

2008

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

Utah Court of Appeals

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

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WILLIAM JUDSON and DONNA	)	
JUDSON, husband and wife,	)	BRIEF OF APPELLEES
	)	
Plaintiffs and Respondents,	)	
	)	
v.	)	Supreme Court No. 20090938
	)	Court of Appeals No. <u>20080688</u> -CA
WHEELER RV LAS VEGAS, LLC,	)	District Court No. 070501867
A Nevada foreign limited liability	)	
company, dba WHEELER’S LAS	)	
VEGAS RV,	)	
	)	
Defendant and Petitioner.	)	
	)	

\_\_\_\_\_

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FILED  
UTAH APPELLATE COURTS  
MAY 24 2010

WILLIAM JUDSON and DONNA  
JUDSON, husband and wife,

V.

Defendant and Petitioner.

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

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## **JURISDICTIONAL STATEMENT**

This Court has jurisdiction pursuant to Utah Code Annotated §§78A-3-102.

## **CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND RULES**

### **Rule 60. Relief from judgment or order.**

(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 of his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), or (3), not more than 3 months after the judgment, order, or proceeding was entered or taken.

### **Rule 12. Defenses and objections.**

(b) How presented.

Every defense, in law or fact, to claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted.

(h) Waiver of defenses.

A party waives all defenses and objections not presented either by motion or by answer or reply, except (1) that the defense of failure to state a claim upon which

relief can be granted, the defense of failure to join an indispensable party, and the objection of failure to state a legal defense to a claim may also be made by a later pleading if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. The objection or defense, if made at the trial, shall be disposed of as provided in Rule 15(b) in the light of any evidence that may have been received.

## **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 pursuant to Rule 60(b) of the Utah Rules of Civil Procedure. The underlying case involves claims by the Plaintiffs/Appellees William Judson and Donna Judson (“Judsons”), against Defendant/Appellant Wheeler RV Las Vegas, LLC’s (“Wheeler”) arising out of the sale of a motorhome. The Judsons prevailed in the trial court and Court of Appeals. This Court granted Wheeler’s petition for a writ of certiorari.

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

The complaint was filed in the trial court on August 16, 2007, and was served upon Wheeler on August 20, 2007. (R. 1-18.) During September, 2007, Judsons’ counsel, Gary Kuhlmann, was contacted by Sharon Nelson, attorney for Wheeler. Ms. Nelson requested an extension of time to answer the complaint. She informed Mr. Kuhlmann that she believed her client was not liable to the Judsons because Wheeler had purchased the involved dealership after the sale of the motorhome at issue in this case to the Judsons. (R. 38, 47.) In mid-September, 2007, Mr. Kuhlmann agreed to grant Ms. Nelson an extension to allow her a short time to provide Mr. Kuhlmann with evidence that her client was not the proper party in the case. (R. 38,

47.) After not hearing from or receiving information from Ms. Nelson, Mr. Kuhlmann's office contacted Ms. Nelson's office by phone on October 15, 2007, and demanded that the requested information be provided or an answer be filed. (R. 38, 47.) On October 30, 2007, Mr. Kuhlmann received a fax from Ms. Nelson containing a two page Bill of Sale which was apparently part of a larger contract. (R. 38, 47, 51-53.) On that same date, Mr. Kuhlmann's office responded to Ms. Nelson's fax and informed her that to evaluate the matter, and determine who was responsible for the dealership liabilities, Mr. Kuhlmann would need to receive the Purchase Agreement and other documents related to the alleged sale of the dealership. (R. 38, 47.) On November 1, 2007, Mr. Kuhlmann received a second fax from Ms. Nelson requiring that Mr. Kuhlmann sign a confidentiality agreement before any further documents would be provided. The demand was for a general confidentiality agreement and was not limited to financial or proprietary matters. (R. 38, 47, 58.) Mr. Kuhlmann refused to sign the confidentiality agreement since it was Wheeler that was requesting that it be dismissed from the case and because to do so could prejudice the Judsons in using the information in the purchase documents in the case in the trial court. (R. 47, 60.)

After receiving no further information and having no further contact with Ms. Nelson, on November 27, 2007, Mr. Kuhlmann, by letter, advised Ms. Nelson that the plaintiffs would be seeking the entry of default and default judgment. (R. 47, 60.) On that same date the Judsons filed their Application for Entry of Default and Motion for Entry of Default Judgment. (R. 19-22.) A Default Certificate was entered on December 3, 2007, and Default Judgment was entered on December 4, 2007. (R. 23-25.) Wheeler took no further action to prevent the entry of default. On December 19, 2007, Mr. Kuhlmann received a phone call from William Frazier, the new



attorney fro Wheeler. Mr. Frazier asked if Mr. Kuhlmann would be willing to stipulate to set aside the default judgment based upon his assertion that his client had purchased the business after the Judsons' purchased the motorhome at issue. While Mr. Kuhlmann refused to simply stipulate to set aside the default without some evidence of the factual assertions of Wheeler's counsel, Mr. Kuhlmann relayed to Mr. Frazier a continuing willingness to review any documents Mr. Frazier would like to provide. At the end of the conversation Mr. Frazier informed Mr. Kuhlmann that he would be obtaining and would provide documentation to show that Wheeler was not the proper defendant in the matter. (R. 48, 62.) To this date such documentation, or other evidence has not been provided.

On February 29, 2008, four days shy of the three months from the date of the Default Judgment, Wheeler filed its Motion to Set Aside Default Judgment pursuant to Rule 60(b)(1) and (6) of the Utah Rules of Civil Procedure. (R. 21, 22.) At no time did Wheeler seek to have the case dismissed or to have the default judgment be declared void by the trial court, but rather sought only to have the trial court set aside the default judgment under Rule 60(b)(1) and (6). (R. 30-33.) Following oral argument the trial court ordered both parties to prepare proposed findings and orders. Wheeler's proposed findings or order fail to reference lack of personal jurisdiction as a ground for setting aside the default judgment pursuant to Rule 60(b)(4). (R. 90-92) (Add. 1.)

On June 24, 2008, the trial court denied Wheeler's Motion to Set Aside Default Judgment (Rule 60(b) Motion). (R. 68-74.) 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) (referred to hereafter as Court of Appeals Opinion). 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.

### **III. Statement of Facts.**

The Judsons purchased a 2000 Journey RV in 2002 from Wheeler RV of Las Vegas for \$124,527.50. (R. 1-2.) At the time of purchase, Wheeler failed to disclose that the RV was a manufacturer's buyback and failed to properly execute a limited warranty for repurchased vehicles. (R. 2.) The Judsons later sold the RV in question, however, Judsons were ultimately forced to buy it back when it was discovered that the RV was an undisclosed manufacturer's buyback. (R. 3.) The Judsons then brought suit against Wheeler under breach of contract, fraud, misrepresentation, and statutory theories. (R. 3-8.) The Complaint sought compensatory damages of \$147,274.08, plus punitive damages, attorney fees, and costs. (R. 8.)

### **SUMMARY OF ARGUMENT**

The Court of Appeals complied with, and properly applied, Rule 60(b) of the Utah Rules of Civil Procedure, in finding that Wheeler failed to seek relief under Rule 60(b)(4) and therefore waived such claim. Wheeler's claim that the default judgment should have been set aside under Rule 60(b) was premised only by subsections (1) and (6) of the rule, and therefore failed to request relief from the district court under Rule 60(b)(4).

Additionally, the Court of Appeals' determination that Wheeler failed to present a meritorious defense was proper, and in conformity with this Court's holding in *Lund v. Brown*, 11 P.3d 277 (Utah 2000). Applying the standards set forth in *Lund*, the Court of Appeals found that the three ambiguous summary statements (regarding personal jurisdiction) which Wheeler

provided in its initial 60(b) motion, failed to raise to the level of a “clear and specific proffer of a defense” as required by *Lund*.

## **ARGUMENT**

### **I. The Court of Appeals’ Application of Rule 60(b)(4) of the Utah Rules of Civil Procedure was Proper.**

Wheeler argues that this Court should ignore the plain language and intent of Wheeler’s initial Rule 60(b) motion, which is clearly premised under subsections (1) and (6) of the rule, and fails to invoke or seek relief under subsection (4) of the same. (*See* Wheeler’s Petition for Writ of Certiorari at p. 1 - 2); ( Wheeler argues that rather than construing Wheeler’s Rule 60(b) motion “according to the subsection that best fits the substantive argument, . . . the Court of Appeals rejected that established approach and instead ruled that Petitioner’s Rule 60(b) motion challenging personal jurisdiction automatically failed for not specifically invoking subsection (4)”). Wheeler cites *State v. 736 North Colorado Street*, 2005 UT 90, 127 P.3d 693, *Chatterton v. Walker*, 938 P.2d 255 (Utah 1997), *Franklin Covey Client Sales, Inc. v. Melvin*, 2000 UT App 110, 2 P.3d 451 and *Saysavanh v. Saysavanh*, 2006 UT App 385, 145 P.3d 1166, as cases requiring that a court consider the merits of jurisdictional challenges even if subsection (4) of Rule 60(b) is not specifically cited in the motion. However, it is clear that the Court of Appeals was cognizant of the requirements of and considered the *736 North Colorado Street*, *Franklin Covey Client Sales, Inc.* and *Saysavanh* cases since such cases are cited by the Court of Appeals in the opinion below. A careful review of the Court of Appeals’ Opinion shows that the Court of Appeals complied with established jurisprudence by considering all of Wheeler’s arguments even though subsection (4) was not specifically cited.

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. (*See* Court of Appeals Opinion.) Rather, the Court of Appeals found that under the arguments and content of Wheeler’s motion, and the record in the case, Wheeler had failed to seek relief under Rule 60(b)(4) and therefore waived such claims. In making this decision the Court of Appeals was cognizant of, and in fact quoted from, Wheeler’s argument before the trial court that Wheeler “will be able to demonstrate that . . . any assertion of personal jurisdiction over [Wheeler] is highly questionable.” (Court of Appeals Opinion at 2 - 3.) The Court further noted that Wheeler had, in its motion to the trial court, “failed to identify any particular problem with personal jurisdiction.” (Court of Appeals Opinion at 3.) Thus, the Court of Appeals, in accordance with established precedent, reviewed Wheeler’s motion as a whole and found that Wheeler had failed to properly and adequately request relief from the trial court based upon any grounds which would fall under Rule 60(b)(4). Therefore, the Court of Appeals properly found that Wheeler had waived such defenses. (Court of Appeals Opinion at 2, fn. 2.)

The fact that the Court of Appeals reviewed the content of the arguments of Wheeler’s Rule 60(b) motion prior to determining that Wheeler failed to properly assert a claim under subsection (4) is also supported by the Court of Appeals’ treatment of Wheeler’s Rule 60(b)(6) claims. In footnote 1 to the Opinion, the Court noted that Wheeler’s motion cited Rule 60(b)(6) but that “Wheeler’s motion did not specifically identify any such other grounds justifying relief from judgment.”

It is the content of Wheeler's Rule 60(b) motion and the other documents filed by Wheeler that are most telling as to whether Wheeler was seeking relief under subsection (4). Wheeler's claim was that "Wheeler **will be able to demonstrate** that . . . any assertion of jurisdiction over [Wheeler] **is highly questionable**. (Court of Appeals Opinion at 2 – 3), (Emphasis supplied). Furthermore, the "Conclusion" of Wheeler's motion and memorandum did not request that the trial court dismiss the case for lack of jurisdiction or find the judgment void due to lack of jurisdiction. In fact, nowhere in Wheeler's motion does it assert that the judgment rendered is void. Instead, Wheeler "requests that the Default Judgment entered against it on or about December 5, 2007 be set aside, due to mistake, inadvertence, excusable neglect, (sic) and surprise." (R. 32.)

After the hearing, the trial court requested that the parties submit proposed findings and orders. Wheeler did so. (R. 90-92.) Nowhere in Wheeler's proposed findings or order is jurisdiction referenced as a means for the trial court to find that the default judgment was void due to lack of personal jurisdiction. (*See* Add. 1.) It clearly is evident from Wheeler's proposed findings and order that Wheeler did not raise issues before the trial court based upon Rule 60(b)(4). In fact, the sole reference to personal jurisdiction found in Wheeler's proposed findings or order is found in the following statement: "Further, Defendant has provided facts demonstrating that legal and valid defenses exist; namely, lack of personal jurisdiction and misjoinder of parties." (R. 91) (Add. 1.) Thus, the issue of whether the judgment was void under URCP 60(b)(4), was never raised in the trial court, was never briefed by the parties and was never decided by the trial court. Indeed, the trial court's findings, conclusions and order, do not even refer to a jurisdictional claim since Wheeler did not raise the issue of personal jurisdiction

before the trial court as a basis for relief, but wished to set aside the default based upon mistake, inadvertence or excusable neglect in order to raise issues regarding joinder of parties and jurisdiction by way of a Rule 12(b) motion to dismiss. (R. 68-74.)

Based upon the content of Wheeler's Rule 60(b) motion, and proposed findings and order, Wheeler was not intending to contest jurisdiction with its motion. Rather, Wheeler indicated it would be able to show, some time in the future, that jurisdictional issues existed. (R. 31-32.) Wheeler further did not assert a lack of jurisdiction but simply indicated that, based upon what Wheeler may be able to show in the future, jurisdiction would be "highly questionable." (R. 31-32.) Further, and as noted by the Court of Appeals, Wheeler's motion "failed to identify any particular problem with personal jurisdiction." (Court of Appeals Opinion at 3.)

Wheeler's contention that its request to set aside the default judgment under Rule 60(b) for lack of personal jurisdiction was expressed plainly (further arguing that any drafting flaws contained in such request should not wipe out Wheeler's jurisdictional challenge), fails to adequately address the Court of Appeals finding that Wheeler "failed to identify any particular problem with personal jurisdiction." (Court of Appeals Opinion at 3.) If 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. To avoid such precedent this Court should find that the Court of Appeals did not err in its treatment of Wheeler's contention that the district court erred in refusing to set aside the default judgment pursuant to Rule 60(b)(4), because Wheeler's conclusory and unsupported statements regarding personal jurisdiction did not constitute a request for relief under Rule 60(b)(4).

## **II. The Court of Appeals Properly Applied Existing Standards in Determining that Wheeler Failed to Adequately Establish a Meritorious Defense.**

Wheeler claims that the Court of Appeals erred by failing to apply this Court's holding in *Lund v. Brown*, 2000 UT 75, 11 P.3d 277, in determining whether Wheeler adequately alleged a meritorious defense in its initial Rule 60(b) motion. "The purpose of the meritorious defense rule is to 'prevent the necessity of judicial review of questions which, on the face of the pleadings, are frivolous.'" *Id.* at ¶28 (citing *Erickson v. Schenkers Int'l Forwaders, Inc.*, 882 P.2d 1147, 1148 (Utah 1994) (quoting *State ex rel. Dep't of Soc. Servs. V. Musselman*, 667 P.2d 1053, 1060 (Utah 1983)). "The rule requires the party seeking to set aside a judgment to 'show' that he or she 'has a meritorious defense to the action.'" *Id.* (citing *Erickson*, 882 P.2d at 1148) (quoting *Musselman*, 667 P.2d at 1055-56) (footnote omitted).

In deciding whether a meritorious defense had been alleged by Wheeler, the Court of Appeals cited *Hernandez v. Baker*, 2004 UT App 462, 104 P.3d 664, which adopted the standards of *Lund*. In fact, the Court of Appeals opinion specifically sets forth the requirements of *Lund* and analyzes Wheeler's motion under such requirements. (See Court of Appeals Opinion.) In *Lund*, the Court's central inquiries were "whether Lund and B&B (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 by the Browns." *Id.* at 28. The Court in *Lund* went on to explain what a party must do to "show" a meritorious defense. "[W]e have made it clear that a party need not actually prove its proposed defenses to meet this standard." *Id.* at 29. The Court then articulated the policy underlying the meritorious defense rule. "That policy is simply to prevent the necessity of treating defenses that are frivolous on their face.

Thus, 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, it has adequately shown a nonfrivolous and meritorious defense...” *Id.* at 29.

Wheeler seems to assert that by simply stating in its initial Rule 60(b) motion 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), they have met the standard this Court set forth in *Lund*. In fact Wheeler states “*Erickson* and *Lund* require nothing more.” (Appellant’s Brief at 18.) Wheeler also contends that the Court of Appeals “denied Wheeler relief because it ‘failed to identify’ particular facts supporting its defenses.” (Appellant’s Brief at 18.) However, contrary to Wheeler’s assertions, nowhere in the two paragraphs of the Court of Appeals Opinion which address Wheeler’s failure to present a meritorious defense does it refer to Wheeler’s failure to identify facts as fatal to Wheeler’s motion. The Court of Appeals found that Wheeler failed to provide a “clear and specific proffer of a defense” as required by *Lund*. (Court of Appeals Opinion at 3.) In so deciding, the Court of Appeals referred to the three summary statements that Wheeler provided in its motion, that the plaintiffs had sued the wrong party, that Wheeler did not own the dealership when the plaintiffs purchased their RV and that Wheeler, in the future, could demonstrate that personal jurisdiction was highly questionable. (Court of Appeals Opinion at 3) The Court of Appeals determined that these ambiguous summary statements did not raise to the level of a “clear and specific proffer of a defense” under the circumstances. In doing so, the Court of Appeals did not deviate from *Lund*, but rather applied *Lund* to this case.



Wheeler seems to assert that ambiguous summary allegations are sufficient to establish a “clear and specific proffer of a defense.” Under Wheeler’s argument, a meritorious defense would exist simply by stating: “jurisdiction is lacking.” Such is not a clear and specific proffer under the parameters of *Lund* as incorporated into the Court of Appeals’ Opinion. Furthermore, such an assertion would be in direct conflict with this Court’s clearly articulated fundamental policy underlying the meritorious defense rule. “That policy is simply to prevent the necessity of treating defenses that are frivolous on their face.” *Lund v. Brown*, 2000 UT 75, ¶ 29, 11 P.3d 277. Under the circumstances, Wheeler failed to make a clear and specific proffer of a meritorious defense when it chose to rely only on the above referenced summary assertions of **potential** defenses. Therefore, the Court of Appeals did not err in affirming the district court’s denial of Wheeler’s motion to set aside the default judgment based on the determination that Wheeler failed to “present a clear and specific proffer” of a meritorious defense.

### **III. Judsons Should be Awarded their Costs and Attorney Fees on Appeal.**

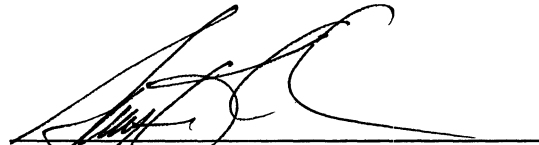
The judgment entered in favor of the Judsons awarded the Judsons their costs and attorney fees incurred in obtaining judgment against Wheeler for breach of contract and other relief. This award was based upon the contract under which the plaintiffs brought suit. Judsons are entitled to an award of their costs and attorney fees incurred on appeal. *See Valcarce v. Fitzgerald*, 961 P.2d 305 (Utah 1998).

### **CONCLUSION**

The Court of Appeals followed established jurisprudence in determining that Wheeler waived any personal jurisdiction defense by failing to adequately raise the same as part of its Rule 60(b) motion. The Court of Appeals further applied correct standards as established in

*Lund* in determining that Wheeler had failed to adequately present a clear and specific proffer of a meritorious defense. Based upon the above, the plaintiffs respectfully request that this Court affirm the Court of Appeals affirmation of the district court's denial, and award the Judsons their costs and attorney fees incurred herein.

RESPECTFULLY SUBMITTED this 24<sup>th</sup> day of May, 2010.

A handwritten signature in black ink, appearing to read 'G. Kuhlmann', is written over a horizontal line.

Gary G. Kuhlmann  
Attorney for Plaintiffs/Appellees

Certificate of Service


I hereby certify that on this 24<sup>th</sup> day of May, 2010, a true and correct copy of the foregoing was served on the following by the method indicated below:

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# **ADDENDUM 1**

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IN THE FIFTH JUDICIAL DISTRICT OF WASHINGTON COUNTY  
STATE OF UTAH

---

WILLIAM JUDSON and DONNA  
JUDSON, husband and wife,

Plaintiffs,

vs.

WHEELER RV LAS VEGAS, LLC, a  
Nevada foreign limited liability company,  
dba WHEELER'S LAS VEGAS RV,

Defendant.

**[PROPOSED] ORDER**

**Civil No.: 070501867**

**Judge: Eric A. Ludlow**

Defendant, WHEELER RV LAS VEGAS, LLC's Motion to Set Aside Judgment, came for hearing on May 15, 2008 before the Honorable Eric A. Ludlow. After consideration of the pleadings, court file, and oral arguments thereon, the Court rules as follows:

///

///

///

Defendant's Motion to Set Aside Default is **GRANTED**.

Defendant demonstrated through the Affidavit of Sharon Nelson, that this Default was taken as a result of surprise mistake, and inadvertence. Based upon the grant of an open extension given by Plaintiffs' counsel, and the ongoing communication between Defendant Wheelers by and through their representative Sharon Nelson and Plaintiffs' counsel, there was no rescission of the open extension to answer the complaint. The first notice that Defendant had of such rescission, by Plaintiffs' mailed Application for Entry of Default, was not received until December 5, 2007 due to an intervening weekend and out-of-state mailing. Plaintiffs' counsel could have faxed or telephoned Defendants to rescind his open extension to answer, but failed to do so. As such, by the time that Defendants learned of the rescission of the open extension to answer, a Default Judgment had already been taken.

Likewise, Defendant's Motion was made in accordance with Rule 60(B) of the Utah Rules of Civil Procedure, in that the Motion was filed less than three months after the Default Judgment was entered. Further, Defendant has provided facts demonstrating that legal and valid defenses exist, namely, lack of personal jurisdiction and misjoinder of parties.

"The rule that courts will incline towards granting relief to a party who has not had the opportunity to present his case is ordinarily applied at the trial court level. *State of Utah v. D. John Musselman and Linda Ann Coram* (1983) 667 P.2d 1055 and Hn1 1983 Utah LEXIS 1086. "Where any reasonable excuse is offered by defaulting party, courts generally tend to favor granting relief from a default judgment unless it appears that to do so would result in substantial

injustice to the adverse party ” *Westinghouse Elec Supply Co v Paul W Larsen Contractor*  
(1975), 544 P 2d 876

Here, Plaintiffs have not demonstrated that substantial injustice would result in Setting  
Aside the Default Judgment Plaintiffs have presented no evidence regarding substantial  
prejudice would result in the event that this Motion were granted Plaintiffs may amend their  
complaint to add parties should they so desire

Defendant must file an Answer or other responsive pleading on or before \_\_\_\_\_

DATED this \_\_\_\_ day of \_\_\_\_\_, 2008

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Honorable Eric A Ludlow