omitted).

III. THE ASSOCIATION'S RELIANCE ON THE PSC AND THE UTAH SUPREME COURT FOR ITS ARGUMENT THAT THE WELL LEASE REQUIRES THE DANSIES TO PAY THEIR PRO RATA TRANSPORTATION COSTS IS MISPLACED.

The Association's argument that requiring its members to provide the Dansies with the water and hook-ups as provided in the Well Lease would violate the ruling of the PSC is irrelevant, as the PSC no longer has jurisdiction over the Water System. Indeed, the Association does not dispute that because the PSC divested itself of jurisdiction over the Water System in 1996, its 1986 Order is no longer binding or enforceable on the water system. Likewise, the Association does not dispute that because the PSC's 1986 Order was the only thing that limited how the courts of Utah have enforced the Well Lease, and because the 1986 Order is no longer binding, the Well Lease must be enforced in its entirety. Rather, the Association simply suggests that because of the costs involved in providing the water and hook-ups, as provided in the Well Lease, those terms should

not be enforced. This argument misses the mark, and the trial court's Order should accordingly be reversed.

The Association also mischaracterizes the Utah Supreme Court's decision in *Hi-Country II*, 901 P.2d at 1023, by stating that "[t]he Supreme Court further held that the PSC could not invalidate the Well Lease 'as long as that agreement did not impact the rates paid by the Homeowners Association.'" Br. of Appellee at 35 (quoting *Hi-Country Estates v Bagley & Co.*, 901 P.2d at 1023). In truth, the Utah Supreme Court stated:

In any event, the PSC did not have jurisdiction to invalidate the 1977 well lease agreement as long as that agreement did not impact the rates paid by the Homeowners Association. Although the PSC has power to construe contracts affecting matters within its jurisdiction such as rate-making, *ordinary contracts unrelated to such matters are outside the purview of PSC jurisdiction.*

Hi-Country Estates v. Bagley & Co., 901 P.2d at 1023 (emphasis added). Viewed in the appropriate context, it is clear that the Utah Supreme Court's language does not never imposed any condition whatsoever on the validity or enforceability of the Well Lease.⁴

The initial decision to limit the application of the Well Lease was made not by the trial court, but by the PSC-which has not had jurisdiction over this matter since February 5, 1996. In contrast, both this Court and the Supreme Court have ruled that the Well Lease is a valid and binding encumbrance on the water system.

⁴ For this same reason, the Association's discussion of the amount that it costs the Association to produce and transport water through the water system is irrelevant, as the PSC's Order is no longer valid or binding.

A. Enforcing The Terms of The Well Lease Would Not Subject The Water System To The Jurisdiction Of The PSC.

Reversing that portion of the trial court's order requiring the Dansie's to pay their pro rata share of the transportation costs would not subject the Association to PSC regulation as a public utility, despite the Association's argument to the contrary. As expressly acknowledged by the Utah Supreme Court, "[t]he PSC has only the rights and powers granted to it by statute." *Hi-Country Estates v. Bagley & Co.*, 901 P.2d at 1021. Thus, the PSC's authority is limited to exercising jurisdiction over "public utilities," i.e., utilities that serve the public. Utah Code Ann. § § 54-2-1(15).⁵ Section 54-2-1(15) of the Utah Code expressly defines a "public utility" as, among other entities, a "water corporation ... where the service is performed for, or the commodity is delivered to, the

⁵ The Association cites to section 24-2-1 (26) & (27) of the Utah Code in support of its argument that supplying water to the Dansies in accordance with the Well Lease would remove it from statutory exemption. Section 24-2 of the Utah Code is nonexistent, and the Dansies assume that the Association is instead relying on section 54, as set forth above. Even with this assumption, the Association's argument must fail. Subsections 26 of section 24-2-1 defines transportation of property to include:

Every service in connection with or incidental to the transportation of property, including in particular its receipt, delivery, elevation, transfer, switching, carriage, ventilation, refrigeration, icing, dunnage, storage, and hauling, and the transmission of credit by express companies.

Subsection 27 of section 24-2-1 likewise defines "water corporation" to include:

Every corporation and person, their lessees, trustees, and receivers, owning, controlling, operating, or managing any water system for public service within this state. It does not include private irrigation companies engaged in distributing water only to their stockholders, or towns, cities, counties, water conservancy districts, improvement districts, or other governmental units created or organized under any general or special law of this state.

Neither of these provisions discuss whether the Association qualifies for exemption as a public utility.

public generally ...” In decertifying the Association as a public utility on Feb 5, 1996, the PSC specifically found that the Association (1) “is organized as a nonprofit corporation providing service to its members,” *and* (2) “serves a limited number of nonmembers pursuant to specific contracts; however it does not offer its service to the public generally.” R. at 001119-1120. Thus, as explained in detail in the Dansies’ Opening Brief, the 1986 PSC Order is no longer applicable. Furthermore, adding the Dansies to the Association’s list of water-users but enforcing the terms of the Water Lease would simply add the Dansies to the “limited number of nonmembers pursuant to specific contracts” recognized by the PSC, and therefore would not remove the Association from exemption of its jurisdiction.

B. Requiring The Association To Provide Water To The Dansies In Accordance With The Terms Of The Well Lease Does Not Conflict With Section 746-331-1.C Of The Utah Administrative Code.

The Association’s reliance on section 746-331-1C of the Utah Administrative Code is likewise misplaced.⁶ This regulation was adopted on April 6, 1998. The PSC

⁶ This regulation provides as follows:

If, on the basis of the information elicited, the Commission finds that the entity is an existing non-profit corporation, in good standing with the Division of Corporation; that the entity owns or otherwise adequately controls the assets necessary to furnish culinary water service to its members, including water sources and plants; and that voting control of the entity is distributed in a way that each member enjoys a complete commonality of interest, as a consumer, such that rate regulation would be superfluous, then the Commission shall issue its finding that the entity is exempt from Commission jurisdiction and the proceeding shall end. Issuance of the findings shall not preclude another Commission inquiry at a later time if changed circumstances or later-discovered facts warrant another inquiry.

therefore could not have relied on any portion of this regulation when it decertified the Association as a public utility in 1996 and therefore irrelevant to this issue. *See Roark v. Crabtree*, 893 P.2d 1058, 1061 (Utah 1995) (“It is a long-standing rule of statutory construction that a legislative enactment which alters the substantive law or affects vested rights will not be read to operate retrospectively unless the legislature has clearly expressed that intention.”); *Madsen v. Borthick*, 769 P.2d 245, 253 (Utah 1988) (same).

Moreover, even if relevant, and without citation to any support, the Association seems to suggest that it would lose its exemption because the Association does not own or control the assets necessary to furnish culinary water service to Dansies, and that the Dansies are neither member of the Association nor do they share a commonality of interest with all other customers of the system. Br. of Appellee at p. 38. These contentions grossly misstate the language of Regulation 746-331-1C. The Association owns title to the Water System, which certainly includes the “assets necessary” to furnish water to the Dansies. Furthermore, nowhere does Regulation 746-331-1C require the Association to provide service *exclusively* to its members. Rather, the requirement is simply that the *voting control* of the entity be “distributed in a way that each member enjoys a complete commonality of interest. . . .” Simply because the Dansies are not members of the Association does not trigger the PSC’s jurisdiction. Accordingly, Regulation 746-331-1.C simply has no bearing on this issue.

IV. THE RECORD DEMONSTRATES THAT THE TRIAL COURT ERRED IN DETERMINING THAT THE ASSOCIATION DID NOT BREACH THE WELL LEASE AND THEREFORE SUFFERED NO DAMAGES.

A. The Record Does Not Support The Trial Court's Conclusion That The Dansies Made No Offer To Pay Transportation Costs.

The Association's argument that there exists "ample evidence" to support the trial court's finding that the Dansies never offered to pay pro rata transportation costs is contrary to the record.⁷ The Association does not dispute that Rodney Dansie had several conversations with the Association whereby he offered to pay costs associated with re-connecting the water system and transporting the water to the Dansies. The Association consistently responded to Rodney Dansie's offers by unequivocally informing him that "absolutely, under no condition would I be reconnected to that water system ever." Tr. at 431:4-21 (Tyler); 120:19-122:2 & 187:6-189:21 (Rodney Dansie).⁸

In addition, Richard Dansie testified that after the Association disconnected the water lines, he attended a meeting with the Association members whereby "I explained my situation, that I needed to be hooked on to the water. I needed water and I was willing to pay whatever it took, whatever the cost was to get me water. And I indicated that, you know, the lines were there, I had meters in place. And they said they couldn't

⁷ In addition, the Association is mistaken that the Dansies failed to adequately marshal the evidence. As set forth in their Opening Brief, the Dansies cited to the trial testimony of Deborah Watson and Joe Totorica, the two witnesses who testified at trial that the Dansies did not offer to pay transportation costs.

⁸ In fact, Rodney Dansie testified that he had conversations with Ken Norton, Daryl Wooly, Craig Winger, Deborah Watson, Joe Totorica and Merrill Jensen, all directors of the Association, whereby Mr. Dansie offered to pay *all* the costs associated with transporting the water through the water system. The Association flatly rejected these numerous offers. Tr. at 187:6-189:25 (Rodney Dansie).

help me.” Tr. at 478:16-21 (Richard Dansie). . When asked why he offered to pay whatever cost was necessary when the Well Lease provided for water at no charge, Richard Dansie explained, “I just needed water. . . . But I needed water then and so I was willing to pay whatever cost would be to get me some water so I didn’t have to cancel parties.” Tr. at 479: 20-24 (Richard Dansie).

Finally, the Association’s attempt to discredit the testimony of Steve Maxfield because he did not testify that Rodney Dansie offered to pay the Association for transportation costs is unavailing. Mr. Maxfield testified that he attended a meeting with Rodney Dansie at the Jordan Valley Water Conservancy District, which was also attended by Association members Deborah Watson and Joe Totorica, both of whom testified that the Dansies never made any offer to pay for the water. Tr. at 1202:7-1203:3; 1218:1-16 (Watson) & 1368:18-1369:8 (Joe Totorica). During this meeting, Mr. Maxfield, an unbiased witness, testified that Rodney Dansie offered to pay the costs associated with hooking him back up to the water system. The Association’s response was simple: “no way, period.” Tr. at 564:1-565:19 (Maxfield). The Association’s response would have certainly been the same regardless of whether Rodney Dansie offered to pay transportation costs. The evidence presented to the trial court therefore supports the conclusion that the Association never had any intention to transport water to the Dansies as required under the Well Lease, and likewise ignored or flatly refused all of the Dansie’s multiple offers to pay to reconnect the water lines. The trial court’s finding that the Dansies made no such offer is therefore not supported by the record.

B. The Record Does Not Support The Trial Court's Decision Denying The Dansies' Claim For Damages.

As explained in detail in the Dansies' Opening Brief, immediately upon assuming control of the Water System, the Association severed the Dansies' connection to that Water System and renounced any obligations under the Well Lease. At that time, the trial court had already held that the Well Lease was a valid and binding encumbrance on the Water System and that finding was still under appeal. As a result of the Association's actions in defiance of the trial court's ruling, the Dansies were forced to construct a temporary water system. Likewise, the Dansies were unable to develop and market their property, and suffered damage to their landscaping and fruit trees. The Association's argument that the Dansies' damages were "self-inflicted" is contrary to this evidence. First, the Dansies mitigated their damages by constructing a temporary water system. In fact, had the Dansies' not expended the effort and expense to construct this water system, their damages would certainly have increased exponentially. Second, it was certainly reasonably foreseeable at the time the Well Lease was executed that the Dansies would suffer damages should the Dansies be disconnected from the water system. Indeed, the purpose of the amendment to the Well Lease was to ensure that the Dansies had an adequate water supply. The Association's argument to the contrary is therefore without merit.

Third, the Dansies have not changed their damages theories. Quite to the contrary, the Dansies have consistently maintained (1) that because the Well Lease requires the Association to provide up to 12 million gallons of water to the Dansies per year at no

cost, the Association breached the Well Lease by disconnecting and severing the water lines; and (2) that as a direct and proximate result of the Association's actions, the Dansies have suffered damages. This is the theory that was presented at trial. Although certain of the damage calculations may have changed as new evidence was brought to light, the theory has remained consistent.

Finally, an alternative water supply was not available to the Dansies. Not only did the Association flatly refuse each of the Dansies' offer to pay to restore water service, but there existed no other source from which the Dansies could draw water. The Dansies could not physically divert water through Lot 9 because no line existed to distribute that water. The Dansie irrigation wells that were scattered across the Dansie property were at elevations where they could not provide service to the Dansie residences and no lines existed to provide such service even if the wells had the capacity to provide water.

Tr. at 105:14-106:21, 115:1-16, 117:3-17, 120:19-122:4, 127:9-128:15 (Rodney Dansie). Rather, the Dansies could secure water service only when they constructed a new temporary water system. Indeed, the fact of the loss of water service to the Dansie property is evidenced by the Dansie complaints to the PSC regarding termination of service, contemporaneous entries in Rodney Dansies' day timer (Trial Ex. 48), the expenses the Dansies incurred in constructing a temporary water system, and Richard Dansies' plea to the Association to restore water service to him, on any conditions. On the basis of this evidence, the trial court clearly erred in concluding that the Dansies did not suffer any damages.

V. THE ASSOCIATION IS LIABLE FOR THE DANSIES' ATTORNEYS' FEES.

The Association mistakenly contends that it is not liable for the Dansies' attorneys fees, as set forth in the Well Lease, because it was not a successor or assign to the Well Lease. As explained above, however, this Court has already determined that the Well Lease is a valid and binding encumbrance on the Water System. The Well Lease provides that successors to Bagley are liable for attorneys' fees incurred in enforcing rights under the Well Lease. For twenty years now, the Association has received the benefits of the Well Lease, and is now Bagley's successor in the operation of the Water System. In fact, it was the Association that severed the Water System, depriving the Dansies of their rights to receive water under the Well Lease. Such action clearly demonstrates that the Association is liable for the Dansies' attorneys' fees incurred both at the trial court and on appeal.

VI. CONCLUSION

For the reasons set forth above, the Dansies respectfully request that this Court enter an Order affirming trial court's Order holding that Well Lease is neither unconscionable nor violative of any public policy, as well as the trial court's judgment of \$16,334.99 in favor of the Dansies. In addition, the Dansies respectfully request that this Court likewise reverse the Order of the trial court, and holding that (1) the Dansies are entitled to the full benefit of the Well Lease, including, at no charge, up to twelve million gallons of water per year and up to fifty connections; (2) by severing the two water systems, the Association breached its obligations pursuant to the Well Lease, causing the

Dansies to sustain damages established at trial; and (3) the Dansies are entitled to an award of attorneys' fees and costs incurred both at the trial court and on appeal.

DATED this 21st day of June, 2007.

PARSONS BEHLE & LATIMER

A handwritten signature in cursive script, appearing to read "Angie Nelson", is written over a horizontal line.

RAYMOND T. ETCHEVERRY

ANGIE NELSON

Attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on this 21st, day of June, 2007, I caused to be mailed, first class postage prepaid, two copies of the foregoing, **REPLY BRIEF OF APPELLANTS**,
to:

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Brian McFarland