2008

# William Judson and Donna Judson, husband and wife v. Wheeler RV Law Vegas, LLC a Nevada Foreign limited liability company, dba Wheeler's Las Vegas RV : Reply Brief

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

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| WILLIAM JUDSON and DONNA JUDSON, husband and wife,<br><br>Plaintiffs/Respondents,<br><br>**vs.**<br><br>WHEELER RV LAS VEGAS, LLC, a Nevada foreign limited liability company, dba WHEELER'S LAS VEGAS RV,<br><br>Defendant/Appellant. | **Appellate Case No.: 20080688-CA**<br><br>**APPEAL**<br><br>**APPELLANT'S REPLY BRIEF**<br><br>Utah Court of Appeals |

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### A. THE ISSUE OF PERSONAL JURISDICTION WAS PROPERLY RAISED IN THE TRIAL COURT AND PRESERVED FOR APPEAL BECAUSE DEFENDANT HAS CONSISTENTLY DISPUTED IN PERSONAM JUSRIDICTION BEGINNING WITH ITS FIRST APPEARANCE IN THE CASE

As stated in Defendant's appellate brief, at the outset of this case, and in Defendant's Motion to Set Aside Default Judgment, Defendant disputed in personam jurisdiction. Defendant's first filing in the trial court was its Motion to Set Aside Default Judgment and Request for Hearing. (Record, pp. 30-33.) Plaintiff has argued that Defendant's claims regarding the trial court's lack of personal jurisdiction are waived due to Defendant's failure to file a Rule 12(b) Motion for lack of personal jurisdiction. (Appellee's Brief at pp. 10-11.) However, it is not requisite that a Rule 12(b) Motion be filed to preserve that defense. This Court has implied that a 60(b) Motion to Set Aside a Default Judgment is permissible as a first pleading, and if raised therein, the issue of lack of personal jurisdiction is preserved for appeal. State v. 736 N. Colo. St., 2004 UT App 232 , ¶7, 95 P.3d 1211; State v. All Real Property at 736 N. Colo. St., 2005 UT 90, ¶11, 127 P.3d 693.

As a Motion to Set Aside a Default Judgment is a valid method of preserving an issue for appeal, the following analysis will show that Defendant's 60(b) Motion and supporting documents, did, in fact, preserve the issue of personal jurisdiction for appeal. In its Motion to Set Aside Default Judgment, Defendant stated:

> 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.

(See pg. 33 of the Record.) As shown, Defendant, beginning with its first filing, has disputed personal jurisdiction. Additionally, despite Plaintiffs' assertion that Defendant failed to raise the issue of personal jurisdiction prior to, or during the hearing on the Motion to Set Aside the Default Judgment (See Appellees' Brief, pg. 8), Defendant did, in fact, raise this issue in the hearing on the matter. (Record, pp. 85-101.) As support for their faulty assertion, Plaintiffs correctly point out that Defendant failed to attach transcripts of that hearing. However, Plaintiffs' counsel's averment is deceitful in that he was present at that hearing and has full knowledge that no Court Reporter was present to record the proceedings of that hearing. Regardless, Defendant summarized the record through its Statement of Evidence Pursuant to Utah Rule of Appellate Procedure 11(G), and Plaintiffs never opposed Defendant's characterization.

Utah Rule of Appellate Procedure 11(g) states:

> If no report of the evidence or proceedings at a hearing or trial was made...the appellant may prepare a statement of the evidence or proceedings from the best available means, including recollection. The statement shall be served on the appellee, who may serve objections or propose amendments within 10 days after service. The statement and any objections or proposed amendments shall be submitted to the trial court for settlement and approval and, as settled

> and approved, shall be included by the clerk of the trial court in the record on appeal.

Here, Defendant served and filed its Statement of Evidence Pursuant to Utah Rules of Appellate Procedure 11(g) on or about July 25, 2008. Plaintiff failed to object to that Statement or to propose amendments thereto. Thus, the clerk of the trial court appropriately included it in the record on appeal. (See pp. 85-101 of the record.) The Statement of Evidence states that "it was argued that the trial court had no jurisdiction over Defendant. As briefed, Defendant has no meaningful or significant contacts with the state of Utah, and does not purposefully avail itself to the benefits of the laws of the state of Utah. Defendant does not advertise or otherwise maintain a presence in the state of Utah." (See pg. 86 of the record.) As stated above, Defendant/Appellant's Statement of Evidence Pursuant to Utah Rule of Appellate Procedure 11(g) was not objected to by Plaintiff. Thus, as stated in Rule 11(g), it is now settled and approved and a part of the record on appeal. Plaintiff's argument that the issue of personal jurisdiction was not raised in the trial court, nor preserved for appeal, is wholly without merit.

Plaintiffs have also alleged that Defendant failed, in its Motion to Set Aside Default Judgment, to include a single fact disputing personal jurisdiction. (Appellees' Brief, pg. 9.) However, Defendant's Motion, along with the Affidavits filed in support of the Motion, Defendant's [Proposed] Order, and Defendant/Appellant's Statement of Evidence Pursuant to Utah Rule of Appellate Procedure 11(g), which identifies the arguments raised at the hearing on the Motion, clearly indicate Defendant's intent not to

submit to the jurisdiction of the trial court. In this regard, the following statements are illustrative:

(1) In the Affidavit of Sharon Nelson in Support of Defendant's Motion to Set Aside Default, Ms. Nelson indicated that Defendant operates its business in Nevada, while Plaintiffs reside in Utah. (See pg. 39 of the record, ¶ 16.) Further, Defendant does not purposefully avail itself to the benefits and laws of the state of Utah. (See pg. 39 of the record, ¶ 16.) As general counsel for Defendant, Ms. Nelson's affidavit is evidence of the lack of any activities or otherwise that would give rise to personal jurisdiction over Defendant; and

(2) Defendant/Appellant's Statement of Evidence Pursuant to Utah Rule of Appellate Procedure 11(g), as noted above, states, among other things, that "Defendant does not advertise or otherwise maintain a presence in the state of Utah."

Additionally, Defendant's [Proposed] Order Granting Defendant's Motion to Set Aside Default, which was discarded by the trial court upon its signing of Plaintiffs' [Proposed] Order (See Addendum 6 to Appellant's Brief, pg. 2), plainly shows that Defendant sought to Set Aside the Default Judgment on the grounds that the trial court lacked personal jurisdiction over Defendant. In this regard, Defendant's [Proposed] Order states: "Further, Defendant has provided facts demonstrating that legal and valid defenses exist; namely, lack of personal jurisdiction and misjoinder of parties."

A 60(b) Motion to Set Aside a Default Judgment is permissible as a first pleading. Defendant raised the issue of personal jurisdiction in a timely-filed Motion to Set Aside

Default Judgment, including Affidavits and a [Proposed] Order in support thereof. At the hearing on the matter, Defendant again raised the issue of personal jurisdiction, as conclusively shown by Defendant/Appellant's Statement of Evidence Pursuant to Utah Rule of Appellate Procedure 11(g). Thus, the issue of whether the trial court had personal jurisdiction over Defendant was preserved for this appeal.

## B. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING DEFENDANT'S MOTION FOR RELIEF FROM THE DEFAULT JUDGMENT BECAUSE THE JUDGMENT WAS OBTAINED THROUGH MISTAKE, INADVERTANCE, SURPRISE, AND/OR EXCUSABLE NEGLECT

As discussed above, Defendant properly objected to the trial court's assumption of personal jurisdiction. However, in the event this Court finds that Defendant failed to properly object to the trial court's in personam jurisdiction over Defendant, such failure to properly object should be excused due to mistake, inadvertence, surprise and/or excusable neglect.

As stated in Defendant's Appellate Brief, the trial court's denial of Defendant's Motion to Set Aside Default Judgment was in error as the Default Judgment was obtained through mistake, surprise, and the excusable neglect of Defendant. Plaintiff, however, argues that Defendant has failed to show mistake, inadvertence, surprise or excusable neglect. (See Appellees' Brief, pg. 12-15.) In this regard, Plaintiff claims that "both the affidavits of defendant's general counsel, Sharon Nelson, and the affidavit of plaintiffs' counsel, Gary Kuhlman, show that prior to the entry of default, there was a total of five contacts between counsel's offices," (See Appellees' Brief, pg. 13) and that, as such,

Defendant did not file the Motion to Set Aside the Default in good faith or with "clean hands". Such is not the case, as will be demonstrated below.

In Chrysler v. Chrysler, 303 P.2d 995 (Utah 1956), cited by Plaintiffs in support of their proposition, the plaintiff filed a divorce action in the state of Utah. Subsequently, an order to show cause was served upon the plaintiff. The plaintiff failed to appear in response, but instead went to Nevada and initiated the same action. Id. at 996. Then, both plaintiff and his counsel failed to appear at the trial in the Utah case or at the subsequent hearing on the Motion to Set Aside the Default Judgment in Utah. Id. at 996. The Utah court stated that this conduct negates a prime requisite for the granting of a Motion to Set Aside a Default Judgment, that the movant come to court with clean hands and in good faith. Id at 997. The court supported its ruling by stating the following:

> Plaintiff initially sought relief before the Utah court, but when he found a contest there, he fled from it and has tried by devious conduct to circumvent the effects of the action he commenced and to defeat the jurisdiction of the court from which he now seeks consideration. Inconsistent with any bona fide intent to pursue the action in the Utah court and abide by its judgment are: his failure to appear when he was served with an order to show cause; his departure from the state; his purported establishment of residence in Nevada; his filing of a new action for divorce there; his deliberate choice to see the Nevada action through and take a judgment even after notice that the Utah court had rendered a judgment in the action he had initiated; his indifference to the Utah decree for more than two months after it was entered; his failure to appear personally on the motion to set aside the judgment, and finally, his rejection of the trial court's request that he set aside the Nevada proceeding and then submit the matter to the Utah court.

Id. at 997. In Pacer Sport and Cycle, Inc. v. Myers, 534 P.2d 616 (Utah 1975), also cited by Plaintiffs, the defendant took no further action to show that plaintiff had sued the

wrong party or to attempt to resolve the allegations in the complaint. Such is obviously not the case in the action at hand. Here, Defendant took numerous steps to show that the Plaintiffs had sued the wrong party, and to resolve the issue with Plaintiffs, as will be shown below.

In this action, the conduct of Defendant falls significantly short of the bad faith conduct by the plaintiff in Chrysler and the lack of action by Defendant in Pacer Sport and Cycle. In this regard, Defendant attempted, from the beginning, to show Plaintiffs that it was the wrong party to this action. After being granted an open extension within which to answer the Complaint, the parties began a dialogue to determine who the proper defendant in the action was. Defense counsel believed that the issue was still in the process of resolution when Defendant was served with the Notice of Entry of Default.

Regarding the amount of contact between the parties in an attempt to resolve the issue of the proper parties to the suit, the affidavit of Sharon Nelson indicates that she first contacted Plaintiffs' counsel sometime in the fall of 2007. (Addendum 3, pg. 2, ¶4 to Defendant's Appellate Brief.) Based upon the conversation, certain documents were requested by Plaintiffs' counsel and an agreement was reached as to an open extension in which to answer the complaint. (Addendum 3, pg. 2, ¶5 to Plaintiff's Defendant's Brief.) Mr. Kuhlman advised Ms. Nelson that she should provide the documents or file an answer. (Addendum A, pg. 2, ¶5 to Plaintiff's Appellate Brief.) Ms. Nelson provided certain documentation, leaving open the extension within which to file an answer. (Addendum 3, pg. 2, ¶5 to Defendant's Appellate Brief; Addendum A, pg. 2, ¶6 to

Plaintiff's Appellate Brief.) Later that day, Plaintiffs' counsel demanded more information. (Addendum 3, pg. 2, ¶6 to Defendant's Appellate Brief; Addendum A, pg. 2, ¶7 to Plaintiff's Appellate Brief.) On November 1, 2007, Ms. Nelson sent a second fax requiring that Mr. Kuhlman sign a confidentiality agreement. (Addendum A, pg. 2, ¶8 to Plaintiff's Appellate Brief.) Ms. Nelson then indicates that she continued to speak with Plaintiffs' counsel. (Addendum 3, pg. 2, ¶7 to Defendant's Appellate Brief.) On November 27, 2007, without any email, fax or telephone notice, Mr. Kuhlman mailed an Application for Entry of Default to Defendant's counsel. (Addendum A, pg. 2, ¶9 to Plaintiff's Appellate Brief.) Thus, Ms. Nelson and Mr. Kuhlman had at least eight contacts, and likely more, prior to the filing of the Notice of Entry of Default, in an effort to resolve the issue of which party or parties are the proper defendant(s) in this action.

It is "generally regarded as an abuse of discretion for a trial court to refuse to vacate a default judgment where timely application is made and there is **any reasonable grounds** for doing so, to the end that cases may be decided on their merits. *Emphasis added.* Chrysler, supra, 303 P.2d at 996. As stated in Defendant/Appellant's Brief, Plaintiffs' counsel granted Sharon Nelson an open-ended extension in which to answer the Complaint. Ms. Nelson understood the phrase "open-ended extension" to mean that Defendant did not yet have to answer the Complaint until the parties resolved the issue of who should have been sued, or at least, until Plaintiffs' counsel notified her that the extension of time was no longer "open". The parties then engaged in the series of communications regarding who was the proper defendant in the action.

On or about November 27, 2007, without prior notification to Defendant's general counsel, and via mail only, Plaintiffs' counsel dispatched a Notice of Application for Entry of Default, knowing that the document would be subject to out-of-state mailing during a peak holiday mailing period, and with an intervening weekend. Defendant's counsel did not receive the document until approximately December 5, 2007. By that time, Plaintiffs had already taken a Default Judgment against Defendant, despite the fact that Plaintiffs' counsel never notified Defendant's general counsel that the open extension of time in which to answer the Complaint had been rescinded.

In Helgesen v. Inyangumia, 636 P.2d 1079, 1981 Utah LEXIS 885, the parties had been negotiating for settlement for five months. After the time for answering the complaint had expired, plaintiff's counsel filed a memorandum to support a default award without having contacted defendant to inform them that he was doing so. Id. The court held that courtesy and equity required that where a defendant had not yet filed an answer and believed his adversary would tell him when he would ask for judgment and defendant was not so advised, the defendant should not be precluded from filing an answer because of such default. Id. at 1081. The court said, "Common courtesy and ordinary professional conduct dictated that before proceeding to the court the attorney should have made contact with the adjuster with whom he had been dealing for so long, and to have made inquiry as to why an answer had not been filed." Id. at 1081. "Under the circumstances the adjuster had every reason to believe that he would be extended professional courtesy by the attorney with whom he was dealing and would hear back from him with further medical information. He was reasonable in believing that no default judgment would be

taken in the meantime. We therefore conclude he was not guilty of lack of diligence and the defendant should be relieved of his default under Rule 60(b) on account of the mistake and excusable neglect." Id. at 1082.

Here, similarly, counsel for the parties were engaged in negotiations. The open extension to answer was never revoked or rescinded by Plaintiffs' counsel. Instead, Plaintiffs' counsel decided just to send to Defendant a Notice of Application for Entry of Default. Defendant was completely surprised by Plaintiffs' counsel's actions. (See pg. 39 of the record, ¶¶ 12-13.) Plaintiff should have been estopped from entry of default due to the open extension of time granted to Defendant by Plaintiffs' counsel, and Plaintiffs' counsel's failure to timely advise Defendant, or to advise Defendant at all, of the rescission of his agreement to grant an open extension of time to answer the Complaint. Defendant was completely surprised and any neglect on its part to file an answer was justified and excusable due to the actions of Plaintiff. Plaintiffs' allegation that Defendant did not act in good faith by failing to file an answer is without merit.

## C. DEFENDANT'S TIMELY FILING OF THE MOTION TO SET ASIDE DEFAULT JUDGMENT NEGATES THE PROPOSITION THAT THE ALLEGATIONS IN THE COMPLAINT HAVE BEEN ADMITTED

Plaintiff has argued that because, at the time Defendant filed its only motion (the Motion to Set Aside Default Judgment), judgment had already been granted in favor of Plaintiff, Defendant's failure to contest the allegations contained in the complaint before default resulted in the allegations being admitted. (See Appellees' Brief, pg. 10.) In support, Plaintiffs cite Cody v. Lowe, 2008 UT App 440, 2008 Utah App LEXIS 438,

citing Stevens v. Collar, 837 P.2d 593, 595 (Utah Ct. App. 1992) and Murdock v. Blake, 26 Utah 2d 22, 484 P.2d 164, 169 (Utah 1971). These cases however, merely stand for the proposition that matters left uncontested are deemed admitted. Neither case identifies at what stage in the litigation matters are found to be uncontested. As stated above, a 60(b) Motion to Set Aside a Default Judgment is permissible as a first pleading, and if raised therein, the issue of lack of personal jurisdiction is preserved for appeal. State v. 736 N. Colo. St., 2004 UT App 232 , ¶7, 95 P.3d 1211; State v. All Real Property at 736 N. Colo. St., 2005 UT 90, ¶11, 127 P.3d 693. Therefore, Plaintiffs' allegations that Defendant's failure to contest the allegations in the complaint prior to default being taken results in the matters being admitted, is also without merit.

## D. DEFENDANT HAS ESTABLISHED A MERITORIOUS DEFENSE WHICH, IF PROVEN, WOULD RESULT IN A JUDGMENT DIFFERENT THAN THE ONE ENTERED

Plaintiffs' argue that, even if Defendant has established the existence of excusable neglect or surprise, Defendant has failed to establish the existence of a meritorious defense, as required for relief under Rule 60(b). (See Plaintiffs' Appellate Brief, pg. 15-16.) In citing State v. Musselman, 667 P.2d 1053 (Utah 1983), Plaintiffs attempt to show that Defendant's Motion and supporting Affidavits dispute the truth of Plaintiffs' allegations, but do not set forth specific facts which, if proven, would result in a different judgment than the one entered. However, as discussed above, the Motion to Set Aside the Default Judgment, the Affidavit of Sharon Nelson, the [Proposed] Order, and Defendant/Appellant's Statement of Evidence Pursuant to Utah Rule of Civil Procedure

11(g), each provide specific facts disputing personal jurisdiction. Additionally, the subject Motion to Set Aside Default Judgment indicates that Defendant did not own the subject dealership when Plaintiffs purchased the recreational vehicle. In other words, Plaintiffs sued the wrong party.

The court in Lund v. Brown stated:

> Although we have never explained precisely what a party must do to adequately 'show' a meritorious defense, we have made it clear that a party need not actually prove its proposed defenses to meet this standard. *See Erickson*, 882 P.2d at 1148 (rejecting a standard essentially requiring that the defaulted party prove its proposed defense before it is eligible to have a judgment vacated). Moreover, we have clearly articulated the fundamental 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 for the purposes of its motion to set aside a default judgment.

Lund v. Brown, 2000 UT 75, ¶29, 11 P.3d 277. Here, Defendant need not prove that Plaintiff has sued the wrong party in this case. Defendant need only show that, if proven true, the Plaintiff's suing of the wrong defendant is a meritorious defense – that it precludes total recovery by the claimant. Thus, Defendant has established a meritorious defense.

## II.
## CONCLUSION

The Trial Court erred in failing to set aside the subject Default Judgment as Plaintiffs have failed to demonstrate a proper basis for personal jurisdiction in the State of

Utah and have sued the wrong party. These issues were preserved for appeal beginning with Defendant's first filing, the subject Motion to Set Aside Default Judgment. The filing of that Motion was adequate, as a first pleading, to dispute personal jurisdiction. Additionally, the Default Judgment was obtained through mistake, inadvertence, surprise, and excusable neglect as Defendant's open extension in which to answer the Complaint was not timely rescinded, or rescinded at all, by Plaintiffs. Lastly, Defendant has established a meritorious defense - that Plaintiffs have sued the wrong party. Thus, the Trial Court erred when it denied Defendant's Motion to Set Aside Default Judgment.

Respectfully submitted,

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DATED: January 28, 2009

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## CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Appellant's Reply Brief was mailed, postage prepaid on January 28, 2009 to the following:

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