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William Judson and Donna Judson v. Wheeler RV Las Vegas, LLC : Reply Brief

Utah Court of Appeals

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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

REPLY BRIEF

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ARGUMENT

The parties appear to agree that it would be error for a court to deny relief merely because a motion to set aside a default judgment fails to refer to a particular subsection of Rule 60(b) of the Utah Rules of Civil Procedure. *See* Br. Appellees at 7. For the reasons discussed in our opening brief, such a hyper-technical approach would be profoundly inconsistent with this Court's jurisprudence and sound judicial practice. *See* Br. Appellant at 14-17. The Judsons do not argue otherwise and indeed deny that failure to cite subsection (4) was even a basis of the decision below. *See* Br. Appellees at 7 ("Nowhere in the Court of Appeals opinion does it state that Wheeler waived its jurisdictional challenge merely because it failed to specifically cite to subsection (4) when it sought relief from the trial court.").

Instead, the Judsons' defense of the decision below turns on two arguments: (1) that Wheeler never raised personal jurisdiction as a defense, and (2) that Wheeler failed to raise a meritorious defense with sufficient clarity. Both arguments are manifestly without merit. They turn on tenuous wordplay and a refusal to credit the plain language in Wheeler's moving papers.

Relief from a default judgment is available under Rule 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, 504 (Utah 2006) (citing *Erickson v. Schenkers Int'l Forwarders*, 882 P.2d 1147, 1149 (Utah 1994); *State Dep't of Soc. Servs. v. Musselman*, 667 P.2d 1053, (Utah 1983) (plurality opinion)). Wheeler's motion satisfies these elements.

I. Wheeler Clearly Raised Personal Jurisdiction as a Basis for Relief from the Default Judgment Under Rule 60(b).

The Judsons repeatedly deny that Wheeler even raised personal jurisdiction as a defense. *See* Br. Appellees at 7-9. With due respect, that is simply inaccurate. Indeed, the Judsons themselves repeatedly quote statements from Wheeler's motion papers demonstrating that it did exactly that.

1. The Judsons argue that "Wheeler did not raise the issue of personal jurisdiction before the trial court as a basis for relief." Br. Appellees at 9. Not so. Wheeler's Rule 60(b) motion plainly stated that "personal jurisdiction is lacking in this matter due to the lack of purposeful availment and significant contacts with the forum state." (R. 32). Supporting that assertion was the affidavit of Wheeler's General Counsel stating that "Defendant does not purposely avail itself [of] the benefits and laws of the state of Utah." (R. 39). Thus, Wheeler expressly raised a personal jurisdiction defense. That the trial court failed to address that proffered defense was reversible error, not evidence that Wheeler raised no such objection at all.

2. Taking another tack, the Judsons argue that Wheeler's Rule 60(b) motion did not actually contest jurisdiction but rather announced its intent to do so later. *Id.* at 9 ("Wheeler was not intending to contest jurisdiction with its motion. Rather, Wheeler indicated it would be able to show, sometime in the future, that jurisdictional issues existed."). As support, the Judsons emphasize the statements that "'Wheeler **will be able to demonstrate** that . . . any assertion of jurisdiction over [Wheeler] **is highly questionable**.'" *Id.* (emphasis by the Judsons, quoting the decision below ("Op.") at 2-

3). But this is mere wordplay. Grammatical tense does not affect the validity of Wheeler's right to be relieved of a void judgment. Neither the language of Rule 60(b) nor this Court's jurisprudence requires that the assertion of rights be expressed in the present tense. And even if it did, Wheeler met that requirement by stating in its motion that "personal jurisdiction **is lacking** in this matter." (R. 32, emphasis added). Further, as discussed below, it is entirely appropriate to assert that one "will" (in the future) establish the merits of a defense because all that is necessary to set aside a default judgment is a proffer (an assertion) of a meritorious defense that will later be proven in the course of litigation.

3. The Judsons argue that the "Conclusion" of Wheeler's Rule 60(b) Motion "did not request that the trial court dismiss the case for lack of jurisdiction." Br. Appellees at 8; *see* R. 32. The argument is misleading. True, Wheeler's motion did not expressly request that the entire case be dismissed immediately for lack of personal jurisdiction. It did not need to. Having plainly asserted that "personal jurisdiction is lacking," nothing in Rule 60(b) or this Court's jurisprudence obligated Wheeler to reiterate that defense in a different section of its motion in order to obtain relief. But even if there were such an unstated requirement, Wheeler's motion satisfied it by specifically stating in the concluding paragraph that it had "legitimate and valid legal defenses, including misjoinder and **lack of personal jurisdiction**." (R. 32, emphasis added). Moreover, under this Court's jurisprudence, the point of Wheeler's Rule 60(b)

motion was to assert meritorious defenses as a basis for setting aside the default judgment, not to seek a full-blown adjudication of the merits of those defenses.

4. In a further twist, the Judsons add that "nowhere in Wheeler's motion does it assert that the judgment rendered is void." Br. Appellees at 8 (emphasis added). But no such assertion is necessary. A judgment rendered without personal jurisdiction is a legal nullity not because a party says so but because, as a matter of law, the absence of personal jurisdiction deprives the court of authority to bind the parties. *See generally Burnham v. Superior Ct.*, 495 U.S. 604, 608 (1990) (describing the centuries-long history behind the principle that "the judgment of a court lacking jurisdiction is void"). The Judsons cite no authority for the proposition that the word "void" must be used when asserting a personal jurisdiction defense under Rule 60(b).

5. The Judsons argue that "[n]owhere in Wheeler's proposed findings or order [submitted following the trial court's hearing on Wheeler's Rule 60(b) Motion] is jurisdiction referenced as a means for the trial court to find that the default judgment was void due to lack of personal jurisdiction." Br. Appellees at 8. Not true. Wheeler's proposed order stated that "Defendant has provided facts demonstrating that legal and valid defenses exist; namely, lack of personal jurisdiction and misjoinder of parties." (R. 91.) In any event, Wheeler's proposed (and rejected) order is irrelevant to its personal jurisdiction defense and this appeal. Wheeler asserted its personal jurisdiction and misjoinder defenses by motion as provided by Rule 60(b), and it is the adequacy of that motion and those defenses that are at issue here.

6. The Judsons' attempt to transform Rule 60(b)(4) into a pleading trap conflicts not only with Utah law but with federal precedents interpreting the analogous Rule 60(b)(4) of the Federal Rules of Civil Procedure. *See V.T.A., Inc. v. Airco, Inc.*, 597 F.2d 220, 224 (10th Cir. 1979) (adjudicating a motion to set aside a default judgment for lack of personal jurisdiction when the defendant "did not specify which subdivision of 60(b) he relied on"); *Dennis Garberg & Assoc. v. Pack-Tech Int'l Corp.*, 115 F.3d 767, 773 (10th Cir.1997) ("where the district court does not have jurisdiction over the defendant, the court must grant relief from a default judgment under Fed. R. Civ. P. 60(b)").

In short, Wheeler amply demonstrated in the motion and accompanying affidavits that "there is a basis for granting relief under one of the subsections of 60(b)." *Menzies*, 150 P.3d at 504. Wheeler's proffered defense that "personal jurisdiction is lacking in this matter" based on lack of minimum contacts (R. 32) obligated the trial court to set aside the default judgment as potentially void. *State Dep't of Soc. Servs. v. Vijil*, 784 P.2d 1130, 1132 (Utah 1989) (labeling the absence of personal jurisdiction "fatal").

II. Wheeler's Rule 60(b) Motion Met the Meritorious Defense Standard.

The Judsons argue that Wheeler's purportedly "ambiguous summary statements did not raise to the level of a 'clear and specific proffer of a defense'" sufficient to meet the meritorious defense standard. Br. Appellees at 11. They contend that "[i]f this Court were to accept Wheeler's argument, all that would be required of a party seeking relief from a judgment or order under Rule 60(b) would be that they simply allude to the fact

that, or mention somewhere in their motion that, personal jurisdiction may be at issue." *Id.* at 9.

The Judsons misunderstand the law. The requisite "clear and specific proffer" of a meritorious defense does not require "clear and specific" proof establishing that the defendant will ultimately prevail on the defense. To satisfy the meritorious defense standard, Wheeler had only to set forth a "proposed defense containing allegations, facts, or claims that, if proven at trial, would preclude total or partial recovery." *Lund v. Brown*, 2000 UT 75, 11 P.3d 277, 283 (Utah 2000) (emphasis added). It "need not actually prove its proposed defenses." *Id.* (emphasis added). Wheeler made a clear and specific proffer of a defense when it stated and argued in its Rule 60(b) Motion that "personal jurisdiction is lacking in this matter" and that the Judsons had sued the wrong party. (R. 31-32). Each proffered defense was sufficient because, if later proven, each "would preclude total or partial recovery."

This Court's reasoning in *Erickson* and *Lund* makes clear that Wheeler's proffer of a personal jurisdiction defense suffices as a meritorious defense for purposes of Rule 60(b). Because general allegations satisfy the meritorious defense standard for other defenses, it follows *a fortiori* that nothing more can be required where a party seeks to set aside a default judgment for lack of personal jurisdiction. Indeed, this Court has emphasized that constitutional concerns presented by the application of the meritorious defense standard to a personal jurisdiction defense are avoided only because that standard is easily met by the kind of general denials expressed by Wheeler in its Rule 60(b)

Motion. *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).

Even if the Judsons were correct that some actual proof supporting Wheeler's personal jurisdiction were required (they are not), the motion still should have been granted. The affidavit in support of Wheeler's Rule 60(b) Motion set forth a brief but adequate factual basis for a personal jurisdiction challenge. (R. 39.) It established that Wheeler "operates it business in Nevada" and "does not purposely avail itself [of] the benefits and laws of the state of Utah." *Id.* The Judsons never challenged or rebutted this jurisdictional evidence with contrary evidence of their own.

In any event, Wheeler adequately met the meritorious defense standard and it was error for the trial court to deny relief under Rule 60(b).

III. The Judsons Are Not Entitled to Attorneys Fees.

Lastly, the Judsons should not be awarded fees, regardless of the outcome. Their reliance on *Valcarce v. Fitzgerald*, 961 P.2d 305 (Utah 1998), is misplaced. There has been no adjudication by this Court on the merits and a nonresident defendant like Wheeler should not be required to pay attorneys fees as the price of challenging a deeply unsound default judgment that is void for lack of personal jurisdiction.

CONCLUSION

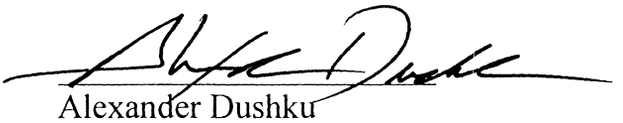
The Judsons do not deny that default judgments are disfavored and that "[g]enerally, courts should be liberal in granting relief against default judgments so that

cases may be tried on the merits." *Erickson*, 882 P.2d at 1149. That is the guiding policy that should inform this Court's analysis here, as it has throughout this Court's default-judgment jurisprudence.

The failure of the courts below to set aside the default judgment against Wheeler was error. Accordingly, this Court should reverse the decision below and remand the case to the district court with instructions to vacate the default judgment.

DATED this 28th day of June, 2010.

KIRTON & McCONKIE



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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of June, 2010, a true and correct copy of the foregoing **REPLY BRIEF**, was served on the following by the method indicated below:

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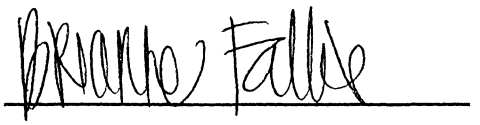

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