

2008

Wasatch County v. Utah State Tax Commission, Warren and Tricia Osborn, et al : Reply Brief

Utah Court of Appeals

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Maxwell Miller; Randy Grimsahw; Parsons Behle & Latimer; Attorneys for Appellees, Warren and Tricia Osborn et al.; Timothy Bodily; Assistant Attorney General; Attorney for Respondent Tax Commission.

Thomas Low; Wasatch County Attorney; Kevin S. Thurman; Deputy Wasatch County Attorney; Attorneys for Petitioner/Appellant.

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IN THE UTAH COURT OF APPEALS

WASATCH COUNTY, Petitioner/Appellant, vs. UTAH STATE TAX COMMISSION, Respondent/Appellee, WARREN AND TRICIA OSBORN, et al. Appellees.	Case No. 20080732 CA Tax Commission Appeals Nos.: 06-1504, 06-1505, 06-1506, 06-1507, 06-1508, 06-1509, 06-1510
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APPEAL FROM THE THIRD DISTRICT COURT, SALT LAKE COUNTY
JUDGE JOHN PAUL KENNEDY

WASATCH COUNTY'S REPLY TO BRIEF OF APPELLEES WARREN AND TRICIA OSBORN, ET AL.

Maxwell Miller (#2264)
Randy Grimshaw (#1259)
Parsons Behle & Latimer
201 South Main Street, Suite 1800
Salt Lake City, UT 84111
Telephone: (801) 532-1234
Facsimile: (801) 536-6111
Attorneys for Appellees, Warren and Tricia Osborn, et al.

Thomas Low (#6601)
Wasatch County Attorney
Kevin S. Thurman (#11236)
Deputy Wasatch County Attorney
805 West 100 South
Heber City, UT 84032
Telephone: (435) 654-2909
Facsimile: (435) 654-2947
Attorneys for Petitioner/Appellant

Timothy Bodily (#6496)
Assistant Attorney General
160 East 300 South, Fifth Floor
Salt Lake City, UT 84114-0874
Telephone: (801) 366-0375
Facsimile: (801) 366-0378
Attorney for Respondent Tax Commission

FILED
UTAH APPELLATE COURTS
JAN 20 2009

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Maxwell Miller (#2264)
Randy Grimshaw (#1259)
Parsons Behle & Latimer
201 South Main Street, Suite 1800
Salt Lake City, UT 84111
Telephone: (801) 532-1234
Facsimile: (801) 536-6111
Attorneys for Appellees, Warren and
Tricia Osborn, et al.

Thomas Low (#6601)
Wasatch County Attorney
Kevin S. Thurman (#11236)
Deputy Wasatch County Attorney
805 West 100 South
Heber City, UT 84032
Telephone: (435) 654-2909
Facsimile: (435) 654-2947
Attorneys for Petitioner/Appellant

Timothy Bodily (#6496)
Assistant Attorney General
160 East 300 South, Fifth Floor
Salt Lake City, UT 84114-0874
Telephone: (801) 366-0375
Facsimile: (801) 366-0378
Attorney for Respondent Tax Commission

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RESPONSE TO TAXPAYERS' STATEMENT OF THE CASE

1. Wasatch County agrees with Procedural Background and Relevant Fact Number 1.
2. With regard to Fact Number 2, Wasatch County admits that it filed a cross petition with the Utah Supreme Court. However, it disagrees with the Taxpayers' assertion that by filing the cross petition the County exercised its option of seeking review of the Tax Commission's decision in the Utah Supreme Court. *See Taxpayers' Brief* at 7.
3. With regard to Fact Number 3, Wasatch County disagrees that it filed a second petition for review. Wasatch County affirmatively asserts that its cross petition filed in the Utah Supreme Court was a responsive pleading to the Taxpayers' petition for review and was merely filed to protect its rights in the Supreme Court action.
4. With regard to Fact Number 4, Wasatch County agrees that it filed a cross petition and motion to stay in case number 20080304-CA with the Utah Supreme Court. However, the County affirmatively asserts that it never filed any pleading entitled "First Petition for Review of the Tax Commission's Final Decision," as Taxpayers wrongfully claim. *Id.*
5. With regard to Fact Number 5, Wasatch County agrees that its motion to stay requested that this Court stay proceedings in case number 2008034-CA, but specifically denies that it filed a "First Petition for Review" in the Utah Supreme Court. *See id.* Wasatch County agrees with the Taxpayers' statement that this Court granted the County's motion to stay.

6. With regard to Fact Number 6, Wasatch County agrees with the majority of the Taxpayers' quotation of this Court's Order granting the County's motion to stay. However, Wasatch County disagrees that this Court labeled the County's cross petition as "[Wasatch County's second Petition for Review]" in its Order. *See id.* This Court in fact stated: "[Wasatch County's] *petition for judicial review* pending in the Fourth District Court . . . as case number 0805001927[.]" *Utah Court of Appeals Order*, at 1 (Case No. 20080304-CA) (emphasis added). *See* Exhibit 1.
7. With regard to Fact Number 7, Wasatch County denies that it filed a "Second Petition for Review." *Taxpayers' Brief* at 8. Otherwise, Wasatch County agrees with the remainder of Fact Number 7.
8. Taxpayers' Brief is absent a Fact Number 8.
9. With regard to Fact Number 9, Wasatch County denies that it filed a "second appeal" in the district court action. *Taxpayers' Brief* at 9. Otherwise, Wasatch County agrees with the remainder of Fact Number 9.
10. With regard to Fact Number 10, Wasatch County denies that it filed a "First Petition for Review" with the Utah Supreme Court. *Id.* Wasatch County also denies that its second Motion to Stay sought a delay of Taxpayers' Petition for Review with this Court, and that such a motion would deprive Taxpayers of "their right of appeal from the Tax Commission to this Court." *Id.* Otherwise, Wasatch County agrees with the remainder of Fact Number 10.
11. Wasatch County agrees with Taxpayers' Fact Number 11.

SUMMARY OF THE ARGUMENT

The County believes that it properly and accurately stated its argument as to why this Court should reverse the district court's action to in its Brief filed on November 7, 2008. Therefore, this Reply will only address the issues raised by the Taxpayers and will address each of the Taxpayers' arguments in the same order as the Taxpayers' Brief.

First, the County did not preclude itself from filing a petition for review in district court by filing a cross appeal in the Utah Supreme Court action first because the County was required to respond to Taxpayers' notice of appeal by filing a cross petition in order to ask the supreme court to enlarge the County's rights or diminish the Taxpayers' rights. If the County, as a responding party, failed to file a cross petition, the County would only have been able to seek affirmation of the Tax Commission's decision.

Second, Taxpayers misconstrue the County's argument that it followed the proper procedure for invoking *de novo* review in the district court outlined in Utah Code Section 59-1-602 and Rule 14 of the Utah Rules of Appellate Procedure. Taxpayers distort the County's argument in a strained effort to claim that the County should be required to pay attorney fees. The County was not, as Taxpayers claim, attempting to force the district court to use the Rules of Appellate Procedure in a *de novo* review. Whether *de novo* review in district court includes an application of the Rules of Appellate Procedure is irrelevant for the action before this Court.

Third, Taxpayers misconstrue the County's argument that a district court *de novo* review is the most efficient manner of developing the factual issues in this case. Taxpayers contend that the County's discussion on efficiency was to ask this Court to

decide an issue pertaining to allocation of value or to supplement the record before this Court. However, as is clear from the County's Brief, the discussion on efficiency was included merely to emphasize that Section 59-1-602 should be interpreted in the County's favor, which is exactly the issue before this Court.

Finally, the County's Appeal to this Court is not frivolous because it is warranted by existing law, specifically case law and statutory authority that squarely contradict the decision of the Third District Court. Thus, Taxpayers are not entitled to attorney fees.

DETAIL OF THE ARGUMENT

I. WASATCH COUNTY WAS REQUIRED TO FILE A CROSS APPEAL IN ORDER TO PRESERVE ITS RIGHT TO CHALLENGE THE LOWER COURT DECISION AND THEREFORE WAS PROTECTING ITS RIGHTS.

The Taxpayers claim that Wasatch County's cross petition, filed in response to the Taxpayers' supreme court petition for review, was a petition for review under Utah Code Ann. § 59-1-602(1)(a). As a result, the Taxpayers argue that the County's district court petition for review was precluded because the County had already filed a petition for review. The Taxpayers accuse the County of "fabricat[ing] legal and factual positions that are not supported by Utah law or the record." *Taxpayers' Brief* at 11. They also claim that the County is attempting to request "a judicial amendment of Utah Code Ann. §59-1-602 to authorize the County's duplicative appeals to the Utah Supreme Court and the Utah district court." *Id.* However, these assertions are unfounded. Further, the County's position that its cross appeal was merely a protective pleading filed in response to the Taxpayers' notice of appeal is clearly supported by Utah law.

Wasatch County was required to file a cross appeal in order to preserve its right to challenge the Tax Commission's decision. The Utah Supreme Court has made it clear that a cross petition must be filed by an opposing party if it seeks to have the appellate court do anything other than affirm a lower court's decision.¹ *State v. South*, 924 P.2d 354, 355-356 (Utah 1996), *remanded to* 932 P.2d 622 (Utah App. 1997), *cert. denied*,

¹ This rule holds true for both actions in the Utah Supreme Court and the Utah Court of Appeals. For example, in *South*, the issue before the Utah Supreme Court was whether the Court of Appeals properly held that the State must file a cross appeal in order to raise additional grounds for affirmance of the lower court's decision.

940 P.2d 1224 (Utah 1997), *cited with approval in Smith v. Four Corners Mental Health Center, Inc.*, 2003 UT 23. In *South*, the Utah Supreme Court held that a party wishing only for the appellate court to affirm the lower court's decision does not have to file a cross petition. *Id.* at 355. In so holding, the court cited with approval the holding in *Langnes v. Green*, 282 U.S. 531 (1931), which held that a party responding to a notice of appeal **must** cross petition the court if the responding party wishes to enlarge their own rights or lessen the rights of their opponents. *Id.* at 355. In agreeing with *Langnes*, this Court stated that the "*Langnes* rule" is "grounded in fairness, common sense, and judicial efficiency." *Id.* at 356.

Further, the Utah Rules of Appellate Procedure contemplate that an appellee alone is different from an appellee who is also a cross-appellant, and each has different rights. For example, Rule 24, "Briefs," states:

(g)(2) The appellee shall then file one brief, entitled ***Brief of Appellee*** and ***Cross-Appellant***, which shall respond to the ***issues raised in the Brief of Appellant*** and ***present the issues raised in the cross-appeal***.

URAP 24(g)(2) (emphasis added) (attached as Exhibit 2). As Rule 24 provides, an appellee responds "to the issues raised in the Brief of the Appellant" and a cross-appellant presents "issues raised in the cross-appeal." *Id.* Thus an appellee, who is automatically a party of the appeal, is merely one who responds to the arguments made by the appellant. On the other hand, an appellee may also be a cross-appellant if he or she has filed a cross-appeal.

This reading of Rule 24 corresponds to Rule 50 of the Utah Rules of Appellate Procedure, which applies to writs of certiorari. Under Rule 50, a brief in opposition is

filed in the Utah Supreme Court by the respondent for the purpose of “disclosing any matter or ground why the case *should not be reviewed* by the Supreme Court.” *URAP 50* (emphasis added) (attached as Exhibit 2). However, the respondent may also file a “cross-petition for a writ of certiorari” if he or she desires to assert independent grounds for supreme court review. *See id.*

Here, Wasatch County filed its cross petition with the Utah Supreme Court to protect its rights to question the Tax Commission’s decision. This was neither a petition for review nor a separate action and was necessary to protect the County’s interests in the Taxpayers’ petition for review. Wasatch County was not merely seeking affirmation of the lower court decision and was therefore required to file the cross appeal. The Taxpayers claim it would have confused them less if the County had, instead, filed a “response” or similar pleading. However, such a pleading would not have allowed the County to argue that its rights should be enlarged or that the Taxpayers’ rights should be lessened. As a result, Wasatch County was not filing a “First Petition” but was merely filing a responsive, protective pleading as was required in the action that was initiated by the Taxpayers’ petition for review.

As the County explained in its Brief, the Tax Commission’s decision was not overwhelmingly in either party’s favor and was essentially a compromise between the County and Appellees. *See County Brief* at 21-22. As is clear from the *South* decision, the County would have lost its ability to challenge the Tax Commission decision had it not filed the cross petition. Failing to file a cross petition would certainly have benefited the Taxpayers, but Wasatch County would have lost a significant right by not doing so.

By filing a cross petition, the County responded to the petition for review filed by the Osborns as it is required to do, and it also preserved its right to argue for something other than mere affirmation of the Tax Commission decision.

II. TAXPAYERS MISCONSTRUE THE COUNTY’S ARGUMENT THAT IT FOLLOWED THE PROCEDURE FOR INVOKING DISTRICT COURT JURISDICTION IN A FRIVOLOUS EFFORT TO REQUEST ATTORNEY FEES.

The Taxpayers devote 4 ½ pages of their brief to discuss a statement in the County’s brief regarding the standard of review for the district court action and take the County’s statement out of context in a frivolous attempt to claim attorneys fees. For example, the County states in its brief that it properly exercised the option to have the district court conduct a *de novo* review by “faithfully follow[ing] the requirements of section 59-1-602(1)(c) and Rule 14 [of the Utah Rules of Appellate Procedure].” *County Brief* at 13-14. Taxpayers argue that the County’s “*argument*” is “nonsensical” and that the County is “attempting to *force* the district court to conduct a ‘trial *de novo*’ using the Utah Rules of Appellate Procedure.” *Taxpayers’ Brief* at 23 (emphasis added). The action currently before this Court is to appeal the Third District Court’s decision to dismiss case number 080907392, not to determine the rules of procedure that the district court will follow in carrying out the *de novo* review. The County merely demonstrated that it had properly invoked the jurisdiction of the district court. *County Brief* at 13. The County also demonstrated that it followed Utah Code Section 59-1-602(1)(c) to invoke the district court’s jurisdiction.

The County also legitimately mentioned the *de novo* standard of review for the purposes of discussing statutory interpretation. In discussing *de novo* review, the County argued that it would be inappropriate to “narrowly constru[e] [Section 59-1-602], which intends to preserve [the] option [of *de novo* review], in a manner that effectively eviscerates the option [of *de novo* review] [.]” *County Brief* at 16. The County emphasized that by allowing each party to choose the forum in which to bring a petition for review, Section 59-1-602(1)(a) necessarily lets each party choose between the two standards of review—*de novo* in district court or a review on the record in the Utah Court of Appeals or Supreme Court. Thus, a narrow construction of Section 59-1-602 to disallow a district court petition for review because a cross petition is also filed in the supreme court would deprive the County of its right to a trial *de novo*.

The question may be asked why the Taxpayers devote 4 ½ pages for an irrelevant point that is not at issue. The answer comes in the very last sentence of the Taxpayers’ argument. The Taxpayers state, “Such arguments do not meet the good faith standard under Rule 33 of the Utah Rules of Appellate Procedure.” *Id.* at 25. Thus, it appears the Taxpayers ask for attorney fees to rebut an argument that the County does not make and that is not properly before this Court. Under such circumstances, it may be appropriate to examine whether this portion of Taxpayers’ brief itself was “interposed for the purpose of delay,” or to “cause needless increase in the cost of litigation.” *See URAP* 33(b) (attached as Exhibit 2). However, in the interests of efficiency and decorum, the County declines to do so.

III. TAXPAYERS MISCONSTRUE THE COUNTY’S DISCUSSION ON *DE NOVO* REVIEW AS ATTEMPTING TO ASK THIS COURT TO CONSIDER AN IMPROPER ISSUE.

In its Brief, the County recites some of the pertinent facts of the original appeal before the Tax Commission, as well as the legal issue affected by those facts—the allocation of value—to emphasize the point that many factual issues are in dispute that are central to the parties’ respective appeals. *County Brief* at 20-21. The County then states that a district court *de novo* review is the most efficient manner of developing the factual issues in this case, thus ensuring more effective and efficient consideration at the appellate level. *County Brief* at 21. This argument was made to provide background as to why this Court should construe Utah Code Sections 59-1-601 and 602, as well as Rule 14 of the Rules of Appellate Procedure, to allow the County to proceed with its action in district court without being precluded from doing so by the filing of the cross appeal the day before.

Taxpayers misconstrue this statement as a request by the County for this Court to decide an improper issue—the allocation issue—or as an attempt by the County to supplement the record before this Court. However, the County’s statement was merely for the purposes of statutory interpretation, which is exactly the issue before this Court; namely, how to properly interpret Utah Code Sections 59-1-601 and 602 and Rule 14. It was not to ask this Court to decide the allocation issue or to supplement the record before this Court. Taxpayers’ argument on this point may be considered frivolous, as the County’s arguments are clear from a respectful reading of its Brief. Contrary to Taxpayers’ contentions, the County agrees wholeheartedly with the statement that “the

only issue is whether or not the district court improperly determined that it lacked jurisdiction” over the County’s petition for review. *Osborn Brief* at 29.

IV. TAXPAYERS ARE NOT ENTITLED TO ATTORNEYS FEES

Taxpayers have made a somewhat aggressive request for attorney’s fees on the basis that the County’s appeal to this Court is frivolous under Rule of Appellate Procedure 33. Damages may be awarded if an appeal is either frivolous or interposed merely for delay. *URAP* 33(a) (attached as Exhibit 2). An appeal is interposed for the purpose of delay if it is “interposed for any improper purpose such as to harass, cause needless increase in the cost of litigation, or gain time that will benefit only the party filing the appeal.” *URAP* 33(b).

As the only delay in Taxpayers’ separate appeal of the Tax Commission’s decision was granted by this Court in response to the County’s motion, no legitimate argument can be made that the present appeal caused any undue delay to the Taxpayers’ appeal. *See* Exhibit 1. Moreover, as the County is merely attempting to assert a right that Utah law affords it (to obtain a *de novo* review of the Tax Commission decision) in order to fill a void in the evidence found to exist by the Tax Commission (how to allocate value within the ten-acre building areas), it can also hardly be said to have filed the present appeal for the purposes of harassment or to needlessly increase the costs of litigation. All that is left, therefore, is Taxpayers’ argument that the County’s appeal is frivolous.

The burden to show frivolity is a heavy one.² Even a meritless appeal is not necessarily frivolous. *L.C. v. State*, 963 P.2d 761, 765 (Utah App. 1998) (in the context of an *Anders* brief, “this court must be assured that an issue is *not just meritless*, but that counsel has engaged in sufficient analysis of the record and case law to be secure in the belief that the issues are *frivolous*.”). Thus Taxpayers must show not only that the County’s appeal is entirely meritless, but they must also show that the arguments in support of the County’s appeal were not advanced “based on a good faith argument to extend, modify, or reverse existing law.” *URAP* 33(b). However, instead of attempting to meet this burden, Taxpayers argue points not at issue in this appeal and leave the County’s arguments all but untouched.

For example, Taxpayers’ brief ignores the question of how the County *should have*, in their view, protected its rights in their supreme court appeal and still prosecuted its own district court appeal. Apparently, therefore, Taxpayers’ position is simply that it cannot ever be done: a litigant before the Tax Commission will always lose one appellate right or the other if another litigant exercises a different appellate right. However, Taxpayers’ brief does not square this awkward position with the precedent and rules which not only permit but *require* cross-appeals. Where Taxpayers’ brief ignores entire swaths of the County’s opening brief, it is difficult for their argument relating to frivolity to have merit.

The County’s appeal to this Court, on the other hand, is warranted by existing law that directly contradicts the arguments of the Taxpayers and the ruling of Third District

² And, in the County’s opinion, it is one that should not be undertaken lightly.

Court. By filing a petition for review in district court, the County was exercising its statutory right to choose its forum to challenge the Tax Commission's decision. Under the *Langnes* rule, it is clear that the County was not filing a duplicative appeal since the cross petition was not a petition for review under Utah Code Ann. § 59-1-602(1)(a), but was rather a responsive pleading filed to protect the County's right to ask the Utah Supreme Court for something other than mere affirmation of the Tax Commission's decision. Thus Wasatch County's position that its cross petition was merely a protective and legally required pleading is in fact "supported by Utah law." See *Taxpayers' Brief* at 11.

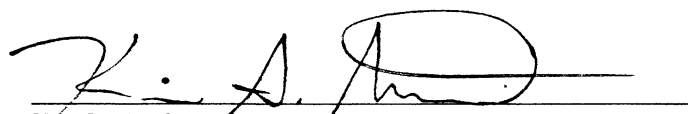
For the foregoing reasons, Taxpayers are not entitled to an award of attorney fees.

CONCLUSION

For the foregoing reasons, Wasatch County asks this Court to reverse the district court's dismissal of the county's *de novo* review and to reinstate that review.

Furthermore, Wasatch County asks this Court to deny Taxpayers' request for attorney fees.

DATED this 20th day of January, 2009.

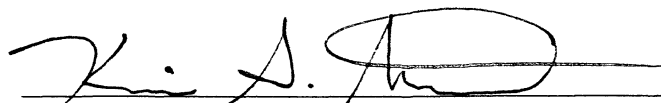

THOMAS L. LOW
KEVIN S. THURMAN
ATTORNEYS FOR WASATCH COUNTY

CERTIFICATE OF MAILING

I hereby certify that I mailed two copies of the foregoing Reply Brief, in its bound condition, by first class mail, postage paid, on the 20th day of January, 2009, to each of the following:

Timothy Bodily (#06496)
Clark Snelson (#04673)
Utah Attorney General's Office
160 East 300 South, Fifth Floor
Salt Lake City, Utah 84111
Telephone: (801) 366-0375
Facsimile: (801) 366-0378
Attorney for Respondent Utah State Tax Commission

Randy Grimshaw (#2264)
Maxwell Miller (#1259)
Parsons Behle & Latimer
201 South Main Street, Suite 1800
Salt Lake City, Utah 84111
Telephone: (801) 532-1234
Facsimile: (801) 536-6111
Attorneys for Petitioners



Kevin S. Thurman, Attorney for Wasatch County
Petitioner/Appellant

EXHIBIT 1

IN THE UTAH COURT OF APPEALS

FILED
UTAH APPELLATE COURT
JUN 04 2008

-----ooOoo-----

Warren and Tricia Osborn;)
Michael F. Sullivan; David and)
Cynthia Mirsky; Norman Provan;)
Jeffrey and Nancy Trumper;)
Gary and Catherine Crittenden;)
David Checketts; and Mount)
Clyde Enterprise LC,)

Petitioners,)

Wasatch County,)

Cross-Petitioner,)

v.)

Utah State Tax Commission,)

Respondent.)

ORDER

Case No. 20080304-CA

RECEIVED

JUN 05 2008

WASATCH COUNTY ATTORNEY'S OFFICE

Before Judges Billings, Davis, and McHugh.

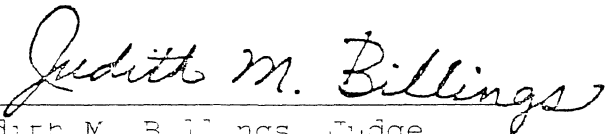
This case is before the court on Cross-Petitioner Wasatch County's motion to stay proceedings on Petitioner's petition for review and its own cross-petition pending disposition of a petition for judicial review pending in the Fourth District Court for Wasatch County pending as case number 0805001927, which seeks de novo review of the same order of the Utah State Tax Commission pursuant to Utah Code section 59-1-601. See Utah Code Ann. § 59-1-601 (2006); see also Utah Code Ann. § 59-1-602(1)(a) (2006) (allowing a party the option to petition for judicial review of a decision of the Utah State Tax Commission in either the district court or the appellate court). Based upon the motion and responses of the parties,

IT IS HEREBY ORDERED that proceedings on the petition and cross-petition before this court are stayed pending disposition of Wasatch County's petition for judicial review pending as case number 0805001092 in the Fourth District Court for Wasatch County.

IT IS FURTHER ORDERED that the parties shall provide separate or joint reports on the status of the district court proceedings ninety days from the date of this order and each ninety days thereafter while this stay order remains in effect.

Dated this 4 day of June, 2008.

FOR THE COURT


Judith M. Billings, Judge

CERTIFICATE OF SERVICE


I hereby certify that on June 4, 2008, a true and correct copy of the foregoing ORDER was deposited in the United States mail or placed in Interdepartmental mailing to be delivered to:

RANDY M. GRIMSHAW
MAXWELL A. MILLER
MATTHEW D COOK
PARSONS BEHLE & LATIMER
201 S MAIN STE 1800
PO BOX 45898
SALT LAKE CITY UT 84145-0898

CLARK L. SNELSON
TIMOTHY A BODILY
ASSISTANT ATTORNEY GENERAL
160 E 300 S 5TH FL
PO BOX 140874
SALT LAKE CITY UT 84114-0874

THOMAS L LOW
WASATCH COUNTY ATTORNEY
805 W 100 S
HEBER CITY UT 84032-3740

Dated this June 4, 2008.

By 
Deputy Clerk

Case No. 20080304
District Court No. 06-1504

EXHIBIT 2

Rule 14. Review of administrative orders: how obtained; intervention.

(a) Petition for review of order; joint petition. When judicial review by the Supreme Court or the Court of Appeals is provided by statute of an order or decision of an administrative agency, board, commission, committee, or officer (hereinafter the term "agency" shall include agency, board, commission, committee, or officer), a petition for review shall be filed with the clerk of the appellate court within the time prescribed by statute, or if there is no time prescribed, then within 30 days after the date of the written decision or order. The petition shall specify the parties seeking review and shall designate the respondent(s) and the order or decision, or part thereof, to be reviewed. In each case, the agency shall be named respondent. The State of Utah shall be deemed a respondent if so required by statute, even though not so designated in the petition. If two or more persons are entitled to petition for review of the same order and their interests are such as to make joinder practicable, they may file a joint petition for review and may thereafter proceed as a single petitioner.

(b) Filing fees. At the time of filing any petition for review, the party obtaining the review shall pay to the clerk of the appellate court the filing fee established by law. The clerk shall not accept a petition for review unless the filing fee is paid.

(c) Service of petition. A copy of the petition for review shall be served by the petitioner on the named respondent(s), upon all other parties to the proceeding before the agency, and upon the Attorney General of Utah, if the state is a party, in the manner prescribed by Rule 3(e). The petitioner, at the time of filing the petition for review, shall also file with the clerk of the appellate court a certificate reflecting service upon all parties to the agency proceeding who have been served.

(d) Intervention. Any person who seeks to intervene in a proceeding under this rule shall serve upon all parties to the proceeding and upon all parties who participated before the agency, and file with the clerk of the appellate court a motion for leave to intervene. The motion shall contain a concise statement of the interest of the moving party and the grounds upon which intervention is sought. A motion for leave to intervene shall be filed within 40 days of the date on which the petition for review is filed.

Rule 24. Briefs.

(a) Brief of the appellant. The brief of the appellant shall contain under appropriate headings and in the order indicated:

(a)(1) A complete list of all parties to the proceeding in the court or agency whose judgment or order is sought to be reviewed, except where the caption of the case on appeal contains the names of all such parties. The list should be set out on a separate page which appears immediately inside the cover.

(a)(2) A table of contents, including the contents of the addendum, with page references.

(a)(3) A table of authorities with cases alphabetically arranged and with parallel citations, rules, statutes and other authorities cited, with references to the pages of the brief where they are cited.

(a)(4) A brief statement showing the jurisdiction of the appellate court.

(a)(5) A statement of the issues presented for review, including for each issue: the standard of appellate review with supporting authority; and

(a)(5)(A) citation to the record showing that the issue was preserved in the trial court; or

(a)(5)(B) a statement of grounds for seeking review of an issue not preserved in the trial court.

(a)(6) Constitutional provisions, statutes, ordinances, rules, and regulations whose interpretation is determinative of the appeal or of central importance to the appeal shall be set out verbatim with the appropriate citation. If the pertinent part of the provision is lengthy, the citation alone will suffice, and the provision shall be set forth in an addendum to the brief under paragraph (11) of this rule.

(a)(7) A statement of the case. The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. A statement of the facts relevant to the issues presented for review shall follow. All statements of fact and references to the proceedings below shall be supported by citations to the record in accordance with paragraph (e) of this rule.

(a)(8) Summary of arguments. The summary of arguments, suitably paragraphed, shall be a succinct condensation of the arguments actually made in the body of the brief. It shall not be a mere repetition of the heading under which the argument is arranged.

(a)(9) An argument. The argument shall contain the contentions and reasons of the appellant with respect to the issues presented, including the grounds for reviewing any issue not preserved in the trial court, with citations to the authorities, statutes, and parts of the record relied on. A party challenging a fact finding must first marshal all record evidence that supports the challenged finding. A party seeking to recover attorney's fees incurred on appeal shall state the request explicitly and set forth the legal basis for such an award.

(a)(10) A short conclusion stating the precise relief sought.

(a)(11) An addendum to the brief or a statement that no addendum is necessary under

this paragraph. The addendum shall be bound as part of the brief unless doing so makes the brief unreasonably thick. If the addendum is bound separately, the addendum shall contain a table of contents. The addendum shall contain a copy of:

(a)(11)(A) any constitutional provision, statute, rule, or regulation of central importance cited in the brief but not reproduced verbatim in the brief;

(a)(11)(B) in cases being reviewed on certiorari, a copy of the Court of Appeals opinion; in all cases any court opinion of central importance to the appeal but not available to the court as part of a regularly published reporter service; and

(a)(11)(C) those parts of the record on appeal that are of central importance to the determination of the appeal, such as the challenged instructions, findings of fact and conclusions of law, memorandum decision, the transcript of the court's oral decision, or the contract or document subject to construction.

(b) Brief of the appellee. The brief of the appellee shall conform to the requirements of paragraph (a) of this rule, except that the appellee need not include:

(b)(1) a statement of the issues or of the case unless the appellee is dissatisfied with the statement of the appellant; or

(b)(2) an addendum, except to provide material not included in the addendum of the appellant. The appellee may refer to the addendum of the appellant.

(c) Reply brief. The appellant may file a brief in reply to the brief of the appellee, and if the appellee has cross-appealed, the appellee may file a brief in reply to the response of the appellant to the issues presented by the cross-appeal. Reply briefs shall be limited to answering any new matter set forth in the opposing brief. The content of the reply brief shall conform to the requirements of paragraphs (a)(2), (3), (9), and (10) of this rule. No further briefs may be filed except with leave of the appellate court.

(d) References in briefs to parties. Counsel will be expected in their briefs and oral arguments to keep to a minimum references to parties by such designations as "appellant" and "appellee." It promotes clarity to use the designations used in the lower court or in the agency proceedings, or the actual names of parties, or descriptive terms such as "the employee," "the injured person," "the taxpayer," etc.

(e) References in briefs to the record. References shall be made to the pages of the original record as paginated pursuant to Rule 11(b) or to pages of any statement of the evidence or proceedings or agreed statement prepared pursuant to Rule 11(f) or 11(g). References to pages of published depositions or transcripts shall identify the sequential number of the cover page of each volume as marked by the clerk on the bottom right corner and each separately numbered page(s) referred to within the deposition or transcript as marked by the transcriber. References to exhibits shall be made to the exhibit numbers. If reference is made to evidence the admissibility of which is in controversy, reference shall be made to the pages of the record at which the evidence was identified, offered, and received or rejected.

(f) Length of briefs. Except by permission of the court, principal briefs shall not exceed 50 pages, and reply briefs shall not exceed 25 pages, exclusive of pages containing the table of

contents, tables of citations and any addendum containing statutes, rules, regulations, or portions of the record as required by paragraph (a) of this rule. In cases involving cross-appeals, paragraph (g) of this rule sets forth the length of briefs.

(g) Briefs in cases involving cross-appeals. If a cross-appeal is filed, the party first filing a notice of appeal shall be deemed the appellant, unless the parties otherwise agree or the court otherwise orders. Each party shall be entitled to file two briefs. No brief shall exceed 50 pages, and no party's briefs shall in combination exceed 75 pages.

(g)(1) The appellant shall file a Brief of Appellant, which shall present the issues raised in the appeal.

(g)(2) The appellee shall then file one brief, entitled Brief of Appellee and Cross-Appellant, which shall respond to the issues raised in the Brief of Appellant and present the issues raised in the cross-appeal.

(g)(3) The appellant shall then file one brief, entitled Reply Brief of Appellant and Brief of Cross-Appellee, which shall reply to the Brief of Appellee and respond to the Brief of Cross-

Appellant.

(g)(4) The appellee may then file a Reply Brief of Cross-Appellant, which shall reply to the Brief of Cross-Appellee.

(h) Permission for over length brief. While such motions are disfavored, the court for good cause shown may upon motion permit a party to file a brief that exceeds the limitations of this rule. The motion shall state with specificity the issues to be briefed, the number of additional pages requested, and the good cause for granting the motion. A motion filed at least seven days before the date the brief is due or seeking five or fewer additional pages need not be accompanied by a copy of the brief. A motion filed less than seven days before the date the brief is due and seeking more than 5 additional pages shall be accompanied by a copy of the draft brief for in camera inspection. If the motion is granted, any responding party is entitled to an equal number of additional pages without further order of the court. Whether the motion is granted or denied, the draft brief will be destroyed by the court.

(i) Briefs in cases involving multiple appellants or appellees. In cases involving more than one appellant or appellee, including cases consolidated for purposes of the appeal, any number of either may join in a single brief, and any appellant or appellee may adopt by reference any part of the brief of another. Parties may similarly join in reply briefs.

(j) Citation of supplemental authorities. When pertinent and significant authorities come to the attention of a party after that party's brief has been filed, or after oral argument but before decision, a party may promptly advise the clerk of the appellate court, by letter setting forth the citations. An original letter and nine copies shall be filed in the Supreme Court. An original letter and seven copies shall be filed in the Court of Appeals. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall state the reasons for the supplemental citations. The body of the letter must not exceed 350 words. Any response shall be made within 7 days of filing and shall be similarly limited.

(k) Requirements and sanctions. All briefs under this rule must be concise, presented with

accuracy, logically arranged with proper headings and free from burdensome, irrelevant, immaterial or scandalous matters. Briefs which are not in compliance may be disregarded or stricken, on motion or sua sponte by the court, and the court may assess attorney fees against the offending lawyer.

Advisory Committee Notes

Rule 24(a)(9) now reflects what Utah appellate courts have long held. See *In re Beesley*, 883 P.2d 1343, 1349 (Utah 1994); *Newmeyer v. Newmeyer*, 745 P.2d 1276, 1278 (Utah 1987). "To successfully appeal a trial court's findings of fact, appellate counsel must play the devil's advocate. 'Attorneys must extricate themselves from the client's shoes and fully assume the adversary's position. In order to properly discharge the marshalling duty..., the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists.'" *ONEIDA/SLIC, v. ONEIDA Cold Storage and Warehouse, Inc.*, 872 P.2d 1051, 1052-53 (Utah App. 1994) (alteration in original)(quoting *West Valley City v. Majestic Inv. Co.*, 818 P.2d 1311, 1315 (Utah App. 1991)). See also *State ex rel. M.S. v. Salata*, 806 P.2d 1216, 1218 (Utah App. 1991); *Bell v. Elder*, 782 P.2d 545, 547 (Utah App. 1989); *State v. Moore*, 802 P.2d 732, 738-39 (Utah App. 1990).

The brief must contain for each issue raised on appeal, a statement of the applicable standard of review and citation of supporting authority.

Rule 33. Damages for delay or frivolous appeal; recovery of attorney's fees.

(a) Damages for delay or frivolous appeal. Except in a first appeal of right in a criminal case, if the court determines that a motion made or appeal taken under these rules is either frivolous or for delay, it shall award just damages, which may include single or double costs, as defined in Rule 34, and/or reasonable attorney fees, to the prevailing party. The court may order that the damages be paid by the party or by the party's attorney.

(b) Definitions. For the purposes of these rules, a frivolous appeal, motion, brief, or other paper is one that is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law. An appeal, motion, brief, or other paper interposed for the purpose of delay is one interposed for any improper purpose such as to harass, cause needless increase in the cost of litigation, or gain time that will benefit only the party filing the appeal, motion, brief, or other paper.

(c) Procedures.

(1) The court may award damages upon request of any party or upon its own motion. A party may request damages under this rule only as part of the appellee's motion for summary disposition under Rule 10, as part of the appellee's brief, or as part of a party's response to a motion or other paper.

(2) If the award of damages is upon the motion of the court, the court shall issue to the party or the party's attorney or both an order to show cause why such damages should not be awarded. The order to show cause shall set forth the allegations which form the basis of the damages and permit at least ten days in which to respond unless otherwise ordered for good cause shown. The order to show cause may be part of the notice of oral argument.

(3) If requested by a party against whom damages may be awarded, the court shall grant a hearing.

Advisory Committee Notes

Rule 33 is substantially redrafted to provide definitions and procedures for assessing penalties for delays and frivolous appeals.

If an appeal is found to be frivolous, the court must award damages. This is in keeping with Rule 11 of the Utah Rules of Civil Procedure. However, the amount of damages -- single or double costs or attorney fees or both -- is left to the discretion of the court. Rule 33 is amended to make express the authority of the court to impose sanctions upon the party or upon counsel for the party. This rule does not apply to a first appeal of right in a criminal case to avoid the conflict created for appointed counsel by *Anders v. California*, 386 US 738 (1967) and *State v. Clayton*, 639 P.2d 168 (Utah 1981). Under the law of these cases, appointed counsel must file an appeal and brief if requested by the defendant, and the court must find the appeal to be frivolous in order to dismiss the appeal.

Rule 50. Brief in opposition; reply brief; brief of amicus curiae.

(a) Brief in opposition. Within 30 days after service of a petition the respondent shall file an opposing brief, disclosing any matter or ground why the case should not be reviewed by the Supreme Court. Such brief shall comply with Rules 27 and, as applicable, 49. Seven copies of the brief in opposition, one of which shall contain an original signature, shall be filed with the Clerk of the Supreme Court.

(b) Page limitation. A brief in opposition shall be as short as possible and may not, in any single case, exceed 20 pages, excluding the subject index, the table of authorities, any verbatim quotations required by Rule 49(a)(7), and the appendix.

(c) Objections to jurisdiction. No motion by a respondent to dismiss a petition for a writ of certiorari will be received. Objections to the jurisdiction of the Supreme Court to grant the writ of certiorari may be included in the brief in opposition.

(d) Distribution of filings. Upon the filing of a brief in opposition, the expiration of the time allowed therefor, or express waiver of the right to file, the petition and the brief in opposition, if any, will be distributed by the clerk for consideration. However, if a cross-petition for a writ of certiorari has been filed, distribution of both it and the petition for a writ certiorari will be delayed until the filing of a brief in opposition by the cross-respondent, the expiration of the time allowed therefor, or express waiver of the right to file.

(e) Reply brief. A reply brief addressed to arguments first raised in the brief in opposition may be filed by any petitioner, but distribution under paragraph (d) of this rule will not be delayed pending the filing of any such brief. Such brief shall be as short as possible, but may not exceed five pages. Such brief shall comply with Rule 27. The number of copies to be filed shall be as described in Rule 50(a).

(f) Brief of amicus curiae. A brief of an amicus curiae may be filed only by leave of the Supreme Court granted on motion or at the request of the Supreme Court. Parties to the proceeding in the Court of Appeals may indicate their support for, or opposition to, the motion. A motion for leave shall identify the interest of the applicant and shall state the reasons why a brief of an amicus curiae is desirable. Except as all parties otherwise consent, an amicus curiae shall file its brief within the time allowed the party whose position it will support, unless the Supreme Court for cause shown shall grant leave for later filing, in which event it shall specify within what period an opposing party may answer. Such brief shall comply with Rules 27, and, as applicable, 49. The brief may not exceed 20 pages, excluding the subject index, the table of authorities, any verbatim quotations required by Rule 49(a)(7), and the appendix. The number of copies to be filed shall be as described in Rule 50(a).