1981

David S. Grow v. Marwick Development, Inc., A Corporation; Daniel R. Southwick; Sterling Martell; Et Al. And Boardwalk Development Corporation : Supplemental Brief of Appellant David S. Grow In Answer To Respondent Boardwalk Development Corporation's And Respondent Phoenix Development Corporation's Petition For Rehearing

Utah Supreme Court

IN THE SUPREME COURT

OF THE

STATE OF UTAH

DAVID S. GROW,

Plaintiff-Appellant,

vs.

MARWICK DEVELOPMENT, INC., a corporation; DANIEL R. SOUTHWICK; STERLING MARTELL; et al.,

Defendants-Respondents,

and

BOARDWALK DEVELOPMENT CORPORATION,

Intervenor-Respondent.

No. 16675

SUPPLEMENTAL BRIEF OF APPELLANT DAVID S. GROW IN ANSWER TO RESPONDENT BOARDWALK DEVELOPMENT CORPORATION'S AND RESPONDENT PHOENIX DEVELOPMENT CORPORATION'S PETITION FOR REHEARING

Appeal from the Judgment of the
4th District Court for Utah County
Honorable David Sam, Judge

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A statement of the nature of this case, its prior disposition in this Court, the relief Appellant seeks in connection with the Petition for Rehearing and a statement of facts are all set forth in Appellant's Brief in Answer to the Petition for Rehearing.

BACKGROUND

On January 19, 1981, Appellant served upon Respondents a copy of its Brief in Answer to Petition for Rehearing. On or

about January 23, 1981, Appellant received a copy of a certain letter, with attached Exhibits (hereinafter referred to as the "Olsen Letter"), dated January 22, 1981, sent by Mr. David R. Olsen on behalf of Respondents and addressed to The Honorable Richard J. Maughan. Copies of the Olsen Letter were also sent directly to each of the other justices of this Court. Apparently, the Olsen Letter was distributed without leave of this Court and was not filed with the Clerk of this Court.

Appellant is justifiably perplexed by the attempt of Respondents to leap beyond the strict statutory guidelines governing appellate practice by submitting personal correspondence instead of appellate briefs. The Olsen Letter is obviously intended either as a correction of Respondents' Brief in Support of the Petition for Rehearing or as some sort of reply brief to Appellant's Brief in Answer to the Petition for Rehearing. In either case, the Olsen Letter fails to comply with the requirements of Rule 76 and its acceptance by this Court will open the door to untold abuse of the rules governing appellate practice.

Appellant therefore respectfully requests this Court to strike as inappropriate and disregard the entire Olsen Letter. Appellant would, of course, have no objection to Respondents' filing a correction to its Brief in Support of the Petition for Rehearing, or, upon special leave of Court, to file a brief in reply to Appellant's Brief in Answer to the Petition for Rehearing.

ARGUMENTS

I. SUBMISSION OF THE OLSEN LETTER WAS ENTIRELY INAPPROPRIATE AND VIOLATIVE OF RULE 76, UTAH RULES OF CIVIL PROCEDURE.

Rule 76, Utah Rules of Civil Procedure, governs the submission of briefs in connection with a petition for rehearing. It incorporates by reference the requirements of form and content set forth in Rule 75. Neither Rule 76 nor Rule 75 make provision for argument by personal "appellate correspondence". Submission of the Olsen Letter is therefore clearly not allowed under the Utah Rules of Civil Procedure.

It must be assumed that Respondents deemed it necessary to submit the Olsen Letter either as a correction of its initial brief or as a reply to Appellant's Brief in Answer to the Petition for Rehearing. In either event, submission of the Olsen Letter violated the Utah Rules of Civil Procedure.

A. The Olsen Letter is an Impermissible Reply Brief. Rule 76 makes specific provision for the filing of a brief in support of a petition for rehearing and a brief in answer to a petition for rehearing. See Rule 76 (e)(1) and (2). Unlike Rule 75, however, the provisions of Rule 76 do not specifically allow a petitioner to file a brief in reply to the brief in answer. Accordingly, it may be argued that if the Olsen Letter is intended to be a reply brief, its submission is not allowed by Rule 76.

B. The Olsen Letter Does Not Comply With Rule 75(p). Even if reply briefs were allowed on rehearing matters,

they must comply with the requirements relating to other rehearing briefs. Rules 76(e)(1) and 76(e)(2) require that the brief in support and brief in answer to a petition for rehearing be prepared in accordance with the provisions of Rule 75(p). It would surely follow that any reply brief must also be prepared in accordance with Rule 75(p).

Appellant need not point out all of the ways in which the Olsen Letter violates the requirements of Rule 75(p). It is sufficient to state that the Olsen Letter meets none of the Rule 75(p) requirements.

C. The Olsen Letter is an Impermissible Correction of the Brief in Support of Petition for Rehearing.

If the Olsen Letter is not considered as a reply brief, it must be viewed as a correction of Respondents' Brief in Support of Petition for Rehearing. Rule 75(p)(3) governs the submission of corrections and additional authorities subsequent to the filing of a brief. It provides in relevant part as follows:

> Briefs are distrubuted to the justices usually not earlier than two weeks before the beginning of the session . . . . Errors should be discovered before that time and correction made directly in ink on the copies of the briefs . . . .
>
> In the event corrections are not timely made on the briefs directly, and in order to save the time of the justices making corrections on a tightly articulated calendar, a party desiring to make any corrections . . . shall, not later than the day of argument, submit to the clerk for insertion in the brief, ten typewritten copies of such correction . . . on paper the same size as

> the brief, the correcting page to be given the same number as the page sought to be corrected. Each such page shall set forth the title of the case, the name of the party for whose benefit the correction . . . is made, and a statement giving the line or lines of the page where the corrections should be made. . . .

Again, Appellant need not detail the numerous ways in which the Olsen Letter violates the provisions of Rule 75(p)(3). It is sufficient to state that the Olsen Letter satisfies none of the Rule 75(p)(3) requirements.

D. The Olsen Letter Should Not Be Considered on Appeal.

Since the Olsen Letter fails completely to comport with the appellate brief requirements of Rules 76 and 75, Utah Rules of Civil Procedure, it would be unwise as a matter of appellate practice procedure to allow a party to reduce appellate practice to private exchanges of correspondence. Serious problems concerning adequate notice, service, and the form and content of pleadings--all constituting a substantial re-writing of established appellate procedural rules--will surely result if Respondents and others are allowed to indulge in personal correspondence as a substitute for proper appellate practice.

The only reasonable and effective means of dealing with the above problems is simply to reject the Olsen Letter in its entirety. Should Respondents feel compelled to make corrections or reply arguments, they should do so by corrections prepared in accordance with Rule 75(p)(3) or by reply brief, if permitted by specific leave of court and prepared in accordance with Rule 75(p).

II. THE OLSEN LETTER CONSTITUTES FURTHER EVIDENCE OF THE ERRONEOUS STATEMENTS OF THE BRIEF IN SUPPORT OF PETITION FOR REHEARING.

Respondents' Brief in Support of the Petition for Rehearing reads in pertinent part as follows:

Statement 1:

> It should be noted that sufficient funds have been placed into Certificates of Deposit and deposited into the Registry of the Court to cure any alleged default under the Contract, regardless of the interpretation which the District Court gives to paragraph 11B. In other words, Grow can be made whole and receive the benefit of his bargain in the event his interpretation of paragraph 11B is correct. (Rehearing Brief at 4.)

Statement 2:

> In addition, sufficient funds have been tendered into the Registry of the Court to satisfy any monetary judgment entered in Grow's favor. (Rehearing Brief at 7.)

Statement 3:

> Sufficient funds have been deposited into the Registry of the Court to cure the "default" if the District Court determines Grow's interpretation of the Contract is correct. (Rehearing Brief at 9.)

Obviously, these statements are erroneous. Several alternative explanations for these errors appear likely.

First, the Rehearing Brief may have been intended to speak as of the date August 9, 1978. That is, Respondents may have in mind the August 9, 1978 "default" and may be asserting that there was enough money in the Registry of the Court to pay the $21,750.36 deficiency claimed under Appellant's August 9,

1978 notice of default. But the Rehearing Brief is erroneously phrased to claim that "sufficient funds have been tendered into the Registry of the Court to satisfy any monetary judgment entered in Grow's favor" without any reference to August 9, 1978, as limiting the time frame concerned.

Secondly, perhaps the Rehearing Brief may have been intended to speak as of August 15, 1979, the date summary judgment was erroneously granted to Respondents. That is, Respondents may be asserting there was enough money in the Registry of the Court to pay the deficiency determined by the Ruling of the trial court. Yet, the Rehearing Brief is erroneously phrased to claim that "sufficient funds have been tendered into the Registry of the Court to satisfy any monetary judgment entered in Grow's favor" without any reference to August 15, 1979, as a limitation on the time frame concerned. There has never been enough money in the Registry of the Court to cure the default as of August 15, 1979.

Thirdly, perhaps the Rehearing Brief may have been intended to speak as of the date of this Court's Opinion or as of the date on which any rehearing on remand is held. That is, Respondents may be asserting that there now is or will be enough money in the Registry of the Court to pay "any monetary judgment entered in Grow's favor." If so, the Rehearing Brief was in gross error as to the amount of money in the Registry of the Court.

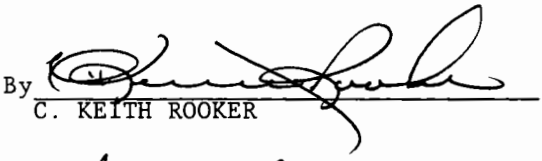
Fourthly, perhaps the Rehearing Brief was in error with respect to what funds were actually placed in the Registry of the Court. It is unquestioned that there is only $25,114.00 currently on deposit with the Registry of the Court, none of which includes Certificates of Deposit. Statement 1 refers to "funds placed into Certificates of Deposit and deposited into the Registry of the Court." Statements 2 and 3 refer only to the funds which have been "tendered into" or "deposited into the Registry of the Court." Statements 2 and 3 could be true only if the Certificates of Deposit were also now held in the Registry of the Court, which they were not.

CONCLUSION

Again, if Respondents wish to correct or clarify the erroneous statements in the Rehearing Brief, there is an authorized manner for doing so under Rule 75(p)(3). Perhaps the Olsen Letter was intended as such a correction, although it does not comply with Rule 75(p)(3). In order to prevent the free-for-all "shouting match" referred to in the Olsen Letter and preserve the integrity of appellate practice before this Court, Appellant respectfully submits that compliance with appellate brief procedural rules not be abandoned in favor of private correspondence. The Olsen Letter should be stricken and disregarded in its entirety.

Respectfully submitted this 5th day of February 1981.

MARTINEAU, ROOKER, LARSEN & KIMBALL

By 
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CERTIFICATE OF MAILING

I hereby certify that copies of the foregoing SUPPLEMENTAL BRIEF OF APPELLANT DAVID S. GROW IN ANSWER TO RESPONDENT BOARDWALK DEVELOPMENT CORPORATION'S AND RESPONDENT PHOENIX DEVELOPMENT CORPORATION'S PETITION FOR REHEARING were served this 5th day of February, 1981, upon the Defendants-Respondents and Intervenor-Respondent by mailing the same, postage prepaid to the following:

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