

2003

Kaylynn Ninnow v. William Lowe and Augusta Rose : Reply Brief of Appellants

Utah Court of Appeals

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Recommended Citation

Reply Brief, *Ninnow v. Lowe and Rose*, No. 20030169 (Utah Court of Appeals, 2003).
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IN THE UTAH COURT OF APPEALS

KALYNN NINOW,

Petitioner and Appellee,
vs.

REPLY BRIEF OF APPELLANTS

Appeal No. 20030169 - CA

WILLIAM LOWE and
AUGUSTA ROSE,

Respondents and Appellants,

and

PAHL'S SALT PALACE LOAN
OFFICE, INC., ex rel. DIAMOND
FORK LAND COMPANY,

Plaintiff,
vs.

KALYNN NINOW.

Defendant.

FILED
UTAH APPELLATE COURTS
JUN 11 2004

Appeal from Third District Court, Salt Lake County, Hon. Tyrone E. Medley.

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PARTIES AND PROCEEDINGS ON APPEAL

After the appellants filed their opening brief, two changes occurred:

1. The Court of Appeals granted the motion made by appellant Grand Staircase Land Company to be dropped and dismissed as party to this matter.

2. The Honorable Tyrone E. Medley, over the timely-filed objections [R. 1337-1376] made by William Lowe, Augusta Rose, Grand Staircase Land Company, and Pahl's Salt Palace Loan Office, Inc., [which made a "special appearance" to object], consolidated the civil case of Pahl's Salt Palace Loan Office, Inc., a Utah corporation, ex rel. Diamond Fork Land Company, a Utah corporation vs. KaLynn Ninow, personal representative of the estate of Gary G. Pahl, deceased, Third District Civil No. 020908627, with this matter. That civil case was originally assigned to Judge Bruce Lubeck and then transferred to Judge Robert Hilder before being consolidated with this matter by order approved by Judge Robert Hilder on March 9, 2004, and entered by Judge Tyrone E. Medley on April 15, 2004. The grounds stated in objection to that order included the ground that this matter is currently on appeal to this court.

Based on the recent dismissal of this matter as to Grand Staircase Land Company and consolidation of a civil case with this matter, this matter has been styled in this Reply Brief of Appellants in the following way: KaLynn Ninow, Petitioner and Appellee, vs. William Lowe and Augusta Rose, Respondents and Appellants, and Pahl's Salt Palace Loan Office, Inc., ex rel. Diamond Fork Land Company, Plaintiff, vs. KaLynn Ninow, Defendant.

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ARGUMENT

INTRODUCTION

KaLynn Ninow moved for summary judgment with 36 undisputed facts [R. 588-697] which, when deemed duly admitted, do not settle the question.

Judge Medley improperly entered summary judgment with 54 “findings of fact” [R. 1118-1129] that vary materially from the 36 undisputed facts.

All the facts and all reasonable inferences drawn therefrom must be viewed on appeal in the light that is the least favorable to KaLynn Ninow.

In so viewing the facts, during his lifetime, Gary Pahl entered into agreements to acquire all 6000 outstanding shares of Pahl’s Salt Palace Loan Office, Inc., and placed 3000 of those shares in the corporation’s treasury for tax planning purposes and to thwart his ex-wife, KaLynn Ninow, in the event of his death. Like all taxpayers, Gary Pahl was “entitled to structure his estate’s affairs to comply with the tax laws while minimizing tax liability.” United States v. Carlton, 512 U.S. 26, 35; 114 S.Ct. 2018, 2024 (1994).

Since Gary Pahl received actual and potential tax benefits from this during his lifetime, his transfer of 3000 shares into the treasury bound him while he was still alive and his personal representative still remains bound.

To gain these tax benefits, he [and now his estate] did not have direct control over the 3000 treasury shares, which were controlled by the directors and are now in the hands of out-of-state owners. Attempts by KaLynn Ninow to vote them have been rejected by the corporation. Reversal of the orders entered October 1, 2002; May 1, 2003; and June 12, 2003, is appropriate.

POINT ONE

The December 28, 1998, treasury stock agreement was raised early and often below and was not raised for the first time on this appeal.

Pursuant to the terms of the May 6, 1998, Bill of Sale agreement, after its successful completion on April 17, 2000, the 3000 shares subject to that agreement [the Frank Pahl shares] belonged to Gary G. Pahl at the date of his death on June 25, 2000, but they "belonged" to him indirectly.

Gary directly owned the 3000 shares [100%] of the corporation that were issued and outstanding on June 25, 2000 [the Gunther Pahl shares]. The other 3000 shares that were being held by the corporate treasurer William Lowe as treasury stock [the Frank Pahl shares] all indirectly "belonged" to Gary as sole owner of 100% of the corporation.

This was a result of the December 28, 1998, Bill of Sale Agreement executed by Gary G. Pahl and William Lowe [R. 421] when Gary directly owned the 3000 shares that had belonged to Gunther Pahl and William Lowe was holding the other 3000 pending successful completion of the May 6, 1998, Bill of Sale. The December 28, 1998, Bill of Sale made note of the fact that the board of directors had voted to reduce the shares of outstanding common stock from 6000 shares down to 3000 shares and that upon completion of the agreement dated May 6, 1998, all of Frank Pahl's 3000 shares would belong to the treasury of the corporation, leaving 3000 common shares outstanding. Because the *ex parte* TRO issued by Judge Sandra Peuler excluded William Lowe and Augusta Rose from records stored at the corporate offices, while giving KaLynn Ninow

and her confederates unsupervised access, neither side has produced the minutes of this board action voting to reduce the shares down to 3000.

In meetings held on August 25, 2000 [R. 424] and September 2, 2000 [R.425], the corporation's board of directors issued the treasury stock, after which there were again 6000 shares issued and outstanding.

On September 5, 2000, all board members executed the written memorialization of the board action taken on September 2, 2000. [R.425]

On September 6, 2000, Gary's estranged ex-wife, KaLynn Ninow, secured appointment as Gary's personal representative [and she also still hangs-on to her office as guardian and conservator of his now-adult son.]

Thus, at no time did KaLynn Ninow have the authority to take any unanimous shareholder action, because, by the time she was appointed the personal representative with authority to vote any shares, the estate over which she had control included only 3000 shares that had belonged to Gunther Pahl, but no longer indirectly owned the 3000 shares that had belonged to Frank Pahl. This created a 50-50 deadlock in outstanding shares that, as a practical and legal matter, ensured board continuity.

KaLynn Ninow argues a "coup" should be inferred. But the record supports a reasonable inference that this was a moderately sophisticated pre-death plan for corporate succession consciously put into place by Gary Pahl for "tax planning" and to "thwart" any efforts by his estranged ex-wife, KaLynn Ninow, to take control of all of his property after death [which Mr. Lowe and Ms. Rose are still fighting below as recently as June 9, 2004 - (see addendum)] and that one of its primary objectives was continuity of the board of directors in the event of Gary's death. As

set forth below, the legal standard to be applied to this summary judgment requires the latter reasonable inference to be drawn. The inference that this was a board coup or that a transfer of shares to the treasury never occurred because sums were still owed under the December 28, 1998, agreement must be rejected as the one most favorable to the moving party. The reasonable inference of a plan for board continuity put in place by Gary Pahl during his life to thwart his ex-wife in the event of death and that any money still owed by the corporation to Gary Pahl under the December 28, 1998, agreement was an unsecured debt after transfer of title to the treasury on April 17, 2000, must still be accepted as the one most favorable to the non-moving parties.

The argument made by KaLynn Ninow at I.B. of her appeal argument that the December 28, 1998, treasury stock agreement is an offer of “facts before this Court that were not properly before the trial court when it decided the motion for summary judgment” is so frivolous as to warrant sanctions under URAP 33. William Lowe and Augusta Rose relied upon the December 28, 1998, agreement in the trial court early and often. It was before the court as early as May 27, 2002 [R. 421], having been filed by William Lowe and Augusta Rose when Robert Henry Copier was the attorney for only William Lowe herein and Augusta Rose was a *pro se* litigant who had not yet retained Mr. Copier. The main argument in opposition to KaLynn Ninow’s motion for summary judgment was that KaLynn Ninow had filed a prolix list of 36 facts that did not settle the question or include facts material to the issues. Central to the issues below was this December 28, 1998, agreement, which was not

offered for the first time on appeal. [Appellee's Brief at 12] Not only was the important fact of the existence of this December 28, 1998, treasury stock agreement presented to the trial court early and often, but, after it was first presented on May 27, 2002 [R. 421], KaLynn Ninow filed her own copy of the document [R. 461] appended to an affidavit [R. 427] claiming it had been turned over by William Lowe on May 23, 2002, and she then addressed this December 28, 1998, treasury stock agreement by arguing [incorrectly] that "there is no evidence that the Board of Directors ever did vote to reduce the shares" [R. 482] even though the December 28, 1998, treasury stock agreement states in its text that such a vote had taken place, it was signed by Gary G. Pahl [who was one of the directors and had personal knowledge that such a vote had taken place], and KaLynn Ninow conceded he was one of the directors. [R. 482] She further recognized the significance and impact of the December 28, 1998, treasury stock agreement below by arguing [incorrectly] that subsequent issuance of the treasury stock by the corporation immediately prior to her appointment as personal representative had been a conflicting interest transaction that violated the articles and bylaws of the corporation. [R. 483] She also argued [incorrectly] that the December 28, 1998, treasury stock agreement required further payments to be made by the corporation before the shares became treasury shares. [R. 482] Of course, when the facts and reasonable inferences are properly viewed in the light most favorable to the non-moving parties, no further payments were required and the board properly issued shares that had become treasury shares on

conditions it deemed reasonable, rendering her argument unavailing for summary judgment. She cannot now prevail in her contention that the December 28, 1998, treasury stock agreement is being raised for the first time on appeal, since she herself expressly argued its implications below.

Apparently recognizing that all of the arguments that she had already made below regarding the December 28, 1998, treasury stock agreement were fact-sensitive and precluded summary judgment, she moved for summary judgment by listing some facts that were not in dispute and failed to list facts pertaining to the December 28, 1998, agreement. As they did below, William Lowe and Augusta Rose oppose the summary judgment because of this failure to list the material facts that address this central December 28, 1998 treasury stock agreement.

POINT TWO

The October 1, 2002, contempt order should be reversed and the May 1, 2003, summary judgment should either be reversed or be the subject of appellate guidance as to its limited reach and effect.

By virtue of Judge Hilder's order of November 26, 2002, title to 3000 treasury shares is now vested in out-of-state owners who are not parties to this proceeding and William Lowe and Augusta Rose continue to serve as a quorum of directors due to the 50-50 shareholder deadlock.

Thus, it may be unnecessary to reverse the May 1, 2003, judgment and it may be sufficient to give the trial court guidance as to the limited reach and effect of its May 1, 2003, order. See Armed Forces Ins. v. Harrison, 2003 UT 14, Par. 38, 70 P.3d 35 [unnecessary to reach some appeal issues but "in the interest of judicial economy, 'discussion of these issues is appropriate as guidance for the trial court' " (citation omitted)].

This is an appeal of an interlocutory order of contempt entered on October 1, 2002, and a final summary judgment entered on May 1, 2003, in a probate proceeding initiated by KaLynn Ninow, personal representative of the late Gary G. Pahl. Ms. Ninow concedes in her brief that the May 1, 2003, summary judgment is a final and appealable order. [Appellee's Brief at 21].

KaLynn Ninow has now caused the November 26, 2002, default judgment entered against her in a related civil case to be consolidated with this probate. Copies are in the numbered record on appeal [R. 1315]

As set forth in Point Three below, the November 26, 2002, judgment should be affirmed on appeal as the final order on the subject 3000 shares.

The June 12, 2003, order [R. 1321] setting it aside should be reversed.

The May 1, 2003, summary judgment [R. 1283] orders, adjudges, and decrees that "Gary Pahl was the owner of all 6,000 shares of stock of Pahl's Salt Palace Loan Office, Inc., at the time of his death, and all of said 6,000 shares are part of the property belonging to the Estate of Gary Pahl, and to Ryan Pahl as the only devisee [sic.] of the Estate." We urge reversal, since appellate review of a summary judgment requires the facts and reasonable inferences drawn therefrom to be viewed in the light most favorable to the non-moving party. When that standard is applied, Gary Pahl owned 3000 shares and the other 3000 shares were held at the time of death by corporate treasurer William Lowe as treasury stock, they were subsequently transferred to out-of-state owners, and Judge Medley had neither personal jurisdiction over the shareowners nor *in rem* jurisdiction over the shares on May 1, 2003.

Appellee's brief fails to meet or address the arguments raised in appellants' opening brief regarding the application of the Utah Rules of Evidence to the uncertainties regarding missing corporate documents created by a TRO that did not preserve the *status quo*, but summarily, radically, and irrevocably altered the *status quo* on a surprise *ex parte* basis. Opposition thereto having been waived, those arguments should be accepted on appeal.

While a trier of fact might decide KaLynn Ninow did not destroy or hide documents, she is not entitled to that inference on a summary judgment.

Ms. Ninow's incomplete statement of undisputed facts in the trial court established only that Gary Pahl owned all 6000 shares at the date of death.

This was a matter not in dispute, since he directly owned 3000 shares outstanding and indirectly owned the other 3000 shares in the treasury. The listed facts did not establish that all 6000 shares were in the estate when Ms. Ninow was appointed to her offices in 2000 or when she first attempted to vote all 6000 shares in 2002. Since the listed facts are not disputed, but also do not settle the question, it was not necessary for parties opposing summary judgment to list and respond to them, because they were deemed admitted under CJA 4-501 [now repealed] to the extent that they were supported by accurate reference to the record. Instead, pursuant to CJA 4-501, the parties opposing summary judgment properly listed some disputed questions of fact with references to affidavits in the record. When the facts embodied in these disputed questions of fact and referenced affidavits are viewed in the light most favorable to the non-moving parties, summary judgment is defeated.

Contrary to the assertion made by KaLynn Ninow at I. B. of her appeal argument, even if all of the undisputed material facts listed by KaLynn Ninow are all deemed to be true for purposes of summary judgment, they still do not establish an entitlement to summary judgment, because they do not address Frank Pahl's conveyance of his 3000 shares to William Lowe under the May 6, 1998, bill of sale agreement [after which they were held by William Lowe in trust] or the conveyance of those shares by Gary Pahl to the corporation's treasury by virtue of the December 28, 1998, bill of sale agreement [by virtue of which they were treasury stock held by William Lowe as the corporate treasurer after April 17, 2000, the date of successful completion of the May 6, 1998, bill of sale agreement, and remained treasury shares until transferred out of the treasury pursuant to action of the directors]. Since it was not disputed that at the time of death Gary Pahl owned all 6000 shares [3000 directly and 3000 treasury shares indirectly], the factual dispute was over share transfers not addressed by KaLynn Ninow in her statement of facts.

The disputed facts pertaining to these further transfers were raised in opposition to summary judgment as disputed facts listed in the Memorandum Opposing KaLynn Ninow's Motion for Summary Judgment [R. 806-812]:

"DISPUTED ISSUES OF MATERIAL FACT

"1. Does KaLynn Ninow own less than a quorum of shares in Pahl's Salt Palace Loan Office, Inc., since Frank Pahl conveyed his 3000 shares to William Lowe and William Lowe never conveyed those shares to Gary Pahl before Gary Pahl's death or to KaLynn Ninow after Gary Pahl's death? (Initial and additional affidavits of Frank Pahl; Affidavit of William Lowe; Affidavit of Augusta Rose.)

“2. Does KaLynn Ninow own less than a quorum of shares in Pahl’s Salt Palace Loan Office, Inc., since Gary Pahl conveyed 3000 shares to the corporation and placed those 3000 shares under the full control of the corporation’s board of directors as treasury stock before his death and the board never voted to convey those treasury shares to Gary Pahl before Gary Pahl’s death or to KaLynn Ninow after Gary Pahl’s death? (Affidavit of William Lowe; Affidavit of Augusta Rose.)”

From appellants’ *“Memorandum Opposing KaLynn Ninow’s Motion for Summary Judgment”*, timely filed on August 9, 2002, R. 806-812]

The memorandum also argued that Ms. Ninow had not addressed all share transfers in her statement of facts and that the court lacked *in rem* and subject matter jurisdiction over shares owned by non-parties: [R. 806-812]:

“POINT ONE

Since Diamond Fork Land Company is not a party, this court cannot summarily deprive it of its 1500 Pahl’s Salt Palace Loan Office, Inc., shares.”

“UCA Sec. 75-3-105(1) provides:

“Persons interested in decedents’ estates may apply to the registrar for determination in the informal proceedings provided in this chapter and may petition the court for orders in formal proceedings within the court’s jurisdiction, including, but not limited to those described in this chapter. The court may hear and determine formal proceedings involving administration and distribution of decedents’ estates after notice to interested persons in conformity with Section 75-1-401. Persons notified are bound though less than all interested persons may have been given notice. [Emphasis added.]”

“Diamond Fork Land Company cannot be summarily deprived of its ownership of 1500 . . . shares.” “ . . .Lowe and . . . Rose . . . have never been removed as directors and are the sole possessors of corporate institutional memory going back to Gary Pahl.”

While Ms. Ninow concedes that the May 1, 2003, summary judgment is a final order timely appealed, she argues the contempt order of October 1, 2002, was a final order not timely appealed. This court already ruled in this case on October 28, 2003, that, consistent with the general rule, the October 1, 2002, civil contempt order is not final, but interlocutory [citing Von Hake v. Thomas, 759 P.2d 1162 (Utah 1998)]. The civil contempt order held William Lowe in contempt for an action he took after the TRO inadvertently expired when KaLynn Ninow's counsel failed to get a timely extension. As more fully discussed in Point Four below, the text of Rule 65A as illuminated by precedent does not give trial courts such authority to retroactively extend a TRO to restrain past conduct. Ms. Ninow wishes to see the power of courts enlarged with such retroactive power in order to chill the freedom of litigants who face the possibility of such a retroactive order, using the demolition of a hypothetical historic building as a reason. As under Roman Law it was better that ten guilty persons go free than one innocent person be punished, under our modern core legal principles of ordered liberty under rule of law it is better that an old building be demolished than the law be expanded to give state judges the authority to retroactively restrain and punish historic conduct.

Returning now to the May 1, 2003, summary judgment, facts and all reasonable inferences drawn therefrom must all be viewed by the appellate court in the light that is most favorable to the non-moving party. Dick Simon Trucking, Inc., v. State Tax Commission, 2004 UT 11. In cross-motions for summary judgment, separately viewed facts and reasonable inferences drawn

therefrom must all be viewed in the light least favorable to KaLynn Ninow, the “moving” party. Prince, Yeates & Geldzahler v. Young, 2004 UT 26.

With these principles in mind, the facts are as follows. At the time of his death, Gary G. Pahl directly owned 3000 shares [100%] of outstanding stock in Pahl’s Salt Palace Loan Office, Inc., and indirectly owned the other 3000 authorized shares held by the corporation’s treasurer, William Lowe, as treasury stock of the corporation. Gary G. Pahl’s death on June 25, 2000, created a vacancy in the position he previously held on the corporation’s three-person board of directors. The surviving directors, William Lowe and Augusta Rose, were authorized to and continued to conduct board business as a quorum of the board of directors and also continued to conduct corporate business and engage in corporate business operations as the officers of the corporation. Acting with that authority, William Lowe and Augusta Rose caused the 3000 shares of stock in the treasury to be transferred from the treasury, after which the 3000 shares changed hands several times and are now held out-of-state by out-of-state owners not parties to the probate proceeding below. Pahl’s Salt Palace Loan Office, Inc., which was not a party to the probate proceeding below, became concerned that the probate proceeding was creating a cloud over its shareholder list and brought a civil action against KaLynn Ninow in her capacity as personal representative of the estate of Gary G. Pahl. Default judgment was entered in which, under the authority granted to the court under URCP 70, the trial court in that case divested KaLynn Ninow’s title, if any, to 3000 shares and vested it in the out-

of-state owners listed by the corporation on its shareholder list, none of whom were parties to that case. After waiting three months to ensure the default judgment would not be set aside under URCP 60(b), those out-of-state owners sold the shares to other out-of-state *bona fide* purchasers and the 3000 shares remain out-of-state in the hands of out-of-state owners. The default judgment was subsequently set aside, but, since the out-of-state owners in whom title to the 3000 shares had been vested by the trial court were not parties to the case, setting aside the default judgment did not re-divest title from those out-of-state owners and did not re-vest title with the personal representative, since the trial court had no power to do so under URCP 70 once the property was out-of-state and title was vested in owners who were not parties to the case. Attempts by Ms. Ninow to vote all 6000 shares have all been rejected by Pahl's Salt Palace Loan Office, Inc., no court of competent jurisdiction over Pahl's Salt Palace Loan Office, Inc., has ever ruled otherwise [See, *inter alia*, UCA 16-10a-724(6)], and William Lowe and Augusta Rose continue to serve as its only officers and as a quorum of its directors. Gary G. Pahl's heir owns 3000 shares (50%), subject to probate claims and administration by the personal representative. As owners of less than a majority of shares, neither the heir nor the personal representative can unilaterally convene a shareholder quorum. They enjoy only those rights enjoyed generally by shareholders of Utah corporations. They have no right to deal in, receive, expend, possess, or dispose of any corporate assets, no right to obligate the corporation, no right to conduct day-to-day corporate

business or to engage in corporate operations, and no right to hold themselves out as doing so, and are not officers, employees, or agents of the corporation.

Regardless of whether the proper standard of appellate review is now applied to facts listed by Ms. Ninow in her summary judgment memorandum in the trial court or to undisputed facts 1-12 now listed by Ms. Ninow on Appeal [Appellee's Brief at 4-8], the summary judgment should be reversed.

Since Ms. Ninow, on appeal, has now set forth numbered undisputed facts 1-12 [Appellee's Brief at 4-8] in order to "aid the court in understanding all of the undisputed facts upon which the lower court based its summary judgment in favor of Ninow" [Appellee's Brief at 8], a reply to those facts is now provided in this reply brief. Paragraph 1 simply sets forth the fact that the articles of incorporation of Pahl's Salt Palace Loan Office, Inc. [which was not a party to this proceeding], provide for 6000 shares of common voting stock and that 3000 of the shares [50%] passed from A. Gunther Pahl to Gary G. Pahl. Paragraph 2 makes reference to the May 6, 1998, Bill of Sale for the other 3000 shares [50%] from Frank H. Pahl to Gary G. Pahl, and establish that William Lowe held the 3000 shares from and after the execution of the May 6, 1998, Bill of Sale. Paragraphs 3 and 4 establish that all of the conditions of the May 6, 1998, Bill of Sale had been satisfied by April 17, 2000. When properly viewed in the light most favorable to the non-moving parties, it is reasonable to infer from these undisputed facts that William Lowe conditionally held the 3000 shares from May 6, 1998, to April 17, 2000, pending completion of the terms of the May 6, 1998, Bill of Sale, and

that after April 17, 2000, William Lowe held the shares as corporate treasurer for and on behalf the corporation, which owned them as treasury shares. The incorrect inference that they were held by Gary G. Pahl as part of his personal estate is drawn by incorrectly viewing the undisputed facts and the reasonable inferences drawn therefrom in the light most favorable to the moving party.

Paragraph 5 contains facts pertaining to a September 25, 2000, Bill of Sale involving a transfer of an interest in buildings which is fully separate and distinct from the transfer of 3000 shares of corporate stock. At the end of Paragraph 5, Ms. Ninow has inserted a sentence that is not a fact properly supported by accurate reference to the record, but is argument: “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.” This argument fails to view all of the facts, and all reasonable inferences drawn therefrom, in the light most favorable to the non-moving parties. The cited reference to the record establishes only that the obligations under the May 6, 1998, agreement were satisfied, but does not establish as an undisputed fact that Gary G. Pahl made no agreements to transfer his interest in the 3000 shares of stock. The use of the term “therefore” makes it clear that it is a mere argument based on the preceding sentences. And it is mere argument that does not advance the analysis or settle the question. All 6000 shares did belong to Gary, 3000 directly and 3000 treasury shares indirectly.

In order to set forth undisputed facts that support summary judgment, Ms. Ninow would have had to include an additional [false] statement in her

numbered statement of undisputed material facts that said substantially the following: “Gary G. Pahl entered into no agreements that caused any transfer of any of his interests in any shares of the corporation.” Had Ms. Ninow done this below, William Lowe and Augusta Rose would have placed such a numbered “undisputed” fact in dispute by simply identifying it as disputed with further references to the December 28, 1998, Bill of Sale, pursuant to which “upon successful completion” of the May 6, 1998, agreement, the 3000 shares that were being conditionally held by William Lowe would “belong to the treasury of the Corporation, leaving a balance of 3,000 common shares outstanding” [R. 421] and the undisputed fact that “successful completion” of the May 6, 1998, agreement occurred on April 17, 2000, prior to death.

Paragraphs 5 through 9 are also not material. They establish that Frank [not Gary] Pahl never personally or through an agent transferred, devised, bequeathed, or assigned any of the 3000 shares to any person other than to sell the said 3000 shares to Gary via the May 6, 1998, Bill of Sale. All 6000 shares did belong to Gary, who directly owned 3000 shares and indirectly owned 3000 treasury shares held by Mr. Lowe. Conspicuously absent is a statement that Gary never personally or through an agent transferred, devised, bequeathed, or assigned any of the 3000 shares. Since such a statement is made as to Frank, but is conspicuously absent as to Gary, the absence of any such transfer agreements by Gary is not deemed admitted under CJA 4-501.

Paragraph 9 merely sets forth the procedural course of proceedings.

Thus, the listed facts are not material and do not settle the question.

Paragraphs 10-12 pertain to the TRO and interlocutory contempt order.

The conspicuous absence of the material facts needed to establish the proposition Ms. Ninow seeks to establish precludes summary judgment. She cannot avoid addressing the transfer into the treasury, the subsequent actions taken by the board to re-issue the treasury stock, and the URCP 70 judgment entered by Judge Robert Hilder in an action against her [now consolidated herewith] by simply failing to mention them. Nor can she ignore official actions duly taken by the board of directors and by courts. She has taken the same approach in her brief by simply ignoring this court's October 28, 2003, order and re-arguing her contention "that the October 1, 2002 contempt order is a final order and that Appellant Lowe did not timely appeal from that order" even though this court has already addressed and adjudicated her argument, rejecting it: "However, consistent with the general rule, the civil contempt order in this case is interlocutory. *See Von Hake v. Thomas*, 759 P. 2d 1162, 1167 & n.3 (Utah 1988)." [Order of October 28, 2003] Below she not only simply ignored material facts not convenient to her position, but she used an approach comparable to claiming this court's October 28, 2003, order can be ignored by claiming that the three Court of Appeals judges named in the October 28, 2003, order are not authorized to sit on this court and then attempting to "prove" this by listing each judge's penultimate employment position or office but omitting the appointment to the Court of Appeals.

As of January 1987, The Honorable Russell W. Bench was no longer in private practice, an assistant attorney general, or a central staff attorney for

the Utah Supreme Court, but was a member of the Utah Court of Appeals.

As of January 1987, Judge Norman H. Jackson was no longer an attorney in private practice, but was a member of the Utah Court of Appeals.

As of January 1987, Judge Gregory K. Orme was no longer an attorney in private practice or a law clerk to Judge Monroe G. McKay, Tenth Circuit Court of Appeals, but was a member of the Utah Court of Appeals.

And as of April 17, 2000, the 3000 shares held by William Lowe were no longer held by him conditionally pending completion of the May 6, 1998, Bill of Sale, but were held by him as the treasurer and were treasury stock.

It was error for the trial court to enter a summary judgment on such an incomplete listing of material facts just as it was error for the trial court to hold William Lowe in contempt as part of its order of October 1, 2002, for action Mr. Lowe took in exercise of rights under, *inter alia*, UCA Secs. 16-10a-901 through 909 after the TRO inadvertently expired. It was not the responsibility of William Lowe or his counsel to get the TRO extended or to alert the court or the other side it was about to expire or had expired. In the case of William Lowe's counsel, alerting the court of the expiration by even asking about it would have violated counsel's duty of loyalty to Mr. Lowe, as such an inquiry would likely have triggered immediate entry of a new order.

Ms. Ninow's brief raises the default judgment entered on February 6, 2003, prior to the time she claimed her counsel had "inadvertently" failed to include some key language in the earlier October 1, 2002, order and belatedly submitted her proposed supplemental summary judgment dated May 1, 2003.

She fails to point out that the main purpose of the February 6, 2003, default judgment was its permanent injunction enjoining Richard Ninow from defaming Augusta Rose and fails to point out that there was nothing left for the court to decide regarding defamation or the 3000 shares after it entered the February 6, 2003, judgment. However, having now asserted that the February 6, 2003, judgment was not a final order, but that the October 1, 2002, order was final, she is estopped from asserting that the May 1, 2003, order was timely submitted within the three month limit set forth in URCP 60(b) in cases of “inadvertence” such as this, since she is estopped from using February 6, 2003, as the starting date for counting that three months.

After the February 6, 2003, order was entered, appellants timely appealed the October 1, 2002, interlocutory order. When the trial court entered a May 1, 2003, summary judgment without leave of the appellate court based on the “inadvertence” of KaLynn Ninow’s counsel in excluding its language from earlier orders, appellants timely filed a second notice of appeal that covered all prior orders in the trial court as a precaution. But KaLynn Ninow is now estopped from using a February 6, 2003, starting date.

KaLynn Ninow’s brief fails to address the jurisdictional point raised on page 50 of appellants’ brief that by the time the new May 1, 2003, summary judgment was entered, Judge Robert Hilder, in a separate civil case against KaLynn Ninow as the personal representative that has been consolidated with this matter, in a default judgment that was still in place on May 1, 2003, had

fully divested any title KaLynn Ninow had in the 3000 shares and vested it in out-of-state owners pursuant to URCP 70. By the time the new May 1, 2003, summary judgment was entered, Judge Tyrone Medley had neither personal jurisdiction over the owners of the 3000 shares to divest their title and vest it in KaLynn Ninow nor *in rem* jurisdiction over the 3000 shares, which were by then all out-of-state beyond his jurisdictional reach pursuant to URCP 70.

URCP 70 provides as follows:

Rule 70. Judgment for specific acts; vesting title.

If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court and the act when so done has like effect as if done by the party. On application of the party entitled to performance and upon order of the court, the clerk shall issue a writ of attachment or sequestration against the property of the disobedient party to compel obedience to the judgment. The court may also in proper cases adjudge the party in contempt. If real or personal property is within the state, the court in lieu of directing a conveyance thereof may enter a judgment divesting the title of any party and vesting it in others and such judgment has the effect of a conveyance executed in due form of law. When any order or judgment is for the delivery of possession, the party in whose favor it is entered is entitled to a writ of execution or assistance upon application to the clerk. [Emphasis added.]

The May 1, 2003, summary judgment is, thus, null and of no effect. It should here be noted that in regards to the nullity of the May 1, 2003, order, as with the various other legal points raised herein, it is not necessary for the Court of Appeals to exhaustively analyze these points with a consideration of all applicable statutes and precedents and then enter a definitive holding. It is

only necessary to conclude these legal points are “colorable” enough to be argued in the light most favorable to appellants when questions of application of law to fact are viewed in that most favorable light and reverse the May 1, 2003, order and the summary judgment parts of the October 1, 2002, order.

POINT THREE

The November 26, 2002, URCP 70 judgment should be affirmed and the June 12, 2003, order setting it aside should now be reversed.

As set forth in Point Two above, the timely response to the motion for summary judgment filed by Lowe and Rose notified Judge Medley that he lacked personal jurisdiction over Diamond Fork Land Company and *in rem* jurisdiction over the 1500 shares it then owned. He later lacked jurisdiction on May 1, 2003, to enter the summary judgment as to any of the 3000 shares because, on November 26, 2002, Judge Hilder had already entered a default judgment against KaLynn Ninow divesting her title, if any, to the 3000 shares, and that judgment was still in effect on May 1, 2003, as it was not set aside by Judge Hilder until June 12, 2003. Over the objections of William Lowe and Augusta Rose, as well as over the objections of Pahl’s Salt Palace Loan Office, Inc., [R. 1342-1371] which was not a party to this proceeding, but made a “special appearance” below for the purpose of objecting, an April 15, 2004, order consolidated Judge Hilder’s case with this probate. Even though title is still vested in the out-of-state shareowners, this court should now bring finality and clarity by reversing the June 12, 2003, order. [R. 1321] KaLynn Ninow was tardy and did not respond to the summons until the day default

was entered. During the days following her tardy response, she failed to exercise any diligence in determining whether a default judgment had been entered and failed to file for URCP 60(b)(1) relief within the required three months. Judge Hilder correctly ruled he had no discretion to grant relief in this “mistake” case since the three-month deadline was not met. [R. 1321]

Judge Hilder then reversed himself and granted relief under Oseguera v. Farmers Insurance Exchange, 2003 Ut App 46, 68 P.3d 1008, which was plain error because that case provides relief only to tardy parties who, unlike KaLynn Ninow, diligently seek to ascertain if a judgment is entered and are somehow misled. Judge Hilder made no such finding as to KaLynn Ninow.

POINT FOUR

The TRO inadvertently expired at the date and time in the TRO.

Turning now to the contempt order, appellee’s brief claims that the case of SEC (Levine) v. Comcoa Ltd, 70 F.3rd 1191 (11th Cir. 1995) stands for the proposition that continuing the hearing into the second day constituted a for-cause extension of the initial 10 day period without the consent of Lowe.

No such holding appears in that case. Footnote 6 from that case on which Ms. Ninow relies does not state extension occurred without consent.

Indeed, in SEC v. Comcoa Ltd, 887 F. Supp 1521 (S.D. Fla 1995), the district court held that this was a “consent” case, reasoning that the failure to object to the court’s declaration that the temporary restraining order would remain in effect until the court rendered decisions on outstanding motions constituted consent to the extension. Significantly, *Moore’s Federal Practice*

3rd Sec. 65.38 analyzes the Comcoa Ltd. case as a “consent” case. The trial court proceedings in Comcoa Ltd. were materially different from proceedings in the trial court in this case. In Comcoa Ltd., the trial court entered an oral extension of the TRO in open court, which was violated after it was entered, while, in the case at bar, there was no such express extension of the TRO, oral or otherwise, prior to the time \$7500 was transferred, and, thus, there was no implied “consent” here. In the Comcoa Ltd. case, as in the case at bar, “(t)he problem arose . . . because the party who petitioned for and obtained the TRO stood silent while the order inadvertently expired without counseling the court of the requirements for its extension.” [Comcoa Ltd., 70 F.3rd 1191, 1194, concurring opinion.] While the Comcoa Ltd. case does not apply here, the holding in SEC v. Unifund Sal, 910 F.2d 1028 (2d Cir. 1990) does apply. As in this case, the preliminary injunction hearing in Unifund Sal commenced prior to the expiration of the TRO and the TRO inadvertently expired. After it expired, the trial court in Unifund Sal entered an untimely order extending the TRO. But unlike the restrained party in Comcoa Ltd., the restrained party in Unifund Sal objected, which vitiated implied consent. On appeal, the court held that the order purporting to extend the TRO in Unifund Sal was invalid since it was not timely entered within the ten day period of the TRO. The holding in Unifund Sal should be adopted in this case and the October 1, 2002, order reversed. Contempt requires an actual order with an unequivocal mandate, settled doctrine in law that is well expressed in a recent case involving the New York attorney general: “To sustain a civil contempt, a

lawful judicial order expressing an unequivocal mandate must have been in effect and disobeyed.” Ulster Home Care, Inc., v. Dennis C. Vacco, as Attorney General of New York, 688 N.Y.S.2d 830 (N.Y. App. Div. 1999).

The United States Supreme Court has held parties are entitled to “*fair and precise notice of what the injunction actually prohibits*” and that “*(i)t would be inconsistent with this basic principle to countenance procedures whereby parties against whom an injunction is directed are left to guess about its intended duration. Rule 65(b) provides that temporary restraining orders expire by their own terms within 10 days of their issuance. Where a court intends to supplant such an order . . . it should issue an order clearly saying so. And where it has not done so, a party against whom a temporary restraining order has issued may reasonably assume that the order has expired within the time limits imposed by Rule 65(b).*” Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers, Local No. 70, 415 U.S. 423, 444-45; 94 S.Ct. 1113, 1126-27. [Emphasis added.]

Contrary to Ms. Ninow’s claim there was no harm, there was harm to William Lowe, who was forced to pay \$7,500.00 to Ms. Ninow [instead of paying it back to the corporation], plus \$5,650.00 in attorney fees, and who was deprived of his right to the \$7,500.00 under, *inter alia*, UCA Secs. 16-10a-901 through 909 by incorrect use by the court of its contempt powers.

With all due respect to Ms. Ninow’s stern warning to this court that reversing the contempt order will somehow invite “judicial chaos”, our rules are very adequately framed to prevent such consequences, since a judge can

extend the TRO by timely doing so and entering the reasons in the record, “effectuating a fluid, uninterrupted” procedure that does not create any “judicial chaos” but helps avoid the “judicial chaos” arising when “parties against whom an injunction is directed are left to guess about its intended duration.” In Ms. Ninow’s hypothetical building demolition story, a “party who petitioned for and obtained the TRO” would not likely have “stood silent while the order inadvertently expired without counseling the court of the requirements for its extension” like Ms. Ninow’s counsel stood silent here.

POINT FIVE

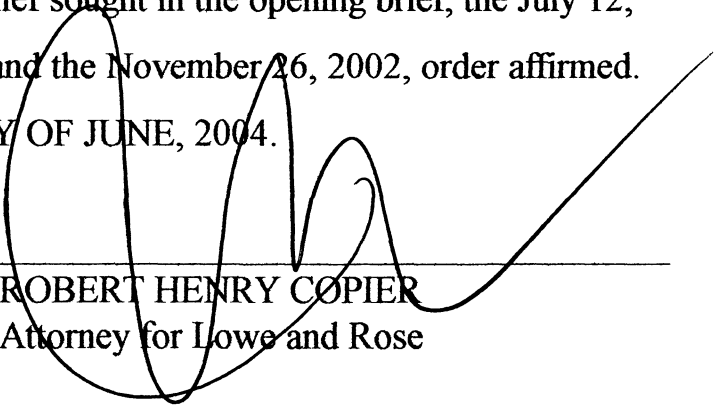
Accusing one’s adversary of factual “distortion, mischaracterization, and exaggeration” [Brief of Appellee, Part C] does not settle the question.

Ms. Ninow claims appellants have distorted, mischaracterized, and exaggerated facts. She then attempts to show this with four paragraphs that improperly state facts and draw inferences in the light that is most favorable to herself. It is not the office of a summary judgment [but it is for a jury] to decide which side is distorting, mischaracterizing, or exaggerating the facts.

CONCLUSION

In addition to all of the relief sought in the opening brief, the July 12, 2003, order should be reversed and the November 26, 2002, order affirmed.

DATED THIS 11 DAY OF JUNE, 2004.



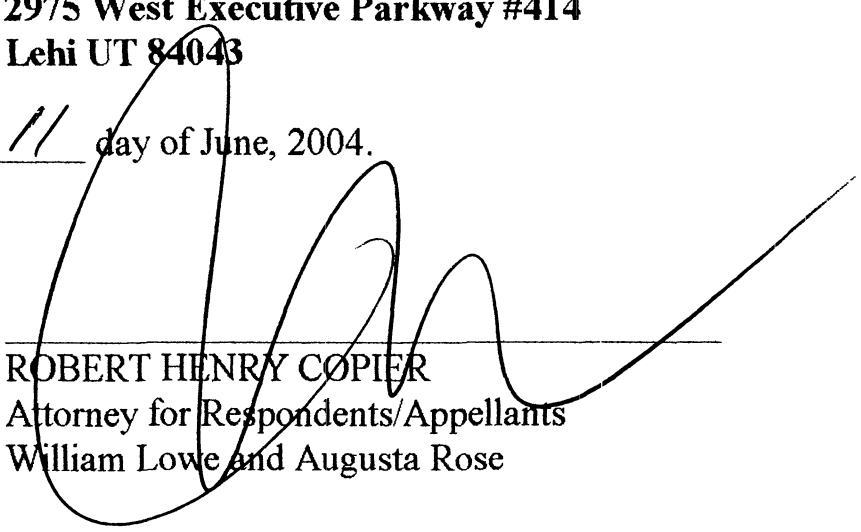
ROBERT HENRY COPIER
Attorney for Lowe and Rose

CERTIFICATE OF SERVICE

True copies hereof were mailed to:

**Daniel F. Van Woerkom
Sandra K. Weeks
Van Woerkom & Weeks
2975 West Executive Parkway #414
Lehi UT 84043**

on this, the 11 day of June, 2004.



ROBERT HENRY COPIER
Attorney for Respondents/Appellants
William Lowe and Augusta Rose

ADDENDA

- A-1 - Court of Appeals Order of October 28, 2003.**
- A-2 - June 3, 2002, transfer notice with provenances.**
- A-3 - Findings of Fact and Conclusions of Law entered on October 1, 2002; Interlocutory order of contempt entered on October 1, 2002; Final judgment entered on February 6, 2003; timely filed February 20, 2003, Notice of Appeal; Reply to Objection to Proposed Findings of Fact, Conclusions of Law and Order Granting Summary Judgment filed by KaLynn Ninow on April 16, 2003, prior to entry of May 1, 2003 order [stating that May 1, 2003, order was being sought because her counsel had "inadvertently" failed to include some language in the earlier order that had been appealed February 20, 2003]; timely filed May 23, 2003, Notice of Appeal.**
- A-4 June 1, 2002, shareholder derivative demand; November 26, 2002, Default Judgment entered by Judge Hilder in the derivative action case; June 12, 2003, ruling and order by Judge Hilder setting aside the default judgment; printout of docket in the shareholder derivative action case.**
- A-5 June 9, 2004, letter to Judge Medley.**

A-1

Court of Appeals Order of October 28, 2003.

OCT 28 2003

Paulette Stagg
Clerk of the Court

IN THE UTAH COURT OF APPEALS

-----ooOoo-----

In the matter of the estate of
Gary G. Pahl, deceased.

ORDER

Case No. 20030169-CA

Kaylinn Ninow,

Petitioner and Appellee,

v.

Grand Staircase Land Co., a Utah
corporation, William Lowe,
Augusta Rose, and Robert
Mortensen,

Respondents and Appellants.

Augusta Rose,

Third-Party Petitioner,

v.

Ryan Pahl, Kaylinn Ninow,
Richard Ninow, and Does I-V,

Third-Party Respondents.

Before Judges Jackson, Bench, and Orme.

This matter is before the court on Appellee's Motion to Dismiss Appeal, Motion for Summary Disposition, Motion to Dismiss Unframed Issues and Improper Parties, and Appellants' suggestions of mootness and request to defer decision on Appellee's motions.²

1. Robert Mortensen was dismissed from the probate proceedings and is not a party to this appeal.

2. Appellants filed a Motion for Summary Disposition, seeking
(continued...)

Appellee contends that the October 1, 2002 contempt order is a final order and Appellant Lowe did not timely appeal from that order. However, consistent with the general rule, the civil contempt order in this case is interlocutory. See Von Hake v. Thomas, 759 P.2d 1162, 1167 & n.3 (Utah 1988).

Appellee also contends that the first notice of appeal was not filed from a final, appealable order because the district court has not ruled on the ownership of the real property.

Appellants have filed suggestions of partial mootness but have not moved to dismiss any part of their appeal. Rather, they request this court to defer decision on Appellee's motions pending resolution of a motion to set aside a default judgment in a collateral action.

IT IS HEREBY ORDERED that Appellants' request to defer decision is denied.

IT IS FURTHER ORDERED that Appellee's motion to dismiss Appellants' appeal, including Appellant Lowe's appeal of the interlocutory contempt order, is denied, and a ruling as to whether Appellants' appeal is taken from a final, appealable order is deferred pending plenary presentation and consideration of the appeal.

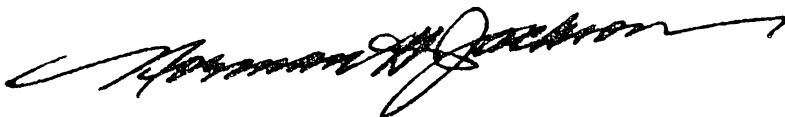
IT IS FURTHER ORDERED that in addition to briefing the merits, the parties shall also brief the issue of whether the appeal is taken from a final, appealable order. See In re Estate of Vorhees, 12 Utah 2d 361, 366 P.2d 977, 980 (1961).

IT IS FURTHER ORDERED that Appellee's Motion to Dismiss Unframed Issues and Improper Parties is denied.

The parties will be notified when a briefing schedule has been established.

Dated this 28th day of October 2003.

FOR THE COURT:



Norman H. Jackson,
Presiding Judge

2. (...continued)
summary reversal. However, Appellants have withdrawn the motion.

A-2

June 3, 2002, transfer notice with provenances.

ROBERT H. COPIER, 727
Attorney for William Lowe and
Grand Staircase Land Company
243 East 400 South, Suite 200
Salt Lake City UT 84111-2803
Telephone (801) 531-7923

FILED DISTRICT COURT
Third Judicial District

JUN 04 2002

SALT LAKE COUNTY

By _____ *BA*
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH
SCOTT M. MATHESON COURTHOUSE
PROBATE DIVISION

In the matter of the

ESTATE OF GARY G. PAHL,

Deceased.

**STOCK TRANSFER NOTICE
AND REQUEST FOR NOTICE**

Probate No. 003901101
Judge Tyrone E. Medley

Grand Staircase Land Company, a Utah Corporation, requests notice of hearings and proceedings in this probate. Grand Staircase Land Company has acquired stock in Pahl's Salt Palace Loan Office, Inc., ("the corporation"). This court has entered a preliminary injunction that temporarily enjoins the officers and directors of the corporation from performing duties. The personal representative herein claims to have caused filing(s) to be made with the State of Utah Division of Corporations setting forth the names of certain persons as purported new officers, directors, and agents of the corporation. Since there was no vote by a quorum of shareholders to elect and qualify any new directors, and there has yet to be an adjudication on the merits of the personal representative's petition to adjudicate share ownership, said filing(s) were premature and invalid. Acceptance of filings by the State of Utah Division of Corporations creates no presumption of validity.

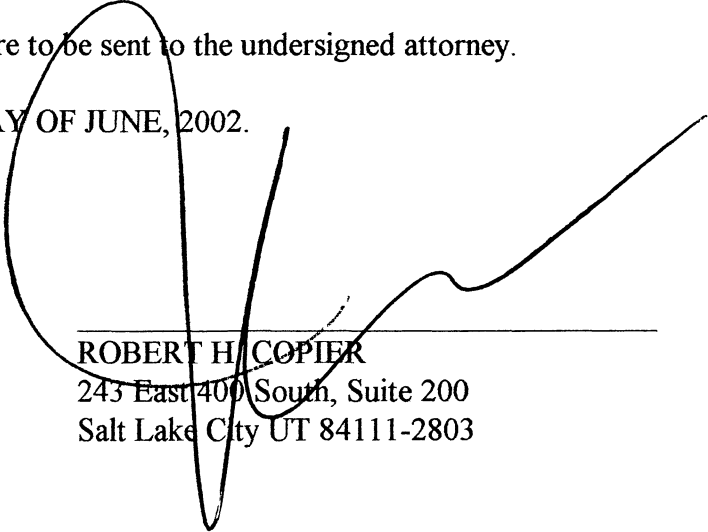
The following appear to be the shareholders of stock in the corporation:

<i>KaLynn Ninow</i>	<i>3000 shares</i>
<i>Grand Staircase Land Company</i>	<i>1500 shares</i>
<i>William Lowe (escrow for Grand Staircase Land Company)</i>	<u><i>1500 shares</i></u>
<i>SHARES AUTHORIZED, ISSUED, AND OUTSTANDING</i>	<i>6000 shares</i>

The 3000 shares owned directly by and/or now held in escrow for Grand Staircase Land Company were acquired from Robert K. Mortensen and Augusta Rose on June 1, 2002. Provenances of shares from them are annexed to this filing.

The requested notices are to be sent to the undersigned attorney.

DATED THIS 3RD DAY OF JUNE, 2002.



ROBERT H. COZIER
245 East 400 South, Suite 200
Salt Lake City UT 84111-2803

CERTIFICATE OF SERVICE

The copy of the foregoing was this-day **MAILED AND FAXED** to:

David C. Condie
Attorney for the Personal Representative
39 Exchange Place, Suite 101
Salt Lake City UT 84111

FAX NO. 801-363-4850

DATED THIS 3RD DAY OF JUNE, 2002.



PROVENANCE

- 1. Transfer from Frank H. Paul to William T. Lowe, May 6, 1998.**
- 2. Transfer from William T. Lowe¹ to Robert K. Mortensen, September 2, 2000.**

¹ Between May 6, 1998, and August 25, 2000, William T. Lowe owed certain duties to others in connection with the shares he owned. These duties changed with time based on actions taken by persons authorized to take them. He initially owed certain duties to Gary G. Pahl and Frank H. Paul. Prior to the death of Gary G. Pahl, and due to actions taken by persons authorized to take them, he then owed certain duties only to Pahl's Salt Palace Loan Office, Inc., and Frank H. Paul. In another later change in duties (prior to the death of Gary G. Pahl) based on the fulfillment of certain conditions, he then owed certain duties to Pahl's Salt Palace Loan Office, Inc., only. This status continued while Gary G. Pahl was alive, and then after his death, until August 25, 2000. On August 25, 2000, based on an action taken by persons authorized to take it, he was released from the duties he owed to Pahl's Salt Palace Loan Office, Inc., and was then free to convey, sell, or gift these shares, in his sole discretion, as he saw fit, which he did September 2, 2000.

PROVENANCE

- 1. Transfer from Frank H. Paul to William T. Lowe, May 6, 1998.**
- 2. Transfer from William T. Lowe¹ to Augusta Rose, September 2, 2000.**

¹ Between May 6, 1998, and August 25, 2000, William T. Lowe owed certain duties to others in connection with the shares he owned. These duties changed with time based on actions taken by persons authorized to take them. He initially owed certain duties to Gary G. Pahl and Frank H. Paul. Prior to the death of Gary G. Pahl, and due to actions taken by persons authorized to take them, he then owed certain duties only to Pahl's Salt Palace Loan Office, Inc., and Frank H. Paul. In another later change in duties (prior to the death of Gary G. Pahl) based on the fulfillment of certain conditions, he then owed certain duties to Pahl's Salt Palace Loan Office, Inc., only. This status continued while Gary G. Pahl was alive, and then after his death, until August 25, 2000. On August 25, 2000, based on an action taken by persons authorized to take it, he was released from the duties he owed to Pahl's Salt Palace Loan Office, Inc., and was then free to convey, sell, or gift these shares, in his sole discretion, as he saw fit, which he did September 2, 2000.

A-3

Findings of Fact and Conclusions of Law entered on October 1, 2002; Interlocutory order of contempt entered on October 1, 2002; Final judgment entered on February 6, 2003; timely filed February 20, 2003, Notice of Appeal; Reply to Objection to Proposed Findings of Fact, Conclusions of Law and Order Granting Summary Judgment filed by KaLynn Ninow on April 16, 2003, prior to entry of May 1, 2003 order [stating that May 1, 2003, order was being sought because her counsel had "inadvertently" failed to include some language in the earlier order that had been appealed February 20, 2003]; timely filed May 23, 2003, Notice of Appeal.

FILED DISTRICT COURT
Third Judicial District

OCT 01 2002

SALT LAKE COUNTY

By

Deputy Clerk

Daniel F. Van Woerkom USB #8500
David Condie USB #8053
VAN WOERKOM & CONDIE, LC
32 Exchange Place, Suite 101
Salt Lake City, UT 84111
Telephone: (801) 531-6195
Facsimile: (801) 363-4850

IN THE THIRD JUDICIAL COURT FOR SALT LAKE COUNTY
STATE OF UTAH

IN THE MATTER OF THE ESTATE OF
GARY G. PAHL

Deceased.

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

Civil No. 003901101
Judge Medley

This matter came before the Court at a hearing on September 5, 2002, based upon the motion filed by KaLynn Ninow, in her capacity as the personal representative of the Estate of Gary G. Pahl, and in her capacity as the court appointed Guardian and Conservator for Ryan B. Pahl, the only heir(devisee) of Gary G. Pahl, and subsequent Order to Show Cause issued June 4, 2002, requiring William T. Lowe to appear and show cause why he should not be held in contempt of court for violation of the Court's previous orders. Several motions and supporting memoranda were filed by Mr. Lowe directly related to the Order to Show Cause, namely: Motion (and Memorandum in Support) to Strike Affidavit, Dismiss Contempt Proceeding and Vacate Order to Show Cause; a Motion (and Memorandum in Support) for Summary Judgment regarding contempt; a Consolidated Reply Memorandum regarding Mr. Lowe's motions

pertaining to contempt; Affidavits of William T. Lowe and Augusta Rose; Response to Order to Show Cause; Bench Brief re: Contempt, and a supplemental Affidavit of William T. Lowe. The motions filed by Mr. Lowe were opposed by KaLynn Ninow.

The Court, following oral argument on the parties competing motions for summary judgment on August 26, 2002, ultimately denied the motions to strike, dismiss and vacate the contempt proceedings, as well as the motion for summary judgment regarding contempt. In connection with the foregoing motions, the Court ruled that KaLynn Ninow had established a prima facie showing of contempt sufficient to support a motion and Order to Show Cause hearing. The Order to Show Cause hearing was scheduled for September 5, 2002.

The Court convened the hearing on the Order to Show Cause as scheduled. Appearing at the hearing were: KaLynn Ninow, represented by and through counsel, David C. Condie; William T. Lowe, represented by and through counsel, Robert Copier. The Court, after having heard the testimony of witnesses and arguments of both counsel, and after considering the evidence and also taking time to review the applicable cases cited distinguishing civil and criminal contempt, makes the following:

FINDINGS OF FACT

1. Based upon the evidence that has been presented, this Court is satisfied that the evidence is clear and convincing, and is undisputed, that William T. Lowe had knowledge of the Temporary Restraining Order ("TRO") issued by the Court on May 20, 2002, and that he also had knowledge of what was required of him under the provisions of the TRO.

2. The Court finds that the evidence is clear and convincing, and is undisputed, that William T. Lowe Based had the ability to comply with the terms of the TRO.
3. The Court finds that the evidence is clear and convincing that Mr. Lowe knowingly and intentionally failed to comply or refused to comply with the TRO, when he immediately left the courtroom on May 30, 2002, and within approximately 12 minutes arrived at the Utah Central Credit Union, accompanied by his legal counsel, removed \$7,500.00 from the Pahl's Salt Palace Loan Office Building Account, immediately obtained a cashier's check payable to Robert Copier for \$7,500.00 and delivered said check to Mr. Copier to cover Mr. Lowe's personal legal expenses.
4. In making the above Findings pertaining to Mr. Lowe's intentional failure to comply with the TRO, the Court further finds as follows:
 - a. Mr. Lowe is a sophisticated party in terms of his level of education and his experience with the court system, albeit that experience was connected with small claims, juvenile and domestic relations cases. Mr. Lowe testified that he had a graduate certificate in mediation training from the University of Utah, and had participated in a number of legal proceedings. Mr. Lowe also testified that he had personally reviewed the provisions of the TRO, and that he had read Rule 65A of the Utah Rules of Civil Procedure. The Court finds that Mr. Lowe undertook a level of personal action which is not common to parties in similar proceedings.

- b. The Court finds that the provisions of the TRO were clear and that they were understood by Mr. Lowe. The TRO placed Mr. Lowe under Court order to appear and show cause why the provisions of the TRO should not continue in the form of a preliminary injunction.
- c. The Court finds that the hearing on the TRO began on May 30, 2002 at approximately 10:00 a.m., for the express purpose to determine whether or not the provisions of the TRO would be continued in the form of a Preliminary Injunction.
- d. The hearing on the TRO/Motion for Preliminary Injunction commenced prior to the time of expiration stated on the TRO.
- e. The Court took a recess for lunch at approximately 12:00 p.m. on May 30, 2002, with the express direction to the parties that the court would reconvene at 1:30 p.m. for the express purpose of continuing the hearing to determine whether or not the provisions of the TRO would be continued in the form of a Preliminary Injunction.
- f. Consistent with the Court's previous rulings announced on August 26, 2002, based upon the facts and circumstances of the case, the TRO was extended for good cause beyond the lunch break.
- g. The evidence is clear and convincing, and is undisputed, that Mr. Lowe did in fact remove the \$7,500.00 from the account at the Utah Central Credit Union approximately 12 minutes following the Court's noon recess.

- h. The Court finds that the removal of said funds was the nature and type of conduct expressly prohibited by the provisions of the TRO.
- i. The Court finds that if any other interpretation were to apply regarding the status of the TRO, returning in the afternoon would have been a futility and a frustration of the express purposes for which the Court had convened.
- j. The Court finds that the continuance and reconvening of the hearing following the noon recess was sufficient to place a reasonable person on notice and impute knowledge that the TRO was still in place pending the resolution of the hearing thereon.
- k. The Court finds that Mr. Lowe's testimony regarding his subjective reasoning, interpretation and ultimate position that the TRO had expired, lacks credibility and is not ^{*J. Medley*} ~~un~~reasonable under the circumstances. The Court finds this to be especially true in light of the fact that Lowe failed to seek any clarification as to whether the TRO remained in place.
- l. The Court finds that this specific failure to seek any clarification further bears on the credibility of Mr. Lowe's overall testimony, which [credibility] is lacking greatly.
- m. Considering all of the facts presented and the circumstances of this case, Mr. Lowe's subjective belief concerning the TRO was not reasonable.
- n. The Court is satisfied that the conduct of Mr. Lowe during the noon recess

on May 30, 2002 was intentional, and that he deliberately sought to satisfy his personal needs in direct contravention of the TRO which was in place by removing money from the account in question and paying his personal attorneys' fees

5. Based upon the evidence and the testimony presented, the Court finds William T. Lowe to be in contempt of this Court's prior rulings pertaining to the TRO.

WHEREFORE, based on the foregoing Findings of Fact, this Court enters its:

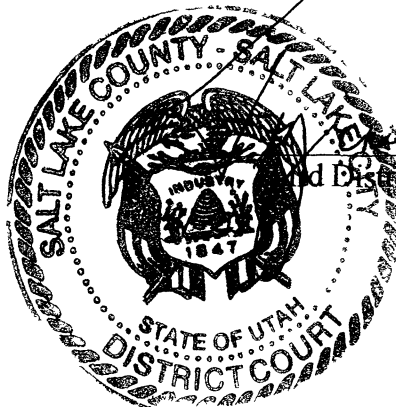
CONCLUSIONS OF LAW

1. Mr. Lowe stands in contempt of Court for his actions undertaken during the noon recess of the hearing conducted on May 30, 2002.
2. The Personal Representative is entitled to relief in light of the contempt committed by Mr. Lowe.
3. The Personal Representative is entitled to the immediate return of the \$7,500.00 taken by Mr. Lowe from the banking account in question, and is also entitled to reasonable attorneys fees and costs related to her efforts in litigating the contempt issues in this case.
4. As a result of his contempt and the resulting damage to the Personal Representative, and in order to secure payment of the amounts indicated in the preceding paragraph, it is appropriate that Mr. Lowe be ordered to serve 30 days in the Salt Lake County Jail if he does not pay the amounts ordered within the time to be specified by the Court.

5. The Court concludes that as a matter of law, that at any time during his service of the 30 day jail sentence, Mr. Lowe will be allowed to purge himself of contempt by paying in full the \$7,500.00 improperly removed from the account in question and paying such sums for attorneys' fees as shall be approved and awarded by the Court.

ENTERED this ____ day of September, 2002.

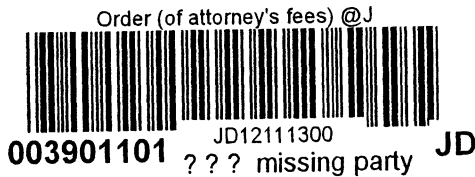
BY THE COURT



Id District Court Judge

Approved as to form:

Robert H. Copier
Attorney for William T. Lowe



FILED DISTRICT COURT
Third Judicial District

OCT 01 2002
SALT LAKE COUNTY
By [Signature]
Deputy Clerk

Daniel F. Van Woerkom USB #8500
David Condie USB #8053
VAN WOERKOM & CONDIE, LC
32 Exchange Place, Suite 101
Salt Lake City, UT 84111
Telephone: (801) 531-6195
Facsimile: (801) 363-4850

IMAGED

ENTERED IN REGISTRY
OF JUDGMENTS
DATE 10/02/02

**IN THE THIRD JUDICIAL COURT FOR SALT LAKE COUNTY
STATE OF UTAH**

**IN THE MATTER OF THE ESTATE OF
GARY G. PAHL**

ORDER

Deceased.

**Civil No. 003901101
Judge Medley**

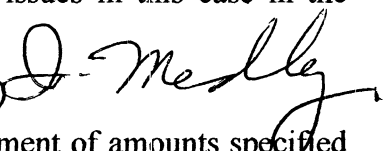
This matter came before the Court at a hearing on September 5, 2002, based upon the motion filed by KaLynn Ninow, in her capacity as the personal representative of the Estate of Gary G. Pahl, and in her capacity as the court appointed Guardian and Conservator for Ryan B. Pahl, the only heir (devisee) of Gary G. Pahl, and subsequent Order to Show Cause issued June 4, 2002, requiring William T. Lowe to appear and show cause why he should not be held in contempt of court for violation of the Court's previous orders. Several motions and supporting memoranda were filed by Mr. Lowe directly related to the Order to Show Cause, namely: Motion (and Memorandum in Support) to Strike Affidavit, Dismiss Contempt Proceeding and Vacate Order to Show Cause; a Motion (and Memorandum in Support) for Summary Judgment regarding contempt; a Consolidated Reply Memorandum regarding Mr. Lowe's motions pertaining to contempt; Affidavits of William T. Lowe and Augusta Rose; Response to Order to

Show Cause; Bench Brief re: Contempt, and a supplemental Affidavit of William T. Lowe. The motions filed by Mr. Lowe were opposed by KaLynn Ninow.

The Court, following oral argument on the parties competing motions for summary judgment on August 26, 2002, ultimately denied the motions to strike, dismiss and vacate the contempt proceedings, as well as the motion for summary judgment regarding contempt. In connection with the foregoing motions, the Court ruled that KaLynn Ninow had established a prima facie showing of contempt sufficient to support a motion and Order to Show Cause hearing. The Order to Show Cause hearing was scheduled for September 5, 2002.

The Court convened the hearing on the Order to Show Cause as scheduled. Appearing at the hearing were: KaLynn Ninow, represented by and through counsel, David C. Condie; William T. Lowe, represented by and through counsel, Robert Copier. The Court, after having heard the testimony of witnesses and arguments of both counsel, and after considering the evidence and also taking time to review the applicable cases cited distinguishing civil and criminal contempt, having entered FINDINGS OF FACT and CONCLUSIONS OF LAW, hereby ORDERS AS FOLLOWS:

1. Mr. Lowe stands in contempt of Court for his knowing and intentional failure to adhere to the provisions of the TRO as demonstrated by his actions undertaken during the noon recess of the hearing conducted on May 30, 2002.
2. The Personal Representative is entitled to relief in light of the contempt committed by Mr. Lowe.

3. Mr. Lowe is ordered to return the \$7,500.00 taken from the Salt Palace Loan Office Building Account to the Personal Representative.
4. Mr. Lowe is ordered to pay the Personal Representative her reasonable attorneys fees related to her efforts in litigating the contempt issues in this case in the amount of 8,5650.⁰⁰ dollars and no cents. *(includes \$50 costs)* 
5. Funds tendered to the Personal Representative for payment of amounts specified in paragraphs three and four shall be in the form of certified check, or guaranteed funds.
6. Mr. Lowe shall have ten business days from the date of entry of this order to pay the aforementioned amounts in full. If said amounts are not paid in full, then it is ordered that an immediate warrant shall issue without further notice, and Mr. Lowe shall be confined to the Salt Lake County Jail for a period of thirty (30) days or until such time as he purges himself of contempt by payment of the amounts specified in paragraphs three and four of this order in full.
7. Any amounts remaining unpaid following the completion of any time served in the Salt Lake County Jail shall constitute a judgment due and owing against Mr. Lowe in favor of the Personal Representative.
8. A review hearing is scheduled for September 25, 2002 at 2:00 p.m. in order to determine whether or not Mr. Lowe has complied with the foregoing order.

SO ORDERED, this _____ day of September, 2002



[Signature] 10/1/02

007901101

Approved as to form

Robert H Copier
Attorney for William T Lowe

IMAGED

FEB 08 2003

By [Signature]
SALT LAKE COUNTY
Deputy Clerk

ROBERT HENRY COPIER, 727
Attorney for Respondents
Grand Staircase Land Company,
William Lowe, and Augusta Rose
243 East University Boulevard - 200
Salt Lake City, Utah 84111-2803
Telephone 531-7923

ENTERED IN REGISTRY
OF JUDGMENTS
DATE 02/07/03

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
SCOTT M. MATHESON COURTHOUSE - PROBATE DIVISION

In the matter of the estate of

DEFAULT JUDGMENT

GARY G. PAHL,

Deceased.

Probate No. 003901101
Judge Tyrone E. Medley

KALYNN NINOW,

Petitioner,

vs.

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

Respondents,

vs.

RYAN PAHL, KALYNN NINOW,

• RICHARD NINOW,

and DOES I-V,

Third Party respondents.

Default Judgment @J

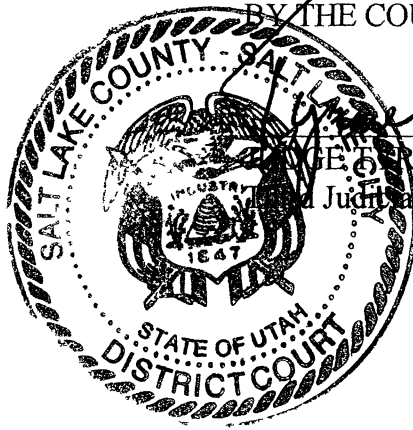
003901101 JD12500312
~~222 missing party~~ JD

The default of Richard Ninow having been entered for failure to appear,
to plead, or to otherwise respond after being served with the Amended Counter

Petition, Third Party Petition, and Demand for Jury Trial by Augusta Rose, and a Motion for Default Judgment having been filed and submitted for court decision with a supporting memorandum, the court, being sufficiently advised, finds that Richard Ninow is violating or has violated the provisions of Part 9 of Title 76 of the Utah Code, and does now hereby permanently enjoin Richard Ninow from a continuance thereof. Judgment in the sum of \$766.00 is entered pursuant to UCA Sec. 76-9-406 against Richard Ninow in favor of Augusta Rose for her costs and reasonable attorney's fees, as was established by the fee and cost affidavit of her counsel dated and filed October 24, 2002.

DATED THIS _____ DAY OF JANUARY, 2003

BY THE COURT:



George E. Medley 2/6/03
GEORGE E. MEDLEY
District Court

ROBERT HENRY COPIER, 727
Attorney for Respondents
Grand Staircase Land Company,
William Lowe, and Augusta Rose
243 East University Boulevard - 200
Salt Lake City, Utah 84111-2803
Telephone 531-7923

FILED DISTRICT COURT
Third Judicial District

FEB 20 2003

SALT LAKE COUNTY

By _____

Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
SCOTT M. MATHESON COURTHOUSE - PROBATE DIVISION

In the matter of the estate of

NOTICE OF APPEAL

GARY G. PAHL,

Probate No. 003901101

Deceased.

Judge Tyrone E. Medley

KALYNN NINOW,

Petitioner,

vs.

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

Respondents,

vs.

RYAN PAHL, KALYNN NINOW,
RICHARD NINOW, and DOES I-V,

Third Party respondents.

Final judgment having been entered on February 7, 2003, Grand Staircase Land Company, William Lowe, and Augusta Rose appeal all prior rulings, orders, and judgments herein from the Third District Court to the Utah Supreme Court.

DATED THIS 20TH DAY OF FEBRUARY, 2003



ROBERT HENRY COPIER

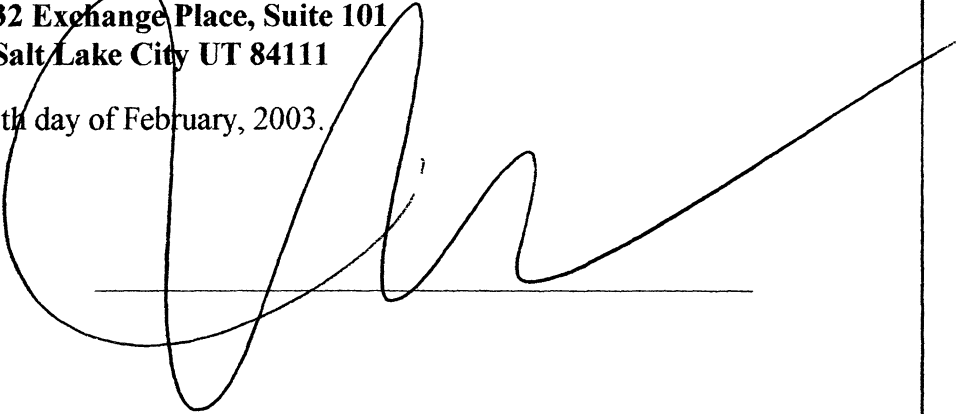
Attorney for the Respondents Grand Staircase
Land Company, William Lowe, and Augusta Rose

CERTIFICATE OF SERVICE

A copy hereof was this-day mailed to.

David C. Condie
Van Woerkom & Condie
Attorneys at Law
32 Exchange Place, Suite 101
Salt Lake City UT 84111

DATED this 20th day of February, 2003.



David Condie, P.C. (USB #8053)
32 Exchange Place, Suite 101
Salt Lake City, UT 84111
Telephone: (801) 531-6195
Facsimile: (801) 363-4850

FILED
THIRD DISTRICT COURT
03 APR 16 PM 4:17
SALT LAKE DEPARTMENT
BY *[Signature]*
CLERK

**IN THE THIRD JUDICIAL COURT FOR SALT LAKE COUNTY
STATE OF UTAH**

**IN THE MATTER OF THE ESTATE OF
GARY G. PAHL**

Deceased.

**REPLY TO OBJECTION TO
PROPOSED FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER
GRANTING SUMMARY JUDGMENT**

**Civil No. 003901101
Judge Medley**

This matter came before the Court at a hearing on August 26, 2002, wherein the Court granted summary judgment and expressly adopted the Statement of Facts as set forth in the Memorandum in Support of Motion for Summary Judgment.

Counsel for KaLynn Ninow, Ryan Pahl and Richard Ninow inadvertently failed to submit the proposed findings and order which he drafted to the court and did not realize the oversight until recently. This delay does not affect the validity nor the granting of the summary judgment, nor the rulings made by the Court from the bench on August 26, 2002, despite the fact that they were not reduced to written form.

During the course of the hearing, Judge Medley adopted the Statement of Facts as set forth therein, and granted the summary judgment as prayed for, and made further findings


consistent with the argument and analysis set forth in the moving memorandum in support of the motion for summary judgment. Counsel for the Ninows and Ryan Pahl has reviewed the videocassette tape of the hearing and has done his best to draft findings of fact, conclusions of law and an order consistent with the pronouncements made from the bench.

Mr. Copier's objection does not even attempt to attack any of the specific findings, nor offer any proposed order of his own. His objections to form and content should therefore be overruled and the proposed findings and order entered, subject obviously to review and additions by the court as it deems appropriate.

Mr. Copier has not appealed the summary judgment. He has appealed the order finding his client William Lowe in contempt. Additionally, Mr. Copier seems to believe that his unilateral withdrawal of his un-adjudicated motions is the equivalent of a final and appealable order. A motion has been filed to dismiss his appeal altogether. Regardless of the status of the appeal, there is nothing which prevents this Court from reducing the order granting summary judgment to written form.

Accordingly, the Findings of Fact, Conclusions of Law, and Order Granting Summary Judgment should be entered.

DATED, this the 6th day of April, 2003.



David C. Condie

FILED DISTRICT COURT
Third Judicial District

MAY 23 2003

SALT LAKE COUNTY

By Deputy Clerk

ROBERT H. COPIER, 727
Attorney for Respondents
Grand Staircase Land Company,
William Lowe, and Augusta Rose
243 East 400 South, Suite 200
Salt Lake City UT 84111-2803
Telephone (801) 531-7923

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH
SCOTT M. MATHESON COURTHOUSE
PROBATE DIVISION

In the matter of the estate of

GARY G. PAHL,

Probate No. 003901101

Deceased.

KALYNN NINOW,

Petitioner,

NOTICE OF APPEAL

vs.

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

Respondents.

vs.

RYAN PAHL, KALYNN NINOW,
RICHARD NINOW, and DOES I -V,

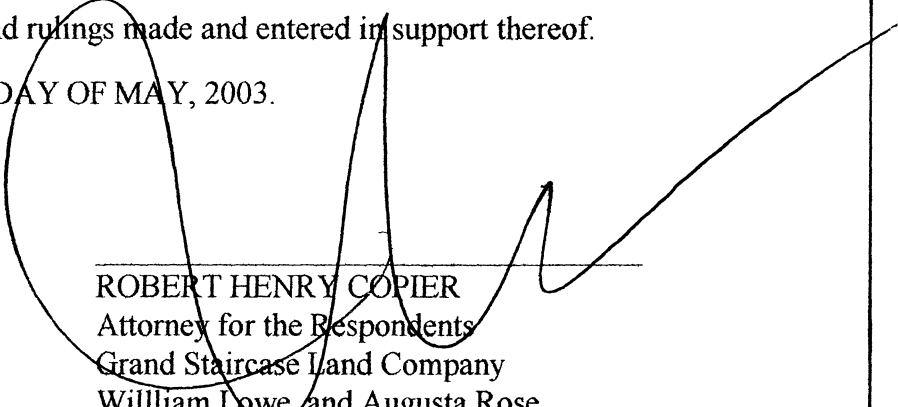
Third-party respondents.

Judge Tyrone E. Medley

\$205.00

Respondents Grand Staircase Land Company, William Lowe, and Augusta Rose hereby appeal, as a matter of right, from the Third District Court to the Utah Supreme Court, the court's signed minute entry order of May 1, 2003, ["the Order of the court resolving the matter"], together with all of the other orders, findings, and conclusions entered herein on May 1, 2003, together with all the prior orders, judgments, and rulings entered in this matter that were adverse to the position(s) taken by one or more of these respondents, including, but not limited to, the Temporary Restraining Order entered May 20, 2002, the Order Granting Preliminary Injunction entered August 26, 2002, the Order of September 25, 2002, and the Order of October 1, 2002, together with all of the related findings of fact, conclusions of law, and rulings made and entered in support thereof.

DATED THIS 23RD DAY OF MAY, 2003.



ROBERT HENRY COPIER
Attorney for the Respondents
Grand Staircase Land Company
William Lowe, and Augusta Rose

MAILING CERTIFICATE

A true copy of the foregoing was this-day mailed to:

David C. Condie
Attorney at Law
32 Exchange Place, Suite 101
Salt Lake City UT 84111
(Via First-Class U.S. Mail)

DATED THIS 23RD DAY OF MAY, 2003.



A-4

**June 1, 2002, shareholder derivative demand;
November 26, 2002, Default Judgment entered
by Judge Hilder in the derivative action case;
June 12, 2003, ruling and order by Judge Hilder
setting aside the default judgment; printout of
docket in the shareholder derivative action case.**

LAW OFFICES
ROBERT COPIER

ATTORNEY & CPA
ADVOCAAT COPIER P.C.
SALT LAKE CITY OFFICE

SALT LAKE CITY OFFICE ADDRESS:
200 METRO PLACE
243 EAST 400 SOUTH, SUITE 200
SALT LAKE CITY, UTAH 84111-2803

SALT LAKE CITY PHONE NUMBERS:
OFFICE TELEPHONE (801) 531-7923
FAX LINE NUMBER (801) 531-7928
24-HOUR VOICE MAIL (801) 272-2222

June 1, 2002

Pahl's Salt Palace Loan Office, Inc.
1588 South State Street
Salt Lake City UT 84115

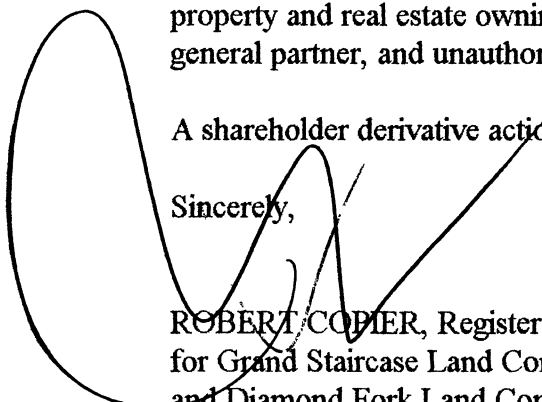
Re: *Shareholder Notice and Demand*

To whom it may concern:

You are hereby notified to update the shareholder records of the corporation to reflect transfer on June 1, 2002, of 1500 shares from Augusta Rose to Grand Staircase Land Company, 243 East 400 South, Suite 200, SLC UT 84111, and of 1500 shares from Robert K. Mortensen to Grand Staircase Land Company, 243 East 400 South, Suite 200 SLC UT 84111, with the latter 1500 shares being held in escrow by William Lowe, 3939 Alberly Way SLC UT 84124, for Grand Staircase Land Company. The beneficial owner of the 1500 shares held in escrow by William Lowe for Grand Staircase Land Company is Diamond Fork Land Company, 243 East 400 South, Suite 200, SLC UT 84111. Both new shareholders demand that you act to vindicate your rights as to claims by KaLynn Ninow, the personal representative of the estate of Gary G. Pahl, that she owns 3000 shares that were held by William Lowe and as to which Gary G. Pahl transferred all his right, title, and interest to the corporation's treasury before he died, trespass by KaLynn Ninow, Ryan Pahl, Richard Ninow, and others upon the corporation's property, the conversion of its property to their own use, their acting without authority as to the real property and real estate owning partnerships in which the corporation is sole surviving general partner, and unauthorized transfer of corporate funds to their probate counsel.

A shareholder derivative action may follow after 90 days if sufficient action is not taken.

Sincerely,



ROBERT COPIER, Registered Agent
for Grand Staircase Land Company
and Diamond Fork Land Company

ROBERT H. COPIER, 727
Attorney for Relator
200 Metro Place
243 East 400 South
Salt Lake City, Utah 84111-2803
Telephone 531-7923

FILED DISTRICT COURT
Third Judicial District

NOV 26 2002

SALT LAKE COUNTY

By

Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

PAHL'S SALT PALACE LOAN
OFFICE, INC., a Utah corporation,
ex rel. DIAMOND FORK LAND
COMPANY, a Utah corporation,

DEFAULT JUDGMENT

Plaintiff,

vs

KALYNN NINOW, personal
representative of the estate of
Gary G. Pahl, deceased,

Civil No. 020908627
Judge Bruce C. Lubeck

Defendant.

Defendant's default having been entered, the court now grants default judgment, and hereby, ORDERS, ADJUDGES, and DECREES, as follows:

1. All of defendant's claims to 3000 shares (50%) of the stock of Pahl's Salt Palace Loan Office, Inc , a Utah corporation, are hereby extinguished and the legal and beneficial title to the said 3000 shares is hereby quieted in favor of the plaintiff's successors to those shares as set forth in the case record, as follows.

*Bangkok Birth Mothers Basic Education Trust 1500 shares (25%)
(With Bangkok Birth Mothers Trust for
Equity and Justice as the beneficial owner)*

*Bangkok Birth Mothers Advocacy Trust 1500 shares (25%)
(With Diamond Fork Land Company, a
Utah corporation, as the beneficial owner)*

2. No other or further writ or order shall be required and this default judgment fully adjudicates any claims between the parties as to the 3000 shares and fully and finally quiets the ownership of the 3000 shares as set forth above

3 In the event that plaintiff or any of plaintiff's successors to the 3000 shares shall deem it necessary to have defendant reasonably execute papers or documents to vindicate and protect the rights of plaintiff's successors to the 3000 shares, defendant is hereby ORDERED to sign all such papers and documents.

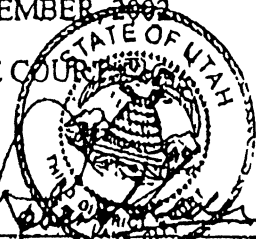
4. As to the second claim for relief in the First Amended Complaint, it is hereby decreed that any and all acts, filings, and transactions purportedly made or entered into by or on behalf of Pahl's Salt Palace Loan Office, Inc., after the death of Gary G. Pahl through the date of this judgment, as well as any actions that were purportedly made or entered into by unanimous action of shareholders or by a quorum of shareholders after the death of Gary G. Pahl through the date of this judgment, which have not been expressly approved or ratified by a board of directors upon which Augusta Rose and William Lowe served as directors, are declared and decreed to be unauthorized, of no force or effect, and *void ab initio*

5. It is further decreed that no action, filing, or transaction purportedly made or entered into by or on behalf of Pahl's Salt Palace Loan Office, Inc., from and after the date of this judgment shall have any force or effect unless approved or ratified by a board of directors upon which William Lowe and Augusta Rose serve as directors, until such time as their successors, if any, are duly qualified.

6 The third claim for relief is dismissed WITHOUT PREJUDICE.

DATED THIS 26th DAY OF NOVEMBER, 2002

BY THE COURT


JUDGE BRUCE C. LOBECK

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

**PAHL'S SALT PLACE LOAN
OFFICE, INC., a Utah corporation,
ex rel. DIAMOND LAND FORK
COMPANY, a Utah corporation,**

RULING AND ORDER

Plaintiff,

vs.

**KAYLYNN NINOW, personal
representative of the estate of
Gary G. Pahl, deceased, and
individually,**

Case No. 020908627

Judge Robert K. Hilder

Defendant.

Defendant's Motion to Set Aside Default Judgment is before the court for decision. The parties briefed the original Motion, and the court heard argument, at which time the court indicated that it believed a Rule 60(b), Utah Rules of Civil Procedure, Motion was time barred, but that there might be grounds to set aside the judgment under Rule 60(a), or even under Rule 55, the underlying basis for a default judgment, pursuant to *P & B Land v. Klungervik*, 751 P.2d 274 (Ut. App. 1988). The parties were requested to submit supplemental briefs addressing the issue raised by the court. Now, having reviewed the briefs and the applicable law, the court rules as follows;

First, the court must exercise its option under *Thurston v. Box Elder County* and *Trembly v. Mrs. Fields Cookies*, to reconsider its previous decision regarding Rule 60(b), because the court is persuaded that it was in error as to the law, and no final judgment has entered based on the court's bench ruling of May 2, 2003.

That is, the court is still persuaded that as to any Motion based on subsections (1), (2) or (3) of Rule 60(b), including motions under 60(b)(6) that could have been brought pursuant to any one of the first three subsections, the time limit is three months, and the court has no discretion to

extend that time.

But, the court is now persuaded, based on the facts of this case and the very recent Utah Court of Appeals decision, *Oseguera v. Farmers Insurance Exchange*, 2003 UT App 46 (February 21, 2003), that Rule 60(b)(6), URCP, provides a clear basis for relief from the default judgment separate from grounds that may be asserted under the first three subsections. As the court explained at the hearing, there is no doubt in this court's mind that the entry of default results solely from court error, probably even more manifestly than was the case in *Oseguera*. Notwithstanding plaintiff's assertion that the default was proper because the responsive pleading was late, at the date the clerk signed the default certificate (November 25, 2002) and at the date the court signed the default judgment (November 26, 2002), a responsive pleading had been filed. The responsive pleading may not have been physically in the court's file, but that was the court's fault.¹ The critical point is defendant had not "failed to plead or otherwise defend" (Rule 55(a), URCP) at the time the default was sought.

In such a case, the clerk is not empowered to enter default, and there is ultimately no basis for a judgment, and *P & B Land* makes it clear that the default is "improper or illegal, and avoidable." 751 P.2d at 277. It makes no sense to consider such a judgment illegal and voidable if the court is nevertheless precluded from voiding the illegal judgment because defendant did not comply strictly with a three month deadline. That is particularly true when, as here, the deadline was missed by a relatively short time, and to some extent that was because plaintiff did not give prompt notice of the judgment.

The court still believes there may be a basis to set aside pursuant to Rule 60(a), URCP, under facts such as these and/or under the court's inherent powers to correct its own errors, particularly in light of the direction given by the *Oseguera* court:

When the trial court's mistakes—not counsel's—are the reason a judgment is improvidently entered and the entry goes undetected, even if it remains undetected for some time, the court should be anxious to whatever needs to be done to fix the mistake as soon as it is called to the court's attention.

Id. at Para. 12.


Despite this belief, based on its reconsideration of the availability of Rule 60(b)(6), URCP, and based on the court's determination that defendant clearly acted within a reasonable time after becoming aware of the default judgment, the court need not reach alternative bases. For the foregoing reasons, defendant's Motion to set Aside default Judgment be and hereby is

¹ Plaintiff may argue that the pleading was deficient in some way, but that is properly a subject of another motion.

GRANTED and the Motion filed November 25, 2002, is the responsive pleading to which plaintiff may direct any future motions. To the extent the defendant's Motion seeks consolidation of this case with the earlier filed case before Judge Medley, that Motion must be directed to Judge Medley. This signed Ruling shall be the **ORDER** of the court and no further Order is required.

DATED this 12th day of June, 2003..

By the Court



Robert C. Inman, District Court Judge

The seal is circular with "STATE OF UTAH" at the top and "THIRD DISTRICT" at the bottom. It features a central emblem and is partially obscured by the signature.

3RD DISTRICT COURT - SALT LAKE
SALT LAKE COUNTY, STATE OF UTAH

DIAMOND FORK LAND COMPANY vs. DOES I-V

CASE NUMBER 020908627 Contracts

CURRENT ASSIGNED JUDGE
ROBERT K HILDER

PARTIES

Plaintiff - PAHL'S SALT PALACE LOAN
Represented by: ROBERT H COPIER

Plaintiff - DIAMOND FORK LAND COMPANY

Defendant - KAYLYN NINOW

Defendant - DOES I-V
Represented by: DAVID C CONDIE

ACCOUNT SUMMARY

TOTAL REVENUE	Amount Due:	154.00
	Amount Paid:	154.00
	Credit:	0.00
	Balance:	0.00

REVENUE DETAIL - TYPE: COMPLAINT - NO AMT S	
Amount Due:	140.00
Amount Paid:	140.00
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: COPY FEE	
Amount Due:	0.50
Amount Paid:	0.50
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: COPY FEE	
Amount Due:	1.50
Amount Paid:	1.50
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: COPY FEE	
Amount Due:	1.00

Amount Paid:	1.00
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: COPY FEE

Amount Due:	2.00
Amount Paid:	2.00
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: COPY FEE

Amount Due:	5.00
Amount Paid:	5.00
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: COPY FEE

Amount Due:	2.50
Amount Paid:	2.50
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: COPY FEE

Amount Due:	1.50
Amount Paid:	1.50
Amount Credit:	0.00
Balance:	0.00

CASE NOTE

PROCEEDINGS

09-03-02 Case filed by karries	karries
09-03-02 Judge LUBECK assigned.	karries
09-03-02 Filed: Complaint No Amount	karries
09-03-02 Fee Account created Total Due: 140.00	karries
09-03-02 COMPLAINT - NO AMT S Payment Received: 140.00	karries
Note: Code Description: COMPLAINT - NO AMT S	
09-04-02 Filed: First Amended Complaint	bryanp
09-07-02 Judge HILDER assigned.	dpx
10-18-02 Filed: Share Transfer Notice	bryanp
10-24-02 Filed return: Summons	bryanp
Party Served: NINOW, KAYLYN	
Service Type: Personal	
Service Date: October 19, 2002	
11-25-02 Filed: Motion to Dismiss and Motion to Consolidate and/or Transfer Case to Judge Medley	bryanp
11-25-02 Filed: Memorandum in Support of Motion to Dismiss and Motion to	

	Consolidate and/or Transfer Case to Judge Medley	bryanp
11-26-02	Filed order: Default Judgment	bryanp
	Judge rhilder	
	Signed November 26, 2002	
12-05-02	Fee Account created Total Due: 0.50	betsyc
12-05-02	COPY FEE Payment Received: 0.50	betsyc
12-17-02	Filed: Notice of Judgment	bryanp
02-11-03	Fee Account created Total Due: 1.50	deborahw
02-11-03	COPY FEE Payment Received: 1.50	deborahw
03-17-03	Filed: Motion to Set Aside Default Judgment	lindav
03-18-03	Filed: Memorandum in Support of Motion to Set Aside Default Judgment	lindav
03-24-03	Filed: CJA 5-401 Memorandum in Opposition to Motion by Defendant to Set Aside the Default Judgment	bryanp
03-31-03	Filed: Reply Memorandum in Support of Motion to Set Aside Default Judgment	lindav
04-03-03	Filed: Exhibits to Reply Memorandum in Support of Motion to Set Aside Default Judgment	lindav
04-08-03	Filed: Memorandum in Support of the Motion to Strike	lindav
04-08-03	Filed: Motion to Strike	lindav
04-11-03	Filed: Notice to Submit	bryanp
04-14-03	Filed: Memorandum in Support of Emergency Ex Parte Motion to Stay Execution or Enforcement of Default Judgment	lindav
04-14-03	Filed: Notice of Hearing	lindav
04-14-03	Filed: Emergency Ex Parte Motion to Stay Execution or Enforcement of Default Judgment	lindav
04-14-03	Tracking started for Under advisement. Review date Jun 13, 2003.	bryanp
04-14-03	Notice - NOTICE for Case 020908627 ID 5576911	bryanp
	MOTION TO SET ASIDE is scheduled.	
	Date: 04/29/2003	
	Time: 10:30 a.m.	
	Location: Third Floor - S34	
	Third District Court	
	450 South State Street	
	SLC, UT 84111-1860	
	Before Judge: ROBERT K HILDER	
04-14-03	MOTION TO STAY scheduled on April 15, 2003 at 10:00 AM in Third Floor - S34 with Judge HILDER.	bryanp
04-14-03	MOTION TO SET ASIDE scheduled on April 29, 2003 at 10:30 AM in Third Floor - S34 with Judge HILDER.	bryanp
04-15-03	Minute Entry - Minutes for MOTION TO STAY	lindav
	Judge: ROBERT K HILDER	
	Clerk: lindav	
	PRESENT	
	Defendant(s): KAYLYN NINOW	
	DOES I-V	
	Defendant's Attorney(s): DAVID CONDIE	

SANDY WEEKS

Video

Tape Count: 10:08

HEARING

COUNT: 10:08

David Condie's argument.

COUNT: 10:10

Sandy Week's statement.

COUNT: 10:11

Court ordered execution on judgment stayed pending 4/29/2003 hearing on motion to set aside. Mr. Condie to prepare order.

04-15-03	Filed: Order Granting Stay of Execution or Enforcement of Default Judgment	bryanp
04-16-03	Filed: Memorandum in Opposition to Motion to Strike Reply Memorandum and Supporting Exhibits	lindav
04-16-03	Filed: Certificate of Service of Order Granting Stay	lindav
04-17-03	Filed: Request to Continue April 29, 2003 Hearing	lindav
04-17-03	Filed: Memorandum in Support of the Motion to Lift Stay	lindav
04-17-03	Filed: Motion to Lift Stay	lindav
04-19-03	Filed: Plaintiff's Reply Memorandum in Support of Motion to Strike	lindav
04-21-03	MOTION TO SET ASIDE scheduled on May 02, 2003 at 02:00 PM in Third Floor - S34 with Judge HILDER	bryanp
04-21-03	Notice - NOTICE for Case 020908627 1D 5582413 MOTION TO SET ASIDE is scheduled. Date: 05/02/2003 Time: 02:00 p.m. Location: Third Floor - S34 Third District Court 450 South State Street SLC, UT 84111-1860 Before Judge: ROBERT K HILDER	bryanp
04-21-03	MOTION TO SET ASIDE Cancelled.	
05-02-03	Minute Entry - Minutes for MOTION TO SET ASIDE Judge: ROBERT K HILDER Clerk: lindav PRESENT	lindav

Plaintiff(s): PAHL'S SALT PALACE LOAN

DIAMOND FORK LAND COMPANY

Defendant(s): RYAN PAHL

Plaintiff's Attorney(s): ROBERT H COPIER

Defendant's Attorney(s): DAVID CONDIE

Video

Tape Count: 2:07

HEARING

COUNT: 2:07

Discussion regarding Ryan Pahl.

COUNT: 2:08

Court order stay to remain in place and simultaneous briefs to be submitted by May 14, 2003. Either party may submit the notice to submit. Court ordered 60 B motion denied. Mr. Copier to prepare order.

COUNT: 2:20

Deft argument

COUNT: 2:24

Court statement.

COUNT: 2:20

Deft argument.

COUNT: 2:24

Court statement.

05-09-03	Fee Account created	Total Due:	1.00	betsyc
05-09-03	COPY FEE	Payment Received:	1.00	betsyc
05-14-03	Filed: Plaintiff's Memorandum RE: Relief Under URCP 60(a)			lindav
05-15-03	Filed: Copy of first page of Supplemental Memorandum in Support of Motion to Set Aside Default Judgment (Showing date stamp and time)			lindav
05-15-03	Filed: Supplemental Memorandum in Support of Motion to Set Aside Default Judgment			lindav
05-20-03	Filed: Memorandum in Opposition to Motion to Lift Stay			lindav
05-22-03	Filed: Plaintiff's Reply Memorandum in RE: URCP 60(a) Relief			lindav
05-22-03	Filed: Notice to Submit for Court Decision			lindav
05-28-03	Tracking started for Under advisement. Review date Jul 27, 2003.			lindav
06-11-03	Tracking ended for Under advisement.			bryanp
06-12-03	Minute Entry - MINUTE ENTRY AND ORDER Commissioner:			
06-16-03	Tracking ended for Under advisement.			bryanp
06-16-03	Filed order: Ruling and Order Judge rhilder Signed June 12, 2003			bryanp
06-18-03	Fee Account created	Total Due:	2.00	betsyc
06-18-03	COPY FEE	Payment Received:	2.00	betsyc
07-02-03	Filed: Plaintiff's Motion to Vacate the Order Setting Aside the Default Judgment			lindav
07-02-03	Filed: Affidavit of Robert Henry Copier			lindav
07-02-03	Filed: Memorandum in Support of Plaintiff's Motion to Vacate the Order Setting Aside the Default Judgment			lindav
07-07-03	Fee Account created	Total Due:	5.00	karries

07-07-03	COPY FEE	Payment Received:	5.00	karries
07-07-03	Filed: Notice to Submit Motion to Dismiss			lindav
07-08-03	Tracking started for Under advisement. Review date Sep 06, 2003.			lindav
07-15-03	Filed: Memorandum in Opposition to Motion to Vacate the Order Setting Aside the Default Judgment			lindav
07-21-03	Filed: Ovjwxrion ro rhw Notice to Submit for Decision			lindav
07-23-03	Filed: Memorandum in Support of Plaintiff's Motion to Strike			lindav
07-23-03	Filed: Motion to Strike			lindav
07-29-03	Filed: Notice RE: "BFP" Owners			lindav
07-29-03	Filed: Reply Affidavit of Robert Henry Copier			lindav
07-29-03	Filed: Reply Memorandum in Support of Motion to Vacate the Order Setting Aside the Default Judgment			lindav
07-30-03	Tracking ended for Under advisement.			bryanp
08-11-03	Note: ***As per Judge Hilder, since the filing of the Notice to Submit in this matter, there has been a lot of activity, which makes the Notice to Submit ineffective. Court will wait for a new Notice to Submit before ruling.***			bryanp
08-18-03	Fee Account created	Total Due:	2.50	deborahw
08-18-03	COPY FEE	Payment Received:	2.50	deborahw
09-13-03	Filed: Notice of Change of Mailing Address of Relator's Counsel			bryanp
10-07-03	Note: Record returned: 2 files			kathys
10-07-03	Filed: Letter from Court of Appeals: record being returned. No indexing requested.			kathys
03-03-04	Fee Account created	Total Due:	1.50	deborahw
03-03-04	COPY FEE	Payment Received:	1.50	deborahw
03-12-04	Filed: Motion to Dismiss			lindav
03-12-04	Filed: Memorandum in Support of the Motion to Dismiss			lindav
04-02-04	Filed: Request to Submit Motion for Decision			lindav
04-05-04	Tracking started for Under advisement. Review date Jun 04, 2004.			lindav

A-5

June 9, 2004, letter to Judge Medley.

LAW OFFICES

ROBERT HENRY COPIER

ATTORNEY AND CERTIFIED PUBLIC ACCOUNTANT

ADMITTED TO PRACTICE BEFORE THE UNITED STATES TAX COURT,
THE UNITED STATES TENTH CIRCUIT COURT OF APPEALS, AND
ALL FEDERAL AND STATE COURTS WITHIN COLORADO AND UTAH.

COLORADO BAR NUMBER 35469
UTAH BAR NUMBER 727

SALT LAKE CITY MAIL
17 EAST 400 SOUTH
SALT LAKE CITY UT 84111

SALT LAKE (801) 531-0099
DENVER (303) 337-0099
TOLL FREE (888) 737-0099

June 9, 2004

Hon. Tyrone E. Medley
Third District Court
450 South State Street
Salt Lake City UT 84111

Re: Estate of Gary G. Pahl
Probate No. 003901101

Dear Judge Medley:

Since Steven E. Tyler's objection and proposed order dated June 8, 2004, were submitted directly to Your Honor, this response by William Lowe and Augusta Rose to his objection is submitted directly to Your Honor. My clients agree with Mr. Tyler that his objection should be SUSTAINED and they do so without waiving their position that the proceeding commenced in May of 2002 was concluded by the entry of summary judgment on May 1, 2003, and that there is currently no formal proceeding pending before this court within which to file motions for summary judgment, let alone serve same upon Mr. Tyler's clients by mailing copies to him. I utilized the mailing certificates employed by KaLynn Ninow's counsel in order to inform all of the persons thereon of my clients' position and have filed a cross-motion and response to KaLynn Ninow's summary judgment motion without waiving the position that her motion is not properly before the court. It should here be noted that a similar failure by KaLynn Ninow to properly join parties prior to the entry of Your Honor's May 1, 2003, summary judgment severely limits that order's jurisdictional reach and effect.

Respectfully,

ROBERT HENRY COPIER

c: all counsel on the mailing certificate