

2005

KaLynn Ninow v. William Lowe and Augusta Rose : Unknown

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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

AMENDED OPENING BRIEF

[Ninow v. Lowe II]

Appeal No. 20050867-CA

KaLynn Ninow,
Petitioner and Appellee,

v.

William Lowe and Augusta Rose,
Respondents and Appellants.

Appeal from a Final Order of the Third District Court, Salt Lake County,
Hon. Leslie A. Lewis, District Judge, presiding.

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LIST OF ALL PARTIES TO THE PROCEEDING BELOW

Original Parties [See Ninow v. Lowe (Estate of Pahl), 2004 UT App. 291]:

1. KaLynn Ninow,

Petitioner,

v.

2. William Lowe; 3. Augusta Rose; 4. Robert Mortensen; and

5. Grand Staircase Land Co., a Utah corporation,

Respondents.

Augusta Rose,

Third-party Petitioner,

v.

KaLynn Ninow, **6. Ryan Pahl, and 7. Richard Ninow,** and Does I-V,
Third-party Respondents.

Additional party added by the trial court's URCP 42 order [April 15, 2004] consolidating two shareholder derivative actions during the pendency of the prior appeal [See Ninow v. Lowe (Estate of Pahl), 2004 UT App. 291, n.10]:

8. Diamond Fork Land Company, a Utah corporation, as relator in a shareholder derivative action against KaLynn Ninow to assert the rights of Pahl's Salt Palace Loan Office, Inc., a Utah corporation not a party to this matter, and as relator in a second shareholder derivative action against Ryan Pahl to assert rights of Pahl's Land Partnership, not a party to this matter, [formerly know, *inter alia*, as GHF Investments or GHF Investment Partnership], by and through its general partner, Pahl's Salt Palace Loan Office, Inc., a Utah corporation not a party to this action. Said shareholder derivate actions brought under Civil Case No. 020908627 and Civil Case No. 030907064 were ordered consolidated April 15, 2004. (R. 1421-1424).]

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JURISDICTION

The Court of Appeals has jurisdiction under UCA Sec. 78-2a-3(2)(j) over the appeal transferred from the Supreme Court and jurisdiction under UCA Sec. 78-2a-3(1) and (2) to “issue all writs and process necessary” to “carry into effect” Ninow v. Lowe (Estate of Pahl) 2004 UT App 291 “in aid of its [appellate] jurisdiction” over the District Court, Third Judicial District.

Appellants’ brief was timely filed on April 26, 2006. This amended brief is filed pursuant to the orders of the Court of Appeals to file a new brief after multiple remands to the trial court to correct the record on appeal.

ISSUES PRESENTED FOR REVIEW

1. The Court of Appeals should carry into effect its September 2, 2004, Memorandum Decision in Ninow v. Lowe (Estate of Pahl), 2004 UT App. 291, and vindicate its appellate jurisdiction over the Third District Court by reversing all interlocutory and final orders entered by the trial court after the trial court signed its *Ruling and Order* on April 26, 2005, [R. 2609], except for those portions of the *Final Order on the May 29, 2002, Petition* signed by the trial court on August 16, 2005, not being challenged on this appeal.

Standard of Appellate Review - Because the trial court disregarded the law of the case established in Ninow v. Lowe (Estate of Pahl) 2004 UT App 291,

this is a matter of vindicating appellate jurisdiction of the Court of Appeals over the Third District Court. As such, it presents a question of law as to which the Court of Appeals has express statutory jurisdiction under UCA Sec. 78-2a-3(1) and (2) to “issue all writs and process necessary” to “carry into effect” Ninow v. Lowe (Estate of Pahl) 2004 UT App 291 “in aid of its [appellate] jurisdiction” without giving any deference at all to the trial court.

Preservation of the Issue – Preserved at R. 1634. After Judge Medley entered a consolidation order consolidating two civil cases into this probate proceeding on April 15, 2004, while it was on appeal in Ninow v. Lowe I, William Lowe and Augusta Rose filed a Post-Consolidation Answer and Responsive Memorandum with URCP 7 Request to Submit Motion for Decision [R. 1634] and the Affidavit of William Lowe [R. 1637]. They alerted the trial court that KaLynn Ninow was arguing on appeal that the May 1, 2003, final order addressed only ownership of shares of stock and was arguing that claims for interests in real estate still remained pending in the trial court. [R. 1634] Mr. Lowe and Ms. Rose indicated that they were not waiving their position that the May 1, 2003, judgment was not a partial summary judgment, but that it concluded the proceeding on the May 29, 2002, petition as to both share ownership claims that had been litigated

without ever joining the necessary parties and real estate claims that could have been litigated, but were not litigated, and did not survive the May 1, 2003, final order. [R. 1364] Ninow v. Lowe I was itself a consolidation of two appeals in which Ms. Ninow initially argued that there was no final, appealable order because, she argued, Judge Medley actually granted only partial summary judgment as to the portion of the claims dealing with the ownership of the 6,000 shares of Pahl's Salt Palace Loan Office, Inc. ("Loan Office") and that the May 29, 2002, Probate Petition is still pending because the second portion of the claims, dealing with the ownership of certain State Street property, has yet to be adjudicated. The Court of Appeals reserved this question for plenary consideration. After the first appeal was filed, Ms. Ninow approached the trial court and secured URCP 60(b)(1) relief in the form of the May 1, 2003, summary judgment based on "inadvertence" by arguing that she had "inadvertently" failed to submit it as a proposed order prior to the first notice of appeal. A second notice of appeal was filed, she conceded that the second notice of appeal was from a final, appealable order, and the two appeals were then consolidated. In rendering its memorandum decision in Ninow v. Lowe I [Estate of Pahl], 2004 UT App. 291, the Court of Appeals ruled that the appeal was from a "final, appealable order," as to

the entire consolidated appeal, thus creating the law of the case on the issue reserved for plenary consideration, rejecting KaLynn Ninow's contention.

2. It was error for the trial court to remove William Lowe and Augusta Rose as officers and directors of Pahl's Salt Palace Loan Office, Inc., in the final order signed August 16, 2005, [1] because this went beyond the scope of this court's remand in Ninow v. Lowe I [Estate of Pahl], 2004 UT App. 291 and [2] because there is no legal basis for their removal and they have the right to continue to serve as directors until their successors are qualified.

Standard of Appellate Review – The issue presented for appellate review requires the Utah Court of Appeals to construe the Utah Revised Business Corporation Act on the question of whether it provides a statutory legal basis for judicial removal under this record. Such construction of a Utah statute presents a question of law as to which the Utah Court of Appeals gives no deference to the trial court. Still Standing Stable, LLC v. Allen, 2005 UT 46, 122 P.3rd 556. Further, since the trial court disregarded the law of the case established in Ninow v. Lowe (Estate of Pahl) 2004 UT App 291, by entering an order that exceeded the scope of the remand in that decision, this is a matter of vindicating appellate jurisdiction of the Court of Appeals over the Third District Court. As such, it presents a question of law as to which

the Court of Appeals has express statutory jurisdiction under UCA Sec. 78-2a-3(1) and (2) to “issue all writs and process necessary” to “carry into effect” Ninow v. Lowe (Estate of Pahl) 2004 UT App 291 “in aid of its [appellate] jurisdiction” without giving any deference at all to the trial court.

Preservation of the Issue - In her ruling and order of May 26, 2005 [at R. 2789], the trial court makes a record that Mr. Lowe argued that the May 1, 2003, summary judgment did not preclude other individuals and entities from pursuing an ownership interest in Pahl’s Salt Palace Loan Office, Inc., shares. The issue was thus preserved. Mr. Lowe’s argument was consistent with the law of the case established when Hon. Tyrone E. Medley, faced with a motion by Diamond Fork Land Company to dismiss the two shareholder derivative actions that had been consolidated into this proceeding based on Diamond Fork Land Company’s transfer of all of its ownership interest in Pahl’s Salt Palace Loan Office, Inc., shares, dismissed without prejudice as moved for by Diamond Fork Land Company, rather than with prejudice, as moved for by KaLynn Ninow and Ryan Pahl. [Supp R. 376; Supp R. 385]. The purpose of that argument was to demonstrate that William Lowe and Augusta Rose had never been removed as officers and directors and that the court should not remove them under the Utah Revised

Business Corporation Act [1] because the May 1, 2003, summary judgment order was not binding upon Pahl's Salt Palace Loan Office, Inc.; its record shareholders on its official shareholder list; and their successors, who all have an interest adverse to the one claimed by KaLynn Ninow; [2] because the text in the body of the summary judgment order contained no language removing officers and directors, but only addressed share ownership; [3] because, by rule, the underlying finding of undisputed summary judgment fact that Lowe and Rose had been removed and replaced had never been incorporated into the summary judgment order itself [which contained no removal language] as an order and, by rule, such an undisputed summary judgment finding of fact for purposes of a May 1, 2003, summary judgment could not provide any basis for any order of removal on August 16, 2005, since, under URCP 7, 56, and former CJA 4-501, the summary judgment facts that are deemed undisputed are so deemed only for purposes of the summary judgment order itself and cannot form the factual basis for any other order[s]; [4] because the summary judgment issue had never been litigated by the corporation, its record shareholders, and successors who claimed a voting interest adverse to Ms. Ninow's claims and who were not bound by the declination of the named parties to controvert the undisputed

material facts, since the named parties claimed no shareholder voting rights, were not agents of the record shareholders, and, in the case of William Lowe and Augusta Rose, were preliminarily enjoined by the court from litigating in a representative capacity as officers of Pahl's Salt Palace Loan Office, Inc., and were never sued in their representative capacities; and, [5] because Pahl's Salt Palace Loan Office, Inc., by and through William Lowe, had given actual notice to KaLynn Ninow that he, as a corporate officer, acting on behalf of the corporation, had rejected the attempt by KaLynn Ninow to vote 100% of the shares, that he had done so based upon the corporation's official shareholder records that showed she lacked sufficient shares to form a quorum to unilaterally vote her shares, and that this rejection of her votes still stands because she has never challenged the rejection before a court of competent jurisdiction in a case to which Pahl's Salt Palace Loan Office, Inc., was made a party. The court rejected this argument as "convoluted" and "simply not credible" [R.2787], thereby preserving it, and, based upon that rejection, later signed the August 16, 2005, order on appeal, removing William Lowe and Augusta Rose as the officers and directors. [R. 3200]

3. Because no cross-appeal was filed, and because no URCP 60(b) motion was filed in the trial court within three months of August 19, 2005,

the Court of Appeals should reverse only that portion of the final order now on appeal [R. 3200] that removes William Lowe and Augusta Rose as the officers and directors and should hold that they have never been removed or replaced. There should be no remand of the final order to the trial court.

Standard of Appellate Review – Because this is an issue involving the management of the appeal, rather than an issue of appellate review of a trial court order, it presents a question of law for the appellate court, since this court has jurisdiction over the appeal. UCA Sec. 78-2a-3(2)(j).

Preservation of the Issue - The issue was preserved by filing a notice of appeal [R. 3303] in the trial court, thus vesting this court with jurisdiction.

4. Because no notice of appeal was filed within 30 days of November 26, 2002, and because no URCP 60(b) motion was filed in the trial court within three months of November 26, 2002, the Court of Appeals should reinstate the November 26, 2002, default judgment in Civil No 020908627 and reverse the June 12, 2003, *sua sponte* order setting aside that default judgment as an erroneous order improvidently entered by the trial court.

Standard of Appellate Review – “Section 78-40-13 of the Utah Code governs default judgments in quiet title actions. It specifies that a default judgment shall be conclusive against all the persons named in the summons

and complaint who have been served.’ Utah Code Ann. § 78-40-13 (2002). ‘The statute’s plain language clearly provides that if a person is properly named in the summons and complaint and served, a default judgment is valid and conclusive against him or her.’ ” State v. Hamilton, 2003 UT 22; 70 P.3d 111. This issue requires the Court of Appeals to construe Utah Code Ann. § 78-40-13 and to also construe the 3-month deadline under URCP 60(b). Construction of a rule or statute presents an issue of law as to which no deference is given to the trial court. Still Standing Stable, LLC v. Allen, 2005 UT 46, 122 P.3rd 556.

Preservation of the Issue – After the order of consolidation was entered on April 15, 2004, consolidating Civil No 020908627 into the May 29, 2002, probate petition proceeding then on appeal, William Lowe and Augusta Rose, having been involuntarily made parties to a consolidated proceeding over their objection, pled their Answer [R. 1634]. They pled that they “support the default judgment of November 26, 2002, because KaLynn Ninow did not timely respond to the summons. They support as correct Judge Hilder’s bench ruling on May 2, 2003, that URCP 60(b) relief was unavailable to Ms. Ninow because she did not timely move for URCP 60(b) relief within the required three months. They object to Judge Hilder’s

minute entry order of June 12, 2003, as incorrectly applying the holding in the case of Oseguera v. Farmers Insurance Exchange, 2003 UT App 46, 63 P.3rd 1008, because that case holding would apply here only if Ms. Ninow had diligently attempted to ascertain whether default had been entered and had been misled by the court. No such finding was made as to Ms. Ninow, who did not file her tardy response to the summons until the day default was entered and then took no steps during the next three months to see if default had been entered and did not file her URCP 60(b) motion based on inadvertence and mistake until after the three-month deadline under URCP 60(b) for filing such motions. These respondents join in the pending motion dated July 2, 2003, to vacate the June 12, 2003, order setting aside the default judgment. Pursuant to URCP 7, they request decision on that motion.” [R. 1635-1636] The trial court entered an interlocutory bench ruling denying the July 2, 2003, motion to vacate on April 6, 2005. [R. 2555 – Minute Entry – “Mr. Copier makes a motion in regards to the ruling on 6/12/03 be vacated. The court orders the motion to vacate is denied.”] A final order was signed on August 16, 2005, and entered on August 19, 2005. A notice of appeal was filed on September 15, 2005, appealing the final order “together with all prior orders entered under or consolidated into this

probate that have not previously been reviewed on the merits by an appellate court, including, but not limited to, the order by Judge Hilder setting aside the default judgment, the order by Judge Lewis denying the motion to vacate the order by Judge Hilder setting aside the default judgment” [R. 3303]

5. Because no cross-appeal was filed in Ninow v. Lowe I, and because no URCP 60(b) motion was filed in Ninow v. Lowe I within three months of May 1, 2003, it was error and a violation of appellate law of the case for the trial court to exceed the scope of the remand in Ninow v. Lowe (Estate of Pahl], 2004 UT App. 291, by ordering, on May 26, 2005, that the final, appealable order affirmed on appeal was only a “partial” summary judgment because real estate claims supposedly remained pending in the trial court and the preliminary injunction supposedly remained in effect. It was a violation of appellate law of the case to so “retroactively” extend the old preliminary injunction. It was also error to enter the May 26, 2005, order [as it was error to enter any of the other interlocutory and final orders on the merits after April 26, 2005], because the only matters pending before the trial court after April 26, 2005, were KaLynn Ninow’s serial contempt motions and a court presiding over a contempt matter has no jurisdiction to enter orders on the merits and no right to enter contempt-type relief absent a contempt finding.

Standard of Appellate Review - Because Judge Lewis disregarded the law of the case established in Ninow v. Lowe (Estate of Pahl) 2004 UT App 291, this is a matter of vindicating appellate jurisdiction of the Court of Appeals over the Third District Court. As such, it presents a question of law as to which the Court of Appeals has express statutory jurisdiction under UCA Sec. 78-2a-3(1) and (2) to “issue all writs and process necessary” to “carry into effect” Ninow v. Lowe (Estate of Pahl) 2004 UT App 291 “in aid of its [appellate] jurisdiction” without giving any deference at all to the trial court. The question of whether the order [and similar orders entered after April 26, 2005], exceeded the scope of the trial court’s jurisdiction [because the only matters pending were Ms. Ninow’s serial contempt motions, there was never an order entered finding anyone in contempt, and there was thus no basis upon which to enter any orders, let alone orders on the merits that exceed the scope of the relief available for contempt], presents a question of law as to which this court gives no deference to the trial court. Homeyer (In Re Cannatella) v. Stagg Associates, 2006 UT App. 89; 132 P.2d 284.

Preservation of the Issue - [R. 2555 – Minute Entry – “Counsel argues the order to show cause. The Court takes the order to show cause under advisement and will issue a written ruling.] [R. 2787 – (written ruling)]

[Appealed, Notice of Appeal, R. 3303 – appealing the interlocutory “orders and rulings extending the preliminary injunction beyond the grant in 2002 of the summary judgment adjudicating the underlying merits of the May 29, 2002, probate petition.”]

6. Because William Lowe’s motion to the court to set a hearing on the TRO undertaking and to give notice to the surety of the hearing fairly fell within the scope of the remand in Ninow v. Lowe (Estate of Pahl) 2004 UT App 291, it was error for the trial court to deny the motion to set the hearing.

Standard of Appellate Review – URCP 65A(c)(3) uses the discretionary word “may” but it also employs the word “shall” once the motion is filed. The discretionary “may” is the discretion of Mr. Lowe to move in the instant proceeding or, in the alternative, to file an “independent action” against the surety, or both, while the mandatory “shall” applies to the court in setting the hearing and in specifying what notice is to be given once the movant elects to proceed against the surety in the instant proceeding and it applies to the court clerk, as a ministerial officer, in the giving of such notice once such a hearing is set. The question before the court is a question of construction of URCP 65A(c)(3) and its mandatory language once, as in this case, a motion is filed, which is a question of law as to which no deference is given to the

trial court. Still Standing Stable, LLC v. Allen, 2005 UT 46, 122 P.3rd 556.

Preservation of the Issue - [R. 2555 – Minute Entry – “Mr. Copier argues the issue of the undertaking. Ms. Weeks gives opposing arguments. The court orders the motion for the undertaking is denied.”] [Appealed, Notice of Appeal, R. 3303 – appealing the interlocutory “order denying the motion to proceed against the surety who made the TRO undertaking”]

7. The removal of the appellants as officer/directors on August 16, 2005, is a correct rendering of an erroneous underlying May 26, 2005, court ruling.

Standard of Appellate Review – Since the trial court signed the August 16, 2005, proposed order as submitted, it is a correct rendering of the underlying May 26, 2005, ruling. Since the underlying May 26, 2005, ruling was error because it exceeded the relief that was available in the contempt proceeding that was the only matter that survived the April 6, 2005, bench order, and no one was properly held in contempt, this is a *de novo* issue of law. Homeyer (In Re Cannatella) v. Stagg Associates, 2006 UT App. 89; 132 P.2d 284.

Preservation of the Issue - [R. 2555 – Minute Entry – “Counsel argues the order to show cause. The Court takes the order to show cause under advisement and will issue a written ruling.”] [R. 2787 – (written ruling)] [Appealed, Notice of Appeal, R. 3303 – appealing the “all prior orders . . .

that have not previously been reviewed on the merits by an appellate court.]

DETERMINATIVE STATUTES AND RULES APPENDED HERETO

UCA Sec. 16-10a-809. Removal of directors by judicial proceeding.

UCA Sec. 75-3-106. Scope of proceedings -- Proceedings independent --
Exception.

URAP 4(d). Additional or cross-appeal.

URCP 60. Relief from judgment or order.

STATEMENT OF THE CASE

A formal petition within an informal probate was filed by KaLynn Ninow on May 29, 2002. The formal proceeding on that formal petition was concluded with a summary judgment on May 1, 2003. The Utah Court of Appeals decided that the May 1, 2003, summary judgment constituted a final, appealable order and affirmed it. Ninow v. Lowe (Estate of Pahl) 2004 UT App 291. In that same decision, the Court of Appeals reversed a portion of an interlocutory contempt order that had held William Lowe in contempt of court and remanded for the limited purpose of ordering that the attorney fee award that Mr. Lowe had paid to Ms. Ninow be returned to Mr. Lowe. While that appeal was pending before the Utah Court of Appeals, Hon. Tyrone E. Medley entered an order on April 15, 2004, consolidating

two civil shareholder derivative actions into this proceeding [See Ninow v. Lowe (Estate of Pahl), 2004 UT App. 291, n.10]. After that appeal was decided, KaLynn Ninow began filing a series of serial contempt motions that were largely identical and based on the same subject matter and contentions.

The trial court signed an order on April 26, 2005, [R.2609] in which it disposed of all matters arising out of the remand ordered in the prior appeal, all matters arising out of the two consolidated civil shareholder derivative actions that had been ordered consolidated during the prior appeal, and all matters arising out of the serial contempt motions filed to-date [with the conclusion that there had been no contempt by any alleged contemnors]. In an attempt to perpetuate the dispute, KaLynn Ninow continued to file more of her serial contempt motions and the trial court entered further orders after April 26, 2005, and entered the August 16, 2005 final order now on appeal.

In contravention of the appellate law of the case established by this court and of her own law of the case established on April 26, 2005, the trial court erroneously ruled on May 26, 2005, that real estate issues supposedly remained pending before her under the May 29, 2002, petition. Having so erred, the court then signed a final order on the May 29, 2002, petition on August 16, 2005, that adjudicated only one additional matter on the merits of

the May 29, 2002, petition beyond that which was contained in the earlier May 1, 2003, final order. That one additional matter was the judicial removal of William Lowe and Augusta Rose as officers and directors of Pahl's Salt Palace Loan Office, Inc., a Utah corporation. This is challenged on appeal because [1] the proceeding on the May 29, 2002, petition was concluded with the May 1, 2003, order and it was error and a violation of the appellate law of the case established in Ninow v. Lowe [Estate of Pahl], 2004 UT App. 291 to reopen it and remove William Lowe and Augusta Rose as officers and directors when the only matter before the court was a contempt proceeding; [2] there was no legal basis under the Utah Revised Business Corporation Act to remove William Lowe and Augusta Rose as officers and directors; and, [3] instead of fostering a trial court litigation environment in which proper parties were brought before the trial court and given a reasonable opportunity to be heard on the merits, the court employed contempt and injunctive powers as well as various rulings, orders, and judicial comments to "chill" and "discourage" parties and potential parties.

This appeal presents a strange procedural posture because, on more than one occasion, KaLynn Ninow failed to appeal, cross-appeal, or move under URCP 60(b) within three months, but was still able to get a trial court

to grant URCP 60(b)-type relief. This strange procedural posture has been exacerbated by KaLynn Ninow's excessive preoccupation with the attorney for the respondents and her attempts to show that he is in bad faith and in contempt, rather than focusing on the law, the facts, and the legal merits.

While all of the orders and rulings entered after April 26, 2005, were error because the only matters pending before the court were Ms. Ninow's serial contempt motions and there was, thus, no jurisdiction to enter orders on the merits [and, since no one was found to be in contempt, there was also no basis for ordering contempt-type relief either], the appellants challenge only a portion of the final order of August 16, 2005. Since no Rule 60(b) motion was filed within 3 months and no cross-appeal was filed, portions of the August 16, 2005, final order not being challenged on appeal will stand even though a timely challenge might have caused the order to be reversed.

FACTS

1. On August 15, 2000, KaLynn Ninow filed a petition for formal adjudication of intestacy and formal appointment of personal representative. [R.1]
2. On September 16, 2000, the August 15, 2000, petition was concluded by an order making the appointment and adjudicating that Gary Pahl

died intestate. [R.18] [See UCA Sec. 75-3-106(d)] [the proceeding was “concluded by an order making or declining the appointment.”]

3. No other petition seeking a final order was filed until May 29, 2002.
4. On May 29, 2002, KaLynn Ninow filed a petition for determination of ownership of shares of stock and interests in real estate. [R.478].
5. The May 29, 2002, petition yielded two orders on the merits:
 - A. An August 20, 2002, interlocutory order dismissing Robert K. Mortensen with prejudice and ordering him to submit his resignation as an officer and/or director of Pahl’s Salt Palace Loan Office, Inc., with said resignation to be filed with the court. [R.868] [No such interlocutory order was entered ordering William Lowe and Augusta Rose to submit their resignations and file it with the court and there was no language in any interlocutory order prior to May 1, 2003, or in the final order entered on May 1, 2003, that judicially removed them.]
 - B. A May 1, 2003, order which ordered, adjudged, and decreed that the motion for summary judgment filed by the personal representative of the estate of Gary Pahl was granted and 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 Ryan Pahl as the only devisee of the estate. [R.1114] The May 1, 2003, order was a “final, appealable order” affirmed appeal in Ninow v. Lowe [Estate of Pahl], 2004 UT App 291. During the pendency of the appeal of the May 1, 2003, order, the trial court entered an order of consolidation on April 15, 2004, by which it consolidated two civil cases into the May 29, 2002, petition. [Civil Case No. 020908627 and Civil Case No. 030907064.] [R. 1421] The [1] remand of an interlocutory order of contempt that was reversed on appeal; [2] litigation of the two civil cases that were consolidated into this matter during the prior appeal; and; [3] order on contempt motions pursued by Ms. Ninow, were the subject of an order signed by the trial court on April 26, 2005, that expressly stated “this shall constitute the final order as to all claims and all parties to any and all proceedings under this probate number.” [R. 2609] After signing this order on April 26, 2005, the trial court erroneously entertained further of Ms. Ninow’s contempt motions that were based upon the very allegations that had been disposed-of by the order of April 26, 2005, and erroneously signed interlocutory orders up to September 15, 2005. A final order was signed August 16, 2005.

SUMMARY OF ARGUMENTS

1. All of the legal issues raised on appeal can be decided in favor of the appellants William Lowe and Augusta Rose by applying the law of the case.
2. Because KaLynn Ninow did not appeal within 30 days of November 26, 2002, or timely move within three months under URCP 60(b), the court should reverse the June 12, 2003, order that set aside the Default Judgment.
3. Because KaLynn Ninow did not cross-appeal within the time allowed and also did not timely move within 3 months of August 19, 2005, for relief under URCP 60(b), this court should reverse all interlocutory orders entered after April 26, 2005 through September 15, 2005, as well as that portion of the August 16, 2005, final order ordering the removal of officers/directors.
4. The trial court should have held a hearing on the \$20,000 undertaking.

ARGUMENT

Point One – Law of the case should be applied to decide this appeal.

The final order that the late Gary G. Pahl owned all 6000 issued and outstanding shares of Pahl's Salt Palace Loan Office, Inc., at the time of his death and that they are part of his estate being probated in the Third District Court that was affirmed on appeal in Ninow v. Lowe (Estate of Pahl), 2004 UT App. 291, did not vest the personal representative with title to the shares

free of adverse claims and liens [because no published notice of the action was given under Titles 75 or 78 of the Utah Code] and did not vest her with the legal right to vote those shares [because Pahl's Salt Palace Loan Office, Inc., was never made a party to the action, it has the right to designate its record shareowners entitled to vote subject to judicial review by a court of competent jurisdiction in an action to which the corporation is a party, and this was not such an action, nor was it a party to this action]. Thus, the legal title to 3000 of the shares that was extinguished in the November 26, 2002, Default Judgment against her and quieted in favor of out-of-state owners is also not free of adverse claims and liens. It is only free of all adverse claims and liens asserted by her. The title remains out-of-state beyond the *in rem* jurisdictional reach of Utah courts and the purpose of getting the Default Judgment reinstated on this appeal is to preclude her from trying to sue any of the current out-of-state owners. This is consistent with the moderately sophisticated business succession planning done by the late Gary G. Pahl, who had no desire to have his estranged ex-wife, KaLynn Ninow, control the corporation and did not desire to turn it over to his son, who was too young to have demonstrated whether or not he had any aptitude to run a pawn shop and, who, as *de facto* owner since May of 2002, has shown he lacks such an

aptitude, as the pawn shop is now temporarily closed. He will be better off as a 50% shareholder and ordinary creditor of the corporation as it pursues its legal claims and resumes operations once its officers and a quorum of its directors, appellants William Lowe and Augusta Rose, are restored to office through this appeal. Pawn lending is a specialty niche business that requires a specialized skill set. Some people have what it takes to be good at it and some people don't have what it takes. Because no successors have ever been qualified, William Lowe and Augusta Rose, as a quorum of directors, successfully continued the corporation's business for two years after Gary's death from mid-2000 to mid-2002. Then, in the year 2002, three separate lawsuits were commenced that are now part of the consolidated proceeding that is now on appeal. The first of these lawsuits was a UCA Sec. 75-3-106 probate proceeding initiated by KaLynn Ninow as the petitioner on May 29, 2002. Because she did not join Pahl's Salt Palace Loan Office, Inc., as a necessary and indispensable party, a share claimant to a beneficial interest in shares transferred by shareholders of record, Diamond Fork Land Company, filed separate shareholder derivative actions, one against KaLynn Ninow as personal representative and one against Ryan Pahl as the late Gary Pahl's son and sole heir. A significant body of law of the case has since developed.

Ms. Ninow's May 29, 2002, petition was concluded with a May 1, 2003, final order that declared that all 6000 shares of Pahl's Salt Palace Loan Office, Inc., had belonged to Gary Pahl at death and were part of his estate. While this made KaLynn Ninow the proper defendant as personal representative in a shareholder derivative suit, it did not make her a record shareholder entitled to vote, because Pahl's Salt Palace Loan Office, Inc., was not a party, its officers and directors were not sued in any kind of representative capacity, but were, instead, preliminarily enjoined from binding the corporation, and it is the corporation that has the legal right to designate its record voting shareholders subject to judicial review by a court of competent jurisdiction in a case to which the corporation is a party. The May 1, 2003, judgment was affirmed on appeal. That affirmation means Ms. Ninow was the proper defendant in the shareholder derivative suit but did not give her a right to vote shares because the corporation is not bound.

Meanwhile, one of the shareholder derivative actions concluded with a final order of Default Judgment on November 26, 2002. It was set aside on June 12, 2003. Both actions were then dismissed without prejudice after they had been consolidated into this proceeding. Because the dismissals without prejudice occurred after consolidation, they were not final orders as

to all claims and all parties and William Lowe and Augusta Rose still had the right to pursue the motion to set aside the June 12, 2003, order in which they had joined. The trial court denied that motion in an interlocutory bench order on April 6, 2005, and it is part of this appeal. The dismissals without prejudice, the entry of a May 1, 2003, final order, and the entry of Default Judgment on November 26, 2002, that is now ripe for reinstatement on this appeal, all make up the fabric that is law of the case. Law of the case is of particular importance in quiet title actions such as the one that resulted in the November 26, 2002, Default Judgment. Because an action quieting title to personal property is of concern not only to the parties, but to anyone who is interested in the property, the 3-month deadline under URCP 60(b) plays a very important role in setting a firm date after which the court that quieted title through a Default Judgment will not disturb it. That date came and went here and is part of the fabric or the law of the case that should now be taken into account in determining whether it was erroneous to, *sua sponte*, set the November 26, 2002, Default Judgment aside on June 12, 2003, or whether that judgment should now be reinstated, as discussed in Point Two.

The June 12, 2003, order was referred to in the prior appeal in a reply brief and in the decision [n.10], but was not yet before this court. It is now.

Point Two – The Court of Appeals should reverse the June 12, 2003, *sua sponte* order that erroneously set aside the November 26, 2002, default judgment and hold that the said November 26, 2002, default judgment stands as the Final Order in Civil Case No. 020908627 and that it is “valid and conclusive” against KaLynn Ninow and against the estate.

Because the final, appealable order that was affirmed on appeal in Ninow v. Lowe (Estate of Pahl) 2004 UT App 291, did not include as parties Pahl’s Salt Palace Loan Office, Inc., and 50% of its record shareholders and their successors [KaLynn Ninow, as the personal representative, was record legal shareholder of only 50% of its shares], Diamond Fork Land Company, an equitable successor, filed two “independent action[s]” [See URCP 60(b)]: [1] A shareholder derivative action to enforce the rights of Pahl’s Salt Palace Loan Office, Inc., against KaLynn Ninow; and, [2] A second such derivative action to enforce the rights of Pahl’s Land Partnership, by and through its sole-surviving partner, Pahl’s Salt Palace Loan Office, Inc., against Ryan Pahl. It did so because the corporation’s officers and directors, William Lowe and Augusta Rose, had not been sued in their official representative capacities and were also prevented by the threat of a preliminary injunction from asserting the rights of Pahl’s Salt Palace Loan Office, Inc., beyond the rejection of KaLynn Ninow’s votes Mr. Lowe gave notice he had officially performed on behalf of the said corporation as a corporate officer during the

interim period **between the expiration** of the TRO and the bench ruling granting the preliminary injunction [based on the right of Pahl's Salt Palace Loan Office, Inc., to reject her votes for want of a quorum based on its own shareholder records.]. The purpose of the two shareholder derivative actions was to, in the bright light of day, bring civil actions [of which the personal representative and the sole heir would both have actual notice as **defendants**] to assert the rights of Pahl's Salt Palace Loan Office, Inc., to be adjudicated.

The shareholder derivative action against Ms. Ninow involved 3000 shares over which she had recently secured a summary judgment. Because she did not join Pahl's Salt Palace Loan Office, Inc., as a party, the "May" and "December" **agreements** referred to in the prior appeal were never fully adjudicated. The **judgment** affirmed on appeal was based on a **supposedly** serendipitous fluke in which one agreement was completed but one was not completed. Had the corporation been made a party, and had appellants been freed from injunction so they could present its defense in an injunction-free environment rather **than this** hair-trigger contempt **environment**, they, as the officers, would have caused the corporation to make its showing that Gary's intent as expressed in his "May" and "December" contracts was completed while Gary was alive by utilizing unsecured debt. Instead, appellants met a

summary judgment motion in which they had no personal interest because they claimed no shares. Surprisingly, Ms. Ninow did not timely respond to the summons and then, after a Default Judgment was entered on November 26, 2002, she failed to timely move for URCP 60(b) relief within 3 months.

Since this was a quiet title action involving 3000 shares of the 6000 shares that the probate court had ordered were owned by Gary Pahl at the time of his death and were part of his estate [an order that was affirmed on the prior appeal], she was the proper defendant in her capacity as personal representative, because the informal probate remained open and the shares remained subject to probate claims and administration. In entering the said Default Judgment, the trial court ordered: “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:” [Emphasis added.] The Utah Supreme Court held in 2003: “Section 78-40-13 of the Utah Code governs default judgments in quiet title actions. It specifies that a default ‘judgment shall be conclusive against all the persons named in the summons and complaint who have been served.’ Utah Code Ann. § 78-40-

13 (2002). 'The statute's plain language clearly provides that if a person is properly named in the summons and complaint and served, a default judgment is valid and conclusive against him or her.' ” State v. Hamilton, 2003 UT 22; 70 P.3d 111. Because Diamond Fork Land Company was only a beneficial owner, and because the legal title was [at the same time that all of the personal representative's claims were extinguished] quieted in favor of out-of-state legal owners who were not parties to the case or to the June 12, 2003, order setting aside the November 26, 2002, Default Judgment, that order did not re-vest the extinguished legal title back in Ms. Ninow. The legal title that had been quieted in favor of the out-of-state owners by the November 26, 2002, order was, from and after the date of entry of that order, beyond the *in rem* jurisdictional reach of the Utah courts. The out-of-state owners in whom legal title was quieted were not parties, so there was no personal jurisdiction either. Accordingly, while the June 12, 2003, order was error, it had no legal effect on legal voting title to 3000 shares, which was out-of-state beyond the court's jurisdiction and remains out-of-state.

The reversal of the June 12, 2003, order is sought because that order was error and reversing it will eliminate any future basis KaLynn Ninow might have for trying to make the out-of-state owners parties to an action.

Lowe and Rose have no control over or contract with those owners.

But as long as those owners desire to have Lowe and Rose remain in office as a quorum of directors, they can keep them there simply by making sure that, as the owners of legal voting title to 50% of the shares, they never appear at any shareholder meeting, thereby thwarting a shareholder quorum.

Lowe and Rose will continue to serve due to the lack of successors.

A court of competent jurisdiction might eventually be able to come in and intervene, but no legal action has ever been brought or pled to do this.

After initially denying Ms. Ninow's URCP 60(b) motion for failing to bring it within the required 3 months [Ms. Ninow was asserting all manner of mistake, inadvertence, excusable neglect, misconduct by her adversary, fraud on the court, and the like, which are, of course, all subject to the three month deadline in the rule], Judge Hilder, in a *sua sponte* order entered on June 12, 2003, granted it. [Supp R.302] ["This court has this day entered a Ruling and Order in case No. 020908627 granting defendant's motion in that case to set aside the default judgment."] It was clearly error to grant a 60(b) motion not filed within 3 months of November 26, 2002. The 2-1 decision in Oseguera v. Farmers Insurance Exchange, 2003 UT App 46, 63 P.3rd 1008, provides no basis for disregarding the 3-month deadline. Unlike the

“unique” facts in Oseguera, Ms. Ninow was not “affirmatively misled” by Judge Hilder either about the entry of the Default Judgment or about the date of the entry of the Default Judgment. See Swart v. State, 2004 UT App 209.

Appellate reversal of the June 12, 2003, order setting aside the Default Judgment should now be ordered for the legal reasons the motion to set aside the Default Judgment was opposed in the trial court: [1] the trial court had no jurisdiction to set the Default Judgment aside because Ms. Ninow did not file her motion within the required 3 months; [2] Ms. Ninow never offered an excuse for the tardiness of her initial responsive motion to the summons and complaint; and, [3] Ms. Ninow offered no defense of at least ostensible merit to the claims for relief pled against her. Erickson v. Sheners Intern. Forwarders, 882 P.2d 1147 (Utah 1994). [Cited and argued to the trial court in “CJA-4-501 Memorandum in Oppoosition to Motion by Defendant to Set Aside Default Judgment” [R.4032]. The June 12, 2003, *sua sponte* order as to which reversal is sought on this appeal went only to the 3-month deadline.

As in the case at bar, responsive papers filed by defendant in Erickson appeared in the case file between the time the default dertificate was entered and the time the default judgment was entered. Yet, Justice Durham wrote that the defendant was still required to file the motion to set aside within 3

months. The 2-1 Oseguera decision by the Court of Appeals obviously did not reverse the unanimous Erickson decision by the Utah Supreme Court.

Further, it was error to set aside the Default Judgment because Ms. Ninow offered no excuse for her seriously tardy response to the summons and complaint and, significantly, offered no defense of at least ostensible merit. The sole defense raised in her responsive motion was that the rulings and orders entered in the probate proceeding initiated by her May 29, 2002, petition had preclusive effect upon the shareholder derivative action. This defense had no ostensible merit at all because the August 26, 2002, summary judgment ruling that later ripened into the May 1, 2003, order did not, on its face, purport to grant share ownership that was free of all adverse claims and liens, did not, on its face, purport to grant any legal voting rights as a record shareholder, and, the trial court had no jurisdiction to grant any such relief because the corporation was not joined as a party, not all legal successors to its “shareholders of record” were joined as parties, and no formal published notice was given under Titles 75 or 78 of the Utah Code under which those non-parties were bound. When that defense was later litigated on the merits it was rejected by Judge Medley, who ordered dismissal without prejudice instead of with prejudice, rejecting the defense of preclusion on the merits.

Appended hereto are copies of some of the filings in opposition to the June 12, 2003, order that were filed **both before it was entered and after it** was entered *sua sponte*. [R.4032-4037; 4057-4058; 4059-4070] They are now incorporated herein both to show that they were raised in the trial court and as arguments on appeal in support of reversal. Also appended hereto is Judge Hilder's June 12, 2003, *sua sponte* order. [R. 4053-4056] Reversal is now sought on appeal. Turning to that order, it correctly orders 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." The trial court should have stopped there and simply denied the motion to set aside the November 26, 2002, Default Judgment as time-barred. Instead, the trial court concluded that Oseguera "provides a clear basis for relief from the default judgment separate from grounds that may be asserted under the first three subsections." The trial court then tried to make the facts of this case fit into Oseguera by reasoning that the entry of the Default Certificate "arose solely from court error." But if even if it was "court error" to enter the default, that "court error" was fully

remediable under URCP 60(b)(1). See Erickson, *supra*. Further, had Ms. Ninow timely responded to the summons, her default would not have been sought or entered and it was clear error on this record to conclude that it was entered “solely” due to such “court error” [if any]. The June 12, 2003, order contains no finding or conclusion that Judge Hilder “affirmatively misled” Ms. Ninow about the fact or date of entry of the November 26, 2002, Default Judgment, as required under Oseguera and Swart, *supra*, which require that a twice-tardy party such as Ms. Ninow [who blew both the 20-day summons deadline and the 3-month 60(b) deadline] must actually be “affirmatively misled” about the entry of the default judgment and/or date thereof. And it must be the trial court that does the affirmative misleading. Here, the June 12, 2003, order concludes only that the 3-month deadline under URCP 60(b) “was missed by a relatively short time, and to some extent this was because plaintiff did not give prompt notice of the judgment.” In fact, the Notice of Judgment [R.3898] was served by mail on December 17, 2002, and gave notice that the Default Judgment had been “entered herein on November 26, 2002” and an actual signed copy of the Default Judgment was appended to that Notice of Judgment. [R. 3899] Ms. Ninow then had over two months to comply with the 3-month deadline. Nothing in the June 12, 2003, order or in

the record as supplemented contends Ms. Ninow's counsel did not receive the Notice of Judgment. This court should not consider such a contention if it is raised on appeal. Swart v. State, supra, citing Ong Int'l (U.S.A.) Inc. v. 11th Avenue Corp., 850 P.2d 447, 455 (Utah 1993) [*5] (stating appellate courts will not consider an issue that is raised for the first time on appeal).

The June 12, 2003, order claims that the trial court had authority to "reconsider" the law of the case created by its initial denial of the URCP 60(b) motion on May 2, 2003, as time-barred under "Thurston v. Box Elder County and Trembley v. Mrs. Fields Cookies" because "no final judgment has entered based on the court's bench ruling of May 2, 2003." [R.4053]

The trial court's analysis is incorrect. The final order is the November 26, 2002, Default Judgment. The May 2, 2003, ruling denied a motion to set that final order aside. The June 12, 2003, order states the trial court is "still persuaded" that said May 2, 2003, ruling was correct as to "motions under 60(b)(6) that could be brought pursuant to one of the first three subsections" and Ms. Ninow's motion could be brought pursuant to URCP 60(b)(1), (2), or (3). The trial court's "critical point" that the "defendant had not 'failed to plead or otherwise defend' [Rule 55(a)], at the time default was sought" and that therefore the clerk "was not empowered to enter the default" [R.4054]

cannot be sustained on appeal. The *sua sponte* finding that the default was sought after Ms. Ninow had filed her responsive motion was made without giving the parties notice that the trial court thought this was a “critical point” and without taking evidence or holding a hearing. In light of the lack of any evidence or hearing, there is no evidence that can be marshaled in support of the trial court’s “critical point.” The only evidence on the “critical point” is the Affidavit of Robert Henry Copier [R.4059] which establishes that default was not sought after defendant had filed her responsive motion, but that the application and motion for entry of default in the form of a proposed Default Judgment was actually submitted to the downstairs civil clerks at the Scott M. Matheson courthouse “several days before the clerk entered the default certificate on November 25, 2002.” Since Ms. Ninow’s responsive motion was belatedly filed on November 25, 2002, two-and-a-half weeks after the November 8, 2002, deadline for filing it, the default “was sought” several days before she filed her responsive motion, not “after” she had filed it. And the conclusion by the trial court that this was a “critical point” is error. The “critical” [and jurisdictional] “point” is that Ms. Ninow failed to file under URCP 60(b)(1), (2), or (3) within 3 months and a “court error” [if there was one] constituted a 60(b)(1) court “mistake” subject to the 3-month deadline.

In the moving papers in which appellants joined after involuntarily becoming parties through case consolidation, it was argued that because the June 12, 2003, order set aside a default judgment that had extinguished legal title of defendant and quieted it in favor of out-of-state non-parties, it may be of some interest to national title insurers who rely on that 3-month deadline.

If this court has any inclination towards affirming the June 12, 2003, order, then some *amicus* briefing should be invited by this court from some representative sample of large national title insurers who may be impacted by such an appellate decision. Because title insurance profit margins are so bloated because the statutory franchises under which title insurers operate disconnect their fees from the underlying actuarial risk, they may see such an appellate decision as an aberration in Utah about which they care little.

But they ought to at least be given that opportunity [in the event this court believes there is legal basis for sustaining the June 12, 2003, order].

Point Three - All rulings and orders entered by the trial court between the signing of the April 26, 2005, *Ruling and Order* and the filing of the *Notice of Appeal* on September 15, 2005, should be reversed as erroneous except for matters in the *Final Order* signed on August 16, 2005, that are not being challenged on appeal. The trial court should be ordered to entertain no matters as to which the April 26, 2005, order is law of the case and ordered to entertain only matters remanded in the decision on this appeal or reserved in the August 16, 2005, order. The removal of appellants as officers/directors of Pahl's Salt Palace Loan Office, Inc., via the August 16, 2005, *Final Order* should be reversed.

Point One above demonstrates that this appeal can be decided in the appellants' favor by applying law of the case. Point Two above shows that the June 12, 2003, order [which was referred to in the prior appeal at n.10 as not yet before the court, but now is] was erroneous because the November 26, 2002, Default Judgment did not constitute a court error and even if it did it was a "mistake" that had to be timely remedied under 60(b)(1), (2), or (3).

This gets us to the orders erroneously entered by the trial court after the reversal and remand in the prior appeal. Because, in her filings in May of 2002, Ms. Ninow had alleged all manner of forgery, embezzlement, and malfeasance in the operation of Pahl's Salt Palace Loan Office, Inc., none of which that was then ever made part of the final order, and because Mr. Lowe and Ms. Rose were not proper parties to the motion for summary judgment because they personally claimed no ownership of any shares adverse to Ms. Ninow's claims, one of their primary objectives was to put up mere token resistance so as to get the final, appealable order as soon as possible and to have this court decide on the appeal of that final, appealable order that it was, indeed, an appeal from a final, appealable order and that there were no real estate issues reserved in the trial court. The issue of whether or not Mr. Lowe and Ms. Rose had succeeded in securing the May 1, 2003, order as the

final order on all the claims pled in the May 29, 2002, petition, and not just the share ownership claims, was duly framed by Presiding Judge Norman H. Jackson in the Order of October 28, 2003, in the prior appeal. [“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 real property.” “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.”] Mr. Lowe and Ms. Rose prevailed on this point in the prior appeal decision. “As an initial matter, we have determined that Respondents' appeal is taken from a final, appealable order.” Ninow v. Lowe (Estate of Pahl), 2004 UT App. 291.¹ Accordingly, after the prior

¹ If the Court of Appeals had decided otherwise and had held that there were still real property issues pending before the trial court, Mr. Lowe would have personally litigated them after the remand. Mr. Lowe has been candid about the fact that Pahl's Salt Palace Loan Office, Inc., in 2000, contracted to pay his attorney fees incurred in his dealings with KaLynn Ninow and pledged the real and personal property that it controlled to secure that contract, and any order on the merits of any real estate claims would have had to consider that claim. As it stands, while Ms. Ninow, in May of 2005, persuaded Judge Lewis that there were still real property issues pending in the trial court, no final order deciding the merits any real estate claims was ever entered below. Ms. Ninow's argument that such claims remained pending is contradicted by Ninow v. Lowe (Estate of Pahl), 2004 UT App. 291; by an order duly signed April 26, 2005, which disposed of everything that had been pending; by Ms. Ninow's filing dated July 8, 2005 [R.3080] asserting that only contempt of court issues remained; and by the Final Order signed on August 16, 2005, based on that July 8th filing. No real estate issues have survived those orders.

appeal was decided, the only matters before the trial court were [1] matters that had been remanded; [2] the two civil cases that had been consolidated during the appeal; and, [3] the contempt motions that Ms. Ninow had begun to file as a serial filer of contempt motions. After the interlocutory bench order on April 6, 2005, and the *Ruling and Order* signed April 26, 2005, everything done after April 26, 2005, through the filing of the *Notice of Appeal* on September 15, 2005, should be reversed, except for the matters in the order signed on August 16, 2005, that are not being challenged on appeal by the appellants. Since all the matters that had either been remanded or consolidated had been disposed of by the close of the trial court's bench order of April 6, 2005, the only matter remaining for decision after April 6, 2005, was alleged contempt, which was disposed of in the *Ruling and Order* of April 26, 2005. Since no one was found to be in contempt, there was no basis for entering any orders. And even if someone had been found to be in contempt, there was no basis for entering any orders going to "the merits."

Because the trial judge in this case who erroneously entered orders on "the merits" from April 26, 2005, through September 15, 2005, even though the only matters pending were contempt matters, [Hon. Leslie A. Lewis], is the same judge who was later reversed on appeal in another case for doing

the same thing in that case [Homeyer (In Re Cannatella) v. Stagg Associates, 2006 UT App. 89; 132 P.2d 284], perhaps Judge Lewis simply made an overly optimistic appraisal of the scope of her own contempt powers and the correction that this court made in that case should also be made in this case.

If this court, on that basis, reverses everything done between April 26, 2005, and August 16, 2005; the portion of the order signed August 16, 2005, that is being challenged; and everything done after signing of that Final Order through the filing of the Notice of Appeal on September 15, 2005, this court may not need to reach the substantive errors in the interlocutory orders and in the challenged portion of the Final Order signed August 16, 2005. It is sufficient to note here that these orders that went beyond the scope of the contempt matter were also erroneous on the legal merits in important ways.²

² The errors, include, *inter alia*: [1] disregarding appellate law of the case by ordering in May of 2005 that a preliminary injunction that had expired under its own terms on August 26, 2002, when the trial court had granted summary judgment on the merits had never “actually” expired because real property issues were “actually” still pending even though that issue had been framed by Judge Jackson in an order and rejected by the Utah Court of Appeals in its decision. [Even Emperor Caligula, who famously wrote his decrees in small letters and posted them on high pillars to ensnare the Roman people, understood he could not retroactively extend an expired injunction in that unfair fashion.]; and, [2] ordering in May of 2005 that the May 1, 2003, summary judgment affirmed on appeal precluded non-parties from asserting adverse claims even though this was contrary to law of the case created by Judge Medley when he dismissed claims without prejudice instead of with prejudice. No conclusions were entered justifying revisiting law of the case.

Since no URCP 60(b) motion was ever filed by Ms. Ninow within 3 months of August 19, 2005, and since she did not cross-appeal herein, the trial court's order [R.2609] signed on April 26, 2005, and filed on April 28, 2005, will now fully stand as the law of the case. The reasoning therein regarding lack any contempt is sound. Undeterred, Ms. Ninow has now continued to try to have counsel, parties, and even a non-party held in "contempt" for the arguments that they have made and the positions that they have asserted in litigation. Thankfully, no one has, at least so far, been held in contempt of court for making legal arguments and taking litigation positions, as such matters are shielded by a broad judicial privilege. The trial court still has pending before it contempt motions that Ms. Ninow has continued to file as a serial filer of contempt motions, but, very sensibly, has deferred them until this appeal is decided. The April 26, 2005, order is not challenged on appeal. It pertains to contempt and this court should order the trial court to entertain no contempt matters based on substantially the same facts. These appellants understand that this court has jurisdiction only over orders entered through September 15, 2005. The requested appellate order would instruct the trial court as to the application of April 26, 2005, law of the case. The appellate order is requested to end serial contempt motions.

The law of the case created by Judge Medley's dismissals of claims adverse to the May 1, 2003, summary judgment order without prejudice instead of with prejudice will also stand both because it is not being challenged on appeal and because it is sound. While that May 1, 2003, summary judgment [that was affirmed on appeal in Ninow v. Lowe I] addressed only share ownership, it was supported by a rather lengthy recitation of numbered facts. Some of those facts were ultimate facts, some of them were subsidiary facts, and some of them were gratuitous facts that were not material to the order of summary judgment. Under URCP 7 and 56, the facts that support a summary judgment are not deemed undisputed for purposes of any other order. To the extent that the facts are ultimate facts or subsidiary facts, they support the summary judgment. To the extent they are neither ultimate nor subsidiary facts, they serve no purpose, because they do not support the summary judgment and cannot be used to support any order other than the summary judgment. In Parduhn v. Bennett, 2005 UT 22; 112 P.3d 495, Justice Parrish wrote that not all facts are created equal: some are ultimate facts, upon which the resolution of a particular issue turns, while others are subsidiary facts supporting the ultimate facts.

The undisputed summary judgment facts in the first appeal included a large number of facts that were neither ultimate nor subsidiary facts, but that were “gratuitous” because they served no purpose as either ultimate facts or subsidiary facts. One of those was a finding that Mr. Lowe and Ms. Rose had been removed and replaced as officers and directors by KaLynn Ninow, Richard Ninow, and Ryan Pahl. That finding was not material to summary judgment, which dealt only with share ownership. It was neither an ultimate fact nor a subsidiary fact that supported the summary judgment. Instead, it was merely a “gratuitous” fact that served no purpose as to the May 1, 2003, summary judgment and could not be used to support any order[s] other than that May 1, 2003, final order. For this reason, Judge Medley declined to give that finding any preclusive effect over non-parties when he dismissed the shareholder derivative actions of Diamond Fork Land Company [which was not a party to the May 1, 2003, summary judgment] without prejudice.

That law of the case [Supp R. 376; Supp R. 385] stands both because it is correct and because Ms. Ninow has not challenged it by filing a motion under URCP 60(b) within 3 months of August 19, 2005, or by filing a cross-appeal. Judge Medley was right on this issue and Judge Lewis was wrong.

And Judge Medley’s law of the case will now stand as unchallenged.

Further, since Judge Medley was the judge who entered both the May 1, 2003, summary judgment as to share ownership [R.1114] affirmed in the prior appeal [Ninow v. Lowe Estate of Pahl, 2004 UT App. 291] and the two orders of dismissal “without prejudice” [Supp R. 376; Supp R. 385] creating law of the case that the May 1, 2003, order has no preclusive effect over any adverse share claimants not a party to the order and no preclusive effect over the corporation itself, he was the judicial officer best positioned to make that call. Nothing in his prior orders or in the decision on appeal is contrary to it.

Mr. Lowe and Ms. Rose have not claimed any personal ownership of shares of stock that is contrary to the May 1, 2003, summary judgment and have not, therefore, ever been in contempt of court to the extent the May 1, 2003, order imposed some “duty” that they disobeyed [which is doubtful].

After the November 26, 2002, judgment declaring legal rights of Mr. Lowe and Ms. Rose as a quorum of directors was set aside on June 12, 2003, Diamond Fork Land Company moved to dismiss, since it had transferred its claims. Mr. Lowe and Ms. Rose have been consistent in asserting a legal right to serve as directors and officers until their successors are qualified, a posture that is consistent with the orders of dismissal “without prejudice” [Supp R. 376; Supp R. 385] and resulting law of the case thereby created.

In arguing for dismissal with prejudice, Ms. Ninow referred to the findings and orders in the probate proceeding and argued that they were binding on Diamond Fork Land Company and its successors, that William Lowe and Augusta Rose had been removed as directors by those findings and/or orders, that KaLynn Ninow, Richard Ninow, and Ryan Pahl had been installed in their place, and that the dismissal should therefore be made with prejudice. Judge Medley dismissed without prejudice and there has been no showing that this law of the case should now be disturbed, nor was there a timely cross-appeal or timely URCP 60(b) motion filed within 3 months of August 19, 2005 under which that law of the case may now be challenged.

UCA Sec. 75-3-106 provides:

“Scope of proceedings -- Proceedings independent -- Exception” provides that “(1) Unless supervised administration as described in Part 5 of this chapter is involved: (a) Each proceeding before the court or registrar is independent of any other proceeding involving the same estate. (b) Petitions for formal orders of the court may combine various requests for relief in a single proceeding if the orders sought may be finally granted without delay.”

In dismissing Diamond Fork Land Company’s suits “without prejudice,” Judge Medley was ruling in a manner consistent with this provision. His May 1, 2003, summary judgment was a final, appealable order that concluded the entire proceeding commenced on May 29, 2002.

Since it did not bind non-parties, it had no preclusive effect on them.

A trial court is never free to enter orders that are contrary to law or to appellate law of the case. A trial court is also not free to disregard trial court law of the case unless the court enters conclusions that allow the trial court law of the case to be revisited under Thurston v. Box Elder County, 892 P.2d 1034 (Utah 1995), and/or Trembley v. Mrs. Fields Cookies, 884 P.3d 1306 (Utah App. 1994). No such conclusions were entered here, and, since there was no timely URCP 60(b) motion filed after August 19, 2005, and there was no cross-appeal, the law of the case duly made by Judge Medley in his interlocutory dismissals without prejudice and by Judge Lewis in those parts of the order signed on August 16, 2005, that are not being challenged, stand.

Ms. Ninow's pursuit of her serial contempt motions after the April 26, 2005, *Ruling and Order*, and the erroneous interlocutory rulings and orders that arose from that pursuit, were contrary to law, contrary to appellate law of the case, contrary to the trial court law of the case, and contrary to the holding in Homeyer (In Re Cannatella) v. Stagg Associates, 2006 UT App. 89; 132 P.2d 284, that clearly prohibits orders on the "merits" in a contempt matter. Ms. Ninow's pursuit of post-April 26, 2005, orders made her one of the "indefatigable diehards" referred to in Thurston. As requested in Point Four, ordering a hearing on the \$20,000 undertaking may help to stop this.

Point Four – A hearing on the TRO undertaking should be ordered.

Judge Lewis was without discretion to deny the request for a hearing, since the language in URCP 65A(c)(3) is mandatory. Denying the motion for a hearing on April 6, 2005, was an error now ripe for appellate reversal.

When Ms. Ninow initiated this dispute on May 20, 2002, by appearing *ex parte* before Hon. Sandra Peuler with the corporation's shareholder list, claiming the list was wrong, that provided no basis for issuing a TRO. A corporation's shareholder list establishes shareholders of record entitled to vote until a court in an action to which the corporation is a party changes it.

Because the official list had never been ordered changed by a court of competent jurisdiction, Ms. Ninow's attempts to unilaterally form a quorum to vote out the directors and install new ones was a legal nullity of no effect.

The ground for the *ex parte* TRO was Ms. Ninow's assertion that the directors were engaged in all manner of forgery, embezzlement, misconduct, and destruction of records, and that an *ex parte* TRO without notice was thus needed. Judge Peuler could have bound both sides with a TRO, ordered the premises padlocked by a constable, and appointed a receiver and/or special master to sort this out. Or she could do what she did, i.e., order a \$20,000 undertaking. The *ex parte* allegations were never established on the merits.

Since Mr. Lowe was wrongfully restrained [both because the basis for the TRO was never embodied in an order on the merits and because the prior appeal included a reversal that scaled-back (to its original 11:00 a.m., May 30, 2002, time and date of expiration) a TRO that had been wrongfully and retroactively extended by the trial court so as to “wrongfully restrain” Mr. Lowe under the TRO during the noon recess on May 30, 2002], Ms. Ninow and her husband Richard Ninow, who posted the \$20,000 undertaking, have no good faith objection at law to having Mr. Ninow now pay the \$20,000.

Mr. Lowe promptly moved for a hearing on that undertaking shortly after the prior reversal and remand. That motion was denied on April 6, 2005, in an interlocutory bench order and is now part of the pending appeal.

Once Mr. Lowe gave Ms. Ninow actual notice that he had utilized the short period between expiration of the TRO at 11:00 a.m. on May 30, 2002, and the announcement of the preliminary injunction to reject, on behalf of the corporation, for want of a quorum of record shareholders, her unilateral attempt to vote him and the other two directors out and to replace them, she should have brought an action under UCA Sec. 16-10a-809, “Removal of directors by judicial proceeding.” She would have the standing to do this because she controlled at least 10% of the outstanding shares of Pahl’s Salt

Palace Loan Office, Inc., and she was alleging that “(a) the directors engaged in fraudulent or dishonest conduct or gross abuse of authority or discretion with respect to the corporation; and (b) removal is in the best interest of the corporation.” She would have been required to “make the corporation a party defendant.” She did none of these things. Trying not to state the obvious, a Utah statutory mandate to make “the corporation a party defendant” cannot be satisfied by, instead, restraining and enjoining all the corporation’s officers so they are unable to mount its defense or pursue its claims. So utilizing a TRO and preliminary injunction is the polar opposite of making the corporation a party defendant. The TRO allegations were never established on the merits and Mr. Lowe is now entitled to a hearing.

CONCLUSION

This court should reverse the June 12, 2003, order, reverse the April 6, 2005, order denying the motion for a hearing on the TRO undertaking, and reverse those portions of post-April 26, 2005, orders challenged on appeal, and should include in its decision the directives requested within this brief.

DATED THIS 10th DAY OF JANUARY, 2006

ROBERT HENRY COOPER
Attorney for the Appellants

MAILING CERTIFICATE

Copies of this brief were this-day mailed to:

**DANIEL F. VAN WOERKOM
SANDRA K. WEEKS
HALA L. AFU
VAN WOERKOM & WEEKS, LC
2975 WEST EXECUTIVE PARKWAY #414
LEHI UT 84043-0255**

DATED THIS 10th DAY OF JANUARY, 2007.



ROBERT HENRY COOPER
Attorney for the Appellant

ADDENDUM

1. Determinative statutes and rules.
2. May 1, 2003, final order affirmed in the prior appeal. [R.1114]
3. October 28, 2003, order in the prior appeal.
4. September 2, 2004, decision in the prior appeal.
5. November 26, 2002, default judgment. [R.3899]
6. December 16, 2002, notice of judgment. [R.3898]
7. March 24, 2003, opposition to motion to set aside. [R. 4032]
8. June 12, 2003, order granting motion to set aside. [R. 4053]
9. July 2, 2003, motion to vacate June 12, 2003, order. [R. 4057]
10. July 2, 2003, affidavit in support of motion to vacate. [R. 4059]
11. July 2, 2003, memorandum in support of motion. [R. 4061]
 - Attachments to memorandum:
 - A. August 14, 2002, response to document request [R. 4071]
 - B. June 30, 2003, letter. [R. 4073]
 - C. May 1, 2003, minute entry. [R. 4074]
12. April 6, 2005, probate minutes. [R. 2555]
13. April 26, 2005, ruling and order filed April 28, 2005. [R. 2609]
14. July 8, 2005, memorandum filed July 14, 2005 [R. 3080]
15. July 15, 2005, reply memorandum filed July 18, 2005 [R. 3091]
 - Attachment to reply memorandum:
 - A. Letter dated July 15, 2005. [R. 3097]
16. August 16, 2005, final order filed August 19, 2005. [R. 3200]
17. September 10, 2005, withdrawal of motions as moot. [R. 3286]
18. September 15, 2005, notice of appeal. [R. 3303]

DETERMINATIVE STATUTES AND RULES

UCA Sec. 16-10a-809. Removal of directors by judicial proceeding.

(1) The district court of the county in this state where a corporation's principal office or, if it has no principal office in this state, its registered office is located may remove a director in a proceeding commenced either by the corporation or by its shareholders holding at least 10% of the outstanding shares of any class if the court finds that:

(a) the director engaged in fraudulent or dishonest conduct or gross abuse of authority or discretion with respect to the corporation; and

(b) removal is in the best interest of the corporation.

(2) The court that removes a director may bar the director from reelection for a period prescribed by the court.

(3) If shareholders commence a proceeding under Subsection (1), they shall make the corporation a party defendant.

(4) A director who is removed pursuant to this section may deliver to the division for filing a statement to that effect pursuant to Section 16-10a-1608.

UCA Sec. 75-3-106. Scope of proceedings -- Proceedings independent -- Exception.

(1) Unless supervised administration as described in Part 5 of this chapter is involved:

(a) Each proceeding before the court or registrar is independent of any other proceeding involving the same estate.

(b) Petitions for formal orders of the court may combine various requests for relief in a single proceeding if the orders sought may be finally granted without delay. Except as required for proceedings which are particularly described by other sections of this chapter, no petition is defective because it fails to embrace all matters which might then be the subject of a final order.

(c) Proceedings for probate of wills or adjudications of no will may be combined with proceedings for appointment of personal representatives.

(d) A proceeding for appointment of a personal representative is concluded by an order making or declining the appointment.

URAP 4(d). Additional or cross-appeal.

If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of

appeal was filed, or within the time otherwise prescribed by paragraphs (a) and (b) of this rule, whichever period last expires.

URCP 60. Relief from judgment or order.

(a) Clerical mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc. On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), or (3), not more than 3 months after the judgment, order, or proceeding was entered or taken. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

FILED DISTRICT COURT
Third Judicial District

MAY - 1 2003

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.

ORDER GRANTING SUMMARY
JUDGMENT

Civil No. 003901101
Judge Medley

This matter came before the Court at a hearing on August 26, 2002 based on the Motion for Summary Judgment 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. Also, the court considered the motions for competing motions for summary judgment filed by Mr. Copier on behalf of his clients. Appearing at the hearing was KaLynn Ninow, represented by and through counsel, Van Woerkom & Condie, LC, William T. Lowe, represented by and through counsel, Robert Copier, who appeared on behalf of his clients. The Court, having heard the arguments of counsel and

being otherwise fully and sufficiently advised, and having entered its FINDINGS OF FACT AND CONCLUSIONS OF LAW hereby ORDERS, ADJUDGES AND DECREES:

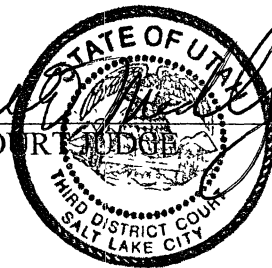
1. The Motion for Summary Judgment filed by the Personal Representative of the Estate of Gary Pahl is GRANTED.

2. 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 of the Estate.

DATED, this the 1 day of May, 2003.

By: 

DISTRICT COURT



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.

IN THE UTAH COURT OF APPEALS

-----ooOoo-----

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

KaLynn Ninow,

Petitioner and Appellee,

v.

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

Respondents and Appellants.

Augusta Rose,

Third-party Petitioner,

v.

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

Third-party Respondents.

MEMORANDUM DECISION
(Not For Official Publication)

Case No. 20030169-CA

F I L E D
(September 2, 2004)

2004 UT App 291

Third District, Salt Lake Department

The Honorable Tyrone E. Medley

Attorneys: Robert H. Copier, Salt Lake City, for Appellants

Daniel F. Van Woerkom and Sandra K. Weeks, Lehi, for Appellee

Before Judges Billings, Davis, and Thorne.

DAVIS, Judge:

William Lowe and Augusta Rose (collectively, Respondents) appeal the trial court's October 1, 2002 order determining that Lowe was in contempt of court and the trial court's May 1, 2003 order granting summary judgment in favor of KaLynn Ninow. We affirm in part, and reverse and remand in part.

As an initial matter, we have determined that Respondents' appeal is taken from a final, appealable order. See In re Estate of Voorhees, 12 Utah 2d 361, 366 P.2d 977, 980 (1961).

Respondents argue that the trial court erred in its October 1, 2002 order by determining that Lowe was in contempt of court. Pursuant to rule 65A of the Utah Rules of Civil Procedure, once a temporary restraining order (TRO) is granted, it

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

Utah R. Civ. P. 65A(b) (2).

The terms of the TRO in this case provided for the preliminary injunction hearing to be held at 10:00 a.m. on May 30, 2002, and for the TRO to expire at 11:00 a.m. on the same day. The parties did not stipulate to an extension of the TRO; Ninow did not request that the trial court extend the TRO for "good cause"; and, contrary to Ninow's argument, commencement of the preliminary injunction hearing one hour prior to the expiration of the TRO did not operate as a "good cause" extension of the TRO. Id. As such, under the plain language of rule 65A(b) (2), the TRO expired at 11:00 a.m. on May 30, 2002. Therefore, Lowe's actions during the noon recess of the preliminary injunction hearing were not in violation of the TRO.⁽¹⁾

Accordingly, we reverse the trial court's determination that Lowe was in contempt of court for violating the TRO. With respect to the relief granted by the trial court in its October 1, 2002 order, we reverse only Ninow's attorney fee award.⁽²⁾ We remand and instruct the trial court to order the return to Lowe of all amounts paid for Ninow's attorney fees awarded in connection with the trial court's contempt determination.⁽³⁾

Respondents also argue that the trial court erred in its May 1, 2003 summary judgment order by determining that Gary G. Pahl (Gary) owned all 6000 shares of Pahl's Salt Palace Loan Office, Inc. (the Corporation) at the time of his death. More specifically, Respondents assert that the trial court erred by determining that, at the time of his death, Gary owned 3000 shares of the Corporation (the 3000 shares) that were previously owned by Frank H. Pahl (Frank).⁽⁴⁾ Based upon this alleged error, Respondents argue that it was error for the trial court to grant summary judgment in favor of Ninow.

Pursuant to rule 56 of the Utah Rules of Civil Procedure, summary judgment "shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Utah R. Civ. P. 56(c). Rule 56 also provides that

[w]hen a motion for summary judgment is made and supported as provided in [rule 56], an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Utah R. Civ. P. 56(e).

The 3000 shares were the subject matter of two transfer agreements contained in the record before us.⁽⁵⁾ In the first agreement, dated May 6, 1998 (the May agreement),⁽⁶⁾ Frank agreed to transfer the 3000 shares to Gary.⁽⁷⁾ In the second agreement, dated December 28, 1998 (the December agreement),⁽⁸⁾ the Corporation agreed to purchase the 3000 shares from Gary, so that the Corporation could hold them as treasury stock. In the statement of undisputed facts contained in Ninow's memorandum in support of her motion for summary judgment, she asserted that (1) the May agreement was completed and "paid in full," and (2) the Corporation did not make the required payments to Gary under the December agreement. Ninow supported these facts with citations to affidavits and exhibits contained in the trial record. Respondents did not specifically dispute these facts

either in their memorandum in opposition to Ninow's motion for summary judgment, or by way of the affidavits and exhibits cited therein. Because Respondents failed to "set forth specific facts showing that there is a genuine issue for trial," the trial court was required to accept these facts as undisputed.⁽⁹⁾ Utah R. Civ. P. 56 (e); see Utah R. Civ. P. 56(c). Because these undisputed facts, together with the plain language of both the May agreement and the December agreement, are determinative of Gary's ownership of the 3000 shares at the time of his death, summary judgment in favor of Ninow was appropriate. See Utah R. Civ. P. 56(c), (e). Therefore, we conclude that the trial court did not err by determining that Gary owned all 6000 shares of the Corporation at the time of his death, and we affirm the trial court's May 1, 2003 order granting summary judgment in favor of Ninow.⁽¹⁰⁾

James Z. Davis, Judge

WE CONCUR:

Judith M. Billings,

Presiding Judge

William A. Thorne Jr., Judge

1. We disagree with Ninow's assertion that our holding on this issue will "invite judicial chaos." If a party wishes to have a TRO extended beyond its original terms, that party can simply seek the opposing party's consent to an extension, or request an extension from the trial court. See Utah R. Civ. P. 65A(b)(2). Ninow could have pursued either of these alternatives prior to or at the outset of the preliminary injunction hearing, but chose not to. Even if Ninow had been unable to secure consent to an extension from Respondents, it is unlikely the trial court would have denied a request to extend the TRO until completion of the preliminary injunction hearing.

2. Based upon our resolution of Respondents' next argument, we affirm the trial court's determinations that Lowe was not entitled to the \$7500 he obtained during the noon recess of the preliminary injunction hearing and that he was required to return those funds to Ninow.

3. Respondents argue that Lowe is also entitled to his reasonable attorney fees in opposing the contempt motion both in the trial court and on appeal. However, none of the legal authorities that Respondents have cited in support of this argument authorize an award of attorney fees to a party opposing a contempt motion. Therefore, we conclude that this argument is inadequately briefed and we do not address it further. See Utah R. App. P. 24(a)(9); State v. Thomas, 961 P.2d 299, 304-05 (Utah 1998).

4. Respondents do not dispute that, at the time of his death, Gary owned the other 3000 shares of the Corporation.

5. Neither party asserts that these were not legal, binding agreements.

6. The trial court determined, and we agree, that the May agreement is "not ambiguous, and can therefore be interpreted as a matter of law."

7. Respondents assert that the May agreement somehow "conveyed" the 3000 shares to Lowe. However, this assertion is contrary to the plain language of the May agreement. The May agreement provided that Lowe was merely "holding" the 3000 shares until the May agreement was "fulfilled in whole." The May agreement also provided that it was "[Frank's] desire to sell [the 3000 shares] to Gary," and that upon "successful completion" of the May agreement, the 3000 shares would "belong to Gary." Accordingly, under the plain language of the May agreement, the trial court correctly determined that "Lowe had no power or authority to retain the [3000 shares] in any way once the [May agreement] had been completed."

8. The trial court determined, and we agree, that the December agreement is "unambiguous and may be interpreted as a matter of law."

9. Based upon these undisputed facts, the trial court correctly determined that (1) "[a]s soon as the payments had been made under the [May agreement], the ownership of the [3000 shares] vested in Gary"; and (2) because "[p]ayment was not made according to the terms of the [December agreement]," it "was never successfully completed and the [3000 shares] could not have become treasury stock, either prior to, or following [Gary's] death."

10. In their reply brief, Respondents ask this court to reverse a June 12, 2003 order entered in a separate civil case against Ninow. We do not address this argument for several obvious reasons. First, although the separate civil case against Ninow may have been combined with this case, that did not occur until nearly one year after Respondents filed their notice of appeal in this case; therefore, any proceedings in the separate civil case against Ninow are not part of

Respondents' appeal in this case. Also, the June 12, 2003 order was not entered until after Respondents' notice of appeal was filed in this case. See Utah R. App. P. 4(a) (stating that "the notice of appeal . . . shall be filed . . . within [thirty] days after the date of entry of the judgment or order appealed from" (emphasis added)). Finally, Respondents raised this argument for the first time in their reply brief. See Utah R. App. P. 24(c); Hart v. Salt Lake County Comm'n, 945 P.2d 125, 139 n.9 (Utah Ct. App. 1997) ("[B]ecause this argument was raised for the first time in [the] reply brief, we decline to address it.").

Attorney for Relator
200 Metro Place
243 East 400 South
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Telephone 531-7923

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)*

3899

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*.

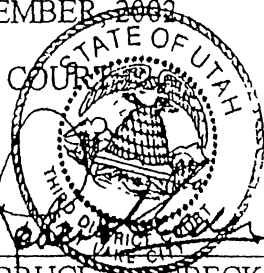
5. It is further decreed that no action, filing, or transaction purportedly made or entered into by or on behalf of Pahl's Salt Palace Loan Office, Inc., from and after the date of this judgment shall have any force or effect unless approved or ratified by a board of directors upon which William Lowe 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. LUBECK



3900

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

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,

NOTICE OF JUDGMENT

Plaintiff,

vs

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

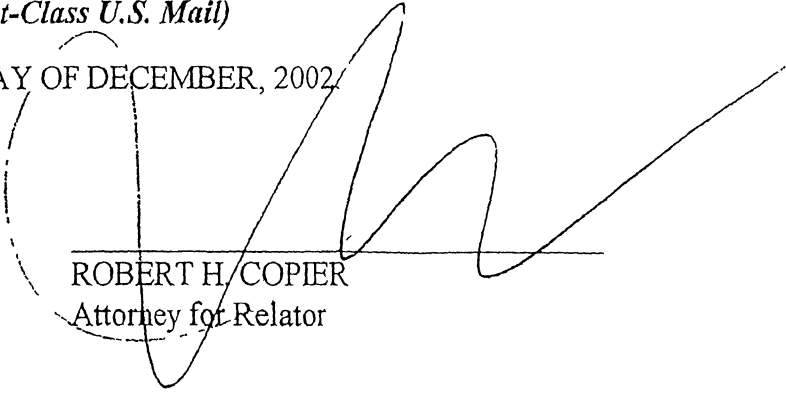
Civil No 020908627
Judge Robert Hilder

Defendant

- Default Judgment was entered herein on November 26, 2002
- A copy of the signed judgment is today served with a copy hereof upon

**Daniel F. Van Woerkom
David C. Condie
Van Woerkom & Condie
Attorneys for KaLynn Ninow
32 Exchange Place, Suite 101
Salt Lake City UT 84111
(Via First-Class U.S. Mail)**

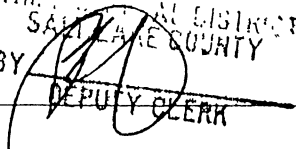
DATED THIS 17TH DAY OF DECEMBER, 2002



ROBERT H. COPIER
Attorney for Relator

3498

ROBERT HENRY COPIER, 727
Attorney for Relator
243 East University Boulevard - 200
Salt Lake City, Utah 84111-2803
Telephone 531-7923

FILED
DISTRICT COURT
03 MAR 24 PM 3:19
JUDICIAL DISTRICT
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,

**CJA 4-501 MEMORANDUM
IN OPPOSITION TO MOTION
BY DEFENDANT TO SET ASIDE
THE DEFAULT JUDGMENT**

Plaintiff,

vs.

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

Civil No. 020908627
Judge Robert Hilder

Defendant.

INTRODUCTION

Defendant was served with process by a deputy constable and failed to timely respond. Defendant's default was duly entered via the entry of a Default Certificate by the clerk. Based on that Default Certificate, the court properly entered Default Judgment on November 26, 2002. Over three months elapsed before defendant moved to set aside the default judgment on March 17, 2003.

POINT ONE

Defendant's failure to file within three months is jurisdictional.

In a unanimous Utah Supreme Court decision written by Justice Durham in Erickson v. Sheners Intern. Forwarders, 882 P.2d 1147 (Utah 1994), a motion to set aside a default judgment that is entered after a Default Certificate is entered for failure to timely respond to a summons is an "excusable neglect" motion that

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must be filed within the three month deadline under URCP 60(b)(1). Since the defendant did not file her URCP 60(b) motion to set aside the default judgment until after the three month filing deadline set forth in URCP 60(b) had elapsed, this court has no authority to grant her motion. This is jurisdictional. Indeed, under the comparable federal rule 60(b), the grant of a motion under these circumstances results in a final order that is directly appealable as a matter of right rather than being an interlocutory order. "There is now also substantial case law support for the proposition that an appeal will lie from the grant of the motion if the contention is that the court lacked power to grant it and not merely that it erred in granting the motion. [Order granting motion for relief from judgment would be treated as final for purposes of appeal, when new trial was challenged as beyond district court's authority on ground motion was not made within (the federal rule 60(b) deadline). Citing National Passenger R.R. Corp. v. Maylie, 910 F.2d 1181 (3rd Cir. 1990).]" *Wright & Miller*, Sec. 2871. As in the case at bar, the defendant in Erickson v. Sheners Intern. Forwarders, *supra*, had appeared and filed papers between the time the Default Certificate was entered and the time that the default judgment was entered. Yet, Justice Durham wrote that the defendant was still required to file the motion to set aside within three months.

Defendant cannot use Subdivision (b)(4), because the judgment is not void. Defendant cannot use Subdivision (b)(5), because she has not identified any subsequent event that has rendered prospective application of the judgment inequitable. See, *inter alia*, Richins v. Delbert Chipman & Sons, 817 P.2d 382 (Utah App. 1987). Defendant cannot use Subdivision (b)(6) to circumvent the applicable three month deadline. Richins v. Delbert Chipman & Sons, *supra*.

This court lacks any authority to set aside the default judgment because the defendant failed to file a timely motion before three months had elapsed as required under URCP 60(b) and Justice Durham's unanimous opinion in Erickson.

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POINT TWO

No reasonable justification or excuse for the neglect has been given.

Justice Durham wrote in Erickson that if a motion to set aside a default judgment is timely filed within three months, the second test that the movant must satisfy is the showing of reasonable justification or excuse for failure to timely file a responsive pleading or responsive motion. No such showing has been made. Indeed, movant has failed to offer any explanation for why she did not file on time. Any attempt to do so in a reply memorandum should be disregarded as untimely and going beyond the scope of matters raised within this memorandum.

POINT THREE

No defense of at least ostensible merit as would justify a trial of the issue has been raised in any proposed responsive motion or pleading.

Under Justice Durham's unanimous opinion in Erickson, if timeliness and a basis for relief under URCP 60(b) are established, the third test is whether the defendant here has met her burden to "proffer some defense of at least ostensible merit as would justify a trial of the issue thus raised." Conspicuously absent from the filings made by the defendant is any proposed answer or any proposed motion containing a defense which may, at the option of the pleader, be raised by motion under URCP 12 instead of by answer. Her untimely URCP 60(b) motion repeats her untimely motion to dismiss in its attempts raise defenses of *res judicata*, issue preclusion, and claim preclusion, matters which may not be raised by motion, but must be raised via pleading. And since the plaintiff herein was not a party to the probate proceeding (and the personal representative did not follow-up on initial limited rulings made in the probate proceeding), the orders entered in that probate proceeding did not involve the matters embodied in the judgment herein. Even though defendant has provided her prolix version of that which she claims was done by Judge Medley, she has provided no copies of any of his actual orders.

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Without copies of Judge Medley's actual orders, this court is not in a position to interpret the actual language of those orders, to measure the scope and reach of those orders, or to ascertain the identity of the persons and entities that are bound by those orders. Since neither the relator herein, Diamond Fork Land Company, nor the plaintiff herein, Pahl's Salt Palace Loan Office, Inc., were made parties to any probate proceeding by KaLynn Ninow, the orders entered by Judge Medley cannot, as a matter of law, create *res judicata*, issue preclusion, or claim preclusion in this case due to the manner in which this case was pled and due to the language in the default judgment entered herein. Thus, even if defendant had timely filed a motion under URCP 60(b) within the required three-month period (which she did not do, thereby depriving this court of the authority to grant her motion), and even if she had offered a reasonable excuse or explanation showing that her neglect in failing to respond to the summons and complaint in a timely manner was "excusable" neglect (which she did not do), it would still be manifest error for this court to grant her motion since, by failing to provide copies of the orders entered by Judge Medley, she has not met her burden of making a proffer showing that her *res judicata*, issue preclusion, and claim preclusion defense has at least ostensible merit as would justify a trial of the issue she attempts to raise.

The default judgment in this case adjudicates the claim made on behalf of Pahl's Salt Palace Loan Office, Inc., that 3000 of its shares were not the property of Gary G. Pahl at the time of his death and are not property of said decedent's estate. In the Utah Supreme Court case of In re Estate of Malliet, 649 P.2d 18 (Utah 1982), such a dispute could not have been resolved by filing and processing a claim against the estate under the probate code. It had to be made as part of this independent action against the personal representative. This was properly done.

The default judgment entered herein is controlling and finally decides the issue. There is no basis in Utah law for now setting that default judgment aside.

4035

POINT FOUR

Third parties who have common interests with the plaintiff and the relator in this matter have relied upon the default judgment entered herein.

A related corporation and two related individuals involved in related litigation¹ previously pending before Judge Sandra Peuler duly waited until after the expiration of the three-month period for filing a URCP 60(b)(1) motion in this case and, in reliance upon the judgment in this case and upon the failure of the defendant to timely move to set it aside, voluntarily dismissed that other case after the major issues therein had been rendered moot by the judgment entered herein.

These same third parties also elected to raise the issues pled by them herein as part of this independent action against the personal representative instead of litigating them in a probate proceeding before Judge Tyrone Medley.

In reliance upon the default judgment entered by the court herein, they limited the litigation before Judge Medley to other matters and then secured a final judgment in their favor in the probate proceeding before Judge Medley.

That probate proceeding is now on appeal to the Utah Supreme Court.

A paper containing the following language was filed in Judge Peuler's case and was duly served by mail upon David C. Condie on December 7, 2002:

"Since Pahl's Salt Palace Loan Office, Inc., was never made a party to any probate proceeding before Judge Medley, it is Judge Hilder's final judgment that adjudicates the matters that are contained therein."

Since the proceeding before Judge Medley and the case before Judge Peuler were both concluded in the trial court in reliance upon Judge Hilder's judgment herein, it would be very unjust to now set aside that judgment.

¹ Counsel in this case made filings in that case, there was some overlap between parties, and the default judgment entered herein mooted major issues in that case.

POINT FIVE

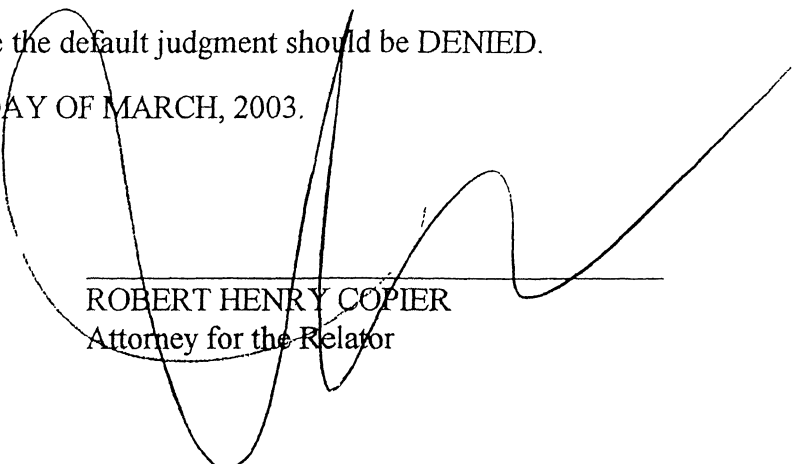
The pejorative remarks included in defendant's memorandum are of no assistance to this court in resolving the legal issues that are present here.

Last year the Utah Supreme Court again reminded counsel that pejorative - remarks regarding opposing counsel are unprofessional and are of no assistance to the courts in resolving legal issues. Prince v. Bear River Mutual Insurance, 2002 UT 68, 452 Utah Adv. Rep 50. The statements accusing the undersigned of filing a frivolous lawsuit in order to harass the defendant do not advance the analysis.

CONCLUSION

The motion to set aside the default judgment should be DENIED.

DATED THIS 24TH DAY OF MARCH, 2003.



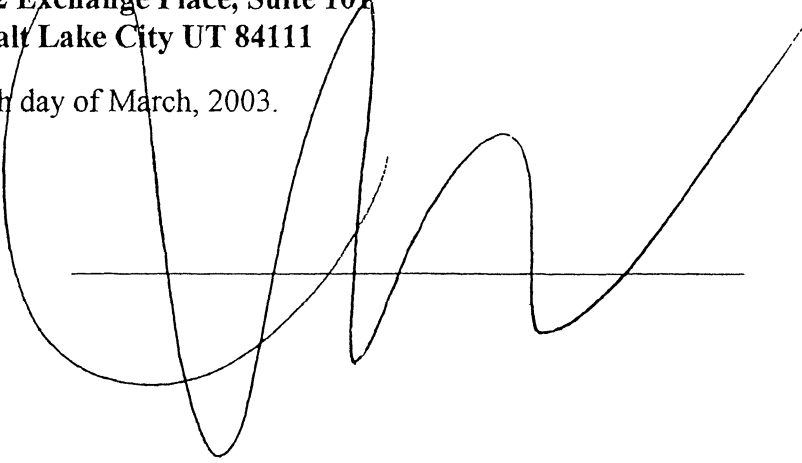
ROBERT HENRY COPIER
Attorney for the Relator

CERTIFICATE OF SERVICE

A copy of the foregoing was this-day caused to be **HAND-CARRIED** to:

David C. Condie
VAN WOERKOM & CONDIE
Attorneys at Law
32 Exchange Place, Suite 101
Salt Lake City UT 84111

DATED this 24th day of March, 2003.



4037

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. Milder

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 *Tremblay 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.

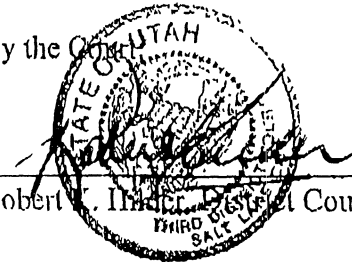
Despite this belief, based on its reconsideration of the availability of Rule 60(b)(6), URCP, and based on the court's determination that defendant clearly acted within a reasonable time after becoming aware of the default judgment, the court need not reach alternative bases. For the foregoing reasons, 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. Inghram, District Court Judge

ROBERT HENRY COPIER, 727
Attorney for the Relator
243 East University Boulevard - 200
Salt Lake City, Utah 84111-2803
Telephone 531-0099

CO JUL -2 AM 11:26
SALT LAKE COUNTY
BY 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,

**PLAINTIFF'S MOTION
TO VACATE THE ORDER
SETTING ASIDE THE
DEFAULT JUDGMENT**

Plaintiff,

vs.

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

Civil No. 020908627
Judge Robert Hilder

Defendant.

Pursuant to CJA 4-501, plaintiff moves the court to fully VACATE its URCP 60(b)(6) order of June 12, 2003, on the grounds that (1) the June 12, 2003, order's *sua sponte* "critical point" is clearly erroneous; (2) this court lacked the authority needed to enter the order; and, (3) if not vacated, the order will have a widespread adverse impact on the ability of national and local title insurers and lenders to "quiet" Utah titles utilizing the URCP 60(b)(1) three-month deadline.

The *sua sponte* "critical point" that "defendant had not 'failed to plead or otherwise defend' (Rule 55(a), URCP) at the time the default was sought" [June 12, 2003, order, p. 2, emphasis added] is clearly erroneous. The default was sought several days before the defendant responded to the summons on November 25, 2002. Defendant had " 'failed to plead or otherwise defend' --- (Rule 55(a), URCP) " when default was sought (several days prior to November 25, 2002)

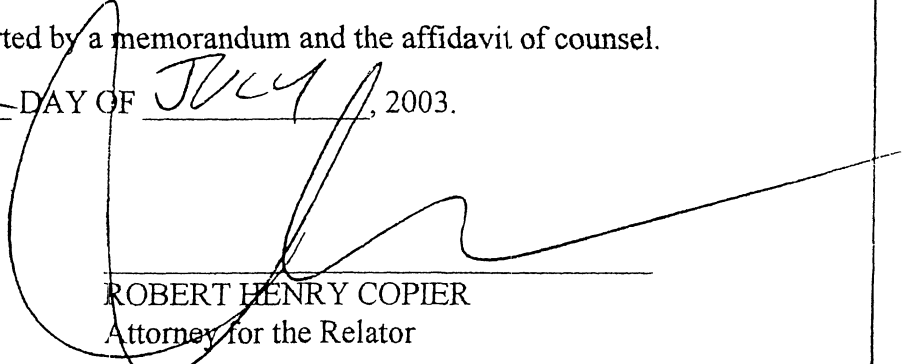
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The default certificate and default judgment were correctly entered, there is a sound legal basis for the default judgment, the judgment is not "improper or illegal, and voidable" under *P & B Land*, 751 P2d at 277, *Oseguera v. Farmers Insurance Exchange*, 2003 UT App 46 [February 21, 2003], is not applicable, and this court lacked any authority to set aside the judgment under URCP 60(b)(6).

This court also lacks authority to set aside the judgment under URCP 60(a), since no "clerical" error was made by the court or its clerk. It was fully defendant's fault that her default was entered because she did not timely "plead or otherwise defend" on or before November 8, 2002 and she delayed doing so until several days after the plaintiff sought the default. Defendant's predicament would have been remediable under URCP 60(b)(1), but she cannot now bring a URCP 60(b)(6) motion she could have filed within three months under URCP 60(b)(1).

This motion is supported by a memorandum and the affidavit of counsel.

DATED THIS 2 DAY OF July, 2003.


ROBERT HENRY COPIER
Attorney for the Relator

MAILING CERTIFICATE

A true copy hereof 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 2 DAY OF July, 2003.


4054

ROBERT HENRY COPIER, 727
Attorney for the Relator
243 East University Boulevard - 200
Salt Lake City, Utah 84111-2803
Telephone 531-0099

03 JUL -2 AM 11:26

CLERK
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,

**AFFIDAVIT OF
ROBERT HENRY COPIER**

Plaintiff,

vs.

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

Civil No. 020908627
Judge Robert Hilder

Defendant.

STATE OF UTAH)
) ss.
County of Salt Lake)

ROBERT HENRY COPIER, being first duly sworn, deposes and says:

- I am the attorney for the relator and have personal knowledge of the facts stated in this affidavit, which relate to the procedural history of this case.
- KaLynn Ninow was required to plead or otherwise defend by November 8, 2002. I waited a reasonable amount of time after November 8, 2002, to make sure that the court file was up-to-date. I then ascertained that KaLynn Ninow had not filed anything. I then sought entry of defendant's default and a default judgment by submitting a proposed default certificate and default judgment.

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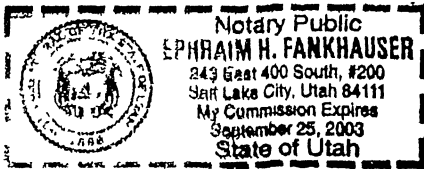
- The proposed default certificate and default judgment were submitted by me to the downstairs civil clerks at the Scott M. Matheson courthouse several days before the clerk entered the default certificate on November 25, 2002.

DATED THIS 20TH DAY OF JUNE, 2003.



ROBERT HENRY COPIER

SUBSCRIBED AND SWORN TO before me, a Notary Public of the State of Utah, on this, the 20th day of June, 2003





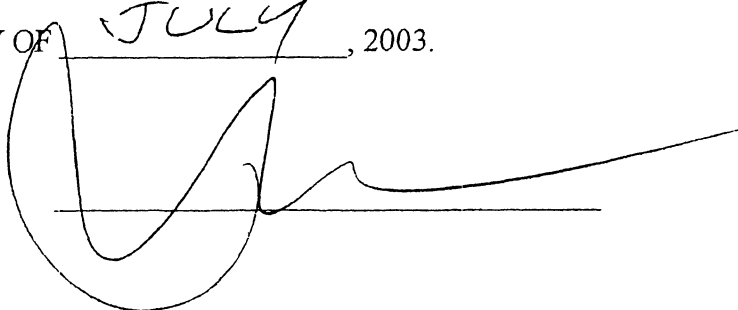
NOTARY PUBLIC

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 2 DAY OF JULY, 2003.



4040

ROBERT HENRY COPIER, 727
Attorney for the Relator
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Salt Lake City, Utah 84111-2803
Telephone 531-0099

COPIED - 2 PM 11:25
BY 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,

Plaintiff,

vs.

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

Defendant.

**MEMORANDUM IN SUPPORT
OF PLAINTIFF'S MOTION
TO VACATE THE ORDER
SETTING ASIDE THE
DEFAULT JUDGMENT**

Civil No. 020908627
Judge Robert Hilder

Pursuant to CJA 4-501, plaintiff has moved the court to VACATE its order of June 12, 2003, setting aside the default judgment under URCP 60(b)(6).

The premise that the court itself identified as "the critical point" is clearly erroneous. This apparently occurred because the court raised the point for the first time *sua sponte* in its June 12, 2003, order, causing the court to make this erroneous "critical point" without benefit of any briefing thereof by the parties.

This motion to vacate is made on the ground that the June 12, 2003, order contains the erroneous *sua sponte* "critical point" that "defendant had not 'failed to plead or otherwise defend' (Rule 55(a), URCP) at the time the default was sought." [June 12, 2003, Order, P. 2, emphasis added]. The default was, in fact, sought several days before the defendant responded to the summons on November 25, 2002. At the time the default was sought (several days prior to November 25,

4061

2002), the defendant had indeed " 'failed to plead or otherwise defend' . . . (Rule 55(a), URCP)." Due to this, the clerk was empowered to enter the default and it was not an error for him to do so, there is a legal basis for the default judgment, the judgment is not "improper or illegal, and voidable" under *P & B Land*, 751 P2d at 277, there is clearly no basis for setting aside the default judgment under *Oseguera v. Farmers Insurance Exchange*, 2003 UT App 46 [February 21, 2003], and this court lacked the authority needed to set aside the judgment under URCP 60(b)(6). This court also lacks authority to set aside the judgment under URCP 60(a) because there was no "clerical" error made by the court or its clerk and it was defendant's fault that her default was entered because she did not timely "plead or otherwise defend" on or before November 8, 2002 and she delayed doing so until several days after the plaintiff had already sought the default.

While defendant's predicament would have been readily remediable under URCP 60(b)(1), she compounded her failure to timely respond to the summons with her failure to move under URCP 60(b)(1) within three months and she cannot bring a URCP 60(b)(6) motion she could have brought under URCP 60(b)(1). The delay of several days between the time the default was sought and the time defendant responded makes the court's "critical point" in its order erroneous. The clerk was fully empowered to enter the default and actually had a nondiscetionary affirmative and mandatory ministerial duty to enter the default when it was sought by plaintiff several days prior to November 25, 2002, since defendant had not timely pled or otherwise defended by November 8, 2002:

"Rule 55(a) . . . requires the clerk to 'enter' the default when the fact of default is made known. If an answer or other responsive pleading or motion were due to be filed within a given number of days, the 'fact' of the 'default' would 'appear' to the clerk at the close of the last day for filing." *Moore's Federal Practice 3rd*, Sec. 55 11[3][a].

4062

This is not a case where it has been shown that a response to a summons was filed prior to the time the clerk entered the default. This is a case where a response was due on November 8, 2002, but was filed late on November 25, 2002. By filing late, defendant bore all the risk that her response was not in the court file when the clerk duly entered defendant's default on November 25, 2002.

Since plaintiff had properly sought defendant's default several days before November 25, 2002, when nothing had been filed by defendant, and since the defendant's response was not in the court file when the clerk entered the default, it is of no consequence that a response was filed on November 25, 2002. It does not matter whether or not the response was in the building when default was entered, since the clerk was empowered to enter the default and properly did his duty.

However, even though the timing of the default on November 25, 2002, vis-à-vis the filing of defendant's response on November 25, 2002, is not of any consequence, the court, in its June 12, 2003, order, states defendant's response "had been filed" when the default was entered. This is pure speculation by the court that is highly unfair to the plaintiff. There is no basis for the court's statement in anything that has been served upon the relator or its counsel.¹

Nothing in the record establishes that defendant's response was filed before the clerk entered the default on November 25, 2002, or excludes the possibility that it was filed on November 25, 2002, after default was entered, and the court's speculation in this regard is highly unfair to the plaintiff and improper.

¹ It is undisputed in the record that defendant has engaged in *ex parte* practice in this case, so relator and its counsel may not have received all of the information defendant has presented to the court. However, since the June 12, 2003, order makes no reference to a basis for the statement that defendant's response was in the court building when default was entered on November 25, 2002, the statement is pure impermissible speculation by the court that is highly unfair to the plaintiff and is directly contrary to the presumption that the clerk's actions are valid.

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The court's improper speculation in this regard puts the June 12, 2003, order at odds with the fundamental principle of civil procedure taught to first-year law students that there is a refutable presumption that the clerk performed his duty and a motion to challenge the clerk's actions must be brought within three months under URCP 60(b)(1) [or comparable shorter or longer deadlines in other states], since the action by the clerk is, at most, merely voidable, and is not void.

Since the record reveals that both the entry of default and the response by the defendant occurred on November 25, 2002, but does not give a time during that day when either occurred, the presumption applies here. This refutable presumption places the entry of default at some point in the day earlier than the filing of defendant's response. Defendant has made no contrary showing that her filing was attempted prior to the entry of the default, and, importantly, she had to do so within the three-month deadline Utah has selected under URCP 60(b)(1).

A typical case in a typical first-year law school casebook sets this out:

"It is well settled that in the absence of a showing to the contrary a public officer, such as the clerk of the court in this case, is presumed to have performed the duty imposed upon him by law. * * * Since the judgment of the lower court is merely voidable, at most, Rule 60(c) of the Arizona Rules of Civil Procedure prevents the defendant from attacking the judgment more than six months after it was entered." Udall, C.J., *Coulas v. Smith*, 395 P.2d 527 (Ariz. 1964), from Cound, Friedenthal, Miller, and Sexton, *Civil Procedure, Cases and Materials*, Fourth Edition, p. 792.

Since the case at bar involves divesting and vesting of title to property, it is not outside of the realm of possibility that the June 12, 2003, order's failure to apply the three-month deadline would attract *amicus* attention during appeal from lenders and title insurers who see the June 12, 2003, order as a Utah aberration making it hard to quiet a Utah title in reliance on the URCP 60(b)(1) deadline.²

² Correcting the erroneous June 12, 2003, order by vacating it would solve this.

Plaintiff's position in this case regarding this court's lack of authority to set aside the default judgment under URCP 60(a) because there was no "clerical" mistake reachable under URCP 60(a) and this court's lack authority to set aside the default judgment under URCP 60(b) because defendant cannot bring a URCP 60(b)(6) motion which she could have brought under URCP 60(b)(1) but failed to timely do so, is a position of simplicity, integrity, clarity, and strength which has never been squarely met by defendant, who has not even given a good excuse for failing to timely respond to the summons or timely move under URCP 60(b)(1).

Instead, defendant has responded with bitter censures and uncharitable imputations regarding relator and its counsel. This has apparently been done in order to tempt the court to torture the record and rape the law in pursuit of some abstract notion of fairness, equity, and justice for one Ryan Pahl which rests on nothing but the flimsy, frail, and feeble framework of classical human intuition.

The court should not yield to this temptation, because even if it were to do so, the record and the law are surely sturdy enough to withstand such an assault.

The court earlier in this case properly granted a motion to strike the prolix and voluminous filings in this case by which defendant sought to divert the court's attention away from the record and the law in search of a result-oriented order.

As a personal representative, KaLynn Ninow is duty-bound to honor the business structure left in place by Gary Pahl. Instead, she falsely claims that her son Ryan Pahl is a "devisee" even though there was no will and she also fails to recognize that Ryan Pahl is a pretermitted heir without recourse to the extent that Gary Pahl, while alive, divested himself of property in a corporate structure.³

³ Indeed, it is the rejection of the kind of ancient entitlement-by-blood claims made for Ryan Pahl that has allowed modern corporation law to create so much prosperity by placing authority in boards of directors, not in the courts or in heirs.

4045

KaLynn Ninow, as the mother of Gary Pahl's primogenitus Ryan Pahl, has aggressively pursued litigation on her son's behalf. Certainly, this must give her attorneys some pause, since vacating the June 12, 2003, order will effectively remit KaLynn Ninow to her claims for relief against her attorneys for negligence.

No one takes any delight in seeing fellow members of the bar have their clients turn on them and sue them for professional negligence. And missing a jurisdictional deadline like KaLynn Ninow's attorneys did in this case usually creates a slam dunk on the issue of liability for professional negligence. While liability for negligence appears clear-cut in this case, the issue of damages is a completely different matter. As to damages, there are none, because KaLynn Ninow would not be able to prove her "case within a case". The motions she has filed to date in this case lack merit and she has no meritorious defenses that she could raise to the claims that have now been reduced to a judgment herein.

Thus, even though her attorneys' negligence appears clear-cut, she has suffered no damages, because she would not have prevailed on the merits even if her attorneys had timely answered or timely filed under URCP 60(b)(1). This is argued here, because, even though the order of June 12, 2003, does not expressly state that it is entered in an attempt to spare defendant's attorneys from liability for their professional negligence, it would be understandable if that is somewhat of a rationale that subtly influenced the court to enter the June 12, 2003, order.

KaLynn Ninow's claim of entitlement to vote more than half of the shares of Pahl's Salt Palace Loan Office, Inc., was duly rejected by the corporation and no court of competent jurisdiction has overruled the corporation in this regard.⁴

No extraordinary measures are needed to protect her attorneys.

⁴ There is no basis for overruling the corporation under corporation records that KaLynn Ninow controls and refuses to produce for the court or counsel, using every legal tactic available to her to delay the production of all of these records.

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KaLynn Ninow, as an unjust plaintiff in any such case against her own attorneys [and an unjust petitioner in the original probate proceeding in which she never joined Pahl's Salt Palace Loan Office, Inc., as a party], has invoked the law in her attempt to circumvent both the corporation's records and the institutional memory of its directors, and she should, thus, be dealt with according to the law.

"With what measure ye mete, it shall be measured to you again."

KaLynn Ninow could not prevail in any action against her own attorneys because, in the probate proceeding, KaLynn Ninow attempted to circumvent the corporation's records and the institutional memory of its directors with primarily three affidavits (1) her own affidavit; (2) the affidavit of Frank Pahl; and (3) the affidavit of Robert Mortensen. In her own affidavit, she claimed to divulge the contents of records over which she has obtained exclusive control, but she never produced the records, contrary to the Utah Rules of Evidence. In the affidavit of Frank Pahl, KaLynn Ninow purports to prove what happened to 3000 shares of Pahl's Salt Palace Loan Office, Inc., stock after Frank Pahl transferred them to William Lowe. However, in a subsequent affidavit, Frank Pahl concedes that he has no personal knowledge of this [and is, thus, not a competent witness on this point]. In the affidavit of Robert Mortensen [who was not a director *before* Gary Pahl's death], KaLynn Ninow purports to prove that the 1500 shares sold by Robert Mortensen to Grand Staircase Land Company had been held in trust by Mortensen for Ryan Pahl. However, when Mortensen later provided the attached response to a document request [something KaLynn Ninow has fought tooth-and-nail to delay in doing], Mortensen admitted there were no documents creating any such trust.⁵

⁵ Such a trust would not have vitiated the sale to Grand Staircase Land Company, but would have exposed Mortensen to liability. KaLynn Ninow has no defenses that can work in this case and has suffered no damages from her lawyers' errors.

The wisdom and the insight underlying the Utah Rules of Evidence is very apparent when one considers the completely outrageous manner in which KaLynn Ninow has falsely represented the contents of documents while at the same time refusing to turn over the documents for review by her adversaries and the courts.

A similar phenomenon in this case has arisen in connection with the prolix and voluminous documents from other cases that she has dumped into the court file (which were properly stricken by the court) in her efforts to demonstrate that something took place in another case that, in fact, did not occur or, if it occurred, was not binding upon the persons or interests in property that she asserts it was.

Counsel for relator has used care in identifying entities and individuals he represents and entities and individuals he does not represent in any given matter.⁶

As an example, KaLynn Ninow adamantly insists that Pahl's Salt Palace Loan Office, Inc., and Diamond Fork Land Company were parties to the probate proceeding before Judge Medley. This is simply not the case. A copy of Judge Medley's Minute Entry Order of May 1, 2003, is annexed hereto. It clearly sets forth the identity of the petitioner, respondents, and third-party respondents. It is clear that neither Pahl's Salt Palace Loan Office, Inc., nor Diamond Fork Land Company, were parties to that action. It is particularly significant that Pahl's Salt Palace Loan Office, Inc., was not a party, because it means that the corporation's rejection of KaLynn Ninow's attempt to elect new directors because there was no quorum present stands and no court of competent jurisdiction has ever changed it.

And that any finding, conclusion, or order that she owns more than half of the shares is simply not binding on the corporation or on the actual share owners.

KaLynn Ninow has suffered no damages from her attorneys' neglect

⁶ For example, see annexed letter dated June 30, 2003.

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In short, the default judgment does not expose KaLynn Ninow's lawyers to real liability to their client for damages for their neglect. To the extent that this concern influenced the court's action in erroneously setting aside the judgment, it should no longer be of concern to the court for all of the foregoing reasons. The *Oseguera v. Farmers Insurance Exchange* case provides no precedent applicable to this case, because there was no mistake made by the court or clerk in entering the default and the only mistake that has been made by the court in this case is erroneously concluding that defendant had already responded when the default was sought when, in fact, default was sought several days prior to that response.

Oseguera v. Farmers Insurance Exchange is a unique case limited to its own unique factual situation. The majority opinion in that case was obviously influenced by the Court of Appeals' concern that the trial judge had given an erroneous version of the record and that they could not affirm her version. That case did not involve quieting of title like this case. The URCP 60(b)(1) deadline of three months is very important in being able to quiet a title. The vacating of the default judgment was erroneous and sets a bad precedent that may draw the legitimate concern of financial institutions and the title insurance community. [Of course, the practical effect in this case is not as Draconian as it would be if this case involved real estate. After the November 26, 2002, judgment divested title to personal property located within Utah and vested it in others pursuant to URCP 70, the property was moved out-of-state. Thus, setting aside the judgment does not reach those shares or their owners, since URCP 70 applied only to the original action of the court on November 26, 2002, an action which has not been reversed by setting aside the judgment because the property is now out-of-state. And in the period between the entry of judgment on November 26, 2002, and the entry of the *ex parte* stay of the judgment earlier this year, William Lowe and Augusta Rose, as corporate officers and directors, did all the relevant corporate housekeeping.]

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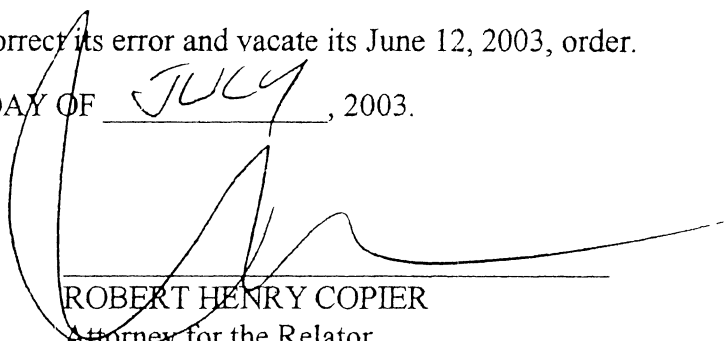
CONCLUSION

Oseguera v. Farmers Insurance Exchange does not help the defendant in this case because there was no error made by the court or the clerk in entering the default, since the defendant had not pled or otherwise defended when default was sought, contrary to the clearly erroneous "critical point" made in the court's order.

Instead, *Oseguera v. Farmers Insurance Exchange* actually helps the plaintiff herein in its sound doctrine that this court should correct its own errors when they are called to this court's attention, as has now been done here.

Since this court had no authority to set aside the default judgment under URCP 60(b)(6), and has no authority to set aside the default judgment under URCP 60(a), the court should correct its error and vacate its June 12, 2003, order.

DATED THIS 2 DAY OF JULY, 2003.



ROBERT HENRY COPIER
Attorney for the Relator

MAILING CERTIFICATE

A true copy hereof 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 2 DAY OF JULY, 2003



4070

James W. McConkie, III (8614)
PRINCE, YEATES & GELDZAHLER
175 East 400 South, Suite 900
Salt Lake City, Utah 84111
Telephone: (801) 524-1000

Attorneys for Robert K. Mortensen

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

IN THE MATTER OF
THE ESTATE OF

GARY G. PAHL,

Deceased.

ROBERT K. MORTENSEN'S
RESPONSES TO FIRST
REQUEST FOR DOCUMENT
PRODUCTION

Case No. 003901101
Judge: Tyrone E. Medley

Robert K. Mortensen hereby responds to Respondents Grand Staircase Land
Company, William Lowe and Augusta Rose's First Request for Document Production as
follows:

REQUEST FOR PRODUCTION OF DOCUMENTS

1. All documents creating, pertaining to, memorializing, or in any way
connected with the alleged trust, and the shares that you claim you held in trust, as referred
to in paragraph number 8 of your affidavit dated June 25, 2002, a copy of which is annexed
hereto and by this reference is made a part hereof.

ANSWER: None.

2. All correspondence between you and/or your attorney(s) and Ryan Pahl, KaLynn Ninow, and/or any attorneys who represent(ed) them, including, but not limited to David C. Condie, Van Woerkem and Condie, or associated attorneys, that was sent or received between May 1, 2002 and the date of production.

ANSWER: Those documents presently in my possession which are responsive to request no. 2 are attached hereto. I further reserve the right to supplement this response should I identify addition responsive documents in the future.

3. All other documents pertaining to the shares of stock referred to in paragraph number 8 of your affidavit dated June 25, 2002, in your possession or in the possession of any attorney(s) who represent you or have represented you.

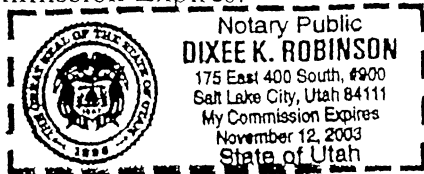
ANSWER: None. However, I reserve the right to supplement this response should I identify responsive documents in the future.

DATED this 14th day of August, 2002.

Robert K. Mortensen
Robert K. Mortensen

SUBSCRIBED AND SWORN to before me on this 14 day of August, 2002.

My Commission Expires:



Dixee K. Robinson
Notary Public
Residing in Salt Lake County, State of Utah

LAW OFFICES

ROBERT HENRY COPIER

ATTORNEY & CERTIFIED PUBLIC ACCOUNTANT

SALT LAKE CITY OFFICE

243 EAST UNIVERSITY BOULEVARD - 200

SALT LAKE CITY, UTAH 84111-2803

TELEPHONE (801) 531-7923

24-HOUR VOICE MAIL (801) 272-2222

FAX (801) 531-7928

June 30, 2003

Daniel F. Van Woerkom and Sandra K. Weeks
VAN WOERKOM REID & WEEKS, L.C.
2975 West Executive Parkway, Suite 128
Lehi UT 84043

David C. Condie
VAN WOERKOM & CONDIE
32 Exchange Place, Suite 101
Salt Lake City UT 84111

Re: *Pahl's Salt Palace Loan Office, Inc.*

Dear Messrs. Van Woerkom and Condie and Ms. Weeks:

As you know, I have served as an attorney for William Lowe since August, 2000, and have served as an attorney for Augusta Rose since June, 2002, in connection with their positions as both officers and directors of Pahl's Salt Palace Loan Office, Inc., a Utah corporation. Today is the last day of the second quarter of 2003 and I am involved in quarter-end housekeeping for a number of corporations and/or corporation officers and directors that I serve as a legal advisor. In that regard, I note that you have still not yet provided some information that has previously been requested from you. Kindly provide me with copies of the front and back of stock certificates evidencing KaLynn Ninow's ownership of shares of the said corporation. Kindly provide me with the date on which KaLynn Ninow conveyed the beneficial ownership of those shares to her son, Ryan Pahl.

Respectfully,

ROBERT HENRY COPIER
Attorney for William Lowe and Augusta Rose

4073

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

In the Matter of the Estate of	:	MINUTE ENTRY
GARY G. PAHL,	:	CASE NO. 003901101
Deceased.	:	
<hr/>		
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.	:	

The personal representative's Proposed Findings of Fact, Conclusions of Law and Order Granting Summary Judgment, and respondent's Objections thereto are submitted to the Court for decision pursuant to Rule 4-501. Having reviewed all relevant documents, including respondent's Objections and the Reply thereto, the Court rules as follows.


1. Respondent's Objections are hereby denied as without merit and unsupported by any cited authority.

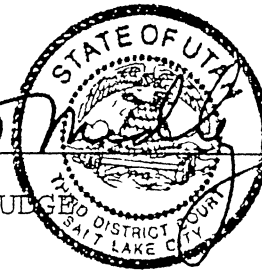
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2. The Proposed Findings of Fact, Conclusions of Law and Order Granting Summary Judgment are hereby signed and entered without modification.

3. This signed Minute Entry shall constitute the Order of the Court resolving the matter referenced herein, no further Order is required.

Dated this 1 day of May, 2003.


TYRONE E. MEDLEY
DISTRICT COURT JUDGE



4075

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Minute Entry, to the following, this 1 day of May, 2003:

Robert H. Copier
Attorney for Respondents
243 East 400 South, Suite 200
Salt Lake City, Utah 84111

Daniel F. Van Woerkom
David Condie
Attorneys for KaLynn Ninow
32 Exchange Place, Suite 101
Salt Lake City, Utah 84111

J Ashley

4076

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

IN THE MATTER OF THE ESTATE : MINUTES
: PROBATE MINUTES
OF GARY G. PAHL :
:
: Case No: 003901101 EF
:
: Judge: LESLIE A. LEWIS
: Date: April 6, 2005

Clerk: chells

PRESENT

Petitioner's Attorney: HALA L AFU JR
RAY G MARTINEAU

Other Parties: SANDRA K WEEKS
ROBERT HENRY COPIER

Video

Tape Number: 2:07 pm

Counsel stipulate that the summary judgment is withdrawn. Counsel argues the order to show cause. The Court takes the order to show cause issue under advisement and will render a written ruling. Mr Copier argues the issue of the undertaking. Ms Weeks gives opposing arguments. The Court orders the motion for the undertaking is denied. Mr Copier makes a motion in regards to rule 11. A rule 11 motion has not been filed, and therefore denied. Mr Copier makes a motion in regards to the ruling on 6/12/03 be vacated. The Court orders the motion to vacate is denied. Ms Weeks makes a motion to stay any remaining pending motions until a ruling on the order to show cause. Mr Copier stipulates to the motion.

2555

APR 28 2005

SALT LAKE COUNTY

By

Deputy Clerk

ROBERT HENRY COPIER, 727
Attorney for Respondent William Lowe
17 East 400 South
Salt Lake City UT 84111
Telephone (801) 272-2222

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

RULING AND ORDER

GARY G. PAHL,

Probate No. 003901101

Deceased.

Judge Leslie A. Lewis

KALYNN NINOW, personal representative
of the Estate of Gary Gunther Pahl and guardian
and conservator of the Estate of Ryan B. Pahl,

Petitioner,

vs.

WILLIAM LOWE, AUGUSTA ROSE,
and ROBERT H. COPIER,

Respondents.

Having taken certain matters under advisement at a hearing on April 6, 2005, the court now rules thereon and enters this order. As all other matters that have been brought by any party under this probate number have now been ruled upon or withdrawn, this shall constitute the final order as to all claims and all parties to any and all probate proceedings pending under this probate number.

The court has now read the written response to the order to show cause that was filed by William Lowe prior to the April 6, 2005, hearing that the court had not yet seen at the time of the hearing. The court has also read Lowe's answer and jury

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demand dated April 19, 2005, and Lowe's motion and memorandum dated April 19, 2005, seeking an evidentiary trial separate from the other named respondents.

The court has also read the decision of the Utah Court of Appeals in Ninow v. Lowe, 2004 UT App 291, wherein the Utah Court of Appeals stated "we reverse the trial court's determination that Lowe was in contempt of court for violating the TRO." [See Ninow v. Lowe, 2004 UT App 291; Page 3 of 6; Paragraph 1.]

The court is persuaded that Lowe would be entitled to an evidentiary trial before another such determination that Lowe is contempt of court could be entered against him. The court is further persuaded that even if everything that KaLynn Ninow, the petitioner, has presented to the court, or could present to the court, and all reasonable inferences to be drawn therefrom, are viewed in the light that is most favorable to Ninow, this court is unable to conclude that Lowe has disobeyed any "judgment, order or process of the court" [UCA Sec. 78-32-1(5)] or that Lowe engaged in any of the other acts or omissions constituting contempt enumerated in Section 1 of Chapter 32 of Title 78 of the Utah Code [2005]. Therefore, the court is persuaded that it is proper to dismiss this proceeding as to Lowe without the need to conduct an evidentiary trial. Petitioner has also named Augusta Rose as one of the respondents in this proceeding. While she has not yet been served with an order to show cause and is not yet before the court, the court concludes that her involvement in any alleged contempt, if any, did not include some of the acts that were alleged against William Lowe, and that this proceeding should be dismissed as to Rose for the same reason that it is being dismissed as to Lowe. Petitioner has also named Robert Henry Copier, counsel for Lowe in this proceeding and counsel for Lowe and Rose in other matters, as a respondent. Copier has not been served with an order to show cause and is not yet before the court as a party. Having now concluded that this proceeding should be dismissed as to Lowe and Rose, the court is persuaded that this proceeding should be dismissed as to Copier as well. It is

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further noted by the court that Copier represented other clients in proceedings under this probate and in other civil cases who were not parties to any preliminary injunction, that Copier was not a party to any preliminary injunction, and that there has been no showing that Lowe and Rose had the right to exercise control over Copier's other clients or to direct Copier in his representation of those clients. It is also noted that Copier's activities as an attorney of record in litigation are subject to privileges and immunities for activities undertaken in the course of litigation. For all of these reasons, it is hereby ORDERED that the above-entitled proceeding styled as *KaLynn Ninow vs. William Lowe, Augusta Rose, and Robert H. Copier*, is hereby DISMISSED. It appears that all other proceedings that were previously pending under this probate number have also been concluded, and that Lowe and Rose withdrew all other matters in which they sought affirmative relief, giving as their reason the following three factors: [1] the court, as of April 6, 2005, has now ruled upon Respondents' Motion to Vacate Order Setting Aside Default Judgment; [2] Ryan Pahl has reached the age of majority and has had a reasonable amount of time to dismiss Ninow as his guardian and take control of his property; and [3] the Utah corporation Pahl's Salt Palace Loan Office, Inc., has now ceased business operations and the land and buildings under its control have been sold, stripping the corporation of any value. It is noted that Ninow is still the guardian of Ryan Pahl even though Ryan Pahl has reached the age of majority and that William Lowe and Augusta Rose have claimed herein that they had hoped to prevent Ninow from closing down the business operations and selling the land and buildings until Ryan Pahl reached the age of majority and had had a reasonable amount of time to dismiss Ninow as his guardian and take control of his property. It is noted that Ninow has been engaged in litigation over property with extended Pahl family members other than Lowe and Rose and that said protracted litigation was only recently resolved without any adjudication on the merits from any trial court. Any

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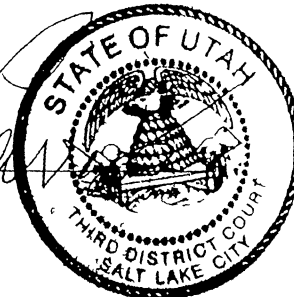
delay experienced by Ninow in selling the land and buildings was not solely a result of litigation in which only Lowe, Rose, and/or Copier were involved with her as parties or counsel. She has been able to close down the business operations of Pahl's Salt Palace Loan Office, Inc., and sell the land and buildings in which those business operations were conducted without any court order on the merits in any of the litigation in which she was involved with Lowe, Rose, and their counsel Copier, and litigation with Pahl family members independent of Lowe, Rose, and Copier.

Accordingly, this final order dismissing the proceeding styled as *KaLynn Ninow vs. William Lowe, Augusta Rose, and Robert H. Copier* concludes all litigation now pending or that had been pending under Probate No. 003901101.

DATED THIS 26 DAY OF APRIL, 2005.

BY THE COURT:


JUDGE LESLIE A LEWIS

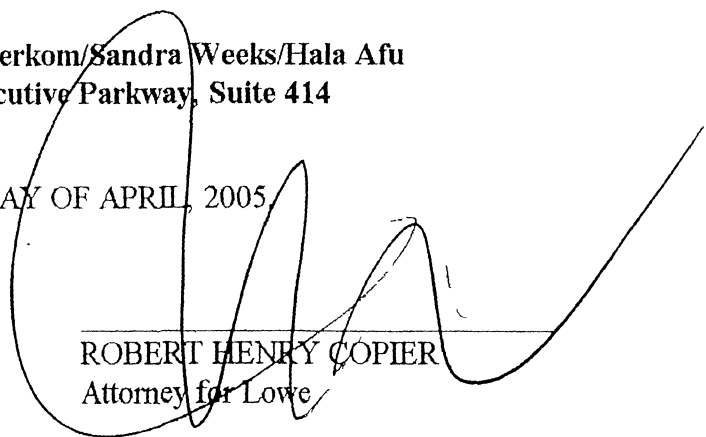


CERTIFICATE OF SERVICE

A copy of the foregoing [proposed] ruling and order was this-day mailed to:

Daniel Van Woerkom/Sandra Weeks/Hala Afu
2975 West Executive Parkway, Suite 414
Lehi UT 84043

DATED THIS 21ST DAY OF APRIL, 2005.


ROBERT HENRY COPIER
Attorney for Lowe

JUL 14 2005

SALT LAKE COUNTY

By GJ
Deputy Clerk

Daniel F. Van Woerkom (USB #8500)
Sandra K. Weeks (USB #8491)
Hala L. Afu (USB #8967)
VAN WOERKOM & WEEKS, LC
2975 West Executive Parkway, Suite 414
Lehi, Utah 84043
Telephone: (801) 407-8330
Facsimile: (801) 407-8331

Attorneys for KaLynn Ninow, as Personal Representative of the Estate of Gary Gunther Pahl and as Guardian and Conservator of the Estate of Ryan B. Pahl

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

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

Deceased.

**KALYNN NINOW, as Personal
Representative of the Estate of Gary
Gunther Pahl and as Guardian and
Conservator of the Estate of Ryan B. Pahl,**

Petitioner,

v.

**WILLIAM LOWE, AUGUSTA ROSE,
ROBERT H. COPIER,**

Respondents,

**MEMORANDUM IN OPPOSITION
TO MOTION FOR A STAY**

Probate No. 003901101

Judge Lewis

Kalynn Ninow, by and through her above named counsel, hereby responds to the Respondents' motion (dated June 24, 2005) for a stay of contempt proceedings as follows.

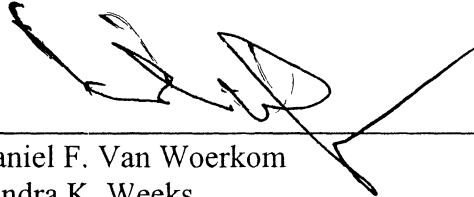
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1. The Motion to Stay should be denied as the contempt proceeding is the only remaining matter in which Respondents' have an interest in this case. Once the issue of contempt is decided, this probate case will be able to move speedily toward conclusion.
2. The Motion to Stay should be denied as Respondents have already requested and were granted one continuance of the contempt hearing from June 29, 2005, to July 21, 2005. The July 21, 2005 date was selected by Respondents' counsel. Any further delays will substantially prejudice Petitioner in her efforts to conclude this matter.
3. There is no need to have the preliminary injunction lifted as the record in this case clearly shows that Respondents have been removed as officers and directors of the Loan Office and that they have no authority to act on behalf of the Loan Office.
4. The preliminary injunction entered in this case should be converted to a permanent injunction as prayed in the contempt pleadings filed and on record in this matter. Any stay of the contempt proceedings will prejudice Petitioner in her attempts to protect the estate from Respondents' repeated and continual attempts to improperly exercise control over the assets of the estate.

Wherefore, Petitioner respectfully requests that Respondents' motion for a stay be denied in full and that the contempt proceeding on July 21, 2005 be heard as scheduled.

DATED this SM 17 day of July, 2005.

VAN WOERKOM & WEEKS, LC

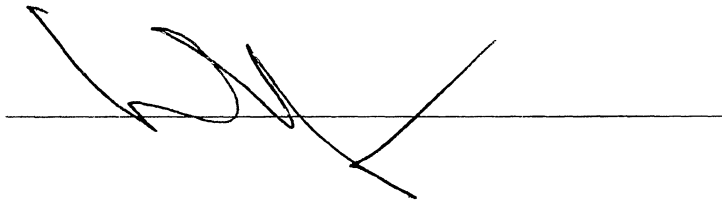


Daniel F. Van Woerkom
Sandra K. Weeks
Hala L. Afu
Attorneys for KaLynn Ninow

CERTIFICATE OF SERVICE

I hereby certify that on the SM 17 day of July, 2005, I placed in the mail, postage prepaid, a true and correct copy of the foregoing addressed as follows:

Robert Copier
17 East 400 South
Salt Lake City, UT 84111



FILED DISTRICT COURT
Third Judicial District

JUL 18 2005

SALT LAKE COUNTY

By CA Deputy Clerk

ROBERT HENRY COPIER, 727
Attorney for Respondents
William Lowe and Augusta Rose
17 East 400 South
Salt Lake City UT 84111
Telephone (801) 272-2222

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

GARY G. PAHL,

Deceased.

**REPLY MEMORANDUM OF
AUGUSTA ROSE IN SUPPORT
OF HER MOTION FOR A STAY**

Probate No. 003901101
Judge Leslie A. Lewis

In the matter of the Estate of Gary G. Pahl, deceased
[Ninow v. Lowe II (Estate of Pahl)]

KaLynn Ninow
Petitioner
vs.

William Lowe, Augusta Rose, Robert H. Copier,
and Diamond Fork Land Company, Inc.
Respondents

Augusta Rose
Counter-petitioner, Cross-petitioner, and Third-party Petitioner
vs.

KaLynn Ninow, DDTS Properties LLC, Cathy Jean Libin, Cherri Lynn Butters,
Joan Christensen Bastermeyer, Susan Lily Pahl Viklund, Lois Frank Pahl Koford,
Gloria Pamela Pahl Ewell, Ryan Pahl, and John/Jane Does 7-10,
individually and as personal representatives and guardians of the estates
and/or persons of Ryan Pahl, Gary G. Pahl, and/or A. Gunther Pahl

Third-party Respondents

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Augusta Rose replies in support of her motion to stay by quoting from KaLynn Ninow's memorandum and then giving her specific reply to each sentence.

"1. The Motion to Stay should be denied as the contempt proceeding is the only remaining matter in which Respondents have an interest in this case."

REPLY BY AUGUSTA ROSE: Based on this new admission by KaLynn Ninow, KaLynn Ninow should immediately release Augusta Rose as a party to KaLynn Ninow's May 29, 2002, petition [Ninow v. Lowe I (Estate of Pahl)], leaving only Augusta Rose's counterclaims/third-party claims for defamation in that proceeding. Ms. Ninow previously made this same admission in correspondence between counsel, but then retracted it. Now that she has made it in a public court filing, it is operative and the estoppel that was created by the preliminary injunction will be eliminated by lifting the injunction. Until this admission was formally made on July 8, 2005, KaLynn Ninow was estopped from asserting that William Lowe and Augusta Rose had been removed as officers and directors of Pahl's Salt Palace Loan Office, Inc., because (1) she was still keeping them under the preliminary injunction; (2) she claimed that she was doing so to pursue litigation as to which the preliminary injunction should stay in place; (3) if William Lowe and Augusta Rose had been removed as officers in May of 2002, there would be no need for such litigation as to respondents after August of 2002 and no need for the preliminary injunction. Now that KaLynn Ninow admits that William Lowe and Augusta Rose have no interest in the May 29, 2002, petition, there is no longer a basis for keeping the preliminary injunction in place, since nothing further will be litigated on the merits as to William Lowe and Augusta Rose and their removal as officers is operative as of July 8, 2005. Had KaLynn Ninow made this important admission earlier, lifted the preliminary injunction, and withdrawn her assertion that the trial court's grant of summary judgment in August of 2002 was only a partial one as to William Lowe and Augusta Rose after the Utah Court of Appeals affirmed the May

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1, 2003, order in which they were interested, the estoppel would have ended much sooner and the entire matter would have been ended no later than April 6, 2005.¹

"1 (continued). Once the issue of contempt is decided, this probate case will be able to move speedily toward a conclusion."

REPLY BY AUGUSTA ROSE: The outcome of the contempt proceeding is irrelevant to other matters in this probate and the ruling on contempt, whether favorable or unfavorable to Ms. Ninow, has no bearing on her ability to move this probate case to a conclusion, speedily or not. After securing a ruling from this court that the May 1, 2003, order on her May 29, 2002, petition was a "partial" summary judgment on her May 29, 2002, petition, Ms. Ninow has now admitted, effective July 8, 2005, that William Lowe and Augusta Rose have no interest in her May 29, 2002, petition. This exposes that her use of that petition as a pretext for keeping Augusta Rose under an injunction was a sham and a fraud on the court and confirms Augusta Rose's contention that Ms. Ninow would never actually pursue her May 29, 2002, petition against Augusta Rose beyond the May 1, 2003, order.

"2. The Motion to Stay should be denied as Respondents have already requested and were granted one continuance of the contempt hearing from June 29, 2005, to July 21, 2005."

REPLY BY AUGUSTA ROSE: The prior continuance was appreciated by counsel for Augusta Rose. The prior continuance is irrelevant to the ground for the motion for a stay. That ground is that the evidentiary hearing on alleged contempt will be more efficient if all matters on the merits have first been concluded. There has already been great confusion in this case in failing to discern the distinctions

¹ KaLynn Ninow is attempting to have the court hold Augusta Rose in contempt for arguments made in litigation. It is necessary to remake those arguments to show that they were not made in "knowing" and "willful" disobedience of a duty imposed by a court order. The arguments are not being renewed for purposes of the merits.

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between arguments being made in opposition to contempt and arguments being made on the merits. By concluding everything going to the merits first, the court will be simplifying the contempt proceeding and will be limiting it to only contempt.

"2 (continued). Any further delays will substantially prejudice Petitioner in her efforts to conclude this matter."

REPLY BY AUGUSTA ROSE: KaLynn Ninow has identified no specific substantial prejudice that she will endure if the court requires her to first speedily conclude matters remaining under her May 29, 2002, petition before litigating the contempt hearing. Indeed, requiring this may help spur Ms. Ninow into action.

"3. There is no need to have the preliminary injunction lifted as the record in this case clearly shows that Respondents have been removed as officers and directors of the Loan Office and that they have no authority to act on behalf of the Loan Office."

REPLY BY AUGUSTA ROSE: Augusta Rose agrees that effective July 8, 2005, from and after April 6, 2005 [the date² of this court's denial of the motion to vacate the June 12, 2003, order], the record in this case shows that respondents have been removed as officers and directors of the Loan Office and that they have

² William Lowe and Augusta Rose asked the Utah Court of Appeals to exercise its discretion to review the June 12, 2003, order as part of the appeal, since the case in which that order had been entered was consolidated into Ninow v. Lowe I (Estate of Pahl) while that proceeding was on appeal. In its decision, the Utah Court of Appeals [1] scaled-back the TRO to its stated 11:00 a.m expiration time; [2] ruled that William Lowe was not in contempt of court; [3] reversed the award of attorney fees; [4] affirmed the May 1, 2003 summary judgment on alternative grounds (the probate court had based the May 1, 2003, summary judgment on its ruling that the "December agreement" was void *ab initio* while the Utah Court of Appeals deemed the "December agreement" to be fully "valid" and "binding" and also determinative of share ownership and that Gary Pahl owned all 6000 shares at death); and, [5] ruled William Lowe was not entitled to keep the \$7500 based on the Utah Court of Appeals' affirmance of the May 1, 2003, summary judgment on these alternative grounds. The Utah Court of Appeals then declined to address the June 12, 2003, order. For this reason, there was a delay until April 6, 2005, to get a final ruling.

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no authority to act on behalf of the Loan Office. Because removal of respondents as officers and directors constitutes an adequate remedy at law, there is no legal basis to keep them under preliminary injunction in the face of the said legal remedy.

"4. The preliminary injunction entered in this case should be converted to a permanent injunction as prayed for in the contempt pleadings filed and on record in this matter."

REPLY BY AUGUSTA ROSE: Augusta Rose agrees that the contempt pleadings filed by KaLynn Ninow pray for a permanent injunction. Because this is relief going to the merits rather than contempt-type relief, it was proper for Augusta Rose to plead under URCP 7(a) and 8 in response to KaLynn Ninow's contempt pleadings. But no permanent injunction can be granted as part of the upcoming evidentiary hearing on contempt because a permanent injunction is relief on the merits that does not turn on whether or not Augusta Rose is in contempt of court.

Regardless of whether or not Augusta Rose is in contempt of court, a permanent injunction should only be entered if the remedy at law is not adequate.

Because the removal of William Lowe and Augusta Rose as officers and directors [as has now been effectively accomplished from and after April 6, 2005, effective July 8, 2005] is an adequate remedy at law that fully protects KaLynn Ninow's rightful interests, there is no legal basis for issuing a permanent injunction.

"4 (continued). Any stay of the contempt proceeding will prejudice Petitioner in her attempts to protect the estate from Respondents' repeated and continual attempts to improperly exercise control over the assets of the estate."

REPLY BY AUGUSTA ROSE: Having been removed as an officer and director, Augusta Rose asserts no right to exercise control over the assets of the estate, she is not engaged in any attempt to exercise control over any such assets, and she will not do so absent further court order providing a basis for her to do so.

Her pending defamation and unjust enrichment claims seek no such order.

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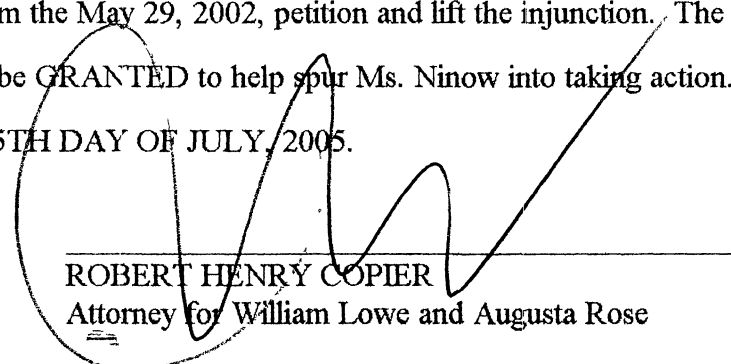
CONCLUSION

If anything, KaLynn Ninow's memorandum of July 8, 2005, shows how confusing it is for her to try to mix a contempt proceeding with the merits. Based on this, it will be helpful if the court stays the evidentiary hearing on contempt until KaLynn Ninow first wraps up everything on the merits and advises the court she has done so. At that point, a contempt hearing can be efficient, fair, and orderly.

The admission made in the first sentence is extremely helpful in bringing the proceedings under this probate number to a close. KaLynn Ninow's interests are fully protected by the removal of Mr. Lowe and Ms. Rose as officers and directors.

The admission confirms Augusta Rose has no interest in the May 29, 2002, petition. Based on her own admission, KaLynn Ninow should move to promptly release Augusta Rose from the May 29, 2002, petition and lift the injunction. The motion for a stay should be GRANTED to help spur Ms. Ninow into taking action.

DATED THIS 15TH DAY OF JULY, 2005.



ROBERT HENRY COPIER
Attorney for William Lowe and Augusta Rose

CERTIFICATE OF SERVICE

True copies of the foregoing were mailed on July 15, 2005, to

Daniel Van Woerkom, Sandra Weeks and Hala Afu
2975 West Executive Parkway, Suite 414
Lehi UT 84043

Attorneys for KaLynn Ninow

David Scofield and Ronald Price
111 East Broadway, Suite 340
SLC UT 84111
Attorneys for DDTS Properties, LLC

Ray Martineau
3098 Highland Drive, Suite 450
Salt Lake City UT 84106
*Attorney for Cathy Jean Libin
and Cherri Lynn Butters*


3096

LAW OFFICES

ROBERT HENRY COPIER

ATTORNEY AND CERTIFIED PUBLIC ACCOUNTANT

TAX COURT BAR NUMBER CR4093
COLORADO BAR NUMBER 35469
UTAH BAR NUMBER 727

MEMBER OF THE AMERICAN BAR ASSOCIATION

ADMITTED TO PRACTICE BEFORE THE TAX COURT OF THE UNITED STATES, BEFORE THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT IN DENVER, COLORADO, AND BEFORE ALL FEDERAL AND STATE TRIAL COURTS AND APPELLATE COURTS VENUED IN COLORADO AND UTAH

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

July 15, 2005

Augusta Rose
7179 South 350 East
Midvale UT 84047

William T. Lowe
3939 South Alberly Way
Salt Lake City UT 84124

Re: *Estate of Gary G. Pahl*

Dear Augusta and Bill:

KaLynn Ninow has now formally admitted that you have no interest in her May 29, 2002, petition. This vindicates our prediction that she would not pursue that petition against you beyond the May 1, 2003, summary judgment. In my opinion, this admission also means that your removal as officers and directors of Pahl's Salt Palace Loan Office, Inc., will be effective as to Ms. Ninow once Ms. Ninow has Judge Lewis lift the preliminary injunction.

I now advise you that, based on this July 8, 2005, admission by Ms. Ninow, once the preliminary injunction is lifted, you will have been effectively removed as officers and/or directors of Pahl's Salt Palace Loan Office, Inc., and will lack any authority to control it or to exercise the rights of seisin and possession over any assets controlled by the corporation.

On another subject, you know that I asked opposing counsel to stipulate to continuing the July 21, 2005, hearing before Judge Lewis in this probate and have asked my opponents in three other cases for the same courtesy as to matters set on July 21 and 22, 2005, so I can help a dear out-of-state friend with transportation and emotional support as she undergoes

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Augusta Rose
William T. Lowe
July 15, 2005
Page Two

surgery to remove a lymph node in order to study it for cancer. This arose as the result of a mammogram taken after the July 21, 2005 hearing had already been set. So far, all of the opposing attorneys in the other cases have graciously agreed to continuances. [One before Judge Lewis in which I represent a criminal defendant; one before Judge Himonas in which I represent a blind mother who I am defending against the petitioner's post-trial efforts to set aside the grant of joint legal and physical custody that I secured for her in a trial before Judge Noel; and one before U.S. District Judge Sam in which I represent one of the defendants in a corporate civil action set for hearing at 2:00 p.m. on July 21, 2005.]

I am unable to predict whether Ms. Ninow's counsel will extend similar courtesy, and, if not, whether Judge Lewis will grant my continuance request without such an agreement by opposing counsel. I will keep you posted on this and I will let you know as soon as I know.

Thank you for giving me the opportunity to serve as your attorney.

Sincerely,




ROBERT HENRY COPIER

30948

AUG 19 2005

ROBERT HENRY COPIER, 727
Attorney for Respondents
William Lowe and Augusta Rose
[As Attorney for Augusta Rose]
17 East 400 South
Salt Lake City UT 84111
Telephone (801) 272-2222

By  SALT LAKE COUNTY
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	FINAL ORDER ON THE
GARY G. PAHL,	MAY 29, 2002, PETITION
Deceased.	Probate No. 003901101
	Judge Leslie A. Lewis

In the matter of the Estate of Gary G. Pahl, deceased
[Ninow v. Lowe I (Estate of Pahl)]

KaLynn Ninow
Petitioner
vs.

William Lowe, Augusta Rose, Robert Mortensen,
and Grand Staircase Land Company, Inc.
Respondents

Augusta Rose
Third-party Petitioner
vs.

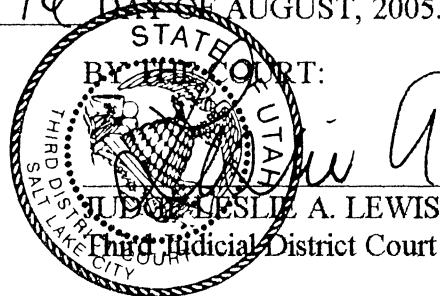
Ryan Pahl, KaLynn Ninow, Richard Ninow, and Does I-V
Third-party Respondents

Kalynn Ninow having admitted by written filing dated July 8, 2005, that she will not pursue the merits of her May 29, 2002, petition beyond the May 1, 2003, order granting summary judgment, the court, being sufficiently advised, ORDERS:

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1. All remaining claims under the May 29, 2002, petition are dismissed.
2. William Lowe and Augusta Rose are hereby ordered removed as officers and directors of Pahl's Salt Palace Loan Office, Inc., and, as they have no authority over Pahl's Salt Palace Loan Office, Inc., by virtue of this removal, the preliminary injunction that was entered in connection with the May 29, 2002, petition is lifted.
3. Augusta Rose's defamation claims against KaLynn Ninow and Ryan Pahl remain pending. The judgment and permanent injunction against Richard Ninow in favor of Augusta Rose entered by Judge Tyrone E. Medley remain in full effect.
4. All unadjudicated URCP 11 motions remains pending.

DATED THIS 16 DAY OF AUGUST, 2005.



CERTIFICATE OF SERVICE

A copy of this [proposed] order was mailed on August 12, 2005, to

Daniel Van Woerkom, Sandra Weeks and Hala Afu
2975 West Executive Parkway, Suite 414
Lehi UT 84043
Attorneys for KaLynn Ninow

ROBERT HENRY COPIER
Attorney for William Lowe and Augusta Rose
[As Attorney for Augusta Rose]

3701

ROBERT HENRY COPIER, 727
Attorney for Respondents
William Lowe and Augusta Rose
17 East 400 South
Salt Lake City UT 84111
Telephone (801) 272-2222

SEP 10 PM 3:34
DISTRICT
SALT LAKE COUNTY
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

GARY G. PAHL,

Deceased.

WITHDRAWAL OF MOTIONS
[AS HAVING BECOME MOOT]

Probate No. 003901101

Judge Leslie A. Lewis

In the matter of the Estate of Gary G. Pahl, deceased
[Ninow v. Lowe I (Estate of Pahl)]

KaLynn Ninow
Petitioner

vs.

William Lowe, Augusta Rose, Robert Mortensen,
and Grand Staircase Land Company, Inc.
Respondents

Augusta Rose
Third-party Petitioner

vs.

Ryan Pahl, KaLynn Ninow, Richard Ninow, and Does I-V
Third-party Respondents

The court entered her final order on the May 29, 2002, petition on August 19, 2005. The ten days for moving for a new trial or to amend under URCP 59(a) and (b) and/or (c) expired September 2, 2005. KaLynn Ninow did not file a timely

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URCP 59 motion on or before September 2, 2005, and, as of September 9, 2005, no such motion appears in the docket. The following motions are now withdrawn by the moving part[ies] as having been mooted by the August 19, 2005, final order:

- *Motion to Set Jury Trial filed on August 25, 2005.*
- *Lowe's URCP 41(b) Motion for Final Order Dismissing the May 29, 2002, Petition as to the Respondents Lowe and Rose filed on August 25, 2005.*
- *Motion to Reverse the April 6, 2005, Ruling Re: Oseguera Order filed on September 1, 2005.*

DATED THIS 10TH DAY OF SEPTEMBER, 2005.

ROBERT HENRY COPIER
Attorney for William Lowe and Augusta Rose

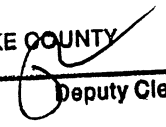
CERTIFICATE OF SERVICE

A copy of hereof was mailed on September 10, 2005, to

Daniel Van Woerkom, Sandra Weeks and Hala Afu
2975 West Executive Parkway, Suite 414
Lehi UT 84043
Attorneys for KaLynn Ninow

3287

ROBERT HENRY COPIER, 727
Attorney for Respondents/Appellants
William Lowe and Augusta Rose
17 East 400 South
Salt Lake City, Utah 84111
Telephone (801) 272-2222

SEP 15 2005
SALT LAKE COUNTY
By  Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY
STATE OF UTAH, PROBATE DEPARTMENT

In the matter of the estate of

NOTICE OF APPEAL

GARY G. PAHL,

Deceased.

Probate No. 003901101
Judge Leslie A. Lewis

Respondents William Lowe and Augusta Rose, through their attorney, Robert Henry Copier, appeal from the Third District Court to the Utah Supreme Court the Final Order on the May 29, 2002, Petition signed by the Honorable Leslie A. Lewis on August 16, 2005, and entered on August 19, 2005, together with all prior orders entered under or consolidated into this probate or any proceeding therein that have not previously been reviewed on the merits by an appellate court, including, but not limited to, the order by Judge Hilder setting aside the default judgment, the order by Judge Lewis denying the motion to vacate the order by Judge Hilder setting aside the default judgment, the order denying the motion to proceed against the surety who made the TRO undertaking, and all orders and rulings extending the preliminary injunction beyond the grant in 2002 of the summary judgment adjudicating the underlying merits of the May 29, 2002, probate petition.

3303

DATED THIS 15TH DAY OF SEPTEMBER, 2005.

ROBERT HENRY COPIER
Attorney for Lowe and Rose

CERTIFICATE OF MAILING

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

**DANIEL VAN WOERKOM
SANDRA WEEKS
HALA AFU
VAN WOERKOM & WEEKS, PC
2975 WEST EXECUTIVE PARKWAY - 414
LEHI, UT, 84043-0255**

DATED THIS 15TH DAY OF SEPTEMBER, 2005.

ROBERT HENRY COPIER
Attorney for Lowe and Rose

3304