

1989

Helmut Reinicke v. Wasatch Tool and Die, Inc., Juergen Mueller and Julia F. Mueller : Brief in Opposition to Certiorari

Utah Supreme Court

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C. Reed Brown; James H. Faust; Hintze, Brown and Faust; attorney for respondent.

John Preston Creer; attorney for appellants.

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UTAH SUPREME COURT
BRIEF

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THE UTAH SUPREME COURT

HELMUT REINICKE,)	
)	
Plaintiff-Respondent,)	BRIEF IN OPPOSITION
	)	TO PETITION FOR
vs.	)	WRIT OF CERTIORARI
)	
WASATCH TOOL & DIE, INC.,)	
JUERGEN MUELLER and)	
JULIA F. MUELLER,	)	Case No. <u>890101</u>
)	
Defendants-Appellants.)	
)	

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

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THE UTAH SUPREME COURT

HELMUT REINICKE,)	
)	
Plaintiff-Respondent,)	BRIEF IN OPPOSITION
	)	TO PETITION FOR
vs.	)	WRIT OF CERTIORARI
)	
WASATCH TOOL & DIE, INC.,)	
JUERGEN MUELLER and)	
JULIA F. MUELLER,)	Case No. _____
)	
Defendants-Appellants.)	
)	

BRIEF IN OPPOSITION TO PETITION FOR
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- Addendum No. 1: Notice of Time for Filing Brief
From Utah Court of Appeals
- Addendum No. 2: Order issued by Judge Judith M.
Billings on December 2, 1988
- Addendum No. 3: Order issued by Judge Richard C.
Davidson on January 30, 1989
- Addendum No. 4: Motion to Dismiss Appeal dated
February 3, 1989
- Addendum No. 5: Order issued by Judge Norman H.
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RESPONSE TO QUESTIONS PRESENTED FOR REVIEW

1. The December 2, 1988, Order of Judge Billings required the filing of the appellants' brief on January 30, 1989, irrespective of the receipt of additional transcribed testimony.
2. Judge Davidson's Order of January 30, 1989 is consistent with Judge Billings' Order of December 2, 1988, concerning the time for filing of the appellants' brief.
3. Rule 11(h) of Rules of the Utah Court of Appeals was intended to correct mistakes in the record as transcribed and is not applicable to correcting errors of counsel.
4. Failure to file a brief when due may result in dismissal of the appeal.

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 will 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 26(c):

Consequence of failure to file briefs. If an appellant fails to file a brief within the time provided in this rule or within the time as may be extended by order of this court, a respondent may move for dismissal of the appeal. If a respondent fails to file a brief within the time provided by this rule or within the time as may be extended by order of this court, an appellant may move that such respondent not be heard at oral argument.

STATEMENT OF THE CASE

This case is a dispute involving a contract. Plaintiff sued defendant, claiming that defendant had breached the contract for failure to make monthly payments as called for in the contract. Defendant claimed that defendant had committed a burglary which should be considered as an offset to any amount defendant otherwise owed plaintiff. After a jury trial a verdict was returned finding that plaintiff was entitled to collect the full amount of the contract from defendant and that defendant was not entitled to any offsets due to the alleged burglary.

The defendant filed a separate action against plaintiff alleging various tort claims. That case was assigned to Judge James Sawaya in the Third Judicial District Court. The case assigned to Judge Sawaya was dismissed for failure to state a cause of action. The appellants herein have also appealed Judge Sawaya's ruling and this matter is presently before the Court of Appeals.

Relevant facts for consideration of the Writ of Certiorari are as follows:

1. May 29, 1988 - Notice of Appeal is filed.
2. June 2, 1988 - Appellants requests transcript of the testimony of only Allison Garland Reinicke and Helmut Reinicke.

3. The transcript of testimony as requested by appellants was prepared and filed October 26, 1988.

4. The brief of appellants was due to be filed on December 10, 1988.

5. On November 28, 1988, twelve days before their brief was due, appellants filed an ex parte motion to extend the briefing schedule, claiming that the court reporter had not transcribed the testimony of the defendant Juergen Mueller. The motion filed by appellants did not disclose the fact that appellants had never requested the transcription of the testimony of the defendant Juergen Mueller.

6. On December 2, 1988, Judge Billings entered an order which was mailed to appellants granting appellants until January 30, 1989, within which to file the brief. Judge Billings changed appellants' proposed order to a date certain so that the filing of the brief was not dependent upon the receipt of the transcript of testimony of this additional witness.

7. At no time did the appellants file an amended notice and request for transcript of testimony or otherwise claim an error in what had been transcribed as required by Rule 11(h).

8. On January 24, 1989, six days before their brief was due, appellants filed a second motion to extend the time within which to file the brief. This motion was denied.

9. Appellants thereafter timely filed a motion to reconsider, which was also denied.

10. Respondent filed a motion to dismiss the appeal for failure to file the brief within the time ordered. This motion was granted, dismissing the appeal on March 8, 1989.

ARGUMENT

THE DECEMBER 2 ORDER OF JUDGE BILLINGS ORDERED THE
FILING OF THE BRIEF ON JANUARY 30, 1989 IRRESPECTIVE
OF THE RECEIPT OF ADDITIONAL TRANSCRIBED TESTIMONY

Counsel for appellants originally requested the transcript of testimony of only two witnesses. This testimony was transcribed and available by October 26, 1988 and appellants' counsel was duly notified. The Court of Appeals notified all parties that the appellants' brief was due December 10, 1988.

Appellants took no further action until November 28, 1988, when appellants' counsel apparently decided he wanted his own client's testimony transcribed. At this time appellants filed an ex parte request for a stay "pending

receiving the transcript of testimony of Juergen Mueller". Upon considering this ex parte motion, Judge Billings crossed out the language on appellants' proposed order and inserted in its place ""stayed pending until January 30, 1989". Judge Billings' order implies that inasmuch as appellants never originally requested the transcript of testimony of Juergen Mueller that the time for filing the brief would be stayed only to a date certain, irrespective of the receipt of the testimony and to insure that the appellants could not delay the appeal process any further. The time for filing the brief was not contingent upon receiving the transcript of the additional testimony so clearly set forth in the order signed by Judge Billings.

JUDGE DAVIDSON'S ORDER OF JANUARY 30, 1989 IS CONSISTENT
WITH JUDGE BILLINGS' ORDER OF DECEMBER 2, 1988

The order of Judge Davidson states a concise review of the relevant facts concerning the briefing schedule. These facts show that appellants never requested the testimony of Juergen Mueller to be transcribed. The extra time granted by Judge Billings was independent of receiving a transcription of the additional testimony.

Judge Davidson points out in his order of January 30, 1989 that appellant had not filed an amended

notice and request for transcript. Appellants also made no claim of mistake pursuant to Rule 11(h). Accordingly, the initial request for transcript was controlling. All Judge Billings' order did was grant appellants an extra 50 days within which to file their brief and was not dependent on the receipt of any additional testimony. Accordingly, Judge Davidson's order is consistent with Judge Billings' order.

RULE 11(h) OF THE RULES OF THE UTAH COURT OF APPEALS
PROVIDES A MEANS OF CORRECTING MISTAKES
IN THE RECORD AS TRANSCRIBED

Appellants have misconstrued Rule 11(h) of the Rules of the Utah Court of Appeals. This rule provides a mechanism for correcting the transcribed record when differences arise "to whether the record truly discloses what occurred in the court from which the appeal is taken". This rule is not a means by which counsel can correct its own mistakes in not requesting a transcript of certain testimony in the initial request for transcript.

The controlling rule is Rule 11(e)(1), which puts the burden on appellant to request from the reporter all testimony he desires to be transcribed. Appellants never amended the request for transcript as originally made on

June 2, 1988. Both Judge Billings' and Judge Davidson's orders show that short of filing an amended request for transcript, appellants were not entitled to this additional testimony in the preparation and filing of the brief.

The court reporter complied with all relevant rules. She received the request for transcription on June 2, 1988. All testimony requested was transcribed and filed by October 26, 1988. The testimony as transcribed was correct and needed no modification. Over a month later appellants decided to ask for additional testimony to be transcribed. Nowhere in any of appellants' motions is a reference made to Rule 11(h) as the basis for the request. Nowhere, in any of the court records, is there a motion claiming a mistake was made in transcription. Reference to Rule 11(h) at this stage of the proceedings is nothing more than an attempt to blame the court reporter for counsel's failure to ask the reporter for additional testimony in the first place.

FAILURE TO FILE A BRIEF WHEN DUE RESULTS IN
DISMISSAL OF THE APPEAL

Rule 26(c) is very specific as to its consequences.

"If an appellant fails to file a brief within the time provided in this rule or within the time as may be extended by order of this court, a respondent may move for dismissal of the appeal."

Respondent filed its motion to dismiss the appeal on February 3, 1989. The motion was granted and the order entered March 8, 1989. Granting dismissal of the appeal is consistent with the Rules of the Utah Court of Appeals and consistent with the prior orders of Judge Billings and Judge Davidson.

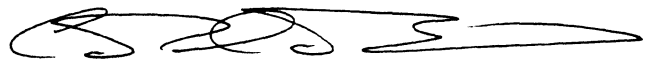
CONCLUSION

Certiorari should be denied. The order of dismissal of the appeal should not be disturbed. Appellants have failed to follow the clear order of Judge Billings as to the time a brief was due. Appellants have attempted to misconstrue Judge Billings' order as to what was involved. Judge Davidson's order is consistent with Judge Billings' order. Judge Jackson's order is thus consistent with the two prior orders concerning timeliness of filing the brief. Dismissing the appeal for failure to file the brief when ordered is an appropriate and just remedy.

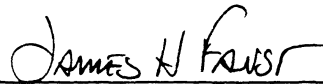
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DATED this 23 day of March, 1989.

Respectfully submitted,



C. REED BROWN

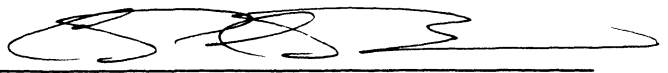


JAMES H. FAUST
Attorneys for
Plaintiff-Respondent

MAILING CERTIFICATE

I hereby certify that I mailed four (4) true and correct copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari, postage prepaid, this 27 day of March, 1989, to the following:

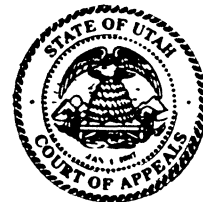
John Preston Creer, Esq.
Attorney for Defendants-Appellants
1200 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111



Regnal W. Garff
Presiding Judge
Richard C. Davidson
Associate Presiding Judge
Russell W. Bench
Judge
Judith M. Billings
Judge
Pamela T. Greenwood
Judge
Norman H. Jackson
Judge
Gregory K. Orme
Judge

Utah Court of Appeals

400 Midtown Plaza
230 South 500 East
Salt Lake City, Utah 84102
(801) 533-6800



Mary T. Noonan
Clerk of the Court

October 28, 1988

John Preston Creer
Attorney for Defendant and Appellant
1200 Beneficial Life Tower
Salt Lake City, UT 84111

In Re:

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

Dear Mr. Creer:

On October 28, 1988, the record index on this appeal was filed in this court. The record remains on file with the trial court for your convenience in preparing your brief.

Pursuant to Rules 13 and 26, the appellant's brief must be served and filed on or before December 10, 1988. This due date takes into consideration the three days mailing provision of Rule 22(d). Briefs filed by use of first class mail must be postmarked on or before December 10, pursuant to Rule 21(a).

Please refer to the enclosed checklist and Rules 24, 26 and 27 for content and format requirements. These requirements are strictly enforced. If you are not sure whether your brief will conform to these rules, we encourage you to bring the unbound original brief to the Court of Appeals. The case managers are available to review it prior to printing.

Sincerely,

A handwritten signature in cursive script that reads "Kathleen Hopkinson".

Kathleen Hopkinson
Case Manager

cc: C. Reed Brown
James H. Faust
Attorneys for Plaintiff and Respondent

FILED

DEC 2 1988
Glenn H. ...
 U.S. ...

JOHN PRESTON CREER (0753)
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 Telephone: (801) 538-2300

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, 1989 the transcript of testimony of Juergen Mueller.

DATED this 2nd day of December, 1988.

BY THE COURT:

William B. ...

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing ORDER by depositing the same with the United States Mail, postage prepaid to the following:

John Preston Creer
Attorney for Defendant and Appellant
1200 Beneficial Life Tower
Salt Lake City, UT 84111

C. Reed Brown
James H. Faust
Attorneys for Plaintiff and Respondent
3450 Highland Dr., Suite 301
Salt Lake City, UT 84106

DATED this 5th day of December, 1988.

By Kathleen Flynn
Kathleen Flynn
Case Management Clerk

IN THE UTAH COURT OF APPEALS

533-6807

-----ooOoo-----

ADDENDUM 3

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

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, Judge

CERTIFICATE OF MAILING

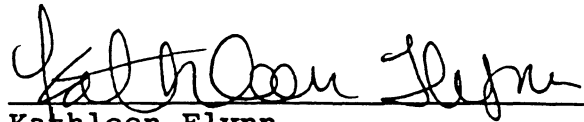
I hereby certify that on 31, January 1989 I mailed a true and correct copy of the foregoing ORDER by depositing the same with the United States Mail, postage prepaid to the following:

John Preston Creer
Attorney for Defendant and Appellant
1200 Beneficial Life Tower
Salt Lake City, UT 84111

C. Reed Brown
James H. Faust
Attorneys for Plaintiff and Respondent
3450 Highland Dr., Suite 301
Salt Lake City, UT 84106

DATED this 31st day of January, 1989.

By

A handwritten signature in cursive script, appearing to read 'Kathleen Flynn', is written over a horizontal line.

Kathleen Flynn
Case Management Clerk

C. REED BROWN, P.C. [0446]
 JAMES H. FAUST [1046]
 HINTZE, BROWN & FAUST
 Attorneys for Plaintiff-Respondent
 3450 Highland Drive, Suite 301
 Salt Lake City, Utah 84106
 Telephone: (801) 484-7632

UTAH COURT OF APPEALS

HELMUT REINICKE,)	
)	
Plaintiff and Respondent,	)	MOTION TO DISMISS APPEAL
)	
vs.)	
)	
WASATCH TOOL & DIE, INC.,)	
JUERGEN MUELLER AND)	
JULIA F. MUELLER,)	
	)	Case No. 880460-CA
Defendants and Appellants.))	

COMES NOW plaintiff and respondent by and through his attorneys of record, C. Reed Brown and James H. Faust, pursuant to Rule 26(c) of the Rules of the Utah Court of Appeals, and move for dismissal of defendants'/appellants' appeal on the grounds that appellants did not file their brief on or before January 30, 1989. As grounds for this motion, respondent recites the following facts:

1. On June 3, 1988, defendants/appellants requested a transcript of the testimony of Allison Garland-Reinicke and Helmut Reinicke and no other witnesses.

2. The court reporter completed the transcript and filed the same in the trial court on October 26, 1988.

3. On November 28, 1988, the defendants/appellants filed a motion requesting a stay of the briefing schedule, claiming that the testimony of the defendant Juergen Mueller had not been transcribed.

4. Plaintiff/respondent filed an objection on November 30, 1988, to the Motion to Stay Briefing Schedule on the grounds that the defendants/appellants had never requested a transcript of the testimony of Juergen Mueller.

5. On December 2, 1988, the Honorable Judith M. Billings granted an order staying the filing of defendants'/appellants' brief until January 30, 1989.

6. Defendants/appellants filed a second Motion to Stay Briefing Schedule on January 24, 1989.

7. The Honorable Richard C. Davidson denied the motion for a second stay of the briefing schedule and ordered that briefs be filed as originally ordered by Judge Billings.

8. Defendants/appellants have failed to comply with the Court's order concerning the timeliness of filing of a brief and pursuant to Rule 26(c), Rules of The Utah Court of Appeals, the appeal should now be dismissed.

DATED this _____ day of February, 1989.

C. REED BROWN
Attorney for Plaintiff/Respondent

James H. Faust

JAMES H. FAUST
Attorney for Plaintiff/Respondent

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Motion to Dismiss Appeal, postage pre-paid, this 3 day of February, 1989, to the following:

John Preston Creer, Esq.
Attorney for Deendants/Appellants
1200 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111

Joyce Pitts

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

CERTIFICATE OF MAILING

I hereby certify that on 08, March 1989 I mailed a true and correct copy of the foregoing ORDER by depositing the same with the United States Mail, postage prepaid to the following:

John Preston Creer
Attorney for Defendant and Appellant
1200 Beneficial Life Tower
Salt Lake City, UT 84111

C. Reed Brown
James H. Faust
Attorneys for Plaintiff and Respondent
3450 Highland Dr., Suite 301
Salt Lake City, UT 84106

DATED this 08th day of March, 1989.

By Kathleen Flynn
Kathleen Flynn
Case Management Clerk