

2008

# William Judson and Donna Judson v. Wheeler RV Las Vegas, LLC : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca3](https://digitalcommons.law.byu.edu/byu_ca3)



Part of the [Law Commons](#)

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

Gary G. Kuhlmann; Gary G. Kuhlmann & Associates, PC; Attorneys for Appellees.

Alexander Dushku; R. Shawn Gunnarson; Kirton & McConkie; Steven R. Bangerter; William E. Frazier; Daniel P. Wilde; Law Offices of Steven R. Bangerter; Attorneys for Appellant.

---

## Recommended Citation

Brief of Appellant, *William Judson and Donna Judson v. Wheeler RV Las Vegas, LLC*, No. 20080688 (Utah Court of Appeals, 2008).  
[https://digitalcommons.law.byu.edu/byu\\_ca3/1096](https://digitalcommons.law.byu.edu/byu_ca3/1096)

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

---

IN THE SUPREME COURT OF THE STATE OF UTAH

---

William Judson and Donna Judson,

*Plaintiffs and Appellees,*

v.

Wheeler RV Las Vegas, LLC dba  
Wheeler's Las Vegas RV,

*Defendant and Appellant.*

Supreme Court No. 20090938  
Court of Appeals No. 20080688-CA  
District Court No. 070501867

(ORAL ARGUMENT REQUESTED)

---

On a Writ of Certiorari to the Utah Court of Appeals

---

BRIEF OF APPELLANT

---

COUNSEL FOR  
PLAINTIFFS/APPELLEES:

Gary G. Kuhlmann  
**GARY G. KUHLMANN &  
ASSOCIATES, PC**  
107 South 1470 East, Suite 105  
P.O. Box 910387  
St. George, Utah 84790  
Telephone: (435) 656-6156  
Facsimile: (435) 634-1398  
*Attorneys for Plaintiffs/Appellees*

COUNSEL FOR  
DEFENDANT/APPELLANT:

Alexander Dushku (Bar No. 7712)  
R. Shawn Gunnarson (Bar No. 7060)  
**KIRTON & McCONKIE**  
60 E. South Temple, Suite 1800  
Salt Lake City, Utah 84111  
Telephone: (801) 328-3600  
Facsimile: (801) 321-4893

Steven R. Bangerter  
William E. Frazier  
Daniel P. Wilde  
**LAW OFFICES OF STEVEN R.  
BANGERTER**  
720 South River Rd., Suite A-200  
St. George, Utah 84790  
*Attorneys for Defendant/Appellant*

FILED  
UTAH APPELLATE COURTS

APR 20 2010

---

IN THE SUPREME COURT OF THE STATE OF UTAH

---

William Judson and Donna Judson,

*Plaintiffs and Appellees,*

v.

Wheeler RV Las Vegas, LLC dba  
Wheeler's Las Vegas RV,

*Defendant and Appellant.*

**Supreme Court No. 20090938  
Court of Appeals No. 20080688-CA  
District Court No. 070501867**

**(ORAL ARGUMENT REQUESTED)**

---

On a Writ of Certiorari to the Utah Court of Appeals

---

**BRIEF OF APPELLANT**

---

COUNSEL FOR  
PLAINTIFFS/APPELLEES:

Gary G. Kuhlmann  
**GARY G. KUHLMANN &  
ASSOCIATES, PC**  
107 South 1470 East, Suite 105  
P.O. Box 910387  
St. George, Utah 84790  
Telephone: (435) 656-6156  
Facsimile: (435) 634-1398  
*Attorneys for Plaintiffs/Appellees*

COUNSEL FOR  
DEFENDANT/APPELLANT:

Alexander Dushku (Bar No. 7712)  
R. Shawn Gunnarson (Bar No. 7060)  
**KIRTON & McCONKIE**  
60 E. South Temple, Suite 1800  
Salt Lake City, Utah 84111  
Telephone: (801) 328-3600  
Facsimile: (801) 321-4893

Steven R. Bangerter  
William E. Frazier  
Daniel P. Wilde  
**LAW OFFICES OF STEVEN R.  
BANGERTER**  
720 South River Rd., Suite A-200  
St. George, Utah 84790  
*Attorneys for Defendant/Appellant*

## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	iii
INTRODUCTION.....	1
STATEMENT OF JURISDICTION.....	2
ISSUES PRESENTED .....	2
KEY LEGAL PROVISION .....	4
STATEMENT OF THE CASE.....	4
I.    Nature of the Case.....	4
II.   Course of Proceedings .....	4
III.  Statement of Facts Alleged in the Complaint .....	7
IV.   The Opinion Below.....	7
SUMMARY OF ARGUMENT .....	9
ARGUMENT .....	11
I.    Wheeler’s Rule 60(b) Motion Meets the Standard for Setting Aside the Default Judgment for Lack of Personal Jurisdiction .....	12
II.   Wheeler’s Rule 60(b) Motion Meets the Meritorious Defense Standard ...	17
III.  The Court of Appeals’ Interpretation of Rule 60(b) Should Be Rejected to Avoid Grave Constitutional Problems. ....	20
CONCLUSION .....	23
REQUEST FOR ORAL ARGUMENT .....	23

## TABLE OF AUTHORITIES

### State Cases

<i>Chatterton v. Walker</i> , 938 P.2d 255 (Utah 1997) .....	15
<i>Erickson v. Schenkers International Forwarders</i> , 882 P.2d 1147 (Utah 1994) .....	2, 3, 10, 11, 12, 17, 18, 19, 22
<i>Franklin Covey Client Sales, Inc. v. Melvin</i> , 2000 UT App 110, 2 P.3d 451 .....	16
<i>Garcia v. Garcia</i> , 712 P.2d 288, (Utah 1986) .....	12, 15
<i>Judson v. Wheeler RV Las Vegas, LLC</i> , 2009 UT App 199 .....	<i>passim</i>
<i>Menzies v. Galetka</i> , 2006 UT 81, 150 P.3d 480 (Utah 2006) .....	12, 16
<i>Parry v. Ernst Home Ctr. Corp.</i> , 779 P.2d 659 (Utah 1989) .....	20
<i>Saysavanh v. Saysavanh</i> , 2006 UT App 385, 145 P.3d 1166 .....	16
<i>State Dep't of Soc. Servs. v. Musselman</i> , 667 P.2d 1053 (Utah 1983) .....	2, 10, 12, 19
<i>State Dep't of Soc. Servs. v. Vijil</i> , 784 P.2d 1130 (Utah 1989) .....	3, 13, 14
<i>State v. 736 North Colorado Street</i> , 2005 UT 90, 127 P.3d 693 (Utah 2005) .....	15
<i>West v. Thomson Newspapers</i> , 872 P.2d 999 (Utah 1994) .....	23
<i>Westinghouse Electric Supply Co. v. Paul W. Larsen Contractor, Inc.</i> , 544 P.2d 876 (Utah 1975) .....	11

## **Federal Cases**

<i>Bludworth Bond Shipyard, Inc. v. M/V Caribbean Wind</i> , 841 F.2d 646 (5 <sup>th</sup> Cir. 1988).....	21
<i>Burger King v. Rudzewicz</i> , 471 U.S. 462 (1985).....	6, 13
<i>Coe v. Armour Fertilizer Works</i> , 237 U.S. 413 (1915).....	21
<i>Davis v. Wechsler</i> , 263 U.S. 22 (1922).....	20
<i>Hanson v. Denckla</i> , 357 U.S. 235 (1958).....	6, 13
<i>International Shoe Co. v. Washington</i> , 326 U.S. 310 (1945) .....	6, 13
<i>Peralta v. Heights Medical Center</i> , 485 U.S. 80 (1988).....	21
<i>World-Wide Volkswagen Corp. v Woodson</i> 444 U.S. 286 (1980).....	6, 13

## **Statutes**

Utah Code Ann. §§ 78A-3-102(3)(a) and (5) .....	2
---	---

## **Rules**

Rule 60(b), Utah Rules of Civil Procedure .....	<i>passim</i>
---	---------------

## **Other Authorities**

Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure( 2d ed. 1987) ..	15
Moore’s Federal Practice 3d .....	21

## INTRODUCTION

This case concerns the standards for setting aside a \$151,931.64 default judgment against a nonresident defendant that filed a timely motion under Rule 60(b) asserting lack of personal jurisdiction and another meritorious defense.

Plaintiffs/Respondents William Judson and Donna Judson (“Judsons”), residents of Washington County, Utah, filed suit against Wheeler RV, Las Vegas, LLC (“Wheeler”), a Minnesota limited liability company doing business in Clark County, Nevada. (R. 1.) Wheeler maintains that it does no business in Utah. (R. 39.) Rather than answering the complaint, Wheeler’s counsel obtained an informal extension of time from the Judsons’ attorney to demonstrate that Wheeler was not the proper defendant. (R. 38.) Before that issue could be resolved, the Judsons unexpectedly filed a notice of default and an application for a default judgment. One day after issuing the default certificate and before Wheeler had even received service, the Fifth District Court granted the default judgment. (R. 19-29, 38.)

Wheeler filed a Rule 60(b) motion to set aside the default judgment for lack of personal jurisdiction and because Wheeler was not the real party in interest (*i.e.*, that they had sued the wrong party). (R. 29-32.) Despite this Court’s teaching that default judgments are highly disfavored, the district court denied the motion (R. 74) and the Court of Appeals affirmed.

The Court of Appeals’ decision was based on two errors that are the subject of this appeal. First, it held that Wheeler’s personal-jurisdiction challenge summarily failed because Wheeler did not cite subsection (4) of Rule 60(b)—even though it invoked Rule

60(b) itself and plainly asserted lack of personal jurisdiction. This holding contradicts this Court's jurisprudence and overlooks the fundamental nature of a personal jurisdiction challenge. If federal due process problems are to be avoided, a motion to set aside a default judgment for lack of personal jurisdiction cannot be defeated merely for not citing one of the numbered clauses of Rule 60(b).

The second error was the Court of Appeals' use of a discarded standard for determining whether Wheeler stated a meritorious defense justifying setting aside the default judgment. The court below held Wheeler to the defunct standard of *State Dep't of Soc. Servs. v. Musselman*, 667 P.2d 1053 (Utah 1983), even though this Court rejected that standard in *Erickson v. Schenkers Int'l Forwarders*, 882 P.2d 1147 (Utah 1994), and *Lund v. Brown*, 2000 UT 75, 11 P.3d 277 (Utah 2000). Because default judgments are so disfavored, stating a meritorious defense is now essentially a pleading requirement that requires no actual proof. Wheeler easily met the correct standard when it asserted defenses based on personal jurisdiction and failure to sue the proper party.

As explained more fully below, the Court of Appeals' decision should be reversed, the default judgment vacated, and this matter remanded to the trial court for further proceedings on the merits of the parties' claims and defenses.

### **STATEMENT OF JURISDICTION**

This Court has jurisdiction under Utah Code Ann. §§ 78A-3-102(3)(a) and (5).

### **ISSUES PRESENTED**

Certiorari was granted on the following issues, as stated in the Court's order dated January 28, 2010:



1. “Whether the court of appeals erred in its treatment of Petitioner’s contention that the district court erred in refusing to set aside the default judgment in this case pursuant to rule 60(b)(4) of the Rules of Civil Procedure.”

Standard of Review. The district court’s decision not to vacate a default judgment for lack of jurisdiction presents a question of law which this Court reviews for correctness. *See State Dep’t of Soc. Servs. v. Vijil*, 784 P.2d 1130, 1132 (Utah 1989) (distinguishing the standard of review for a motion to vacate a judgment based on lack of jurisdiction from the standard of review for other rule 60(b) motions).

Preservation. This issue is preserved at R. 30-32 (Motion to Set Aside Default Judgment and Request for Hearing arguing that the district court lacks personal jurisdiction); *see also* R. 72 (district court’s Findings, Conclusions and Order finding that Wheeler challenged the trial court’s exercise of personal jurisdiction).

2. “Whether the court of appeals erred in affirming the district court’s denial of Petitioner’s motion to set aside the default judgment based on the determination that Petitioner failed to present a meritorious defense.”

Standard of Review. Application of the meritorious defense standard under Rule 60(b) of the Utah Rules of Civil Procedure is a question of law that this Court reviews for correctness. *See Erickson v. Schenkers Int’l Forwarders*, 882 P.2d 1147, 1148 (Utah 1994).

Preservation. This issue is preserved at R. 72-74 (setting forth the meritorious defense standard in the District Court’s Findings, Conclusions, and Order and concluding that Wheeler failed to satisfy that standard).

### **KEY LEGAL PROVISION**

Rule 60(b) of the Utah Rules of Civil Procedure provides in relevant part:

(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; ... (4) the judgment is void ....

### **STATEMENT OF THE CASE**

#### **I. Nature of the Case**

This appeal from a decision of the Court of Appeals concerns the standards for setting aside a disputed default judgment against a nonresident defendant. The underlying case involves claims by the Judsons against Wheeler arising out of the sale of an RV. The Judsons prevailed in the trial court and Court of Appeals. This Court granted Wheeler's petition for a writ of certiorari on the questions set forth above.

#### **II. Course of Proceedings**

Because this case concerns a default judgment, the critical facts are procedural. On August 15, 2007, the Judsons filed suit in the Fifth District Court against Wheeler alleging a variety of claims related to the sale of a recreational vehicle ("RV"). (R. 3-7.) After being served, Wheeler's general counsel contacted the Judsons' counsel and obtained an agreement to extend the time in which to file an answer. (R. 38, 47.) Counsel for Wheeler explained that the complaint was directed to the wrong defendant because ownership of the RV dealership had changed since the Judsons' RV purchase. (R. 38.) Discussions reached an impasse when the Judsons refused Wheeler's request to

execute a nondisclosure agreement before it produced the financial documents underlying the sale of the dealership. (R. 38, 47.)

The Judsons sought and obtained a default judgment. Without telling Wheeler, the Judsons cut short the promised extension of time, filing an application for an entry of default on Tuesday, November 27, 2007. (R. 19-20.) Notice of the application was served by mail on Wednesday, November 28, 2007. (R. 20.) On Monday, December 3, 2007, the district court clerk issued a default certificate. (R. 23.) The following day the district court entered a default judgment for \$147,274.08 plus \$1,954.50 in costs and attorneys' fees. (R. 24-25.) Wheeler did not learn of the alleged default before the default judgment was entered. Wheeler's counsel received the application for entry of default by mail on Wednesday, December 5, 2007—the day after the default judgment had been entered. (R. 38.)

Wheeler filed a Motion to Set Aside Default Judgment and Request for Hearing ("Rule 60(b) Motion") on February 29, 2008. (R. 30.) The motion cited subsections (b), (b)(1), and (b)(6) of Rule 60 of the Utah Rules of Civil Procedure but not subsection (b)(4). However, the accompanying memorandum explained the nature of the relief sought, the court's authority to grant it, and Wheeler's reasons for seeking it. It relied on Rule 60(b) generally and argued (1) that the Judsons had mistakenly sued the wrong party; (2) that the default judgment had been the result of a surprise decision by the Judsons to seek a default judgment instead of informally resolving the proper defendant issue as agreed; and, most importantly, (3) that the district court lacked personal jurisdiction over Wheeler. Its jurisdictional objection stated:

Further, Plaintiffs have failed to demonstrate a proper basis for personal jurisdiction. Defendant will be able to demonstrate that it is not the proper party, and that any assertion of personal jurisdiction over Defendant is highly questionable under the seminal cases of *International Shoe Co. v. Washington* . (1945) 326 U.S. 310, 316, *World-Wide Volkswagen Corp. v. Woodson* (1980) 444 U.S. 286, 297, *Hanson v. Denckla* (1958) 357 U.S. 235, 253, and *Burger King v. Rudzewicz* (1985) 471 U.S. 462, 478-482 and their progeny. Each of the aforementioned cases support Defendant's position that personal jurisdiction is lacking in this matter due to the lack of purposeful availment and significant contacts with the forum state.

(R. 32.) This jurisdictional objection was supported by the affidavit of Wheeler's general counsel, Sharon Nelson. (See R. 30-31 (incorporating affidavit into memorandum by reference)). She stated that "there are significant personal jurisdictional issues," in that "Defendant operates its business in Nevada, while Plaintiffs reside in Utah" and that "Defendant does not purposely avail itself [of] the benefits and laws of the state of Utah." (R. 63).

Following oral argument, the district court denied Wheeler's Rule 60(b) Motion in an order dated June 24, 2008. (R. 68-74.) The court also awarded the Judsons \$2,703.06 in attorneys' fees for responding to the motion, bringing the total judgment to \$151,931.64. (R. 74, 83-84.)

Wheeler filed a timely appeal. (R. 80.) On July 23, 2009, a panel of the Court of Appeals affirmed. See *Judson v. Wheeler RV Las Vegas, LLC*, 2009 UT App 199, No. 20080688-CA, slip op. at 3 (July 23, 2009) (contained in Addendum-1 ("Add.-1") and referred to hereafter as "Op."). Wheeler's petition for rehearing was denied on September 14, 2009. This Court extended the time to file a petition for certiorari to November 13, 2009. On January 28, 2010, this Court granted certiorari with respect to the two questions set forth above.

### **III. Statement of Facts Alleged in the Complaint**

The allegations in the complaint are irrelevant to the issues presented, which center on procedural questions and not the substantive facts or claims. The Judsons allege that in 2002 they purchased a 2000 Journey RV from Wheeler RV of Las Vegas for \$124,527.50. (R. 1-2.) They allege that Wheeler failed to disclose at the time of sale that the RV was a manufacturer's buyback and to execute a limited warranty for repurchased vehicles. (R. 2.) The Judsons claim they later sold the RV but were ultimately forced to buy it back when it was discovered that the vehicle was an undisclosed manufacturer's buyback. (R. 3.) Based on these allegations, the Judsons brought claims for breach of contract, misrepresentation, and statutory violations. (R. 3-8.) Their complaint sought compensatory damages of \$147,274.08, plus punitive damages, attorneys' fees, and costs. (R. 8.)

### **IV. The Opinion Below**

A panel of the Court of Appeals (Judge Thorne writing, with Judge Bench concurring and Judge Davis concurring in the result) affirmed the district court's denial of Wheeler's Rule 60(b) motion. Op. at 1 (*see* Add.-1). As a result, Wheeler remains bound by the default judgment, including attorneys' fees, of \$151,931.64.

The court first addressed Wheeler's argument that the district court had erred by refusing to set aside the default judgment as void for lack of personal jurisdiction. *Id.* at 2. The standard of review on this issue is for correctness: "When a party asserts lack of personal jurisdiction as a ground for attacking a default judgment, the district court is

granted no discretion, and we review its personal jurisdiction determination as a matter of law.” *Id.* (citation omitted).

The court below overlooked Wheeler’s challenge to the trial court’s personal jurisdiction. In spite of the clarity with which Wheeler asserted the absence of personal jurisdiction in its Rule 60(b) motion—*e.g.*, “personal jurisdiction is lacking” (R. 32)—the court below held that Wheeler’s jurisdictional defense to the default judgment was waived because “[Wheeler] did not request relief from the district court under rule 60(b)(4).” Op. at 2.

Nevertheless, the court below addressed the adequacy of Wheeler’s personal jurisdiction defense for the purpose of determining whether it was meritorious under Rule 60(b)(1).<sup>1</sup> To state a “meritorious defense,” the court explained, “‘a party must ‘present[ ] a clear and specific proffer of a defense that, if proven, would preclude total or partial recovery by the claimant.’” (quoting *inter alia Lund*, 2000 UT 75, ¶ 28).

Analyzing Wheeler’s jurisdictional defense together with its defenses of “mistake, inadvertence, surprise, or excusable neglect” (*see* Utah R. Civ. P. 60(b)(1)), the court below held that “Wheeler did not make a clear and specific proffer of a meritorious defense.” Op. at 2. It acknowledged that Wheeler’s Rule 60(b) Motion asserted lack of personal jurisdiction by stating “that [Wheeler] ‘will be able to demonstrate that . . . any

---

<sup>1</sup> On this point the decision below is unclear. It concludes that Wheeler “did not request relief from the district court under rule 60(b)(4)” with respect to Wheeler’s jurisdictional argument but then addresses that same argument under the rubric of Rule 60(b)(1), even though subsection (1) does not address the lack of personal jurisdiction as a ground for vacating a default judgment. Op. at 2-3. For purposes of this brief, we have taken the decision below as we find it when addressing its errors.

assertion of personal jurisdiction over [it] is highly questionable.” Op. at 3. It also acknowledged that Wheeler’s motion contained an additional argument that “[the Judsons] have sued the wrong party’ because [Wheeler] ‘did not own the subject dealership when [the Judsons] purchased the recreational vehicle.” *Id.* at 2. But the court rejected both defenses out of hand for lack of particularity. The court reasoned that Wheeler “failed to identify any particular problem with personal jurisdiction” and that it “failed to assert that Wheeler did not assume the liabilities of its predecessor in interest when it purchased the dealership . . . .” *Id.* at 3 (emphasis added). On those grounds, the court below ruled that Wheeler’s “summary assertions of potential defenses, even when supp[lemented] by the attached affidavits, did not constitute ‘a clear and specific proffer of a defense’ under the circumstances.” *Id.*<sup>2</sup>

Noting “the district court’s factual findings and Wheeler’s pleading failures,” the court concluded that “the district court did not exceed the boundaries of its discretion or otherwise err when it denied [Wheeler’s] rule 60(b) motion, even if the default judgment itself may have been improvidently granted under the totality of the circumstances now alleged by [Wheeler].” *Id.*

### **SUMMARY OF ARGUMENT**

Default judgments must be vacated and the case reopened when a defendant like Wheeler plainly and reasonably asserts the absence of personal jurisdiction. The decision below erred by deeming Wheeler’s jurisdictional argument waived merely because its

---

<sup>2</sup> The court also rejected Wheeler’s argument that denying its Rule 60(b) Motion was an abuse of discretion because of the “strong policy in favor of allowing parties to resolve their disputes on the merits.” *Id.* (citations omitted).

Rule 60(b) Motion omitted an exact citation to subsection (4). That motion was indisputably brought under Rule 60(b) and contained Wheeler's unambiguous argument that the trial court lacked personal jurisdiction. Wheeler needed to do no more. The validity of a personal jurisdiction challenge to a default judgment does not and should not turn on whether an out-of-state defendant cites subsection (4) of Rule 60(b). If indeed the trial court lacked personal jurisdiction, it lacked power to act regardless of the niceties of pleading. That the decision below deemed Wheeler's jurisdictional argument waived was error and should be reversed.

Likewise, the Court of Appeals' rejection of Wheeler's defenses under the meritorious defense standard was error. That standard looks to the face of a pleading or motion, not to the quantum of proof. By demanding greater factual detail from Wheeler's Rule 60(b) Motion, the court below effectively resurrected the discarded test in *State Dep't of Soc. Servs. v. Musselman*, 667 P.2d 1053 (Utah 1983), for determining when a defense is meritorious. Unless reversed, the decision below will undermine this Court's decisions in *Erickson v. Schenkers Int'l Forwarders*, 882 P.2d 1147 (Utah 1994), and *Lund v. Brown*, 2000 UT 75, 11 P.3d 277 (Utah 2000), which expressly rejected *Musselman*, and saddle defendants with liability for default judgments based on an unfairly demanding legal standard.

This Court should reject the analysis of the court below to avoid serious due process problems under the federal Constitution. Where personal jurisdiction has been directly and clearly challenged, as here, refusing to set aside a default judgment based on inflexible interpretations of state procedural rules would violate due process rights under



the Fourteenth Amendment. Wheeler specifically raised personal jurisdiction as a ground for vacating the default judgment—an argument that claims the judgment was void as unconstitutional. A challenge so fundamental to the district court’s power to act cannot be ignored merely because subsection (4) of Rule 60(b) was not cited or because the precise flaws in the trial court’s exercise of personal jurisdiction were not laid out in greater detail. To avoid serious due process concerns, this Court should reiterate its settled understanding that Rule 60(b) affords relief for defendants like Wheeler that plainly and reasonably assert jurisdictional and other defenses under Rule 60(b).

### **ARGUMENT**

The decision below is fundamentally inconsistent with this Court’s longstanding Rule 60(b) jurisprudence. Default judgments are plainly disfavored. Although values like judicial efficiency are important, this Court has taught that resolving cases on the merits is more so:

It is indeed commendable to handle cases with dispatch and to move calendars with expedition in order to keep them up to date. But it is even more important to keep in mind that the very reason for the existence of courts is to afford disputants an opportunity to be heard and to do justice between them. In conformity with that principle the courts generally tend to favor granting relief from default judgments where there is any reasonable excuse, unless it will result in substantial prejudice or injustice to the adverse party.

*Westinghouse Electric Supply Co. v. Paul W. Larsen Contractor, Inc.*, 544 P.2d 876, 879 (Utah 1975). This Court’s decisions hold that “[g]enerally, courts should be liberal in granting relief against default judgments so that cases may be tried on the merits.” *Erickson*, 882 P.2d at 1149 (Utah 1994).

This Court has explained that “[i]n general, a movant is entitled to have a default judgment set aside under 60(b) if (1) the motion is timely; (2) there is a basis for granting relief under one of the subsections of 60(b); and (3) the movant has alleged a meritorious defense.” *Menzies v. Galetka*, 2006 UT 81, ¶ 64, 150 P.3d 480 (Utah 2006) (citing *Erickson*, 882 P.2d at 1149; *Musselman*, 667 P.2d 1053 (plurality opinion)). It is undisputed that Wheeler’s Rule 60(b) Motion was timely.<sup>3</sup> Review was granted to decide, in effect, whether that Motion contained “a basis for granting relief” under Rule 60(b)(4) and whether Wheeler “alleged a meritorious defense.” *Id.* As to each issue, the Court of Appeals erred as a matter of law.

**I. Wheeler’s Rule 60(b) Motion Meets the Standard for Setting Aside the Default Judgment for Lack of Personal Jurisdiction.**

The first issue is “[w]hether the court of appeals erred in its treatment of Petitioner’s contention that the district court erred in refusing to set aside the default judgment in this case pursuant to rule 60(b)(4) of the Rules of Civil Procedure.” The short answer is that it did.

Rule 60(b) provides that “[o]n 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 [when] ... (4) the judgment is void.” Utah R. Civ. P. 60(b)(4). A judgment is void when the court lacks personal jurisdiction. *See Garcia v. Garcia*, 712 P.2d 288, 291 n.5 (Utah 1986) (“A judgment is void only if the court that

---

<sup>3</sup> In any event, timeliness is immaterial to Wheeler’s jurisdictional challenge, because “there is no time limit on an attack on a judgment as void.” *Garcia v. Garcia*, 712 P.2d 288, 291 (Utah 1986) (per curiam) (addressing the timeliness of a motion to set aside a judgment for lack of personal jurisdiction).

rendered it lacked jurisdiction of the subject matter, or the parties, or if it acted in a manner inconsistent with due process of law.”). Such a judgment must be set aside because “[a] lack of [personal jurisdiction] is fatal to a court’s authority to decide a case with respect to a particular litigant.” *Vijil*, 784 P.2d at 1132 (citations omitted). This Court has emphasized that “if jurisdiction is lacking, the judgment cannot stand without denying due process to the one against whom it runs.” *Id.* (citations omitted). Indeed, the question of jurisdiction is weighty enough that on appeal this Court “do[es] not defer to the district court” in deciding whether to set aside a judgment for lack of personal jurisdiction. *Id.*

Wheeler’s Rule 60(b) motion and accompanying memorandum left no doubt that it was seeking relief from the default judgment, in part, for lack of personal jurisdiction:

Further, Plaintiffs have failed to demonstrate a proper basis for personal jurisdiction. Defendant will be able to demonstrate that it is not the proper party, and that any assertion of personal jurisdiction over Defendant is highly questionable under the seminal cases of *International Shoe Co. v. Washington* . (1945) 326 U.S. 310, 316, *World-Wide Volkswagen Corp. v. Woodson* (1980) 444 U.S. 286, 297, *Hanson v. Denckla* (1958) 357 U.S. 235, 253, and *Burger King v. Rudzewicz* (1985) 471 U.S. 462, 478-482 and their progeny. Each of the aforementioned cases support Defendant’s position that personal jurisdiction is lacking in this matter due to the lack of purposeful availment and significant contacts with the forum state.

(R. 32 (emphasis added); accord R. 39 (Affidavit of Wheeler’s General Counsel (“Defendant does not purposely avail itself [of] the benefits and laws of the state of Utah.”).) Wheeler added in its conclusion that it “has legitimate and valid legal defenses, including misjoinder and lack of personal jurisdiction.” (R. 32 (emphasis added).) Wheeler’s request to set aside the default judgment under Rule 60(b) for lack of personal jurisdiction was expressed plainly.

The Court of Appeals expressly acknowledged that the motion asserted lack of personal jurisdiction. Op. at 2-3 (noting that the motion stated that “Wheeler ‘will be able to demonstrate that . . . any assertion of personal jurisdiction over [Wheeler] is highly questionable.’”). The district court likewise found that Wheeler had asserted lack of personal jurisdiction in its Rule 60(b) Motion. (*See* R. 72.)

Yet, the court below refused even to consider Wheeler’s personal jurisdiction argument—a fundamental due process issue that goes to the core of the trial court’s authority to enter a binding judgment—merely because Wheeler did not specifically “request relief from the district court under rule 60(b)(4).” Op. at 2 & n.2. To be sure, Wheeler’s motion specifically referred to subsections (1) and (6) but not subsection (4) and formally requested that the default judgment “be set aside, due to mistake, inadvertence, excusable neglect, and surprise.” (R. 29, 32.) But these minor drafting flaws cannot wipe out Wheeler’s unambiguous jurisdictional challenge to the default judgment.

A reading of Rule 60(b) that rigidly requires a jurisdictional challenge to specifically cite subsection (4) mistakes the special character of that challenge. A judgment rendered without personal jurisdiction must be vacated because that defect “is fatal to a court’s authority to decide a case with respect to a particular litigant” and therefore “cannot stand without denying due process to the one against whom it runs.” *Vijil*, 784 P.2d at 1132 (citations omitted) (emphasis added). A challenge to personal jurisdiction in an otherwise proper Rule 60(b) Motion does not evaporate merely because the drafter omits a precise reference to subsection (4). In concluding to the contrary, the

court below failed to fully appreciate that jurisdiction is a matter of the court's power, not the precision with which a party cites a rule. *See Garcia*, 712 P.2d at 291 (“‘Either a judgment is void or it is valid. Determining which it is may well present a difficult question, but when that question is resolved, the court must act accordingly.’”) (quoting 11 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2862 2d ed. 1987)).

No doubt for these reasons, this Court has not required an exact citation to subsection (4) of Rule 60(b) as a condition of setting aside a default judgment for lack of personal jurisdiction. This Court's decision in *State v. 736 North Colorado Street*, 2005 UT 90, 127 P.3d 693 (Utah 2005), was the only authority on which the court below relied for its holding that Wheeler's personal jurisdiction challenge failed because “(4)” was omitted from its repeated citations to Rule 60(b). *Op.* at 2 & n.2. But *736 North Colorado Street* stands for exactly the opposite principle: Rule 60(b) motions should be adjudicated on their merits and not on the niceties of citation. There the Court adjudicated two separate motions to set aside a default judgment as if brought under Rule 60(b)(4) despite the fact that the defendant “did not articulate which prong of rule 60(b) he brought his motions under.” 2005 UT, ¶ 3, n.3. This Court's decision in *Chatterton v. Walker*, 938 P.2d 255 (Utah 1997), followed the same approach. There the Court considered the merits of a Rule 60(b) motion even though it was “not clear precisely which provision of Rule 60(b) [the defendant] invoked in its attempt to set aside the default judgment”. *Id.* at 259, n.7.

The decision below is also contrary to the Court of Appeals’ own cases. In *Franklin Covey Client Sales, Inc. v. Melvin*, 2000 UT App 110, 2 P.3d 451, the defendant “appeal[ed] from the trial court’s denial of his Rule 60(b) motions for post-judgment relief.” *Id.* ¶ 1. He invoked subsections (1), (2), and (3) of Rule 60(b) but failed to cite subsection (4) as the basis of his personal jurisdiction challenge. The court found the omission irrelevant, addressing the merits of the jurisdictional challenge without suggesting that he might have waived his due process rights merely for failing to cite subsection (4). *Id.* ¶ 10 (“Although Melvin does not present it as such, the challenge to personal jurisdiction in the context of an appeal from the denial of a Rule 60(b) motion is properly brought under Rule 60(b)(4), which permits the trial court to relieve a party from a void judgment.”). Similarly, in *Saysavanh v. Saysavanh*, 2006 UT App 385, 145 P.3d 1166, the court followed *Franklin Covey* in addressing a wife’s Rule 60(b) motion to set aside a default decree of divorce for lack of personal jurisdiction. Even though the opinion describes the wife’s motion as “a motion to set aside the default decree of divorce pursuant to rule 60(b),” *id.* ¶¶ 6-7—without any reference to subsection (4)—the court ultimately held that the divorce decree was void for lack of personal jurisdiction without citing a particular subsection of the rule. *Id.* ¶ 26.

The court below should have followed this well-established approach and addressed Wheeler’s jurisdictional challenge under Rule 60(b). A fair reading of its motion demonstrates that Wheeler properly moved for relief under Rule 60(b) and that it asserted the lack of personal jurisdiction as a reason to grant that relief. That was enough to assert personal jurisdiction as a defense. *See Menzies*, 150 P.3d at 504 (a party is

entitled to relief from a judgment if “there is a basis for granting relief under one of the subsections of 60(b)”). Both courts below erred as a matter of law by refusing to set aside the default judgment based on Wheeler’s jurisdictional challenge.

## **II. Wheeler’s Rule 60(b) Motion Meets the Meritorious Defense Standard**

The second issue is “[w]hether the court of appeals erred in affirming the district court’s denial of Petitioner’s motion to set aside the default judgment based on the determination that Petitioner failed to present a meritorious defense.” It certainly did.

“A defense is sufficiently meritorious to have a default judgment set aside if it is entitled to be tried.” *Erickson*, 882 P.2d at 1149 (emphasis added). Requiring a meritorious defense to be shown seeks “to prevent the necessity of judicial review of questions which, on the face of the pleadings, are frivolous.” *Id.* at 1148 (quoting *Musselman*, 667 P.2d at 1060 (Durham, J., dissenting)) (emphasis added). Because the rule is a pleading requirement and not an evidentiary one, “a party need not actually prove its proposed defenses to meet this standard.” *Lund*, 11 P.3d at 283 (emphasis added). The standard is met when the defendant “(1) adequately ‘showed’ the trial court a (2) proposed defense containing allegations, facts, or claims that, if proven at trial, would preclude total or partial recovery . . . .” *Id.* (emphasis added). A showing is adequate “where a party presents a clear and specific proffer of a defense that, if proven, would preclude total or partial recovery by the claimant or counterclaimant.” *Id.* (emphasis added).

Wheeler’s Rule 60(b) Motion fully met the meritorious defense standard. Judged on its face, the motion contains “a clear and specific proffer” of at least two proposed

defenses to the default judgment, both of which are “entitled to be tried.” *Id.*; *Erickson*, 882 P.2d at 1149. Wheeler clearly stated there that “[t]he evidence will show that Plaintiffs have sued the wrong party” and that “Plaintiffs have failed to demonstrate a proper basis for personal jurisdiction.” (R. 31, 32.) Each defense is supported in the motion by argument and legal citation (R. 30-32.), consisting of “allegations, facts, or claims that, if proven at trial, would preclude total or partial recovery.” *Lund*, 11 P.3d at 283. *Erickson* and *Lund* require nothing more.

The court below rejected Wheeler’s defenses anyway. It held that Wheeler’s Rule 60(b) Motion did not show a meritorious defense because it “failed to assert that [Wheeler] did not assume the liabilities of its predecessor in interest when it purchased the dealership, and it also failed to identify any particular problem with personal jurisdiction.” Op. at 3. In other words, the court below denied Wheeler relief because it “failed to identify” particular facts supporting its defenses. *Id.* On that basis, the court held that Wheeler’s “summary assertions of potential defenses, even when supp[lemented] by the attached affidavits, did not constitute ‘a clear and specific proffer of a defense’ under the circumstances.” *Id.* (citation omitted).

This holding was error. In fact, a more direct contradiction of *Erickson* and *Lund* would be difficult to find. There is no real difference between Wheeler’s supposed “summary assertions of potential defenses” that the court below rejected and this Court’s express endorsement in *Lund* of “proposed defense[s] containing allegations, facts or claims that, if proven at trial, would preclude total or partial recovery.” 11 P.3d at 283 (emphasis added). The *Lund* Court held that even bare allegations that a contract was



breached constituted “a nonfrivolous and meritorious defense” sufficient for Rule 60(b). *Id.* at 283-84; *accord Erickson*, 882 P.2d at 1149 n.2 (holding that “a general denial such as the one offered in this case is sufficient to meet the meritorious defense requirement”). The decision below, if applied in *Erickson* and *Lund*, would have produced the opposite results.

Indeed, the holding below that Wheeler did not show a meritorious defense because it “failed to identify any particular problem with personal jurisdiction” (Op. at 3, emphasis added), essentially resurrects the discarded *Musselman* test.<sup>4</sup> Under that test a Rule 60(b) movant had to “set forth specific facts showing meritorious defenses to those allegations in order to have the default judgment set aside.” *Erickson*, 882 P.2d at 1148 (quoting *Musselman*, 667 P.2d at 1057-58) (emphasis added). This Court rejected the *Musselman* standard because it “place[d] a high burden on a defendant otherwise eligible for relief under rule 60(b),” a result this Court found to be inappropriate. *Erickson*, 882 P.2d at 1148. Because Wheeler’s Rule 60(b) Motion amply met the meritorious defense standard as enunciated in *Erickson* and *Lund*, the decision below was error and should be reversed.

---

<sup>4</sup> In committing this error the Court of Appeals may have been influenced by the trial court, which relied on *Musselman* expressly. The trial court ruled that “[t]he defendant has failed to provide the Court with any ‘specific and sufficiently detailed facts which, if proven, would have resulted in a judgment different from the one entered.’” (R. 73-74 (quoting *Musselman*, 667 P.2d at 1057)). However, the court below should have been warned off this error by *Hernandez v. Baker*, 2004 UT App 462, 104 P.3d 664, which it cited for the meritorious defense standard. Op. at 2. *Hernandez* reversed a trial court ruling that had erroneously relied on *Musselman*. 104 P.3d at 666-67. The *Hernandez* court emphasized that “[t]o proffer a defense, a party does not have to specifically name the defense and does not have to prove the defense.” *Id.* at 667 (citing *Lund*, 11 P.3d at 277) (emphasis added).

### **III. The Court of Appeals' Interpretation of Rule 60(b) Should Be Rejected to Avoid Grave Constitutional Problems.**

Reversing the Court of Appeals' decision and vacating the default judgment has the additional benefit of avoiding weighty constitutional issues that would otherwise become unavoidable. Nonresident defendants like Wheeler hold federal due process rights in state courts. "Due process requires that before a court can exercise specific personal jurisdiction over a nonresident defendant, the defendant must have had 'minimum contacts with the forum state such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Parry v. Ernst Home Ctr. Corp.*, 779 P.2d 659, 662 (Utah 1989) (quoting *inter alia Int'l Shoe Co.*, 326 U.S. at 316). This right, guaranteed with respect to Utah judgments by the Fourteenth Amendment, cannot be defeated through state procedural requirements that unduly limit its substantive protections. *Davis v. Wechsler*, 263 U.S. 22, 24 (1922) (Holmes, J.) ("[T]he assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.").

The decision below defeats the federal due process rights of a nonresident defendant "in the name of local practice." *Id.* It effectively requires a nonresident defendant to cite a specific subsection of Rule 60(b) or forfeit its right to a tribunal with personal jurisdiction. The decision below also requires that a nonresident defendant identify particular facts to support a motion to vacate a default judgment for lack of personal jurisdiction. If this interpretation of Utah procedure is upheld, each of these requirements would authorize a Utah court to bind a nonresident defendant like Wheeler to a default judgment when the defendant lacks minimum contacts with the state and

when the defendant's assertion of the right to be free of such a judgment was "plainly and reasonably made." *Id.* That result would defeat federal rights through state procedures.

The United States Supreme Court has held that the Fourteenth Amendment was offended by a state rule that upheld a default judgment against a nonresident defendant despite insufficient service of process on the ground that the defendant failed to meet additional pleading requirements. *Peralta v. Heights Medical Center*, 485 U.S. 80, 86-87 (1988) ("Where a person has been deprived of property in a manner contrary to the most basic tenets of due process, 'it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits.'") (quoting *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 424 (1915)). For the same reasons, federal courts interpreting Rule 60(b) of the Federal Rules of Civil Procedure (substantively identical to Utah's Rule 60(b)) do not require a showing of a meritorious defense when a defendant asserts the lack of personal jurisdiction: the assertion alone is sufficient. *See* 12 Moore's Federal Practice 3d, § 60.44[5][b] ("Moving party [under Rule 60(b)] Does Not Have to Prove Meritorious Claim or Defense"); *accord Bludworth Bond Shipyard, Inc. v. M/V Caribbean Wind*, 841 F.2d 646, 649 (5<sup>th</sup> Cir. 1988) (district court must set void judgment aside, "regardless of whether the movant has a meritorious defense").

This Court has already been presented with a claim that Utah's meritorious defense rule conflicts with the Fourteenth Amendment. In *Erickson*, the Court directly addressed whether requiring "the showing of a meritorious defense in addition to the other requirements of Rule 60(b) of the Utah Rules of Civil Procedure before a default

can be vacated, is constitutionally permissible under the due process clause of the Fourteenth Amendment of the United States Constitution.” Brief of Defendant/Appellant at 1, *Erickson*, 882 P.2d at 1147. In support of this claim, the defendants specifically cited *Peralta*. *Id.* at 6. Precisely because it concluded that the meritorious defense rule can be satisfied easily, the Court reasoned that it need not reach the constitutional question. *See Erickson* at 1149 n.2 (“Because we hold that a general denial such as the one offered in this case is sufficient to meet the meritorious defense requirement, it is unnecessary to reach [the defendants’] claim that the requirement is unconstitutional.”) (emphasis added). Applying the meritorious defense rule to a defendant who challenges a default judgment for lack of personal jurisdiction likely survives *Peralta* only because this Court’s standard in *Erickson* and *Lund* is comparatively undemanding. But if, as the court below held, a robust *Musselman*-like requirement now applies, grave due process problems arise.

These concerns are not mere technical infirmities. The decision below lets stand a substantial injustice against Wheeler. The six-figure default judgment was issued before Wheeler knew that plaintiffs had applied for an entry of default and therefore before Wheeler had a fair opportunity to cure. Because of novel and erroneous procedural requirements that Wheeler could not have anticipated when it sought relief from the district court, the judgment has remained undisturbed despite a timely Rule 60(b) motion that asserted a valid personal jurisdiction defense. The refusal of the lower courts to vacate the default judgment and consider whether they even had jurisdiction over Wheeler creates serious due process concerns.

These due process problems can be eliminated if the Court follows the familiar principle of constitutional avoidance. *See, e.g., West v. Thomson Newspapers*, 872 P.2d 999, 1104 (Utah 1994) (“courts should decide cases on nonconstitutional grounds where possible, including common law or statutory grounds”). Reversing the decision below on the ground that Wheeler’s motion for relief under Rule 60(b) should have been granted because it was not waived and because the meritorious defense standard was satisfied will avoid the constitutional issues that would otherwise arise.

### **CONCLUSION**

The decision below is legally erroneous, constitutionally suspect, and leads to an exceptionally harsh result. Wheeler respectfully requests that the Court of Appeals’ decision be reversed, that the district court’s default judgment be vacated, and that the case be remanded to the district court for further proceedings on the merits of the parties’ claims and defenses.

### **REQUEST FOR ORAL ARGUMENT**

Wheeler respectfully requests oral argument because it will materially assist this Court in adjudicating the legal issues in this appeal.

DATED this 19th day of April, 2010.

KIRTON & McCONKIE

A handwritten signature in black ink, appearing to read 'Alexander Dushku', with a large, stylized 'D' and a horizontal line extending to the right.

Alexander Dushku

R. Shawn Gunnarson

*Attorneys for Defendant/Appellant*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 19th day of April, 2010, a true and correct copy of the foregoing **BRIEF OF APPELLANT**, was served on the following by the method indicated below:

Gary G. Kuhlmann  
GARY G KUHLMANN &  
ASSOCIATES PC  
107 South 1470 East, Suite 105  
P.O. Box 910387  
St. George, Utah 84790

(☒) U.S. Mail, Postage Prepaid  
( ) Hand Delivered  
( ) Overnight Mail  
( ) Facsimile

\_\_\_\_\_

## **ADDENDUM**

## **TABLE OF CONTENTS**

Decision of the Court of Appeals .....	Addendum-1
Order Denying Petition for Rehearing.....	Addendum-2
District Court's Findings, Conclusions and Order.....	Addendum-3



**ADDENDUM -1**

**DECISION OF THE COURT OF APPEALS**

FILED  
UTAH APPELLATE COURTS  
JUL 23 2009

IN THE UTAH COURT OF APPEALS

-----ooOoo-----

William Judson and Donna	)	MEMORANDUM DECISION
Judson,	)	(Not For Official Publication)
	)	
Plaintiffs and Appellees,	)	Case No. 20080688-CA
	)	
v.	)	F I L E D
	)	(July 23, 2009)
Wheeler RV Las Vegas, LLC dba	)	
Wheeler's Las Vegas RV,	)	2009 UT App 199
	)	
Defendant and Appellant.	)	

-----

Fifth District, St. George Department, 070501867  
The Honorable Eric A. Ludlow

Attorneys: Steven R. Bangerter, William E. Frazier, and Daniel  
P. Wilde, St. George, for Appellant  
Gary G. Kuhlmann, St. George, for Appellees

-----

Before Judges Thorne, Bench, and Davis.

THORNE, Associate Presiding Judge:

Wheeler RV Las Vegas, LLC (Wheeler) appeals from the district court's denial of its motion to set aside a default judgment in favor of William and Donna Judson. We affirm.

The Judsons sued Wheeler over a recreational vehicle that they had purchased from Wheeler's predecessor in interest. There were some negotiations between the parties, and Wheeler did not file an answer to the Judsons' complaint. When negotiations broke down, the Judsons requested and were granted a default judgment against Wheeler. Wheeler timely filed a rule 60(b) motion seeking to set aside the default judgment on the grounds of mistake, inadvertence, surprise, or neglect. See Utah R. Civ.

P. 60(b)(1).<sup>1</sup> The district court denied Wheeler's motion, and Wheeler appeals.

Wheeler now argues that the district court erred in failing to set aside the default judgment pursuant to rule 60(b)(4) because the judgment was void for lack of personal jurisdiction over Wheeler, a Nevada entity. See generally id. R. 60(b)(4) (allowing for relief from a "void" judgment). When a party asserts lack of personal jurisdiction as a ground for attacking a default judgment, the district court is granted no discretion, and we review its personal jurisdiction determination as a matter of law. See Saysavanh v. Saysavanh, 2006 UT App 385, ¶ 7, 145 P.3d 1166. Here, however, we conclude that Wheeler did not request relief from the district court under rule 60(b)(4), and thus, the district court committed no error in failing to grant such relief regardless of the merits of Wheeler's personal jurisdiction claim.<sup>2</sup>

As to Wheeler's request for relief under rule 60(b)(1), we agree with the district court that Wheeler failed to adequately present the district court with any meritorious defense against the Judsons' claims. In order to prevail on a 60(b) motion, "a party must 'present[] a clear and specific proffer of a defense that, if proven, would preclude total or partial recovery by the claimant.'" Hernandez v. Baker, 2004 UT App 462, ¶ 6, 104 P.3d 664 (quoting Lund v. Brown, 2000 UT 75, ¶ 29, 11 P.3d 277). "[I]t is the proffer of the defense, not the supporting facts, that must be clear and specific." Id. (internal quotation marks omitted).

Here, Wheeler's motion stated merely that "the evidence will show that [the Judsons] have sued the wrong party" because Wheeler "did not own the subject dealership when [the Judsons] purchased the recreational vehicle," and that Wheeler "will be

---

1. Wheeler's motion also cited to rule 60(b)(6), which allows for relief from a judgment for "any other reason justifying relief from the operation of the judgment," see Utah R. Civ. P. 60(b)(6). However, Wheeler's motion did not specifically identify any such other grounds justifying relief from judgment.

2. Personal jurisdiction defenses may be raised in a party's initial 60(b) motion attacking a default judgment, see State v. 736 N. Colo. St., 2005 UT 90, ¶¶ 8-11, 127 P.3d 693, and a party who fails to raise a personal jurisdiction defense in its initial 60(b) motion waives that defense, see id. ¶ 11 ("We therefore conclude that a party waives the right to bring [a personal jurisdiction] defense if the party does not raise that defense in his initial rule 60(b) motion.").

able to demonstrate that . . . any assertion of personal jurisdiction over [Wheeler] is highly questionable." Wheeler's motion failed to assert that Wheeler did not assume the liabilities of its predecessor in interest when it purchased the dealership,<sup>3</sup> and it also failed to identify any particular problem with personal jurisdiction. We agree with the trial court that Wheeler's summary assertions of potential defenses, even when supplanted by the attached affidavits, did not constitute "a clear and specific proffer of a defense" under the circumstances. See Hernandez, 2004 UT App 462, ¶ 6. Accordingly, we affirm the district court's rule 60(b)(1) ruling on the ground that Wheeler did not make a clear and specific proffer of a meritorious defense. See id.

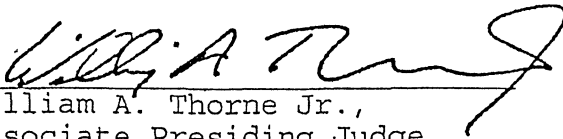
Finally, Wheeler argues that the district court abused its discretion in denying Wheeler's 60(b) motion because there is a strong policy in favor of allowing parties to resolve their disputes on the merits. See, e.g., Erickson v. Schenkers Int'l Forwarders, Inc., 882 P.2d 1147, 1149 (Utah 1994) ("Generally, courts should be liberal in granting relief against default judgments so that cases may be tried on the merits."). Although we recognize the public policy in favor of resolution of cases on the merits, the district court is nevertheless entitled to considerable discretion in deciding whether to set aside a default judgment. See Lund, 2000 UT 75, ¶ 9 ("A trial court has broad discretion in deciding whether to set aside a default judgment."). The district court's discretion is not unlimited, see id., but in light of the district court's factual findings and Wheeler's pleading failures, we do not conclude this to be such a close case that the district court was deprived of the discretion to deny Wheeler's motion to set aside the default judgment.

We conclude that the district court did not exceed the boundaries of its discretion or otherwise err when it denied Wheeler's rule 60(b) motion, even if the default judgment itself may have been improvidently granted under the totality of the circumstances now alleged by Wheeler. See Franklin Covey Client Sales, Inc. v. Melvin, 2000 UT App 110, ¶ 19, 2 P.3d 451 ("An appeal of a Rule 60(b) order addresses only the propriety of the denial or grant of relief . . . [and] does not, at least in most cases, reach the merits of the underlying judgment from which

---

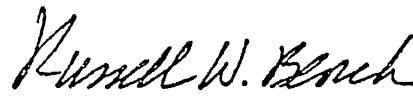
3. This is apparently the very issue on which the Judsons attempted, unsuccessfully, to obtain documentation from Wheeler prior to seeking a default judgment.

relief was sought." (internal quotation marks omitted)).  
Accordingly, we affirm the ruling of the district court.

  
\_\_\_\_\_  
William A. Thorne Jr.,  
Associate Presiding Judge

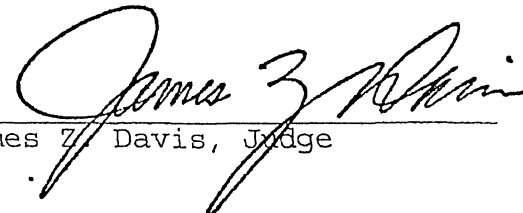
-----

I CONCUR:

  
\_\_\_\_\_  
Russell W. Bench, Judge

-----

I CONCUR IN THE RESULT:

  
\_\_\_\_\_  
James Z. Davis, Judge

CERTIFICATE OF MAILING

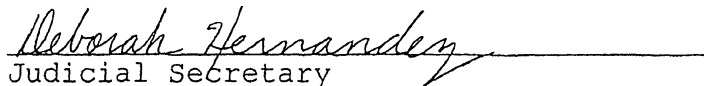
I hereby certify that on the 23rd day of July, 2009, a true and correct copy of the attached DECISION was deposited in the United States mail or placed in Interdepartmental mailing to be delivered to:

GARY G KUHLMANN  
GARY G KUHLMANN & ASSOCIATES PC  
107 S 1470 E STE 105  
PO BOX 910387  
ST GEORGE UT 84790

STEVEN R. BANGERTER  
WILLIAM E. FRAZIER  
DANIEL P WILDE  
LAW OFFICES OF STEVEN R BANGERTER  
720 S RIVER RD STE A-200  
ST GEORGE UT 84790

HONORABLE ERIC A. LUDLOW  
FIFTH DISTRICT, ST GEORGE  
WASHINGTON CO HALL OF JUSTICE  
220 N 200 E  
ST GEORGE UT 84770

FIFTH DISTRICT, ST GEORGE  
ATTN: DENNIS/DIANNE/TIPPY  
WASHINGTON CO HALL OF JUSTICE  
220 N 200 E  
ST GEORGE UT 84770

  
Judicial Secretary

TRIAL COURT: FIFTH DISTRICT, ST GEORGE, 070501867  
APPEALS CASE NO.: 20080688-CA

**ADDENDUM-2**

**ORDER DENYING PETITION FOR REHEARING**

FILED  
UTAH APPELLATE COURTS  
SEP 14 2009

IN THE UTAH COURT OF APPEALS

---oo0oo---

William Judson and Donna	)	
Judson,	)	ORDER
	)	
Plaintiffs and Appellees,	)	Case No. 20080688-CA
	)	
v.	)	
	)	
Wheeler RV Las Vegas, LLC, dba	)	
Wheeler's Las Vegas RV,	)	
	)	
Defendant and Appellant.	)	

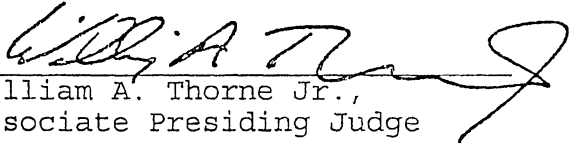
-----

This matter <sup>is</sup> before the court upon Appellant's petition for rehearing filed August 28, 2009.

Now, therefore, IT IS HEREBY ORDERED that the petition for rehearing is denied.

Dated this 14 day of September, 2009.

FOR THE COURT:

  
William A. Thorne Jr.,  
Associate Presiding Judge




CERTIFICATE OF SERVICE

I hereby certify that on September 14, 2009, a true and correct copy of the foregoing ORDER was deposited in the United States mail or placed in Interdepartmental mailing to be delivered to:

GARY G KUHLMANN  
GARY G KUHLMANN & ASSOCIATES PC  
107 S 1470 E STE 105  
PO BOX 910387  
ST GEORGE UT 84790

STEVEN R. BANGERTER  
WILLIAM E. FRAZIER  
DANIEL P WILDE  
LAW OFFICES OF STEVEN R BANGERTER  
720 S RIVER RD STE A-200  
ST GEORGE UT 84790

Dated this September 14, 2009.

By   
Judicial Assistant

Case No. 20080688  
District Court No. 070501867

RECEIVED SEP 16 2009

**ADDENDUM- 3**

**DISTRICT COURT'S FINDINGS, CONCLUSIONS AND ORDER**

---  
FIFTH DISTRICT COURT  
2008 JUN 25 PM 3:04

FIFTH DISTRICT COURT  
2008 JUN 13 PM 4:42  
JUDSON

GARY G. KUHLMANN & ASSOCIATES, PC  
Gary G. Kuhlmann (#4994)  
Attorney for Petitioner  
107 South 1470 East, Suite 105  
P.O. Box 910387  
St. George, Utah 84791-0387  
Telephone: (435) 656-6156

FIFTH DISTRICT COURT  
WASHINGTON COUNTY, STATE OF UTAH

WILLIAM JUDSON and DONNA	)	
JUDSON, husband and wife,	)	
	)	PLAINTIFFS' <del>PROPOSED</del> FINDINGS,
Plaintiffs,	)	CONCLUSIONS AND ORDER
	)	
v.	)	
	)	
WHEELER RV LAS VEGAS, LLC, a	)	Civil No. 070501867
Nevada foreign limited liability company,	)	
dba WHEELER'S LAS VEGAS RV,	)	
	)	
Defendant.	)	Judge Eric A. Ludlow
	)	

The plaintiffs hereby submit their proposed Findings of Fact, Conclusions of Law and Order regarding the defendant's Motion to Set Aside Default Judgment and respectfully request that the Court adopt such findings, conclusions and order.

**PROPOSED FINDINGS, CONCLUSIONS AND ORDER**

This matter came before the Court for hearing on May 15, 2008, on defendant's Motion to Set Aside Default Judgment. The Court reviewed the motion, the opposition thereto, the affidavits supporting the motion and opposition, and the file herein. The Court also heard and

considered the arguments of counsel at the hearing on May 15, 2008. Based thereon, the Court now makes the following:

### **FINDINGS OF FACT**

1. A Complaint in the above-captioned matter was filed on August 16, 2007, and was served upon the defendant on August 30, 2007.
2. The Complaint was served upon the defendant on August 20, 2007.
3. During September, 2007, plaintiffs' counsel was contacted by Sharon Nelson, attorney for the defendant. Ms. Nelson requested an extension of time to answer the Complaint.
4. During such conversation, Ms. Nelson informed plaintiffs' counsel that the dealership at issue had changed ownership and that the defendant was not responsible for the plaintiffs' claims in this case.
5. Plaintiffs' counsel agreed to grant Ms. Nelson an extension to allow her a short time to provide plaintiffs' counsel with evidence that the defendant was not the proper party in this case.
6. After not hearing from or receiving information from Ms. Nelson for some time, plaintiffs' counsel's office contacted Ms. Nelson's office by phone on October 15, 2007, and demanded that the requested information be provided or an Answer filed.
7. On October 30, 2007, plaintiffs' counsel received a fax from Ms. Nelson containing only a Bill of Sale which was apparently part of a larger contract.

8. On that same date, plaintiffs' counsel's office responded to Ms. Nelson's fax and informed her that to evaluate the matter, plaintiff's counsel would need to receive the entire agreement and other documents related to the alleged sale of the dealership.

9. On November 1, 2007, plaintiffs' counsel received a second fax from Ms. Nelson requiring that plaintiffs' counsel sign a confidentiality agreement before any further documents would be provided.

10. Plaintiffs' counsel refused to sign the confidentiality agreement since it was the defendant that was requesting that the defendant be dismissed from the case and because to do so could prejudice the plaintiff in using the information in the purchase documents in this case.

11. After receiving no further information and having no further contact with Ms. Nelson, on November 27, 2007, plaintiffs' counsel advised Ms. Nelson that plaintiffs would be seeking the entry of default and default judgment.

12. An Application for Entry of Default, and Motion for Entry of Default Judgment were filed with the court on November 27, 2007.

13. A Default Certificate was entered on December 3, 2007, and Default Judgment was entered on December 4, 2007.

14. Despite having been advised that the plaintiffs would be seeking a default judgment and being provided with a copy of the Application for Entry of Default, the defendant's attorney took no action to prevent the entry of default.

15. On December 19, 2007, plaintiffs' counsel received a phone call from William Frazier, the new attorney for the defendant. Mr. Frazier asked plaintiffs' counsel if he would be

willing to stipulate to set aside the Default Judgment based upon his assertion that his client had purchased the business after the plaintiff's purchase of the motorhome at issue.

16. While plaintiffs' counsel refused to simply stipulate to set aside the Default Judgment without some additional evidence, plaintiffs' counsel informed Mr. Frazier of plaintiffs' counsel's continuing willingness to review any documents he would like to provide.

17. At the end of the conversation, Mr. Frazier informed plaintiffs' counsel that he would be obtaining, and would provide plaintiffs' counsel with, documentation to show that Mr. Frazier's client was not the proper defendant in this matter.

18. Despite being told again that plaintiffs' counsel would be provided certain documents by the defendant, plaintiffs' counsel received no further documents and had no further contact from the defendant's attorney until February 27, 2008.

19. On February 27, 2008, plaintiffs' counsel received a voice-mail message from defendant's counsel simply indicating that defendant would be filing a motion seeking to set aside the Default Judgment in this case.

20. The defendant's Motion to Set Aside Default Judgment was filed with the Court on February 29, 2008, four days shy of three months from the date of entry of the Default Judgment.

21. The defendant was afforded over three months to provide the plaintiffs with the documents requested by plaintiffs or to file an Answer in this case.

22. The only statements provided to the Court to demonstrate a meritorious defense to this action by the defendant are the conclusory statements of defendant's counsel that:

a. “The evidence will show that Plaintiffs have sued the wrong party.” *See* Defendant’s Memorandum of Points and Authorities in Support of Defendants’ Motion to Set Aside Default Judgment at p. 3.

b. Defendants (sic) did not own the subject dealership when the Plaintiffs purchased the recreational vehicle.” *Id.* at p. 4.

c. Defendant will be able to demonstrate that it is not that proper party, and that any assertion of personal jurisdiction over Defendant is highly questionable ” *Id*

From the foregoing, the Court now makes the following:

#### CONCLUSIONS OF LAW

1. To be relieved from the Default Judgment, defendant must show: (a) that the motion for relief from the judgment was filed within three months of the entry of the judgment; (b) that mistake, inadvertence, surprise or excusable neglect were present; and (c) that the defendant has a meritorious defense to the action. *See* URCP 60(b).

2. “Excusable neglect” is “the existence of ‘due diligence’ by a reasonably prudent person under similar circumstances.” *Stevens v. LaVerkin City*, 2008 UT App 129, ¶ 27.

3. To show excusable neglect “the movant must show that he has used due diligence and that he was prevented from appearing by circumstances over which he had no control. . . . [A] party must provide the court with specific details that demonstrate due diligence in spite of uncontrollable circumstances” *Id.*

4. “A meritorious defense is one which sets forth specific and sufficiently detailed facts which, if proven, would have resulted in a judgment different from the one entered.

Defendant must therefore do more than merely dispute or deny the truth of plaintiff's allegations; he must set forth specific facts showing meritorious defenses to those allegations in order to have the default judgment set aside." *State vs. Musselman*, 667 P.2d 1053, 1057 - 1058 (Utah 1983).

5. Defendant has asserted no basis for finding the existence of mistake or inadvertence in this case but rather relies on the claims of excusable neglect and surprise.

6. Defendant did not exercise due diligence in this matter since an answer could have been filed by the defendant at anytime during the more than three months between that date the Complaint was served and the date the default was entered. Nothing prevented the defendant from filing such Answer and there were no circumstances outside the control of the defendant which rendered the defendant unable to file an Answer. An Answer was not filed simply because the defendant chose not to do so. Based thereon, the defendant has failed to show the existence of excusable neglect in this case.

7. The defendant has further failed to establish the existence of surprise. Defendant's counsel was told that only a short time would be given to provide the documents requested by plaintiffs' counsel and defendant failed to provide such documents. Further, the defendant was informed that the plaintiff was seeking a default and a copy of the Application for Entry of Default was provided to defendant's counsel. Nevertheless, no action was taken by defendant to prevent or overcome a default being entered until almost three months after the default judgment was entered.

8. The defendant has failed to provide the Court with any "specific and sufficiently detailed facts which, if proven, would have resulted in a judgment different from the one



entered.” Thus, even if the Court were to find the existence of a mistake, inadvertence, excusable neglect or surprise, the defendant’s motion is deficient and should be denied.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Court now enters the following:

**ORDER**

1. The defendant’s Motion to Set Aside Default Judgment is denied.
2. The plaintiffs are awarded their costs and reasonable attorney fees incurred in responding to the defendant’s motion, with such amount to be established by affidavit of plaintiffs’ counsel.

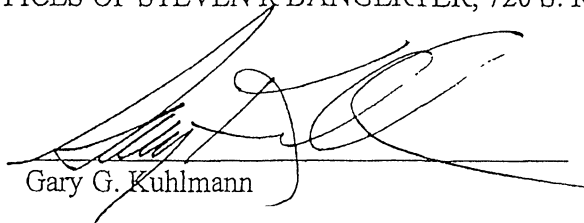
Dated this 24 day of June, 2008.



Honorable Eric A. Ludlow  
District Court Judge

Certificate of Service

I hereby certify that on this 13<sup>th</sup> day of June, 2008, I mailed a true and correct copy of the foregoing to: William E. Frazier, LAW OFFICES OF STEVEN R BANGERTER, 720 S. River Rd., Suite A-200, St. George, UT 84790.



Gary G. Kuhlmann