

2005

# KaLynn Ninow v. Willaim Lowe, Augusta Rose, Robert Mortensen, and Grand Staircase Land Co., Inc. : Petition for Rehearing

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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

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**PETITION FOR REHEARING**

KaLynn Ninow,  
  
Petitioner and Appellee,  
v.

Case No. 20050867-CA

William Lowe; Augusta Rose;  
Robert Mortensen; and Grand  
Staircase Land Co., Inc.

Respondents and Appellants.

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Augusta Rose,  
  
Third-party Petitioner,  
v.

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

Third-party Respondents.

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Appeal from Final Order, Third District Court, Hon. Leslie A. Lewis

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Pursuant to URAP 35, William Lowe and Augusta Rose petition for rehearing. Their counsel, Robert Henry Copier, certifies that this petition is presented in good faith and not for delay. This petition seeks to have the award of attorney fees for failure to meet appellate briefing requirements removed from this court's Opinion of December 6, 2007, in that the court misapprehended the success of appellants in meeting all their objectives on appeal, misapprehended the briefing strategy successfully employed by appellants in successfully securing those objectives, misapprehended the briefing tactics employed by appellants in successfully pursuing that strategy, and granted attorney fees in error even though appellee's request for fees included neither applicable citations nor a properly developed argument.

**I. Implicit in the award of attorney fees is the assumption by this court that Mr. Lowe and Ms. Rose failed to meet their objectives on appeal. This is a misapprehension.** Mr. Lowe and Ms. Rose had two objectives. The first was to secure a holding from this appellate court that the April 26, 2005, trial court ruling and order that favorably disposed of the contempt claims against them was a final, appealable order that Ms. Ninow did not appeal within 30 days. By securing such a holding, Mr. Lowe and Ms. Rose assert that the *res judicata* thereby in place should put a stop to serial contempt motions Ms. Ninow has attempted to pursue against them.

The second objective was to secure a holding that their removal as officers and directors on August 16, 2005, was substantively identical to the finding of fact made in 2003 that they had been removed in 2002 and that the order made in August 16, 2005, was effective *nunc pro tunc* to the earlier date of removal. By securing that objective, they have solidified their status as both officers and a quorum of directors of Pahl's Salt Palace Loan Office, Inc., from the death of Gary Pahl in June of 2000 through mid-May of 2002.

It was proper to get such a holding, because in her initial TRO moving papers in May of 2002, Ms Ninow had claimed that Mr. Lowe and Ms. Rose had never been officers or directors. As this would have required a jury trial of facts as to which Mr. Lowe and Ms. Rose were the only living witnesses, Ms. Ninow backed off from this when moving for the summary judgment in 2002 and, instead, obtained a factual finding that they had been removed by unanimous shareholder action in mid-May of 2002. Mr. Lowe and Ms. Rose can live with that, since it means they were officers and directors until then.

The December 6, 2007, holding now solidifies that status even more.

**II. Implicit in the award of attorney fees is the assumption by this court that Mr. Lowe and Ms. Rose either had no appellate briefing strategy or that their strategy failed. This is a misapprehension.** The strategy employed by Mr. Lowe and Ms. Rose on appeal was to leave as little to chance as possible by coaxing their adversary, Ms. Ninow, to argue on appeal that the April 26, 2005, trial court ruling and order that favorably disposed of the contempt claims against them was a final, appealable order, and that their removal as officers and directors on August 16, 2005, was substantively identical to the finding of fact made in 2003 that they had been removed in 2002 and that the order made in August 16, 2005, was effective *nunc pro tunc* to the earlier date of removal. By getting their adversary to argue in favor of what they wanted [see Brief of Appellee, I.C at p. 21; II.B at p. 24], Mr. Lowe and Ms. Rose successfully pursued this briefing strategy.

**III. Implicit in the award of attorney fees is the assumption by this court that Mr. Lowe and Ms. Rose either utilized no appellate briefing tactics to support their strategy or that their tactics failed. This is a misapprehension.** Mr. Lowe and Ms. Rose utilized two tactics to pursue

their strategy of getting their adversary, Ms. Ninow, to argue in favor of that which Mr. Lowe and Ms. Rose desired to achieve on appeal. The first of these tactics was to raise issues that would make it prudent for Ms. Ninow to so argue, since all alternatives were more risky and burdensome. Ms. Ninow was faced with such a choice between arguing that the April 26, 2005, trial court ruling and order that favorably disposed of the contempt claims against Mr. Lowe and Ms. Rose was a final and appealable order, or the much more risky and burdensome alternative of arguing that the ruling and order should be disregarded, which would mean there was no final order until August 16, 2005, and that this court could reach and restore the November 26, 2002, default judgment. In facing that choice, Ms. Ninow declined to choose and argued both sides of the question. [See Brief of Appellee, II.A at p. 22; II.B at p. 24.] This court decided for her by stating in *dicta* that the order might have been inadvertently entered but holding that it was a final, appealable order that had to be appealed within 30 days.<sup>1</sup> Ms. Ninow was also faced with a choice between arguing that the August 16, 2005, order was effective *nunc pro tunc* to the earlier May 1, 2003, finding [which she attempted to do at Brief of Appellee I.C at p. 21] and thereby expose herself to risk that Mr. Lowe and Ms. Rose were wrongfully enjoined from May 26, 2005, until August 16, 2005, because they had already been removed as officers, or to continue to try to argue that they were not wrongfully enjoined by arguing

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<sup>1</sup> There is nothing in the trial court record by which the trial court indicated she had signed the April 26, 2005, order inadvertently. Speculation in that regard by Ms. Ninow in her brief and by this court in *dicta* is unfair to the trial court in that it calls into question her attentiveness and scholarship. It is more likely that she intentionally entered the April 26, 2005, order and then forgot about it later when Ms. Ninow kept on filing serial contempt motions.

no final order had yet entered. Since this would again have created a risk that this court would reach and reinstate the November 26, 2002, default judgment, it was very prudent for Ms. Ninow to argue that the removal had been concluded by final, appealable order in 2003. The second tactic used by Mr. Lowe and Ms. Rose to subtly channel Ms. Ninow into arguing in favor of what Mr. Lowe and Ms. Rose wanted involved appellate briefing work that is both proprietary and protected by the attorney work product privilege. It is sufficient to state for these purposes that it involves use by the undersigned attorney/CPA of probability analysis and the quantifying of prior behavior by opposing counsel to predict how an adversary will respond during the litigation process when confronted with specific types of briefing.

Those experiments were successful and the predictions were accurate

**IV. The court overlooked the fact that the appellee's request for fees included neither citations that were on-point nor a properly developed argument, and it was therefore error to grant an award of attorney fees.**

Ms. Ninow's argument for attorney fees under URAP 24(k) is only three paragraphs long. [See Brief of Appellee, VIII.D, pp. 46-47] She cites only one case, State v. Green, 2004 UT 76, Par. 11, 99 P.3<sup>rd</sup> 820. That case is inapplicable here because it is a case where the court disregarded portions of a brief, but did not award any fees. Appellate courts routinely decline to consider portions of briefs, most often when appellants attempt to challenge factual findings without meeting the marshaling requirement. As a case in which the court disregarded portions of a brief, but did not award fees, State v. Green, *Id.*, provides no precedent or guidance as to specific circumstances under which a court should hold that a brief is so extraordinarily deficient in terms of its briefing quality that an award of attorney fees under URAP 24(k)



should be made in lieu of or in addition to simply disregarding all or part of the brief. That case stands only for the proposition that a court may award fees under URAP 24(k), a settled legal principle apparent from the rule itself.

Ms. Ninow then failed to properly develop an argument. She failed to identify any specific pages or paragraphs in the Amended Opening Brief that should be disregarded or stricken, and as a result of that, this court's decision of December 6, 2007, neither strikes any portion of the brief nor identifies any brief sentence or paragraph that the court is disregarding for an alleged failure to meet appellate briefing requirements. Ms. Ninow argues at the beginning of the second paragraph of her three-paragraph argument that the Amended Opening Brief "failed to include a summary of arguments . . ." but she makes no citation to the Amended Opening Brief to try to demonstrate this assertion. The Amended Opening Brief, in fact, includes "a summary of arguments." A "Summary of Arguments" is on page 21 and the "Table of Contents" lists the said "Summary of Arguments" as appearing on page 21.

She then asserts, without references to the brief and without specific examples, that the entire opening brief is convoluted, verbose, rambling and an incredibly tedious read. Because Ms. Ninow did not favor the reader with any specific examples, appellants' counsel reread his brief and found it to be neither convoluted, verbose, rambling, nor tedious, and also concluded that even a single read-through by Ms. Ninow should have caused her to easily conclude that she should respond with a relatively short brief in which she argued that the court lacked jurisdiction because the April 26, 2005, order was a final, appealable order, that judicial removal of William Lowe and Augusta Rose and lifting of the preliminary injunction on August 16, 2005, was an unnecessary redundancy that related back *nunc pro tunc* to the final,

appealable order entered on May 1, 2003, and that therefore she did not need to argue anything further in response. She attempted to argue this, but then unnecessarily went on to attack the character of appellants' counsel at great length and to argue the matters as to which the court would likely hold that it lacked jurisdiction once Ms. Ninow conceded that the April 26, 2005, ruling and order was a final, appealable order that neither side had timely appealed.

Ms. Ninow further fails to properly develop an argument when she concedes that the "Oseguera issue" is addressed in appellants' opening brief with "traditional legal argument and analysis with support by citations to proper legal authority" [Brief of Appellee, p. 47, Par. 1] but then fails to show why there should be an award of attorney fees in light of this. As this court noted in its Opinion, most of the Amended Opening Brief is devoted to this "Oseguera issue" and Ms. Ninow concedes that issue was briefed with "traditional legal argument and analysis with support by citations to proper legal authority." Indeed, in briefing the "Oseguera issue," almost all of the brief is devoted to the third-prong of the analysis to be employed in deciding whether it was proper to set aside the November 26, 2002, default judgment on June 12, 2003, *i.e.*, whether Ms. Ninow had presented a defense of at least ostensible merit. [The first two prongs were also properly briefed, *i.e.*, whether the motion to set aside the default judgment needed to be filed by the 3 month 60(b) deadline and whether Ms. Ninow had provided plausible justification for her failure to timely respond to the initial summons within 20 days and her failure to timely move for relief from judgment within the 30 month 60(b) deadline.] In briefing that third prong, appellants went beyond simply showing that the sole defense that had been raised by Ms. Ninow had no ostensible merit under the law of the case [because, when

faced squarely with that issue, Judge Medley ruled against Ms. Ninow and dismissed the shareholder derivative actions without prejudice instead of with prejudice]. In going beyond simply showing that the sole defense that she had raised had no ostensible merit under the law of the case, appellants broadly surveyed the history of this case to demonstrate the absence of any other defenses of at least ostensible merit. Since the burden was on Ms. Ninow to show that she had a defense of at least ostensible merit [and not on appellants to show that she lacked one], this demonstration in the brief of the absence of any other defenses of at least ostensible merit was broad but not deep. Appellants were not required to serve aces. Instead, they were only required to lob the ball onto Ms. Ninow's side of the court and give her the choice of either trying to return it, or, as she did, declare the game over [by conceding that the April 26, 2005, ruling and order was final and appealable].

The Amended Opening Brief was written under the real possibility that this court would hold that neither the April 26, 2005, order nor the August 16, 2005, order were final orders, a question still open at the oral argument that was raised by the court at the oral argument. It was written to send a message to Ms. Ninow that if she did not concede that the April 26, 2005, order was a final, appealable order, that this court might dismiss this appeal as premature for absence of a final, appealable order. At that point, Mr. Lowe and Ms. Rose would likely have taken a URCP 54(b) run at getting the November 26, 2002, default judgment reinstated by Judge Kennedy, based on their "traditional legal argument and analysis with support by citations to proper legal authority" and the lack of any ostensible defense on the merits. In order to avoid that possibility, it was prudent for Ms. Ninow to take the position that the April 26, 2005, ruling and order was

final and appealable, which is what appellants wanted her to do in order to put an end to Ms. Ninow's pursuit of them, since, Ms. Ninow was still trying to keep the dispute going by trying to still keep appellants under injunction.

The basic point of disagreement between the parties in July of 2005 was Ms. Ninow's assertion that Mr. Lowe and Ms. Rose should be kept under injunction *because* they had been removed as officers and directors and the position taken by Ms. Rose that the said matter should be dismissed because their removal as officers and directors was an adequate remedy at law and that any injunction thereafter was wrongful. The court sided with Ms. Rose when she again dismissed on August 16, 2005. The Amended Opening Brief was written to give real incentive to KaLynn Ninow to keep things that way and to not try to keep this legal dispute going in perpetuity.

The brief thus achieved its purpose of getting Ms. Ninow to choose to end this dispute by conceding that the April 26, 2005, order was final and appealable so she could avoid risking a ruling that neither the April 26, 2005, order nor the August 16, 2005, were final and leaving appellants free to take a 54(b) shot at getting the November 26, 2002, judgment reinstated by Judge Kennedy. This purpose might not have been achieved if appellants had not broadly written about all of the case factors vitiating any defense of at least ostensible merits *vis-à-vis* the November 26, 2002, default judgment. Since appellants achieved all the goals they were pursuing in writing their brief the way they did, arguing that they did not meet appellate briefing requirements is akin to WWII-era French generals arguing that the Germans could never have breached the Maginot Line even though the Panzers were already in Paris, having done an end-run through the Low Countries. In like manner, the brief at issue was written for a specific purpose that was fully achieved.

Had the Amended Opening Brief not been written the way it was, Ms. Ninow would likely have perceived no downside in attempting to keep this dispute<sup>2</sup> going in the trial court by arguing that the April 26, 2005, order was an inadvertent order that should be treated as nullity and that the August 16, 2005, order was not a final, appealable order because it expressly reserved some claims as to some parties for future litigation. Because the brief as written demonstrated that trying to keep the dispute going could lead to having Judge Kennedy<sup>3</sup> take a look under URCP 54(b) at reinstating the

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<sup>2</sup> See, *inter alia*, the July, 2005, dispute over the injunction as framed in the papers appended to the Amended Opening Brief. At R.3081 Ms. Ninow argues on July 8, 2005, that only the contempt proceeding remains and that as part of that “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.” In reply, Augusta Rose argues on July 15, 2005, at R. 3094 that “the record in this case 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. Because removal of respondents as officers and directors constitutes an adequate remedy at law, there is no basis to keep them under preliminary injunction in the face of said legal remedy.” The trial court agreed with Ms. Rose, and dismissed on August 16, 2005, with express reference to Ms. Ninow’s July 8, 2005, filing.

<sup>3</sup>Judge Kennedy took over for Judge Lewis. Judge Lewis regularly had her openly disseminated judicial evaluation scores dragged down by low marks for her appearance of bias. The undersigned believes that for a number of years he basked in the warm glow of bias in his favor by Judge Lewis as he watched his perplexed and exasperated adversaries in her courtroom trying to make sense of why they were losing. When he perceived that the winds of bias had inexplicably shifted against him, the undersigned moved to have Judge Lewis removed from all of his cases including this probate, two white collar criminal defense cases, and another probate. She was removed from this probate and the two white collar criminal cases and was then defeated in a retention election before the motion in the other probate was ever acted on.

November 26, 2002, default judgment due to a lack of a defense of at least ostensible merit and the inapplicability of Oseguera to this case, she chose the most prudent path by conceding that the April 26, 2005, order was final.

Since Ms. Ninow concedes that the “Oseguera argument” was briefed with “traditional legal argument and analysis with support by citations to proper legal authority” and since almost the entire brief is devoted to the showing of an absence of lack of defense of at least ostensible merit under that analysis, it was error for the Court of Appeals to award attorney fees.

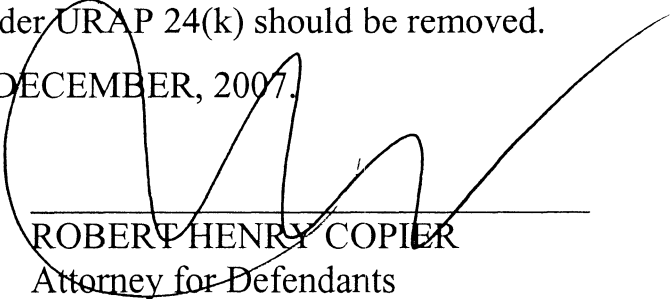
### **REQUEST FOR HEARING**

While URAP 24(k) provides no express right to hearing upon request comparable to the one provided for at in URAP 33(c)(3), this court should either remove the award of attorney fees from its Opinion or should grant a hearing to the appellants. Because Ms. Ninow did not properly develop her three paragraph argument for URAP 24(k) fees, and because appellants fully responded to and met the argument she did make, there should be no award of attorney fees under URAP 24(k) without a hearing providing due process.

### **CONCLUSION**

The award of attorney fees under URAP 24(k) should be removed.

DATED THIS 19<sup>th</sup> DAY OF DECEMBER, 2007.



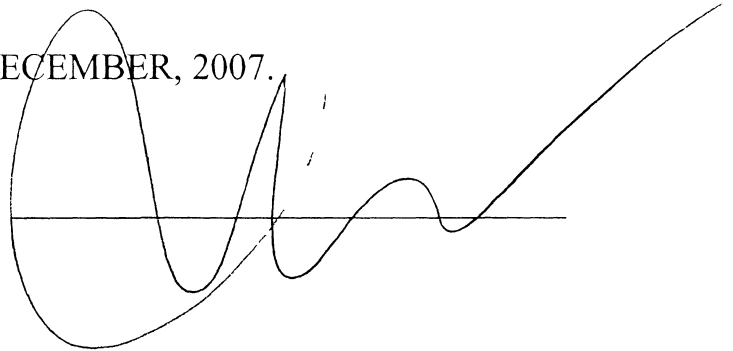
ROBERT HENRY COPIER  
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## MAILING CERTIFICATE

Copies hereof were this-day mailed to:

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SANDRA K. WEEKS  
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2975 WEST EXECUTIVE PARKWAY #414  
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DATED THIS 19<sup>th</sup> DAY OF DECEMBER, 2007.

A handwritten signature in black ink, consisting of a large loop followed by several smaller loops and a long horizontal stroke extending to the right.