

1989

Helmut Reinicke v. Wasatch Tool and Die, Inc., Juergen Mueller and Julia F. Mueller : Petition for Writ of Certiorari

Utah Supreme Court

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Recommended Citation

Legal Brief, *Reinicke v. Wasatch Tool*, No. 890101.00 (Utah Supreme Court, 1989).
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UTAH SUPREME COURT
BRIEF

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DOCKET NO.

890101

THE UTAH SUPREME COURT

HELMUT REINICKE,

:

Plaintiff-Respondent, :

vs.

:

Case No. _____

WASATCH TOOL & DIE, INC.,

:

JUERGEN MUELLER and

JULIA F. MUELLER,

:

Defendants-Appellants.:

PETITION FOR WRIT OF CERTIORARI FROM THE
UTAH COURT OF APPEALS
Civil No. 880460-CA

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FILED

MAR 20 1988

890101

Clerk, Supreme Court, Utah

THE UTAH SUPREME COURT

HELMUT REINICKE, :

Plaintiff-Respondent, :

vs. :

Case No. _____

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ADDENDA

- Addendum No. 1: Order issued by Judge Judith M. Billings on December 2, 1988, staying the briefing schedule until January 30, 1989
- Addendum No. 2: Order issued by Judge Richard C. Davidson, on January 30, 1989, denying the Motion to Stay Briefing Schedule
- Addendum No. 3: Order issued by Judge Norman H. Jackson on March 8, 1989, denying the Motion for Reconsideration

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QUESTIONS PRESENTED FOR REVIEW

1. Is there a conflict between the panels of the Court of Appeals?
 - (a) Is Judge Judith M. Billings' Order staying the briefing schedule in conflict with Judge Richard C. Davidson's Order denying the motion to stay?
2. Did the appellant's motion to stay the briefing schedule satisfy the requirements of Rule 11(h) of the Rules of the Utah Court of Appeals?
3. A panel of the Court of Appeals has rendered a decision that has departed from accepted and usual course of judicial proceedings.

OPINIONS OF THE COURT OF APPEALS

On December 2, 1988, Judge Judith M. Billings of the Utah Court of Appeals issued an Order staying the briefing schedule until January 30, 1989, based on a Motion from appellant that further testimony from the trial needed to be transcribed.

(See Addendum)

A second Motion to stay the briefing schedule was filed when the transcript was not available in time from the District Court reporter. Judge Richard C. Davidson denied the second motion to stay. (See Addendum)

On March 8, 1989, a motion for reconsideration of the denial of the motion to stay the briefing schedule was denied by a third panel. (See Addendum)

JURISDICTION OF THE COURT
(Rule 46(6), Rules of the Utah Supreme Court)

A. The decisions sought to be reviewed were made by Judge Richard C. Davidson on January 30, 1989, and by Judge Norman H. Jackson on March 8, 1989.

B. The Court on rehearing the motion upheld Judge Davidson on March 8, 1989.

C. Not applicable. No cross petition for writ of certiorari.

D. Rule 43(1)(3) of the Rules of the Utah Supreme Court confer jurisdiction on this Court.

CONTROLLING RULES OF THE UTAH COURT OF APPEALS

Rule 11(e)(1):

Request for transcript; time for filing. Within 10 days after filing the notice of appeal, the appellant shall request from the reporter a transcript of such parts of the proceedings not already on file as the appellant deems necessary. The request shall be in writing, and within the same period, a copy shall be filed with the clerk of the court from which the appeal is taken and with the clerk of the Court of Appeals. If no such parts of the proceedings are to be requested, within the same period the appellant shall file a certificate to that effect with the clerk of the court from which the appeal is taken and a copy thereof with the clerk of the Court of Appeals. If there was no reporter but the proceedings were

otherwise recorded, the appellant shall follow the procedure outlined above, except that the original request for a transcript shall be filed with the clerk of the court from which the appeal is taken, who will arrange for the appointment of a reporter to prepare a transcript. The reporter who is appointed shall be subject to all of the obligations imposed on reporters by these rules.

Rule 11(h):

Correction or modification of record. If any difference arises as to whether the record truly discloses what occurred in the court from which the appeal is taken, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, the court from which the appeal is taken, or the Court of Appeals either before or after the record is transmitted to the Court of Appeals, on proper suggestion or of its own initiative, may direct that the omission or misstatement be corrected and, if necessary, that a supplemental record be certified and transmitted. The moving party or the court, if it is acting on its own initiative, shall serve on the parties a statement of the proposed changes. Within 10 days after service, any party may serve objections to the proposed changes. All other questions as to the form and content of the record shall be presented to the Court of Appeals.

Rule 12(a):

Duty of reporter to prepare and file transcript; notice to Court of Appeals. Upon receipt of a request for a transcript, the reporter shall acknowledge at the foot of the request the fact that the reporter has

received it and the date on which the reporter expects to have the transcript completed and shall transmit the request so endorsed, to the clerk of the Court of Appeals. If the transcript cannot be completed within 30 days of receipt of the Court of Appeals and the action of the clerk shall be entered on the docket and the parties notified. In the event of the failure of the reporter to file the transcript within the time allowed, the clerk of the Court of Appeals shall notify the judge of the Court from which the appeal is taken and take such other steps as may be directed by the Court of Appeals, including but not limited to an order relieving the reporter of all regular duties until such time as the transcript is completed. Upon completion of the transcript, the reporter shall file it with the clerk of the court from which the appeal is taken and shall notify the clerk of the Court of Appeals that the transcript has been filed.

CONTROLLING RULES OF THE UTAH SUPREME COURT

Rule 43(1)(3)

Considerations governing review of certiorari.

(1) When a panel of the Court of Appeals has rendered a decision in conflict with a decision of another panel of the Court of Appeals on the same issue of law;

(3) When a panel of the Court of Appeals has rendered a decision that has so far departed from the accepted and usual course of judicial proceedings or has so far sanctioned such a departure by a lower court as to call for an exercise of this court's power of supervision;

STATEMENT OF THE CASE

This was a case involving two men who operated a machine tool business. When they split up, Mr. Mueller agreed to buy the interest of Mr. Reinicke. Mr. Mueller made payments to Mr. Reinicke on the contract until he learned from Mr. Reinicke's wife that Mr. Reinicke had burglarized his shop a few days after the contract to purchase was signed and had bribed customers of Mr. Mueller to give their business to Mr. Reinicke's new machine shop. Mr. Mueller ceased making payments. Mr. Reinicke sued on the contract.

The defendant, Mr. Mueller, attempted to raise several tort counterclaims as offsets to the amount owing and the trial judge would not allow the counterclaims to be litigated in this action and excluded evidence helpful to Mr. Mueller. Judge David Young held that torts are not offsets to contractual claims. The jury returned a verdict in favor of Mr. Reinicke and against Mr. Mueller, thus requiring Mr. Mueller to pay the amount owing on the contract.

An appeal was taken to the Utah Supreme Court claiming error on the part of the trial judge.

Thereafter the appellant Mueller filed a notice of appeal on May 20, 1988, with the Utah Supreme Court. On June 2, 1988, a notice and request for transcript was filed with the Utah

Supreme Court asking for the transcript of the testimony of Allison and Helmet Reinicke. On July 29, 1989, the Supreme Court bound over a matter to the Utah Court of Appeals.

A motion to stay the briefing schedule was filed in the Utah Court of Appeals on November 28, 1988, to allow appellant to obtain a transcript of another witness' testimony. On November 30, 1988, respondents filed an objection to that motion. On December 2, 1988, Judge Judith Billings signed an order staying the briefing schedule until January 30, 1989. At that time nothing was in the file bearing the name amended notice and request for transcript. (emphasis added)

The court reporter did not notify the Court of Appeals that the transcript could not be completed within 30 days of receipt of the request but did seek a continuance on January 30, 1989, the day that the brief was due. Further, the Court of Appeals did not notify the trial judge that the transcript had not been filed within the 30 days. These are requirements of Rule 12(a) of the Utah Court of Appeals.

On January 24, 1989, a second motion was filed to stay the briefing schedule because the court reporter for the trial judge had not completed the transcript. On January 30, 1989, Judge Richard C. Davidson denied the second motion to stay the briefing schedule.

On January 31, 1989, a motion for reconsideration was filed by the appellant Mr. Mueller. On February 3, 1989, a

motion to dismiss the appeal was filed by the respondent Mr. Reinicke. On February 14, 1989, the appellant Mr. Mueller filed an opposition to the motion to dismiss the appeal. On March 8, 1989, an order was issued denying the motion for reconsideration and granting the motion to dismiss the appeal and dismissing the appeal.

ARGUMENT

WHAT DOES RULE 11(h) OF THE UTAH COURT OF APPEALS REQUIRE WHEN A PARTY REQUESTS ADDITIONAL TESTIMONY TO BE TRANSCRIBED AFTER THE INITIAL NOTICE AND REQUEST FOR TRANSFER HAS BEEN FILED

The operative language of Rule 11(h) seems to be as follows: "The moving party. . .shall serve on the parties a statement of the proposed changes." (emphasis added) This refers to any correction or modification of the record after the initial request for transcript has been properly made.

It is the contention of the appellant, Mr. Mueller, that the first Motion to Stay the Briefing Schedule which was filed on November 28, 1988, and sent out to all the parties and was objected to by the respondents. Judge Judith Billings thereafter stayed the briefing schedule to January 30, 1989. It appears the language of Rule 11(h) of the Rules of the Utah Court of Appeals was complied with in that a statement of the

proposed changes in the record was filed with the court and with counsel.

At this point, in the sequence of events, the Utah Court of Appeals had made a ruling through one of its panels. The panel of the Court of Appeals said have the brief in on a day certain rather than the practice of the Supreme Court of Utah and elsewhere wherein many such rulings are worded, "_____ days after the receipt of the transcript the brief is due".

The fact that the court reporter had not finished the transcript by January 30, 1989, was certainly not the fault of counsel or his client.

The net effect of what happened in the Court of Appeals was the burden was placed on counsel to get the trial court's reporter to transcribe the testimony in order to comply with the ruling of Judge Billings and have it done by January 30, 1989. Whereas, Rule 12(a) of the Rules of the Utah Court of Appeals seems to place that burden upon the Court of Appeals and the court reporter. Counsel for the appellant discussed the problem several times with the Clerk of the Court of Appeals informing the court verbally that the transcript was not being done in a timely way and was told that the proper procedure was to file a motion to stay the briefing schedule. From all counsel is aware, the Court of Appeals made no effort to comply with Rule 12(a) of the Rules of the Utah Court of Appeals to enforce Judge Billings' Order.

There was no other choice but to seek a further extension. Had the Court of Appeals used the same language as the Supreme Court often uses this issue would not have arisen.

The relevant language in Judge Davidson's Order denying the extension of the briefing schedule on January 30, 1989, reads as follows:

Appellant has not filed an amended notice and request for transcript. The initial request for transcript is controlling herein.

No place in all of Rule 11 of the Utah Court of Appeals is there language using the words "amended notice for request for transcript". (emphasis added) What Rule 11(h) does say is, ". . . may serve objections to the proposed changes", which was, in fact, done. The fact that the "Motion for staying the briefing schedule" was not labeled an "Amended Notice and Request for Transcript" is not required because there is no provision in Rule 11 of the Utah Court of Appeals requiring such language. The only requirement was to give notice. Notice was given and received.

The initial notice and request for transcript was timely filed in the Supreme Court pursuant to their rules prior to the case being bound over to the Court of Appeals.

THERE IS A CONFLICT PANELS OF THE UTAH COURT OF APPEALS.

Different judges on the Utah Court of Appeals are assigned to handle appeals as they are docketed regardless of who may have handled a matter on the same appeal prior. It is therefore possible to get this kind of conflicting ruling. The language "amended notice and request for transcript" required by Judge Davidson was clearly not required by Judge Billings who issued the first stay without there being filed a document so entitled. Judge Billings responded favorably to a motion to stay the briefing schedule only. It would appear that had this motion been returned to Judge Billings it may well have been handled in a different way.

When the third panel of judges considered the motion to reconsider dated March 8, 1989, their opinion states that the motion for reconsideration was denied because of "failure to file appellant's brief" (emphasis added). Judge Davidson's ruling was issued on the day Judge Billings had ordered the brief due and was not received by counsel until the day after. Counsel waited as long as possible before filing the second request to stay the briefing schedule, hoping the transcripts would be finished in time to allow counsel to finish the brief and file it in the Court.

It appears to be a harsh solution to have these inconsistent rulings by different panels of the Utah Court of

Appeals which caused the appeal to be dismissed when there was compliance of the spirit and letter of Rule 11(h) and such action was a departure from accepted appellate practice.

SUPREME COURT'S ADVISORY COMMITTEE'S PROPOSAL FOR MODIFICATION
OF THE RULES OF PROCEDURE AND EVIDENCE (JANUARY 1, 1989)

An effort is being made, in the proposed amendments to the Rules of Appellate Procedure to strengthen the hands of the Court of Appeals with regard to the transmission of the record from the court reporter to the Court of Appeals under the proposed changes in Rule 12. These proposed changes in Rule 12 would seem to resolve part of the problem the appellant was faced with in not meeting the first deadline of the Court of Appeals. The court reporter did not notify the Utah Court of Appeals as to the date she would have the transcript prepared even though she was appraised of the cut-off date of the filing of the brief issued by Judge Billings.

A further clarification of the proposed changes to Rule 12 of the appellate procedure would be helpful if it dealt with the timing between the court reporter's transcript and complying with the briefing schedule issued by the appellate court.

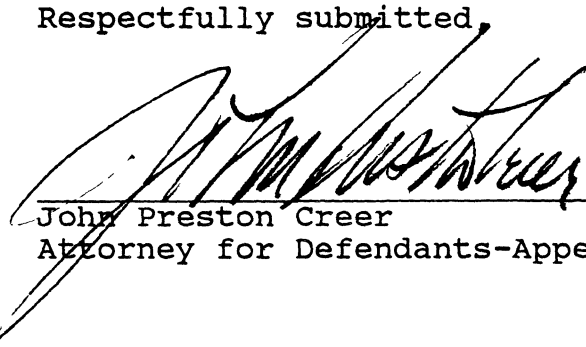
CONCLUSION

It does appear that the letter of Rule 11(h) was complied with and that because of the diversity of opinion on the various panels at the Court of Appeals and the lack of one judge handling the matter from beginning to end, we get the inconsistent rulings. We urge the Utah Supreme Court to order the appellant's brief to be submitted to the Court of Appeals so the matter can be heard on its merits on appeal.

The appellant should not be denied an appeal when the Court of Appeals and the court reporter failed to follow the procedure of Rule 12(a) of the Utah Court of Appeals.

DATED this 20 day of March, 1989.

Respectfully submitted,

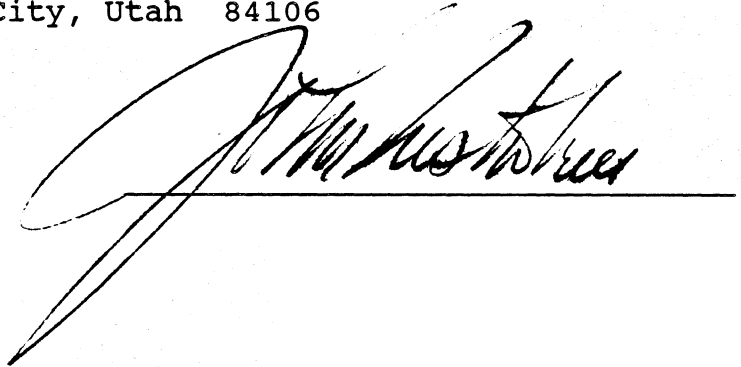


John Preston Creer
Attorney for Defendants-Appellants

CERTIFICATE OF MAILING

I hereby certify that I mailed four (4) true and correct copies of the foregoing PETITION FOR WRIT OF CERTIORARI, postage prepaid, to the following this 20 day of March, 1989.

C. Reed Brown, Esq.
3450 Highland Drive, Suite 301
Salt Lake City, Utah 84106

A handwritten signature in dark ink, appearing to read "C. Reed Brown", is written over a horizontal line.

ADDENDA

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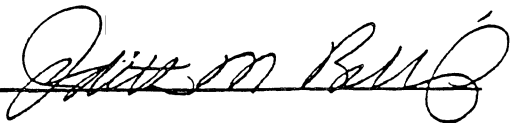
UTAH COURT OF APPEALS

HELMUT REINICKE,	:	
	:	
Plaintiff-Respondent,	:	ORDER STAYING
	:	BRIEFING SCHEDULE
vs.	:	
	:	
WASATCH TOOL & DIE, INC.,	:	
JUERGEN MUELLER and	:	Civil No. 880460-CA
JULIA F. MUELLER,	:	
	:	
Defendants-Appellants.:	:	

Based upon the representations of counsel in the Motion to Stay the Briefing Schedule, it is hereby ORDERED, ADJUDGED AND DECREED that the briefing schedule be stayed pending ^{until January} receiving 30, ~~the transcript of testimony of Juergen Mueller.~~ 1989

DATED this 2nd day of December, 1988.

BY THE COURT:



THE UTAH COURT OF APPEALS

FILED

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JAN 30 1989
Mary T. Noonan
 Mary T. Noonan
 Clerk of the Court
 Utah Court of Appeals

Helmut Reinicke,)
)
 Plaintiff and Respondent,)
)
 v.)
)
 Wasatch Tool & Die, Inc.)
 Juergen Mueller and)
 Julia F. Mueller,)
)
 Defendants and Appellants.)

ORDER

Case No. 880460-CA

This matter is before the Court upon appellant's Motion To Stay Briefing Schedule, filed 26 January 1989. Appellant supports the Motion on the ground that the court reporter has not transcribed the testimony of Juergen Mueller.

Appellant requested a transcript by filing the Notice And Request For Transcript on 3 June 1989. The Request is specific in that it seeks transcription of the testimony of two individuals - Allison Garland-Reinicke and Helmut Reinicke. The request is silent with respect to the testimony of Juergen Mueller. The Court reporter completed the transcript and filed the same in the trial court on 26 October 1988.

Appellant received an initial stay of the briefing schedule when this Court issued its Order of 2 December 1988, requiring that the brief be filed on or before 30 January 1989. Appellant has not filed an amended notice and request for transcript. The initial Request For Transcript is controlling herein.

Now therefore, it is hereby ORDERED that the Motion To Stay Briefing Schedule is denied.

Dated this 30 day of January, 1989.

BY THE COURT:

Richard C. Davidson
 Richard C. Davidson, Judge

IN THE UTAH COURT OF APPEALS

-----oo0oo-----

Helmut Reinicke,)	
)	ORDER
Plaintiff and Respondent,)	
)	
v.)	Case No. 880460-CA
)	
Wasatch Tool & Die, Inc., Jergen)	
Mueller and Julia F. Mueller,)	
)	
Defendants and Appellants.)	

Before Judges Jackson, Garff and Greenwood (On Law and Motion).

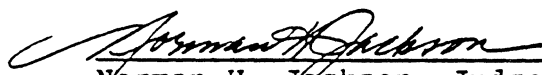
This matter is before the court on appellant's motion for reconsideration of this court's denial of its second motion to stay briefing schedule and on respondent's motion to dismiss the appeal for failure to file appellant's brief.

IT IS HEREBY ORDERED THAT the motion for reconsideration is denied, and

IT IS FURTHER ORDERED THAT the motion to dismiss appeal is granted and the appeal is dismissed.

DATED this 8th day of March, 1989.

FOR THE COURT:


Norman H. Jackson, Judge