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March 4, 1993

Mary T. Noonan, Esq.
Clerk of the Court
UTAH COURT OF APPEALS
230 South 500 East, Suite 400
Salt Lake City, Utah 84102

VIA HAND-DELIVERY

Re: Kent L. Brown and Larry R. Hendricks, Plaintiffs/Appellants v. Roy B. Moore; Elaine B. Weis; and The Department of Financial Institutions of Utah, Defendants/Appellees, Case No. 920703-CA

Dear Ms. Noonan:

Appellants Kent L. Brown ("Brown") and Larry R. Hendricks ("Hendricks"), by and through their undersigned counsel, hereby object and respond to the letter dated February 26, 1993 by counsel for Appellees sent to the Court after oral argument (held February 17, 1993), purportedly to advise of new supplemental authority entitled Prows v. State, 822 P.2d 764 (Utah 1991).

OBJECTION TO CONSIDERATION OF APPELLEES' SUBMISSION

Brown and Hendricks object to consideration of the described submission of Appellees on the following grounds:

1. The Prows case cited in the letter is not a decision which has only recently come to the attention of Appellees. Appellees argued in the district court in this action that the unpublished decision of the Third District Court in the Prows case was authority to support the position of Appellees. R. at 267, 274.[1]

[1] This was an improper argument at the time since it violated Rule 4-508 of the Utah Code of Judicial Administration prohibiting references to unpublished opinions with no precedential value, as

2. Counsel for Appellees in this case were also counsel for the State of Utah and the Department of Financial Institutions as parties in the Prows case. Since the Prows opinion of the Utah Supreme Court was released in early December of 1991, before the briefing began in this appeal presently before the Court, the Prows decision is not a matter which can properly be viewed as having only recently come to the attention of Appellees or their counsel.

3. The Prows opinion was cited in Appellants' Reply Brief (at p. 12) for the limited purpose of providing background facts regarding certain aspects of the history of the situation presented here, only to rebut an unsupported assertion in Appellees' brief. Appellees had full opportunity to refer to the Prows opinion at oral argument, but chose not to do so. That decision does not now entitle Appellees to argue the case in a subsequent written submission to the Court.

4. Appellees' complete and presumably intentional failure to even mention the Prows opinion in their principal brief, shows that Appellees' counsel recognized then that the Prows opinion has no application to this case. Not only are the relevant facts in Prows different and distinguishable from those in the present case, the legal theories upon which the two cases have proceeded are entirely different.

5. To allow Appellees now to have the information in their letter of February 26, 1993 considered by this Court subverts the orderly process so carefully prescribed in the Rules of Appellate Procedure and should not be countenanced.

SUBSTANTIVE REPLY

Should this Court decide to allow consideration of Appellees' letter of February 26, 1993, notwithstanding the procedural problems therewith described above, Appellants Brown and Hendricks respond substantively as follows:

I. Prows is Distinguishable on Both its Facts and Legal Theories.

As Appellees themselves partially acknowledge and concede in paragraph 2 of their February 26, 1993 letter, the Prows case is

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was then the case.

readily distinguished from the case at bar. In Prows, there apparently was no written contract between the State Department of Financial Institutions and Mr. Prows and Mr. Wood, the new owners of Foothill Thrift.

In the present case, Appellants Brown and Hendricks entered into formal written contracts with both the Department of Financial Institutions ("DFI") and the Industrial Loan Guaranty Corporation ("ILGC"). Both contracts were specifically reviewed and approved by Defendant Weis as Commissioner of the DFI. Both contracts were premised on a written pro forma projection of the anticipated future performance of Western Heritage Thrift & Loan ("Western Heritage") under its new owners. In the Prows opinion, there is no reference to nor reliance on any such arrangement, which was missing in that case.

In Prows, the Supreme Court held that the only contract there alleged, one between Foothill and the ILGC, was not based on any "bargain" made in that case, since the consideration from each party was provided only pursuant to statute. Prows, 822 P.2d at 767-768. Further, the contract claim was not made by the individual plaintiffs, but rather by plaintiff Foothill Federated, which asserted that the ILGC was obligated only to guarantee "statutorily mandated levels" of insurance coverage for deposits. Id. By contrast, the contract claim of Brown and Hendricks does not seek enforcement of statutory obligations, and is based on a written agreement between them individually, on the one hand, and the DFI, on the other.

In Prows, no constitutional or taking claim was alleged and the Court was not asked to examine the circumstances of any seizure which may have there occurred. Moreover, any such seizure occurred, if at all, under circumstances quite different from those of the present action.

II. The Brown and Hendricks Contract was Based on Substantial Consideration, Not Statutory in Nature.

Appellees, in suggesting in point (2) of their letter that the Brown and Hendricks contract may suffer a statutory consideration infirmity similar to the entirely different "contract" alleged in Prows, improperly construe and attempt to misapply the Prows holding. In the case at bar, Brown and Hendricks specifically bargained with the DFI to invest $550,000.00 of new capital and

personal management services in return for a reasonable opportunity to make Western Heritage sufficiently profitable so that they might make back their investment and more. This consideration was not statutory on either side. Brown and Hendricks were not obligated by statute to contribute anything to Western Heritage. Their decision to do so was induced by the implied promise of the DFI, inherent in the pro forma and written contract based thereon, to allow them to manage Western Heritage for a reasonable period of time.

While Utah statutes gave Commissioner Weis the power to require the stock of Western Heritage to be transferred away from its prior owners, which was done in 1984, that statutory power was exercisable only because Western Heritage's prior owners had allowed it to become a failing financial institution. This did not depend on any conduct or consideration which originated with Brown and Hendricks. The statute did not obligate Commissioner Weis to transfer that stock to any new investor. She could and presumably would have kept that stock for the DFI in December 1984 were it not for the new investment of capital, management experience and effort which Brown and Hendricks brought to the deal. This was reflected in Commissioner Weis' requiring the three-year future financial projections as a basis for the DFI's willingness to transfer the stock to Brown and Hendricks.

III. The State's Taking Order Deprived Brown and Hendricks of any Legal Basis for Compensation in Liquidation Proceedings.

The theoretical suggestion contained in point (3) of Appellees' letter of February 26, 1993 is a new argument, raised on appeal for the first time. It also ignores the fact that the ex parte taking order depriving Brown and Hendricks of all of their title to Western Heritage and its assets, leaves no legal basis for Brown and Hendricks to claim, as former owners, any right to any residual value which the liquidation proceedings might produce.

Moreover, that taking and divestiture precluded Brown and Hendricks from any meaningful participation in the management of the liquidation proceedings. This exclusion makes it less likely for any excess recovery to be achieved by liquidators who are less familiar with the thrift's assets. In addition, the State consolidated the liquidation proceedings of many thrifts in such a way that any excess produced by Western Heritage goes to pay depositors of other thrifts, further lessening the likelihood

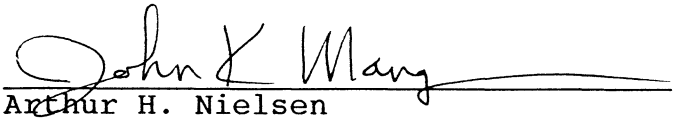
that there could ever be any excess available for Brown and Hendricks, even if they still had the right to seek such payment, because the other thrifts being liquidated with Western Heritage by the Appellees were much worse off financially than Western Heritage. This transfer of "surplus" collections only could be accomplished because of the taking of title to Western Heritage and its assets from Brown and Hendricks.

Finally, the premise that underlies the unavailable remedy suggested by Appellees is that good and profitable management will be appropriately rewarded through a greater surplus while inadequate management will be penalized by its inability to generate a surplus. That premise supports the claims of Brown and Hendricks.

Brown and Hendricks were recruited to step in and save a dying institution just moments before it would have otherwise taken its last breath, they provided new life blood for the thrift in the form of new capital contributions, were providing the best care and management possible for their patient, the thrift, and were significantly ahead of schedule in strengthening it and making it healthy when Appellees took Western Heritage. Appellees have misdiagnosed the problem created by Appellees and their proposed treatment is no cure.

An original plus seven copies hereof are respectfully submitted this 4th day of March, 1993, and today I have sent a copy to Mr. Denton M. Hatch, and Mr. Bryce H. Pettey, counsel for Appellees, by first class mail.

NIELSEN & SENIOR, P.C.



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cc: Denton M. Hatch, Esq.
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