

2003

Gary G. Pahl, Kalynn Ninow v. Grand Staircase
Land Company, William Lowe, Augusta Rose :
Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS
450 South State Street, Salt Lake City, Utah 84111

In the matter of the Estate of

GARY G. PAHL,

Deceased.

KALYNN NINOW,

Petitioner and Appellee,

v.

**GRAND STAIRCASE LAND
COMPANY, a Utah corporation,
WILLIAM LOWE, and AUGUSTA
ROSE,**

Respondents and Appellants,

v.

**RYAN PAHL, KALYNN NINOW,
RICHARD NINOW, and DOES I-IV,**

Third-party respondents.

BRIEF OF APPELLEE

**Court of Appeal No. 20030169-CA
District Court Probate No. 003901101**

BRIEF OF APPELLEES

**Appeal from Summary Judgment of the Third District Court, Salt Lake County, State of
Utah, Honorable Tyrone E. Medley, District Court Judge**

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UTAH APPELLATE COURTS**

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STATEMENT OF JURISDICTION

Jurisdiction is proper under Utah Code Ann. § 78-2a-3(2)(j), as this appeal was transferred to this Court by the Utah Supreme Court. (R. 1105.)

STATEMENT OF ISSUES¹ AND STANDARDS OF REVIEW

Issue No. 1 - Whether the trial court properly found Lowe in contempt regarding the TRO.

Standard of Review - The trial court's interpretation of statutes, rules [Utah R. Civ. P. 65A in this case] and ordinances is a question of law reviewed for correctness. *See Rushton v. Salt Lake County*, 977 P.2d 1201, 1203 (Utah 1999).

Issue No. 2 - Whether the trial court properly granted summary judgment in favor of Ninow.

¹Lowe has filed three separate docketing statements. The first was filed on March 5, 2003 and presented only one issue (Issue No. 1) for review, though it lists multiple "potential" issues. A second, amended docketing statement was filed on May 7, 2003, presents Issue No. 1, and states that all other potential issues appear to have been mooted. The third docketing statement was filed on May 29, 2003 in the "companion" appeal, which was consolidated into this appeal. That docketing statement presents Issue No. 1, but also presents, without reservation, eight more issues for review.

In his Brief, Lowe only sets forth two issues for review. Because those are the only issues presented by Lowe for review, Ninow is briefing only those two issues, plus the third issue this Court ordered it to brief in its Order dated October 28, 2003. Ninow does so on the basis that appellate courts have routinely declined to consider arguments which are not adequately briefed on appeal. *Burns v. Summerhays*, 927 P.2d 197, 199 (Utah App. 1996)(citing *State v. Yates*, 834 P.2d 599, 602 (Utah App. 1992)). *See also State v. Bishop*, 753 P.2d 439, 450 (Utah 1988) ("[A] reviewing court is entitled to have the issues clearly defined with pertinent authority cited and is not simply a depository in which the appealing party may dump the burden of argument and research."). In *Burns*, the court found that where the appellant failed to provide adequate legal analysis and legal authority in support of his claims, his assertions did not permit appellate review. *Burns*, 927 P.2d at 199. In the event this Court determines that the other issues delineated in any one of the docketing statements has not been waived, Ninow reserves her right to address those issues at that time.

Standard of Review - A trial court may properly grant summary judgment when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See* Utah R. Civ. P. 56(c) and (e); *Norton v. Blackham*, 669 P.2d 857, 859 (Utah 1983); *Heglar Ranch, Inc. v. Stillman*, 619 P.2d 1390, 1391 (Utah 1980). Accordingly, the propriety of a trial court's grant of summary judgment is a question of law reviewed for correctness. *Id.* *See also Progressive Casualty Insurance Co. v. Dagleish*, 2002 UT 59, 52 P.2d 1142 (Utah 2002).

Issue No. 3 - Whether the appeal is taken from a final, appealable order.

Standard of Review - The trial court's interpretation of statutes, rules [Utah R. Civ. P. 65A in this case] and ordinances is a question of law reviewed for correctness. *See Rushton v. Salt Lake County*, 977 P.2d 1201, 1203 (Utah 1999).

DETERMINATIVE RULES

Utah R. Civ. P. 56(c) and (e) which state, in relevant part, as follows:

(c) . . . The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(e) Form of affidavits; further testimony; defense required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to

be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Code of Judicial Administration Rule 4-501 (2)(B):

Memorandum in opposition to a motion. The points and authorities in opposition to a motion for summary judgment shall begin with a section that contains a verbatim restatement of each of the movant's statement of facts as to which the party contends a genuine issue exists followed by a concise statement of material facts which support the party's contention. Each disputed fact shall be stated in separate numbered sentences and shall specifically refer to those portions of the record upon which the opposing party relies. All material facts set forth in the movant's statement and properly supported by accurate reference to the record shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the opposing party's statement.

Utah Civil Rule of Procedure 65A (b)(2) states, in relevant part:

(2) . . . The [temporary restraining] order shall expire by its terms within such time after entry, not to exceed ten days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record.

STATEMENT OF FACTS

For purposes of this appeal and with regard to the summary judgment issue, appellants August Rose, William Lowe, Grand Staircase and/or Robert Moretenson (collectively referred to hereinafter as "Lowe") are entitled to present the facts in the record in the light most favorable to him. However, he is not entitled to distort,

mischaracterize or exaggerate those facts. Nor is he entitled to tell the court only part of the undisputed material facts in an attempt to create the appearance of a fact issue when the rest of the undisputed material facts clearly show that there is no fact issue.

A. Ownership of Stock.

Appelle Kalynn Ninow, in her capacities as personal representative of the Estate of Gary Pahl and/or as Guardian/Conservator of the Estate of Ryah Pahl (hereinafter referred to as “Ninow”) presents the following undisputed facts to aid the court in understanding all of the undisputed facts upon which the lower court based its summary judgment ruling in favor of Ninow:

1. The Articles of Incorporation of the Loan Office provide for six thousand shares of common voting stock. (R. 688, 1118.) Three thousand shares belonged to A. Gunther Pahl and subsequently passed to Gary G. Pahl. (R. 689-690, 1118-1119.)

2. The other three thousand shares were owned by Frank H. Pahl. On May 6, 1998, Frank H. Pahl and Gary G. Pahl both signed a Bill of Sale, which stated in part, "It is my [Frank H. Pahl's] desire to sell my full interest in Pahl's Salt Palace Loan Office, Inc. to Gary G. Pahl. My full interest consists of 3,000 shares Upon successful completion of this Bill of Sale, my [Frank H. Pahl's] 3,000 shares of Pahl's Salt Palace Loan Office, Inc. will belong to Gary G. Pahl. The three thousand shares amount to fifty percent (50%) of the business. William T. Lowe is holding the three thousand-share certificates until this Bill of Sale is fulfilled in whole." In addition to the signatures of

Frank H. Pahl and Gary G. Pahl, Lowe signed the Bill of Sale as a witness. (R. 690-691, 1120.)

3. The purchase price for Frank Pahl's 3000 shares was \$96,000.00. (R. 691, 1120.) The Bill of Sale called for a down payment of \$46,000.00 and Frank Pahl agreed to carry a note on the remaining \$50,000.00 which was to be repaid monthly at the rate of \$1,000.00. (R. 691, 1120.)

4. Gary Pahl made the \$46,000.00 down payment as well as the monthly payments required by the Bill of Sale terms. (R. 691, 1120.) The payment schedule was accelerated and completely paid in full as of April 17, 2000. (R. 691, 1120.) Frank H. Pahl signed a Ratification of Payment for Bill of Sale dated May 6, 1998, acknowledging and ratifying that the Bill of Sale was paid in full by Gary G. Pahl before his death on June 25, 2000. (R. 691, 1120.)

5. The acceleration of the payment schedule took place because Frank H. Pahl entered into a subsequent Bill of Sale dated September 25, 2000 to transfer Frank's interest in the buildings located at 1588 and 1594 South State Street, Salt Lake City Utah to the Loan Office. Before Frank would allow the sale of his interest in the buildings to go through, he insisted that Gary pay him in full for his stock in the Loan Office. To meet Frank's demands, Gary refinanced his home and obtained a \$10,000.00 loan from his mother, Beverly Pahl. The money from the refinancing and the loan was used to pay Frank in full for his stock. Therefore, pursuant to the terms of the May 6, 1998 Bill of

Sale and its "successful completion", said three thousand shares belonged to Gary G. Pahl at the date of his death. (R. 692, 1120.)

6. Frank H. Pahl has never at any time sold, transferred, devised, bequeathed or assigned any of his shares to any person other than to sell the said three thousand (3,000) shares to Gary G. Pahl via the said Bill of Sale referenced above. (R. 692, 1121.)

7. Additionally, Frank H. Pahl has never at any time appointed or designated an agent or ratified any agent's actions to purportedly sell the said three thousand (3,000) shares to any other person. He is also unaware of any person ever attempting to claim that they have sold Frank's shares on his behalf or of any person attempting to claim that they have acquired Frank's shares either directly or through an agent or other transaction. (R. 692, 1121.)

8. Gary G. Pahl passed away on June 25, 2000. On September 6, 2000, the Third Judicial Court appointed KaLynn Ninow Personal Representative of Gary G. Pahl's estate and decreed that Gary G. Pahl died intestate. Pursuant to the laws of intestacy under the Uniform Probate Code, all property in Gary G. Pahl's estate passed to his son Ryan B. Pahl, as sole heir (devisee). (R. 693, 1121.)

9. On July 26, 2002, Ninow moved for summary judgment on her claims pertaining to ownership interests in shares of stock in Pahl's Salt Palace Loan Office Inc. ("Loan Office"). (R. 683.) On August 12, 2002, Lowe filed his memorandum opposing Ninow's motion for summary judgment (R. 817.) along with a notice to submit Ninow's

motion for summary judgment. (R. 822.) Oral argument on the motion for summary judgment was scheduled for August 26, 2002. (R. 824.) The trial court granted Ninow's motion for summary judgment, entered findings of fact and conclusions of law and an order granting Ninow's motion for summary judgment.

B. The Order of Contempt

10. On May 20, 2002, Judge Sandra Peuler issued a Temporary Restraining Order against Lowe. (R. 526.) Lowe was expressly prohibited from disbursing or transferring any Loan Office monies. The TRO provided for a preliminary injunction hearing to be held May 30, 2002, at 10:00 a.m. It also provided that the TRO expired at 11:00 a.m. on May 30, 2002, ten days after its issuance. (R. 526.)

11. On May 30, 2002, a hearing on the TRO/Preliminary Injunction was held at 10:00a.m. as scheduled. (R. 1391.) The court recessed for lunch at approximately 12:00 p.m. (R. 523.) At approximately 12:12 p.m. Lowe entered a Utah Central Credit Union located at 25 East 1700 South in Salt Lake City and transferred seven thousand five hundred dollars (\$7,500.00) from the Loan Office's account to his own account at the Credit Union. (R. 523.) He then converted the funds to a cashier's check payable to Robert Copier, his attorney. (R. 523.)

12. Based on this incident, Ninow filed an Order to Show Cause asserting that Lowe's actions above were done in contempt of the court's TRO. The trial court agreed

and found Lowe in contempt ordering him to repay the monies taken from the Loan Office account. (R. 945.)

C. Lowe's Distortion, Mischaracterization and Exaggeration of Facts.

In his statement of the case and statement of facts, Lowe makes several statements that distort, mischaracterize or exaggerate the record he cites in support of the statement.

On page 2 of his Brief, Lowe contends that 3000 shares in the Loan Office “were transferred from Frank Pahl to Mr. Lowe on May 6, 1998 . . .” Page 5 states that Lowe held 3000 shares when Gary Pahl died. In support of both contentions, Lowe cites a Bill of Sale between Frank H. Pahl and Gary G. Pahl. That Bill of Sale, however, has no language purporting to convey or transfer the shares to Lowe but only states that Lowe will hold the share certificates until the Bill of Sale is fulfilled. (R. 271.) As explained more fully in section B below, the terms of the Bill of Sale were fulfilled and the shares passed to Gary Pahl as a result.

On page 6 of his brief, Lowe contends that he and Gary Pahl executed a “superseding agreement” whereby the 3000 shares held by Lowe would “belong to the treasury of the Corporation . . .” (Brief of Appellant p.6, ¶ 7.) According to the terms of the alleged superseding agreement, Gary had personally paid Frank Pahl for the purchase. (R. 695, 1123.) This amount was to be repaid to Gary by the corporation at the rate of \$700.00 per month beginning January 10, 1999 until paid in full. (R. 695, 1123.)

The record below indicates that the Loan Office, however, did not and has not reimbursed either Gary or his estate for the purchase of the shares acquired from Frank Pahl back into the treasury of the Loan Office. (R. 695-696, 1124.) Additionally, when the payment schedule to Frank was accelerated (R. 691, 1120) in the spring of 2000, the money to pay Frank in full came from Gary's personal funds, and not the funds of the Loan Office. (R. 695-696, 1124.) None of the requirements or conditions precedent of the December 28, 1998 Bill of Sale Agreement which would have transferred Gary's shares into the treasury of the Loan Office have ever been met. (R. 695-696, 1124.)

SUMMARY OF ARGUMENTS

The trial court properly granted Ninow's Motion for Summary Judgment. Lowe utterly failed to comply with the governing rules and failed to properly set forth facts controverting Ninow's Motion, rendering Ninow's statement of the facts admitted for purposes of the Motion. Furthermore, the facts submitted by Ninow substantively support the trial court's Findings that the stock at issue properly belongs to Ryan Pahl. Thus, the trial court properly found that no genuine issues of material fact and properly summarily granted judgment to Ninow.

The trial court additionally acted properly in finding Lowe in contempt for violation of the TRO. The hearing to determine whether the TRO would become a preliminary injunction had already commenced, serving as a good cause extension of the

TRO even though the reasons are not entered as of record. As Lowe's conduct was a blatant violation of the terms of the extended TRO, contempt was appropriate.

Alternatively, even if the trial court acted improperly in finding Lowe in contempt, such error was harmless. The court not only ultimately granted the preliminary injunction, but also entered summary judgment finding that Lowe never had any interest in the Loan Office. Having taken funds to which he was never entitled, Lowe would have had to repay the funds regardless of the outcome in the contempt proceedings by virtue of the summary judgment findings.

Lastly, Lowe improperly appealed from a Default Judgment issued in by the lower court. Lowe rectified this error, as to Issue No. 2, when he appealed from the Order granting summary judgment on May 23, 2003. As to Issue No. 1, Lowe has failed by either appeal and under any standard to timely seek appellate redress of his concerns.

ARGUMENT

I. THE TRIAL COURT PROPERLY GRANTED NINOW'S MOTION FOR SUMMARY JUDGMENT

- A. Lowe failed to controvert Ninow's Statement of Undisputed Facts, rendering the facts admitted and summary judgment appropriate.

Utah R. Civ. P. 56(e) provides in relevant part as follows:

When a motion for summary judgment is made and supported as provided in this rule, *an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.* If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(emphasis added). Furthermore, Rule 4-501 of Utah's Code of Judicial Administration required Lowe to frame his opposition as follows:

Memorandum in opposition to a motion. The points and authorities in opposition to a motion for summary judgment shall begin with a section that contains a verbatim restatement of each of the movant's statement of facts as to which the party contends a genuine issue exists followed by a concise statement of material facts which support the party's contention. Each disputed fact shall be stated in separate numbered sentences and shall specifically refer to those portions of the record upon which the opposing party relies. All material facts set forth in the movant's statement and properly supported by accurate reference to the record shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the opposing party's statement.

In his opposing memorandum, Lowe completely disregarded the mandate of the above-cited rules. Instead of a verbatim restatement of facts he contends are disputed and instead of separate numbered sentences, in the section entitled "Disputed Issues Of Material Fact," Lowe merely offers five questions relating to the case as a whole. (R. 817.) Then, instead of offering specific evidence in support of these global questions, Lowe cites generally to several affidavits filed a few weeks before he filed his Opposing Memorandum. Lowe offers no specific statements or other documentation to controvert the facts that are set forth by Ninow with great specificity by Ninow in her Motion and Memorandum. Accordingly, by operation of law, Ninow's facts are deemed admitted and summary judgment in Ninow's favor based on those admitted facts was entirely appropriate.

B. Ninow's Facts Support the Trial Court's Issuing Summary Judgment in her Favor.

Summary judgment is proper when the pleadings, depositions, affidavits and admissions show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. See *Billings ex rel. Billings v. Union Bankers Ins. Co.*, 819 P.2d 803 (Utah 1991)(citations omitted). The facts set forth above, as drawn from the record below, support the trial court's substantive ruling that Ryan Pahl is the proper and legal owner of all 6,000 shares of stock.

Lowe's argument in opposition to this substantive determination by the lower court is made for the first time on this appeal. In his Brief, Lowe contends that he and Gary Pahl executed a "superseding agreement" whereby the 3000 shares held by Lowe would "belong to the treasury of the Corporation" (Brief of Appellant p.6, ¶ 7.) This argument was not properly set forth in Lowe's opposition memorandum, (R. 817), or otherwise articulated in the court below. To offer facts before this Court that were not properly before the trial court when it decided the motion for summary judgment is an attempt to litigate the matter on appeal as opposed to reviewing the trial court's decision. Such an attempt is improper and should not be considered by the Court.

Furthermore, even if Lowe had offered the "superseding agreement" before the trial court, he did nothing to controvert Ninow's proof that such an agreement was not fulfilled and therefore never took effect. Thus, the trial court acted properly in granting Ninow's Motion for Summary Judgment and such action should be affirmed.

II. THE TRIAL COURT PROPERLY HELD LOWE IN CONTEMPT.

Utah Civil Rule of Procedure 65A (b)(2) states in relevant part,

the temporary restraining order shall expire by its terms within such time after entry, not to exceed ten days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reason for the extension shall be entered of record.

In a case strikingly similar to the case at bar, the Eleventh Circuit interpreted Rule 65A(b)(2). *See Levine v. COMCOA LTD.* 70 F.3d 1191 (11th Cir. 1995). In *Levine*, the Court a TRO on May 6, 1994 at 9:25 a.m. and therein notified the parties, among other things, that a preliminary injunction hearing would be held on May 16. *Id.* at 1192. The hearing was subsequently held over two days, on May 16 and 17. The district court judge heard argument from counsel and the testimony of several witnesses. *Id.* At the end of the hearing on May 17, the district court stated to the parties that “it was extending the 6 May temporary restraining order until the court ruled on the substantive motions by Defendants.” *Id.* While discussing whether the TRO had expired before the Preliminary Injunction Order was entered, the court reiterated that, as to the initial ten day period before the hearing, the mere act of “continuing the hearing into the second day constituted a for-cause extension of the initial 10 day period.” *Id.* at 1193, n.6. The court does not go into more detail concerning the expiration of the TRO due to the two-day hearing, but simply acknowledges the hearing’s continuance in and of itself as a valid for-cause extension of the TRO.

This reasoning is not foreign to Utah Courts. For example, in *Miller v. Martineau & Co., CPA*, 983 P.2d 1107, 1115 (Utah Ct. App. 1999), the Utah Court of Appeals indicated that strict compliance with Rule 65A's requirement that the reasons for extension of a temporary restraining order be entered in the record is not always required.

As another example, in *IKON Office Solutions, Inc. v. Crook*, 2000 UT App. 217, 6 P.3d 1143 (Utah 2000), the parties had stipulated to a temporary restraining order "until the [preliminary injunction] hearing." *Id.* at ¶15. The Court interpreted "until the hearing" to mean that the temporary restraining order did not "expire" until the hearing was over at "the end of the day." *Id.* This interpretation directly aligns with the reasoning employed by the lower court determining Lowe violated the temporary restraining order, as well as with decisions issued by other jurisdictions.

Furthermore, in *IKON*, supra, the Court of Appeals indicated that a temporary restraining order has one of two fates: if the preliminary injunction is granted, the temporary restraining order is deemed to have merged into the preliminary injunction. If the preliminary injunction is not granted, the temporary restraining order dissolves by its own terms. *IKON*, supra. This language indicates the intent by Utah's courts to effectuate a fluid, uninterrupted transition from a temporary restraining order to a preliminary injunction. Courts from other jurisdictions have noted similar doctrines. See, e.g., Emerson Electric Co v. Sherman, 502 N.E.2d 414, 418 (Ill App. 1986) ("It is clear that when the temporary restraining order is not dismissed before a hearing on the merits,

it becomes merged with the preliminary injunctions, if the plaintiff prevails.”); *Stocker Hinge Mfg. Co., v. Darnel Indus., Inc.*, 447 N.E.2d 288, 293 (Ill. 1983) (stating that the “purpose of a restraining order is to maintain the status quo while the court is hearing evidence to determine whether a preliminary injunction should issue.”).

In the present case, the parties were in court prior to the time the TRO was scheduled to expire. The hearing began at approximately 10:00 a.m. The fact that the court had to continue the hearing beyond 11:00 a.m. on May 30, 2002, operated as a good cause extension of the terms of the TRO.

To hold otherwise would invite judicial chaos. Accepting Lowe’s argument that as soon as the clock struck 11:00 a.m. he was free of all restrictions would undermine all confidence in the court’s ability to control litigants who are present and in the courtroom, to say nothing of confidence in protecting assets subjects to immediate and irreparable harm.

Imagine that this were a case of a TRO issued to halt the demolition of a historic building. According to Lowe, at the stroke of 11:00 a.m. on May 30, 2002, while the Court was hearing testimony, Lowe should have been free to quietly get up from the table, walk into the hallway and call his demolition crews on his cell phone and immediately destroy the structure. There would be nothing that the Court could do, and the motion for preliminary injunction would be moot, as the order would have expired and the object of the preliminary injunction destroyed and irrecoverable.

In the case at bar, Lowe walked out of the courtroom on recess, went to the credit union with his lawyer, withdrew corporate funds to which he was not entitled and was ordered not to access, and gave the funds to his counsel. To adopt Lowe's interpretation and arguments in this case would undermine judicial confidence and defeat the very purpose of the rules regarding the issuance and viability of temporary restraining orders.

This result is consistent with the court's statement that "[t]he purpose of a TRO is to maintain the status quo while the court is hearing evidence to determine whether a preliminary injunction should issue." *Stocker Hinge Manufacturing Co. v. Darnel Industries, Inc.*, 447 N.E.2d 288, 293 (Ill. 1983).

Rule 65A(b)(3) regarding priority of hearings states that: "If a temporary restraining order is granted, the motion for a preliminary injunction shall be scheduled for hearing at the earliest possible time and takes precedence over all other civil matters except older matters of the same character..." The reasoning behind the rule is to get parties before the court as quickly as possible so as to allow for a hearing on the merits of the motion prior to its expiration. Despite the court's best efforts, it simply is not possible in all circumstances, as in this circumstance, to hold the entire preliminary injunction hearing prior to the technical expiration of the TRO. Courts commonly hold such hearings over several days.

The reasoning in *Levine* is sound and appropriately enforced by this Court. When prior to the expiration of a TRO, the parties are in court and engaged in a hearing to

continue the provisions of a TRO, the continuance of the hearing beyond the time set for expiration operates as a “good cause” extension of the TRO until the conclusion of the hearing or further ruling of the court.

A. Even If The Trial Court’s Finding Of Contempt Was Incorrect, Such Error Was Harmless.

Harmless error is defined as an error that is sufficiently inconsequential that there is no reasonable likelihood that the error affected the outcome of the proceedings. *Covey v. Covey*, 2003 UT App 380, ¶21 (citing *Crookston v. Fire Ins. Exch.*, 817 P.2d 789, 796 (Utah 1991)). Put in other words, an error is harmful only if the likelihood of a different outcome is sufficiently high as to undermine our confidence in the verdict. On appeal, the appellant has the burden of demonstrating an error was prejudicial - that there is a reasonable likelihood that the error affected the outcome of the proceedings. *Covey v. Covey*, 2003 UT App 380, ¶21 (citing *Steffensen v. Smith's Mgmt. Corp.*, 820 P.2d 482, 489 (Utah Ct.App. 1991, *aff'd*, 862 P.2d 1342 (Utah 1993))).

The ultimate outcome of these proceedings was that a preliminary injunction was issued and summary judgment was granted in favor of Ninow. (R. 1111.) It was also found that Gary Pahl was the owner of all 6,000 shares of stock of the Loan Office. Lowe would have had to repay the \$7,500 he inappropriately transferred from the Loan Office account, regardless of whether it was a result of the order of contempt or a consequence of the order granting summary judgment.

III. APPELLANT ONLY PARTIALLY APPEALED FROM A PROPER, APPEALABLE ORDER.

This Court has requested the parties to brief the issue of whether the appeal is taken from a final, appealable order, referring to that case entitled *In re Estate of Vorhees*, 366 P.2d 977, 980 (1961). *Vorhees* states, "The fact that the court retained jurisdiction . . . to adjudicate further matters did not leave open for consideration the [matter previously ruled upon]. There was nothing further to be decided on that particular issue That being so, the decree entered thereon was final and therefore appealable. *Id.* This language in *Vorhees* coincides to the language of other Utah cases specifically dealing with the issue of appeals from a probate proceeding.

Utah's law requires use of a pragmatic case-by-case approach in determining what constitutes a "final judgment" for purposes of appeal from a probate matter. *See In re Estate of Morrison*, 933 P.2d 1015, 1016-1017 (Utah Ct. App. 1997). The guiding standard is properly articulated as follows: for purposes of appeal from a probate matter, a "final judgment" is one that both "resolved an issue of vital importance" and "concluded a major phase" in the probate, or as stated by the *Vorehees* court, leaves "nothing further to be decided upon a particular issue." *Id.* *See also In re Estate of Christensen*, 655 P.2d 646, 648 (Utah 1982). The purpose in applying this standard is to prevent subsequent proceedings in the probate matter from going forward "under a cloud of uncertainty that would seriously impair the personal representative's efforts to administer the estate." *Id.*

Applying this standard to the instant circumstances, the default judgment from which Appellants first appealed does not constitute a "final judgment."

A. "Issue of vital importance."

While the parties were actively arguing over ownership of the Pawn Shop stock, on July 11, 2002, Appellant Augusta Rose filed a document entitled "Answer, Counter Petition, Third Party Petition and Demand for Jury Trial." R. at 643-649. As is evidenced by a simple review of the document, the Petition does not make any claims against the Estate or make any claims related to ownership of the Pawn Shop stock or of the real estate. Instead, the Petition asserted defamation claims against KaLynn Ninow, personally, her husband, Richard Ninow, and her son, Ryan Pahl. On August 1, 2003, Mr. Ninow not having been properly served, KaLynn Ninow and Ryan Pahl opposed Ms. Rose's petition, claiming the Probate Court lacked jurisdiction to hear the defamation claim. R. at 755-757. Nonetheless, on September 17, 2002, Appellant Augusta Rose filed an Amended Petition against the same parties, served the Petition upon Mr. Ninow. R. at 984-990. On January 13, 2003, Appellants filed a document entitled "URCP 41(c) Voluntary Partial Dismissal" dismissing the Amended Petition in its entirety against both Ryan Pahl and KaLynn Ninow, but leaving a single claim for statutory defamation remaining against Mr. Ninow. R. at 1074-1075. On or about February 8, 2003, Ms. Rose ultimately received a default judgment against Mr. Ninow in the amount of \$766.00 (hereinafter "the Default Judgment"). R. at 1078-1079. Lastly, on February 20, 2003,

Appellants filed a Withdrawal of Unadjudicated Probate Petitions and Motions, withdrawing "any and all probate petitions and motions filed in this probate by them, or any of them, which have not yet been adjudicated or ruled upon by the court." R. at 1084-1085.

The Default Judgment alleged that Richard Ninow defamed Augusta Rose. This alleged defamation was completely unrelated to the settling of Gary Pahl's estate, and can therefore hardly be considered an "issue of vital importance" in a probate matter. Furthermore, the mere \$766.00 awarded to Ms. Rose via the Default Judgment further underscores just how unimportant the Default Judgment is in a probate matter where the probate estate values exceeds \$350,000.00.

B. "Concluded a Major Phase."

Furthermore, the Default Judgment did not conclude a "major phase" in the probate litigation. The two prevalent issues related to settling of the Estate are ownership to the shares of stock of the Pawn Shop and ownership to certain real property, including the property from which the Pawn Shop conducts business. The Probate Court resolved the stock ownership issue by its August 26, 2002 determination that Ryan Pahl is the beneficial owner of all outstanding stock in the Pawn Shop. Issues related to ownership of the real property upon which the business is operated remain wholly unresolved. Entry of the Default Judgment did not conclude either of these "phases" of the probate. In fact, the Petition underlying the Default Judgment may more properly be characterized as

starting a new phase of litigation, as the defamation allegations were entirely new claims unrelated to any issues previously considered in the proceeding and was not asserted against the Estate or its representative.

In addition, Appellant's February 20, 2003 "Withdrawal of Unadjudicated Motions" renders questionable the "finality" of the default judgment. If, as asserted by Appellant in other filings before this Court, the Default Judgment resolved all outstanding issues involving the Appellants, then how could unadjudicated issues be left to withdraw?

In short, if a judgment has been entered in the Probate Proceeding that both resolves an "issue of vital importance" and "concludes a major phase" in the litigation, the default judgment is NOT that judgment. Having failed to appeal from a "final judgment" this Court lacks jurisdiction to hear the first appeal. See Utah R. App. P. 3.

However, subsequent to the initial appeal, Lowe filed a what he labeled a companion appeal, which was initially numbered 20030458. That case appealed from the lower court's entry of the May 1, 2003 Order officially granting the Summary Judgment which it had previously articulated by bench ruling in August of 2003. R. at 1114-16. Appellant does not now and has never denied that the summary judgment order is properly appealed from, that Order having resolved one of the two major issues in the probate litigation – ownership of the shares of Pahl's Pawn Shop.

That leaves only the question of the timeliness of the appeal of the Order of Contempt finding Lowe in contempt of court for violating the terms of the TRO. It can

hardly be said in any setting, let alone a probate setting, that a proceeding for contempt for violation of an order can be said to comprise a major phase in the litigation or an issue of vital importance, as contempt, by its very nature, is nearly always a secondary issue related to a counsel or parties' violation of an order already entered on issues already determined. Thus, under *Vorhees*, once Lowe was found to be in contempt, there was nothing further to be determined on that issue, i.e., there are no further proceedings to be had related to whether the discrete act of removing money from the credit union was or was not proper. Accordingly, under *Vorhees*, the order finding Lowe in contempt of court are "final and therefore appealable." Utah law specific to civil contempt issues concurs in this result. *See Von Hake v. Thomas*, 759 p.2d 1152, 1157 fn. 3 (Utah 1988) (holding that the entry of The civil contempt order was issued on September 5, 2002. As a final appealable order, the Rules of Appellate Procedure require appeal within thirty (30) days. See Utah R. App. P. 4. Accordingly, the appeal of the civil contempt Order, whether considered to be the appeal from the default judgment on filed in February 27, 2003 or from the formal appeal of Summary Judgment on May 23, 2003, is untimely and cannot be considered by this Court.

CONCLUSION

Based on the foregoing argument, Ninow respectfully requests that the actions of the trial court be affirmed.

DATED this 7th day of April, 2004.

VAN WOERKOM & WEEKS, PLLC



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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of April, 2004, I caused a copy of the foregoing
to be sent via first class mail, postage prepaid, to the following:

Robert H. Copier, Esq.
17 East 400 South
Salt Lake City, Utah 84111

