

2000

# Kohn B. Hawkins v. Tom Callahan : Petition for Rehearing

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca2](https://digitalcommons.law.byu.edu/byu_ca2)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Shawn D. Turner; Attorney for Appellee.

Thor B. Roundy; Attorney for Appellant.

---

## Recommended Citation

Legal Brief, *Hawkins v. Callahan*, No. 2000550 (Utah Court of Appeals, 2000).  
[https://digitalcommons.law.byu.edu/byu\\_ca2/2531](https://digitalcommons.law.byu.edu/byu_ca2/2531)

This Legal Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

---

IN THE UTAH COURT OF APPEALS

---

JOHN B. HAWKINS,	)	PETITION FOR REHEARING
	)	
Plaintiff and Appellee,	)	Trial Court No. 980906136
	)	
v.	)	Appellate Court No.
	)	2000550-CA
TOM CALLAHAN,	)	
	)	
Defendant and Appellant.	)	

---

Appeal from the Third District Court, Salt Lake County,  
Judge Hilder

Shawn D. Turner  
Attorney for Appellee  
4516 S. 700 East, Suite 100  
Salt Lake City, Utah 84107

Thor B. Roundy  
Attorney for Appellant  
275 E. South Temple, Ste 150  
Salt Lake City, Utah 84111

**FILED**  
NOV 30 2001  
COURT OF APPEALS

---

IN THE UTAH COURT OF APPEALS

---

JOHN B. HAWKINS,	)	PETITION FOR REHEARING
	)	
Plaintiff and Appellee,	)	Trial Court No. 980906136
	)	
v.	)	Appellate Court No.
	)	2000550-CA
TOM CALLAHAN,	)	
	)	
Defendant and Appellant.	)	

---

Appeal from the Third District Court, Salt Lake County,  
Judge Hilder

Shawn D. Turner  
Attorney for Appellee  
4516 S. 700 East, Suite 100  
Salt Lake City, Utah 84107

Thor B. Roundy  
Attorney for Appellant  
275 E. South Temple, Ste 150  
Salt Lake City, Utah 84111

### **PETITION**

Appellant Tom Callahan herewith submits this petition for re-hearing in the above-captioned matter. The basis for this petition for re-hearing is set forth in detail below.

### **CERTIFICATION OF GOOD FAITH BY COUNSEL**

The undersigned counsel for Appellant Tom Callahan hereby certifies that this petition for rehearing is being submitted in good faith and not for any improper purpose including but not limited to any purpose of delay.

### **STATEMENT OF THE FACTS AND LAW OVERLOOKED BY THE APPELLATE COURT**

I. The Court of Appeals overlooked Appellant's identification of the witnesses Mr. Chen and Mr. Rohrberg expressly referred to in the Appellant's Brief, who would have been called but for the admissions already established in the case.

II. The Court of Appeals incorrectly applied the holding in Langeland v. Monarch Motors, Inc., 952 P.2d 1058 (Utah 1998) in failing to consider that the defendant was prejudiced in the presentation of its case by the surprise

associated with the Court's decision to set aside the order establishing admissions on its own motion at the outset of the trial.

III. The Court of Appeals failed to consider the lack of evidence that was presented at the trial supporting the conclusion reached by the Trial Court that the Lease Extension constituted a forgery or an alteration.

#### **AGRUMENT**

#### **I. THE COURT OF APPEALS OVERLOOKED APPELLANT'S IDENTIFICATION OF THE WITNESSES MR. CHEN AND MR. ROHRBERG EXPRESSLY REFERRED TO IN THE APPELLANT'S BRIEF, WHO WOULD HAVE BEEN CALLED BUT FOR THE ADMISSIONS ALREADY ESTABLISHED IN THE CASE.**

The Appellant notes that the Court of Appeals based its decision from the Trial Court's actions on the absence of evidence of prejudice to the Defendant at trial. The opinion by the Court of Appeals specifically states:

"Callahan's assertion that he was prejudiced is a bare recitation of Langeland. He has not identified any witness or item of evidence that was not available to him at trial and has not established prejudice. See Id. at 1063 (stating prejudice requires showing that the party is less able to obtain evidence required to prove the admitted matter than at the time admission was made)."

In order to reach that conclusion, the Court of Appeals must have overlooked at least three specific locations in the Appellant's Brief where the witnesses Mr. Chen and Mr. Rohrberg were identified as the witnesses that would have been called but for the order establishing admissions. The Trial Court's decision, announced at the outset of the trial, to ignore the admissions and receive information contradicting them was, therefore, extremely prejudicial to the Defendant because there was no longer an opportunity to call the two witnesses in question at that late date.

The Appellant makes reference the two witnesses on pages 13-14 of the Brief of the Appellant as follows:

"Because the Trial Court failed to act until trial, Defendant had no chance to issue subpoenas to witnesses that were made unnecessary as a result of the admissions in this case. In fact, various witnesses were out of the state and because of the passage of time would likely have been unavailable to Defendant to testify at trial. These include at least two other roommates that were evicted by Plaintiff. The unavailability of witnesses does satisfy the requirements of Langeland v. Monarch requiring Defendant to show prejudice in order to prevent amendment to the admissions."

Also in the Appellant's Brief, "Exhibit 'C' [R. 125-126]" is a notarized statement by Dan Rohrberg supporting Defendant Tom Callahan's position, refuting the position of the Plaintiff and otherwise attacking the Plaintiff's credibility. Page 11 of the Reply Brief of the Appellant also identifies the witnesses as follows:

"The specific witnesses who would have been brought to trial to impeach the credibility of the Plaintiff, if the Defendant had not relied upon the Trial Court's order establishing admissions, would have been the other tenants at the premises. These tenants included gentlemen by the name of Mr. Chen and a gentleman by the name of Dan Rohrberg. If the Court has any question whether Dan Rohrberg would have impeached the testimony of the Plaintiff, the Court need look no further than the handwritten affidavit of Mr. Rohrberg signed and notarized on August 3, 1998 and which was incorporated as part of the request for admission as Exhibit "C" [R. 125-126]. It is undisputable that Defendant was prejudiced by the Trial Court's action."

In the Brief of the Appellant, on page 7, is the reference to such prejudice that was apparently referenced by the Appellate Court in its decision. However, this is merely the summary of the argument.

Therefore, the Appellate Court must conclude that they overlooked Appellant's designation of the specific witnesses

that would have been called and the specific source of prejudice that the Defendant suffered when the Trial Court set aside its own order establishing admissions at the moment that the trial was about to begin.

**II. THE COURT OF APPEALS INCORRECTLY APPLIED THE HOLDING IN LANGELAND V. MONARCH MOTORS, INC., 952 P.2D 1058 (UTAH 1998) IN FAILING TO CONSIDER THAT THE DEFENDANT WAS PREJUDICED IN THE PRESENTATION OF ITS CASE BY THE SURPRISE ASSOCIATED WITH THE COURT'S DECISION TO SET ASIDE THE ORDER ESTABLISHING ADMISSIONS ON ITS OWN MOTION AT THE OUTSET OF THE TRIAL.**

In addition to the inability of Defendant to call Mr. Chen and Mr. Rohrberg as witnesses, because of the Trial Court's change of its ruling, Defendant was prejudiced in other ways. Remember that the Trial Court had already issued an order establishing admissions in the case. This was issued months before and was the basis of Mr. Callahan's entire trial preparation. Had the Trial Court not issued that order, Mr. Callahan would have engaged in other discovery about other leases entered into, their relative terms, negotiations that the Plaintiff typically engaged in and so forth. It would have been the Defendant's position to demonstrate that the Plaintiff typically allowed all of his renters to negotiate terms such as those that appeared



in the lease with Mr. Callahan. Because of the admissions, however, Defendant did not engage in that additional discovery prior to trial. Defendant did not have preparation to cross-examine the two tenants that were called by the Plaintiff at trial. Defendant did not have copies of their leases. Defendant did not have copies of the leases of other tenants, including those of Mr. Chen and Mr. Rohrberg. Furthermore, discovery with regard to those matters may also have lead to discovery of other related evidence that would have been helpful to Mr. Callahan at trial. All of this type of discovery goes directly to the heart of the creditability of the respective parties. Who was lying, Mr. Callahan or Mr. Hawkins? Defendant never had to confront these issued in his trial preparation, because the Court had issued an order establishing admissions, which removed those issues from trial.

Consequently, all of Defendant's trial preparation was prejudiced. The entire trial strategy was undermined by the Court's decision at the moment trial was about to begin to set aside the admissions and receive contrary evidence. Defendant's opening statement was undermined. Defendant's

own testimony was undermined. It is simply impossible at the moment a trial is about to begin for an attorney and his client to suddenly rethink their focus for trial, communicate with one another and effectively present their case. To the extent that Mr. Callahan may have appeared to have any lack of credibility, it was probably largely the result of the surprise created by the Trial Court in changing its ruling at the moment trial was about to begin.

Langeland v. Monarch Motors, Inc., 952 P.2d 1058 (Utah 1998) case did not concern a judge changing his order concerning admissions at the moment trial was about to begin. Instead, cases such as Langeland properly address the question of whether several months before trial a party is prejudiced in their ability to locate witnesses or other evidence by admissions being set aside. In Langeland, for example, trial strategy and preparation was not an issue because the parties were still quite some time away from trial. Had Langeland concerned circumstances such as the present case, the above-described additional prejudice to the affected party would certainly have been discussed. The Appellate Court should not ignore the prejudicial effect of

the "Trial surprise" that resulted from the Trial Court's action in the present case. The Appellate Court should not ignore the inapplicability of Langeland to the unique prejudice suffered by the Defendant in the present case. While it is true, as discussed above, that there would be no way now for Mr. Callahan to ever locate Mr. Chen and Mr. Rohrberg and perhaps obtain other useful evidence, in addition Defendant was prejudiced by the sheer surprise at trial created by Trial the Court's action.

**III. THE COURT OF APPEALS FAILED TO CONSIDER THE LACK OF EVIDENCE THAT WAS PRESENTED AT THE TRIAL SUPPORTING THE CONCLUSION REACHED BY THE TRIAL COURT THAT THE LEASE EXTENSION CONSTITUTED A FORGERY OR AN ALTERATION.**

The Appellate Court's memorandum decision filed November 16, 2001, fails to address an important point raised by the brief of the Appellant. The outcome of the trial should be reversed and judgment entered in favor of the Defendant because of the lack of sufficient evidence to support the Trial Court's finding that Mr. Callahan altered the lease extension.

Trial testimony did not justify any amendment. Plaintiff admitted that the signature on the document

attached as Exhibit "A" was his signature. [R: 301 Plaintiff's Exhibit 1; 505 p. 23:18-22] Similarly, in response to Request for Admission No. 19, Plaintiff admitted that it was his signature on the document attached as Exhibit "B". [R: 301 Plaintiff's Exhibit no. 4; 505 pp. 36:18-21.] It seems nonsense that Plaintiff wishes to deny that the extension is exactly what it purports to be. Other various admissions are simply admissions of facts set forth in other documents. The documents are virtually impossible for Plaintiff to convert.

At trial several signature cards, signed by the Plaintiff each month, were introduced as exhibits. [R: 301 Plaintiff's Exhibit no. 4] Plaintiff executed all of the signature cards directly beneath the text on the card. [R: 301 Plaintiff's Exhibit no. 4; 505 pp. 34:20-37:5, 59:11-61:7] In each case the text on the card was in the center of the card and the signature of Plaintiff was also very near the center of the card. [R: 301 Plaintiff's Exhibit no. 4; 505 pp. 59:11-61:7] In stark contrast, the Plaintiff squeezed his Signature on the extension into the very bottom corner of the card, indicating that the Plaintiff executed

it when the text of the card completely filled the remainder of the card, executed Exhibit "B". [R: 301 Plaintiff's Exhibit no. 4; 505 pp. 59:11-61:7] There is no other possible explanation for execution by the Plaintiff obviously squeezed into the lower part of the card. At trial, Plaintiff was invited to give an explanation for why his signature might be on the very bottom edge of the card. [R: 505 pp. 60:9-61:7] Plaintiff had absolutely no explanation. [R: 505 pp. 60:9-61:7] Plaintiff's testimony was essentially an admission that the text had, in fact, been there at the time that he executed the card.

Trial testimony did not justify any amendment to admission no. 18, nor did the evidence justify a finding that Plaintiff's Exhibit "4" was anything other than an unaltered extension of the lease, as it purported to be on its face. Likewise, admission no. 1 and 2 established that Plaintiff executed the Lease. Plaintiff's testimony at trial was that it was, in fact, his signature on the Lease. [R: 301 Plaintiff's Exhibit no. 1; 505 p. 23:18-22]

**IV. THE APPELLATE COURT MUST RECOGNIZE WHAT OCCURRED TO  
CREATE THE TRIAL COURT'S ERROR.**

The Court of Appeals should recognize this situation for what it really was. The Trial Court began the trial having already made a decision that it was going to set aside the request for admissions and find the absence of a lease extension. In short, the Trial Court was prejudice in advance to make such a decision, having been grappling with its own conscience to find a way to try to treat the Plaintiff fairly. As the record illustrates, the Court's decision was made before having any testimony from Mr. Callahan. Therefore, to state that the Court found Mr. Callahan to not be a credible witness cannot in any way be used to legitimately and credibly support the Trial Court's finding that the lease extension or any other document was result of a forgery or an alteration after the fact. In order to find fraud, the standard is clear and convincing evidence. Even if all of the standards necessary to prove fraud are inapplicable to the lease and the lease extension, there is certainly nothing in the testimony given by Mr. Hawkins, which could explain how the lease extension could

possibly be altered. He acknowledged, himself, that he had absolutely no explanation for why he would sign the lease extension in the lower right-hand corner and leave all that extra space in which to forge an alteration of the lease extension. He acknowledged that it was his signature. He acknowledged that he signed all of the receipts for payment of rent right below the location where the writing stopped. There is no credible way that Mr. Hawkins could have pinched his signature in the lower right-hand corner the way he did unless there was already writing above his signature. The Trial Court simply perpetuated a gross injustice upon Mr. Callahan based on a predisposition to do what it did and to find the way it did. The Trial Court's reference to Mr. Callahan's credibility was nothing more than an effort to rebut its prejudicial act by creating a record that really had nothing to do with the Court's decision.

**V. CORRECTION OF THE TRIAL COURT'S ERROR IS NECESSARY TO  
MAINTAIN THE INTEGRITY OF THE JUDICIAL SYSTEM.**

The Court of Appeals is probably aware--and certainly should be aware--that not only the public has lost a significant amount of confidence in our judicial system.

The lawyers are also losing confidence in the legal system. Lawyers routinely tell clients that going to trial is always a gamble. A loss of confidence in the legal system has a great deal to do with judges failing to follow the law in an effort to produce an outcome that they have decided seems fair to them. The Trial Court's ruling in this case undermines public confidence and the confidence of lawyers in the legal system. It is erroneous, it is inexplicable and it is unjust--no matter how good the Trial Court's intentions may have been.

There is a heavy burden on the Court of Appeals to correct erroneous Trial Court decision when they should be corrected. The public and attorneys are not going to reserve any level of confidence for the Appellate Courts if the Appellate Courts fail to correct erroneous a Trial Court's decision when warranted. Therefore, it is extremely important that Appellant's request for rehearing in this instance be granted. If the Clerks for the judges employed by the Court of Appeals failed to thoroughly read the brief submitted by the Appellant, then that is understandable. Now that the Appellant has pointed out the location of the



information missed by the Appellate Court's Clerks, correction of the decision on the basis of this petition for rehearing represents the means by which this Appellate Court can maintain and/or restore the confidence of the public in the role that they play.

**VI. MR. ROHRBERG AND MR. CHEN ARE NO LONGER AVAILABLE IN  
THE EVENT OF A RE-TRIAL.**

The means by which the Trial Court's error should be corrected is simply to enter a judgment based on the evidence properly admitted at trial. That evidence includes the admissions establishing the existence of the lease terms and the extension. Mr. Callahan presented all of his damages evidence at trial. Therefore, judgment can be entered based on the trial record.

It is not an option to have a re-trial. The witnesses that were unavailable at the time of trial will never be available in the future. At the time that the responses to the request for admissions were due, both the location of Mr. Chen and Mr. Rohrberg was still known to the Defendant. At the time of trial, the Defendant had already lost track

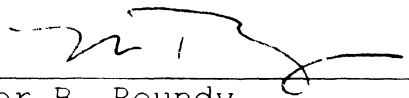
of where these individuals had moved. Mr. Rohrberg, for example, was believed to have moved to New York.

In addition to the impossibility of locating all of the witnesses necessary to a new trial, it would be unjust to put the parties to the expense of new trial, the additional discovery that would necessarily be entailed if the request for admissions were to be set aside, particularly where all of the evidence necessary to an appropriate judgment in favor of the Defendant was present at trial. The Trial Court's judgment should simply be corrected, including in all of those particulars described by the briefs submitted by the Appellant herein.

#### **CONCLUSION**

For the foregoing reasons, Appellant requests that the Court correct its decision and/or schedule the matter for oral argument.

DATED this 20<sup>th</sup> day of November, 2001.

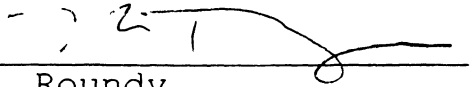
  
\_\_\_\_\_  
Thor B. Roundy  
Attorney for Appellant

CERTIFICATE OF SERVICE BY MAIL

Thor B. Roundy  
275 East South Temple, Suite 150  
Salt Lake City, Utah 84111  
Telephone (801) 364-3229  
Bar No. 6435

I, THOR B. ROUNDY, certify that on this 30<sup>th</sup> day of November, 2001, I served two copies of the attached PETITION FOR REHEARING, Trial Court No. 980906136, Appellate Court No. 2000550CA, upon counsel for the Appellee in this matter by mailing it to him by first class mail with sufficient postage prepaid to the following address:

Shawn D. Turner  
4516 South 700 East, Suite 100  
Salt Lake City, Utah 84107

  
\_\_\_\_\_  
Thor B. Roundy  
Attorney for Appellant