

1990

Johnson-Bowles Company, Inc., Marlen V. Johnson
v. John C. Baldwin, M. Truman Bowler, Kent
Burgon, David Hardy, Margaret Wickens, Keith
Cannon : Reply Brief

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO.

IN AND BEFORE THE UTAH

COURT OF THE APPEALS

JOHNSON-BOWLES COMPANY, INC., a
Utah corporation and MARLEN V.
JOHNSON,

Petitioners and
Appellants,

v.

JOHN C. BALDWIN, Director,
Securities Division of the
Department of Commerce, State
of Utah, and M. TRUMAN BOWLER,
KENT BURGON, DAVID HARDY,
MARGARET WICKENS, and KEITH
CANNON, members of the Securities
Advisory Board overseeing the
Securities Division,

Respondents and
Appellees.

REPLY BRIEF OF APPELLANTS

CASE NO. 900210-CA

Rule 29(b)(15) Priority

Appeal from a Rule 54(b) Order Denying Reinstatement
of an Extraordinary Writ and Order (among other
assignments of error) in the Third Judicial District
Court in and for Salt Lake County, State of Utah, the
Honorable James S. Sawaya, Judge Presiding
(District Court Case No. 89-0906506-CV)

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SEP 24 1990

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Utah Court of Appeals

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CORRECTIONS TO APPELLEES' STATEMENT OF THE CASE

Appellees' Statement of the Case on pages 1 through 7 of their opposing brief is generally correct. However, it does contain certain highly inaccurate and misleading statements. On page two, bottom, page three top, thereof, the Appellees state that ". . . Johnson-Bowles offered to purchase . . . U.S.A. Medical stock from Utah citizens" This is fundamentally belied by the Appellees' own brief. In the last sentence of ¶6, page 12 of Appellees' Appendix "A" to their brief, the Appellees themselves held, on August 13, 1990, that Johnson-Bowles did not offer to purchase any stock from anyone after the Division's March 1, 1989, suspension Order went into effect. [Emphasis added.] This brazen inconsistency evidences that the Division's case, as it has itself articulated it, makes little, if any, sense. For instance, if the Division's administrative adjudicative proceedings are and have been predicated on Appellants' having violated Utah Code Ann. §61-1-6(1)(g) -- because Johnson-Bowles allegedly "solicited" or "encouraged" or otherwise "aided" in the violation of §61-1-7 of the Act -- the Appellees by their own Findings of Fact in their August 13, Order, make it impossible to have violated §61-1-6(1)(g) on that basis.

The Appellees further misstate the clear meaning and intendment of the applicable Department of Commerce rule in issue. On page 5 of the Appellees' brief, the Appellees contend

that Department of Commerce Rule R151-46B-12D contemplates that an "order" on agency review is to issue 20 days after the "last responsive pleading" is filed. This is neither the rule nor the law. The Division was required by law to issue an order on agency review 20 days after September 26, 1989, and there is no question that it abjectly failed to do so. The Appellees' entire opposing brief presupposes a complete misreading of the applicable Department of Commerce Rule and thus begs the question of how this Court should decide this case.

Lastly, the Appellees assert that Appellants' registrations with the Division have now been suspended for one (1) year as a result of the August 13, 1990, Findings of Fact, Conclusions of Law, and Order thereon. (See Appendix "A" to Appellees' Brief.) This is also false in that Department of Commerce Executive Director David L. Buhler is presently reviewing the entire administrative proceedings and such review suspends the operation of the Appellees' August 13, 1990, Order. In short, Appellants are not yet guilty of anything other than doing everything available to them to protect themselves and their livelihoods.

REBUTTAL OF APPELLEES' ARGUMENTS

COUNTER-ARGUMENT I

APPELLANTS DID NOT MISLEAD THE LOWER COURT IN THEIR PETITION FOR EXTRAORDINARY WRIT. ON THE CONTRARY, THE APPELLEES, IN ORDER TO PREVENT ANY REVIEW OF THE ALJ'S AUGUST 29, 1989,

ORDER AND PREVENT ANY DISPOSITIVE RESOLUTION OF THE PROCEEDINGS AT THAT STAGE, DELIBERATELY MISLEAD THE LOWER COURT EX PARTE.

The Appellees contend that Appellants somehow "hookwinked" the lower court into granting extraordinary relief by failing to disclose in their October 27, 1989, Petition nothing more than the Division's own unilateral interpretation of Department of Commerce Rule R151-46B-12 -- a convenient "Division interpretation" that Appellants lacked the omniscience to be aware of in advance. On the contrary, a request for agency review had been sought by Appellants on September 11, and the Division's counsel, not the Division itself, filed a responsive pleading on September 26. The fact is that no order on agency review had issued from the Division nor had any other communication been received from the Division itself -- not its counsel -- as required under the applicable rule. Certainly the Division's counsel is not the alter ego of the Division. The procedural reality is that Appellees themselves mislead the lower court by informing the lower court that their counsel's own "responsive pleading" was tantamount to or otherwise excused the Division's legal obligation to issue an order on agency review.

COUNTER-ARGUMENT II

THE DISTRICT COURT HAD JURISDICTION BECAUSE THE DIVISION'S FAILURES WERE ANYTHING BUT DISCRETIONARY.

Throughout Appellees' opposing brief, Appellees presuppose that the Department of Commerce Rule in issue is

discretionary. Because the rule has a 20 day requirement and triggering mechanism for the issuance of an order on agency review, there is nothing discretionary about it. After soliciting this Court to follow their erroneous presuppositions, the Appellees attempt to distinguish Appellants' reliance on Aluminum Company of America v. ICC, 761 F.2d 746 (D.C. Cir. 1985)(then Judge Scalia). However, the factual differences between Aluminum Company and this case has no bearing on Aluminum Company's legal holding. Specifically, Aluminum Company stands for the unambiguous proposition that a government agency must abide by its own rules and seeking an extraordinary writ in the district court to compel an agency to comply with the law is the appropriate remedy. Whether the order at issue is interlocutory or final is neither the issue in this case nor in Aluminum Company. The issue in Aluminum Company, as in this case, is that the government agency failed to comply with its own non-discretionary rules.

Throughout the Appellees' memorandum, the Appellees further argue that the ALJ's August 29, 1989, order from which agency review was sought on September 11, 1989, was "interlocutory". Whether such order was interlocutory is one of opinion and it does not excuse the Division from failing to comply with law requiring affirmative conduct on its part. Such rule, by its own language, simply says and contemplates review of an "order" as does §12 of the UAPA. The decision the Court

should render in this case is that if an agency fails to comply with its own rules (i.e., the law), the relief sought by those like Appellants should be granted by default. This is because an agency should be penalized for stalling the just and efficient resolution of an administrative adjudicative proceeding, particularly when the respondent is hamstrung in the agency's self-serving forum and such person's livelihood and constitutional rights are at stake. Thus, because the Division failed to act, the request for agency review in issue should have been granted and/or the order should have been certified as "final" for immediate judicial review. Otherwise, persons like Appellants would be inextricated endlessly and unfairly in the administrative adjudicative arena as has unfortunately and unnecessarily occurred in this case. Belaboring the distinction of "final" versus "interlocutory" when discretion to issue an order on agency review is not the issue in this case is simply putting the cart before the horse.

Appellees' argument that Appellants should have apparently sought extraordinary relief in the Court of Appeals further miscomprehends what is going on in this case. A general jurisdiction district court of the State of Utah certainly has the power and authority to compel a Utah administrative agency to obey the law. Wright v. City of Wellsville, 608 P.2d 232, 233-34 (Utah 1980). There is no reason on earth why Appellants should have sought an extraordinary writ in the Court of Appeals and had

they done so, they would have had no legal basis therefor. Simply because the Division changed its mind and converted the proceedings from "formal" to "informal" -- ignoring its own sub-agency rules that such proceedings are always designated as informal¹ -- does not lead to the conclusion that in this case, only the Court of Appeals would have had jurisdiction to make the Division abide by the law.

The Appellees' failure to abide by the very rules governing them is certainly arbitrary and capricious. In Wright v. City of Wellsville, supra at 233-34, the Utah Supreme Court held that mandamus allows courts to intrude into or interfere with functions or policies of other departments of government if such body has acted capriciously and arbitrarily. Accord: Ledbetter v. Oklahoma Alcoholic Beverage Laws Enforcement Commission, 764 P.2d 172, 180 (Sup. Ct. Okla. 1988). Contrary to what Appellees assert, the case at bar does not involve policy, but rules -- rules which are not to be enforced capriciously and arbitrarily as Appellees have done.

In All Purpose Vending, Inc. v. City of Philadelphia, 561 A.2d 1309, 1311 (Pa. Cmwlth. Ct. 1989), a case cited by Appellees, the Court held that the existence of substantial

1 At the time the Division's petitions were filed in April 1989, the Division's administrative adjudicative proceedings under R177-6-1g, "Dishonest or Unethical Business Practices", were expressly designated as "informal". The Division amended its rules effective, July 1, 1990, at Blue Sky L. Rep., Vol. 3, (CCH) ¶57,403, pp. 50,508-511.

questions of constitutionality and the absence of adequate statutorily prescribed remedies, confers equity jurisdiction on a court. Accord: Ledbetter, supra at 180. In this case, there were no statutory remedies available to Appellants and the Constitutional questions raised by Appellants in the lower court with regard to federal pre-emption and the inherent conflict of Appellants' administrative prosecutors, judges, and jurors are substantial enough that the lower court indeed had jurisdiction to address them. Unfortunately, the lower court did not and therefore, this appeal exists.

The issue in this case is not Appellants' failure to exhaust administrative remedies as Appellees would want this court to believe. Merrihew v. Salt Lake County Planning and Zoning Commission, 659 P.2d 1065, 1967 (Utah 1983). On the contrary, Appellants were pursuing all administrative remedies available to them. The problem is that such remedies weren't sufficient. This, coupled with Appellees' "do-nothing" judicial attitude prejudicing Appellants, forced Appellants to do what they did in an attempt to fully resolve the proceedings quickly and otherwise protect themselves and their livelihoods.

In sum, the Division would have had to act properly -- or at least within its discretion -- for mandamus not to lie in the district court. Ingram-Clevenger, Inc. v. Lewis and Clark County, 636 P.2d 1372, 1374 (Sup. Ct. Mont. 1981)(holding that if there has been an abuse of discretion

amounting to no exercise of discretion at all, mandamus will lie to compel proper exercise of powers granted); Olsen v. Salt Lake City School District, 724 P.2d 960, 39 Ut. Adv. Rep. 39, 42 (Sup. Ct. 1986)(holding that where the law imposes limitations on the exercise of discretion, mandamus is available to enforce those limitations). In this case, it was improper for the Division to disregard and ignore its own rules only to prejudice Appellants. Under the circumstances, the Division had no discretion to keep Appellants from doing whatever they could to resolve the proceedings according to the very law governing the Division. Thus, the district court indeed had jurisdiction to expedite or resolve the proceedings. This is not to ignore that the district court itself abused its discretion in not reinstating the extraordinary writ, and therefore it can and should be reversed on appeal. Garcia v. City of South Tucson, 663 P.2d 596, 598 (Ariz. App. 1983). In fact, because there was no impossibility of performance on the part of the Division, the district court erred in not reinstating the extraordinary writ. Garcia, supra at 598.

COUNTER-ARGUMENT III

WHETHER THE ALJ'S ORDER FROM WHICH AGENCY REVIEW WAS SOUGHT WAS "INTERLOCUTORY" OR "FINAL" IS IRRELEVANT TO THIS APPEAL AND THE MERITS HEREOF BECAUSE SUCH REVIEW HAS A "SUBSTANTIAL EFFECT UPON THE ULTIMATE OUTCOME OF THE PROCEEDINGS".

The Appellees have cited several cases in their brief, which, if examined, readily support Appellants' appeal on the merits. In In Re Uniform Administrative Procedure Rules, 90 N.J. 85, 447 A.2d 151 (Sup. Ct. 1982), the New Jersey Supreme Court held that there is nothing improper about reviewing a so-called "interlocutory order" if it has "a substantial effect upon the ultimate outcome of the proceedings". Id. at 158-159. In this case, if it could have been quickly established that the Division lacked jurisdiction to discipline Appellants simply for complying with their concomitant federal obligations, the case would have been disposed of summarily as opposed to 1½ years of pointless litigation, substantial pain and suffering, and thousands and thousands of dollars later. Unfortunately, the Division wanted its pound of flesh and wasn't interested in learning that it may have lacked jurisdiction. In fact, the Appellees' conduct and arrogant attitude brings to mind the words of philosopher Herbert Spencer:

There is a principle which is a bar against all information, which is proof against all arguments and which cannot fail to keep man in everlasting ignorance -- that principle is contempt prior to investigation.²

Based on the foregoing, whether the ALJ's order was "interlocutory" or not is irrelevant to the disposition of this case, an argument comprising virtually all of Appellees' brief.

² Source: The "Big Book" of Alcoholics Anonymous, Alcoholics Anonymous World Wide Services, Inc., Third Edition, New York City, 1976, p. 570.

COUNTER-ARGUMENT IV

IF THIS APPEAL WERE MOOT, THERE NEVER WOULD OR EVER COULD BE A DECISION INTERPRETING §12, UAPA, OR ANY COROLLARY AGENCY RULE.

The Division argues that this appeal is moot because, if the lower court were reversed and it were required to reinstate the extraordinary writ, the relief that would result is that which is in the very process of presently occurring, namely, agency review by the executive director of the Department of Commerce. The argument ignores the fact that had the Division or the Court of Appeals reviewed Appellants' Rule 12(b)(1) motion and the ALJ's August 29, 1989, Order relative thereto, the proceedings may have not gone any further and required the enormous amount of time, energy and money spent by all the parties, including the taxpayers of Utah. To the extent the failure to address the ALJ's August 29, "order" was a mistake, Appellants have been severely damaged and a ruling reversing the ALJ would have dispensed with all that has occurred relentlessly between now and then, including Appellants' forthcoming appeal to this Court of the entire administrative adjudicative proceedings. Thus, a ruling from this Court on the merits is in the interests of judicial economy and will save this very Court from but another lengthy and far more protracted, complicated, and time consuming decision to render. A proper resolution of this appeal will thus obviate additional appeals to this very Court.

Moreover, in the event Appellants do not get a favorable ruling from Executive Director Buhler and they seek judicial review under §16, UAPA, Appellants will more than likely move to consolidate this appeal with the forthcoming appeal of the entire administrative adjudicative proceedings. If such occurs, this Court can address all of the issues presented in both appeals and by virtue of this appeal, it will be able to see the entire picture of what has arbitrarily and capriciously transpired.

If this appeal is moot, it also means that there would never be an appellate decision in Utah interpreting §12, UAPA. This is because under the practicalities of administrative and judicial appellate procedure, an administrative proceeding would clearly be resolved by the administrative agency prior to the time a judicial appeal is heard and ruled upon. Appellants submit that it was never the intention of the legislature or our legal system in general to render certain statutes unreviewable and uninterpretable by an appellate court as a matter of law. Yet this is precisely the Appellees' argument. Furthermore, if this appeal is indeed moot, why wasn't the very same issue on appeal in Aluminum Company moot for the same reasons, the very issue addressed first and foremost by then Judge Scalia?

COUNTER-ARGUMENT V

THE APPELLEES' OPPOSING BRIEF IS NON-RESPONSIVE TO APPELLANTS' BRIEF AND TOTALLY IGNORES THE CONSTITUTIONAL AND

MERITS ISSUES OVER WHICH THIS COURT HAS JURISDICTION AND WHICH ARE NOW RIPE TO DECIDE.

Without reiterating Appellants' Constitutional and other issues relative to the merits of their September 11, 1989, request for agency review, the Appellees have neglected to even refer in passing to such issues in their opposing brief. Furthermore, because the Appellees have lodged no objection to addressing the ALJ's August 29, 1989, Order on the merits, they have certainly opened the door, if not encouraged, this Court to address such in their entirety. Further, to save the time and expense of a forthcoming appeal of the entire administrative adjudicative proceedings, this Court would be well advised in the interests of its own time and that of the parties to review the ALJ's Order on its merits in this appeal.

There is also authority that an appellate court has authority to modify a judgment in a mandamus proceeding. Cain v. The Department of Health and Environmental Sciences, 582 P.2d 332, 335 (Sup. Ct. Mont. 1978). Accordingly, this Court has the ability to rule on the merits of both Appellants' Constitutional arguments before the lower court and those in their request for agency review, all as set forth in their Brief, if only to prevent further costly and wholly unnecessary litigation between the parties, including further appeals.

COUNTER-ARGUMENT VI

THIS APPEAL IS NOT FRIVOLOUS BECAUSE APPELLANTS' ENTIRE LIVELIHOODS ARE AND HAVE BEEN AT STAKE AND WHEN CITIZENS ARE INEXTRICATED INTO A MALICIOUS AND POINTLESS ADMINISTRATIVE ADJUDICATIVE PROCESS THREATENING THEIR VERY SURVIVAL, THEY HAVE EVERY RIGHT TO DO WHATEVER IS NECESSARY TO PROTECT THEMSELVES.

Appellants have been in the securities brokerage business for over 15 years. They have had thousands and thousands of customers. As a result of the Division's pointless proceedings,³ designed merely to teach the world that, according

³ The point of the Division's administrative adjudicative proceedings is and has been no less spectacular than to create a legal precedent that one who simply buys unregistered, non-exempt securities (for whatever reason) is guilty of aiding and abetting the unlawful sale thereof. [Emphasis added.] This Division obsession is legally ridiculous in that it creates a strict liability, in pari delicto defense to the offer and sale of unregistered, non-exempt securities by professional stock swindlers or anyone else. In fact, what is so remarkable is that on June 15, 1988, the U.S. Supreme Court already rejected, in this very context, the "substantial factor" test (one of the components of the three prong aiding and abetting test) in Pinter v. Dahl, ['87-'88 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶93,790.

Without being facetious, the other point made by the Division's proceedings is that "crime does pay." For instance, on September 7, 1990, U.S. District Judge David Sam, in the case of United States v. James Lynn Averett, Case No. 90-CR-129S, sentenced Utah attorney James L. Averett to mere probation for having pleaded guilty to the felony of criminal conspiracy relative to his direct involvement in the U.S.A. Medical stock fraud and market manipulation. By sharp comparison, it is undisputed that Appellants single-handedly exposed the entire U.S.A. Medical fraud and market manipulation in U.S. District Judge Greene's court at February end, 1989. As their reward for doing the government's work, Appellants have had a determination by Appellees that their registrations with the Division be revoked for a year, an additional two year probationary period, and, as a result, their entire business and reputations have been

to the Division, securities broker-dealers shouldn't honor conflicting and pre-existing federal, SEC and NASD obligations, Appellants' business and livelihoods have now been destroyed. To be sure, in simply complying with their overriding SEC and NASD obligations and responsibilities, Appellants are, thanks to the Division, out of business -- without even a just resolution of these proceedings. For instance, based on the pendency of these proceedings, Appellants have had to withdraw their NASD registrations and a valuable trader, who brought in nearly a million dollars a year in income, has left the firm. Appellant Johnson is now out of work after having operated a successful brokerage firm with, at one time, up to 20 employees. Several of such employees have also been put out of work and have had to seek other, less promising employment. There is thus nothing frivolous about the chaos and havoc the Division has raised in the lives of Appellants and those of their former employees just to make a point that never had to be made in the first place. Certainly there is nothing frivolous about doing what a person has to do to protect himself and his or her very existence,

destroyed. Thus, the lesson learned from the Division is that it pays for a broker-dealer to participate directly in a securities fraud and market manipulation by directly and secretly buying stock from those directly involved in the scheme as opposed to doing what Appellants did, namely, what is known in the industry as "whistleblowing". To be sure, the Division's position is contrary to SEC v. Dirks, (U.S. Supreme Court) (July 1, 1983) ['82-'83 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶99,255, n. 8, p. 96,124.

including seeking to expedite the proper resolution of administrative adjudicative proceedings through extraordinary relief. The Appellees' flippant view of their power and ability to destroy peoples' lives and reputations, as if they were spending their own money, not someone else's in the process, is certainly anything but frivolous.

The irony of this case is that the Division licenses 16,833 agents, 763 broker-dealers, and 91 investment advisors.⁴ At the same time, the Division has admittedly done little more since April 27, 1989, than pursue Appellants with a vengeance,⁵ simply for complying with their federal, SEC and NASD obligations. If the Appellants' defense to such pointless proceedings is itself frivolous, then perhaps no one should engage in the securities brokerage business, or any other

4 Source: The Commerce Quarterly published by the Utah Department of Commerce, August, 1990, an article ironically entitled, of all things, "Division Mission".

5 The Division's excuse as to why it hasn't prosecuted virtually anyone else in the last year and a half over anything is that it has been admittedly concentrating on putting Appellants herein out-of-business. For instance, the Division, in 1989, filed an action against registered agent Paul Jones, a securities broker who sold U.S.A. Medical stock to Appellants in direct violation of the Division's March 1989, Orders. Yet instead of moving for summary judgment against Mr. Jones in the last year and a half -- a rather facile endeavor requiring a one page supporting memorandum -- the Division has busied itself, at the taxpayers' expense, pursuing Appellants for honoring their overriding federal obligations, conduct on the part of Appellants that ironically did not result in the distribution of any U.S.A. Medical stock to any Utah residents -- the only avowed goal of the Division's March 1989, Orders, and which it is undisputed that Mr. Jones, not Appellants

business regulated by government, and everyone should just quit, go home, and watch cable television. To be sure, this state has a deplorable reputation for securities fraud.⁶ Yet, the Division sees fit to single-out these two Appellants as the only persons it regulates and seek an unlawful \$50,000 "fine" for the last 1½ years -- not for engaging in securities fraud -- but for buying worthless stock which was not redistributed to Utah residents, stock used solely by Appellants to honor pre-existing Exchange Act contracts and insure that those to whom Appellants previously owed stock out of this state, would not lose several hundred thousand dollars.

The Division's cry and hue of the frivolousness of this appeal brings to mind what is presently occurring in RICO litigation across this nation. In the well-known and cited RICO case of Wabash Valley Power Association, Inc. v. Public Service Company of Indiana, Inc., 678 F.Supp. 757, 761 n.1

⁶ See e.g., The "Stock-Fraud" Capital Tries To Clean Up Its Act, Business Week, February 6, 1984, at 76. ("[Utah] is now known as the sewer of the securities industry. The SEC estimates that some 10,000 state residents lost up to \$700 million through unregistered securities, fraud and flagrant mismanagement over the past three or four years."); Utah Investors Said to Lose \$125 Million In Securities Scam, Wall Street Journal, Dec. 5, 1984 at 42. Regardless of Utah's reputation for securities fraud, it is significant that in the case at bar, not one single, solitary Utah resident was in the least damaged by the conduct of Appellants in complying with U.S. District Judge Greene's ruling and in otherwise acting with integrity and commercial honor to protect those out-of-state broker-dealers and clearing corporations to whom they owed U.S.A. Medical stock prior to March 1, 1989.

(S.D. Ind. 1988), the Court stated:

This Court's research reveals that it has become standard practice for RICO defendants to allege lack of specificity. This Court takes a dim view of this litigation strategy because it tends to delay, rather than enhance, a resolution of a RICO claim. For example, in this case, PSI filed an answer to WVPA's original complaint. When WVPA amended its complaint to add its RICO claim, WVPA incorporated its prior allegations into its RICO claim. Suddenly, however, the PSI were unable to answer because of lack of specificity.

By the same token, it has become standard practice to allege frivolousness in appeals and everywhere else. The Division, which in this appeal chose not to file a motion for summary disposition, is using no different and no less pitiable of a tactic with respect to frivolousness. Such charges, as with those in Wabash, do not resolve the dispute in issue. Certainly, if Appellants are dragged through the another malicious administrative process as the Division has vindictively threatened, Appellants are entitled to a proper and just interpretation of §12, UAPA, and the corollary rule, inasmuch as none presently exists. For these reasons, this appeal is far from frivolous and this Court should take a similar "dim view" of such "standard practice".

Lastly, if this appeal is frivolous, one has to explain away why the district court, after being well advised, granted Appellants' Petition for Extraordinary Writ in the first place on October 27, 1989. Hunt v. Hurst, 785 P.2d 414, 125 Ut. Adv. Rep.

23, 25 (Sup. Ct. 1990)(one of reasons appeal lacked merit was fact of losing on summary judgment so resoundingly in lower court).

CONCLUSION

This case, contrary to what Appellees assert, is about false pride, the false pride of a government agency that has no interest whatsoever in discovering if it is acting in error and which uses its own little forum to foist the personal agendas of its personnel on those it regulates. What this case is about is a government agency which brought an action against but two of its nearly 17,500 licensees because it "heard" -- through unreliable sources which included convicted securities felons -- that Appellants made several hundred thousand dollars "covering" their "short" positions in certain unregistered securities. Yet when the Division and its counsel eventually learned that Appellants hadn't made a "fortune" (i.e., that Appellants made just over \$6,000 and had spent well over \$100,000 in attorney's fees alone) and that Appellants wouldn't (or couldn't, even if they wanted to) pay the Division a \$50,000 unlawful "fine" to settle the matter,⁷ it was too late to bow out gracefully and

⁷ When the proceedings were initially brought against Appellants in April 1989, Utah Code Ann. §61-1-6 did not confer any power or authority on the Division to extract fines from its licensees. As a result of these proceedings and the Division's embarrassment at trying to extract a \$50,000 fine from Appellants which they had no authority to do, the Division lobbied the legislature and such statute was amended, effective April 23,

dismiss the proceedings. Then, in a concerted effort to perpetuate such proceedings and "cover" its own embarrassment and indiscretion at not reasonably investigating in advance -- and also because Appellants had the "audacity" to resist the proceedings -- the Division embarked on a campaign to put Appellants, and no one else, out-of-business no matter what the cost to the taxpayer or anyone else.

One would think that a government agency would want to know whether it had jurisdiction to regulate citizens in a manner diametrically inconsistent with its licensees' simultaneous obligations under federal law. However, instead of being the least bit interested in resolving this rather paramount, preliminary issue, the Division sought to "string" the proceedings out endlessly in its own little forum, hoping that Appellants would get tired of the cost and expense and eventually capitulate to a sanction, thereby justifying the Division's "noble" efforts to allegedly "protect the public" from, of all people, those like Appellants.

At issue here is whether Appellants had the right to get the case disposed of summarily and quickly and whether the Division should want to know if it indeed had jurisdiction to regulate Appellants in a manner antithetical to federal rules and

1990, to allow the director to impose a fine at his or her discretion. See Utah Code Ann. §61-1-6(1), as amended, p. 5, top, of 1990 Supplement.

regulations.⁸ Appellants believe that this issue should have been submitted to an impartial reviewing officer without delay or Appellants should have at least been permitted to pursue the issue quickly and effectively with the appropriate appellate court, either by way of extraordinary writ or otherwise. What this case is about is creating precedent that either an agency or the courts ought to review dispositive matters under §12, UAPA, or the corollary rule.

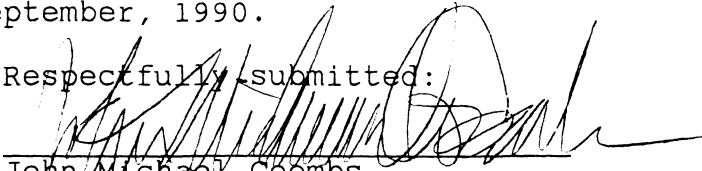
Appellants have been told that administrative adjudicative proceedings were designed with the intent that disposition in such forums would be cheaper, more efficient, and certainly more cost-effective. Yet the administrative adjudicative proceedings in issue are a monument to the fact that this is anything but the case, that Appellants could have litigated the entire matter in district court or elsewhere at half the cost in time, energy, money and mutual animosity. This Court should rule that the Division should have heard the Appellants' dispositive request for agency review or certified the same for judicial appeal as Judge Sawaya originally ordered. At the same time, this Court should dismiss the administrative

⁸ See this very Court's decision in Western Capital & Securities, Inc. v. Kundsvig, 799 P.2d 688, 113 Utah Adv. Rep. 53, (Ct. App., February 7, 1989), [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶94,337. The Court should also note Rule 302 of the Utah Rules of Evidence which provides: "In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which federal law supplies the rule of decision is determined in accordance with federal law." [Emphasis added.]

adjudicative proceedings in their entirety in that Appellees' amended petitions were pre-empted under federal securities law. Further, this Court should decide that the proceedings are and have been unconstitutional because Appellants have been pursued by those acting as prosecutor, judge, jury, and executioner -- all at the same time. These are sufficient grounds to dismiss the proceedings in their entirety and make any and all other rulings prayed for in Appellants' Brief.

DATED this 24th day of September, 1990.

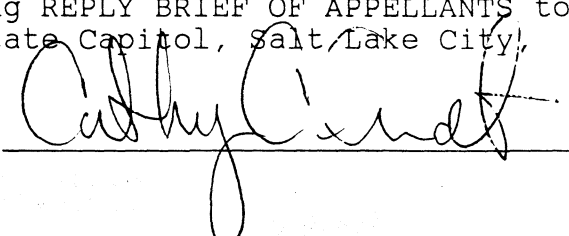
Respectfully submitted:



John Michael Coombs
Craig F. McCullough
Attorney for Appellants

PROOF OF SERVICE

The undersigned hereby certifies that on the 24th day of September, 1990, (s)he hand-delivered a sufficient number of true and correct copies of the foregoing REPLY BRIEF OF APPELLANTS to Mark J. Griffin, located at 115 State Capitol, Salt Lake City, Utah 84114.



L:REPLY.5-14