

2008

# Judson v. Wheeler RV : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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WILLIAM JUDSON and DONNA  
JUDSON, husband and wife,

Plaintiffs/Respondents,

vs.

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

Defendant/Appellant.

Appellate Case No.: 20080688-CA

APPEAL

BRIEF OF APPELLANT

Utah Court of Appeals

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THE DEFAULT JUDGMENT AGAINST DEFENDANT  
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This issue was preserved in the trial court. See pp. 30-33 of the record.

**Issue #3:** Did the trial court err in failing to set aside the default judgment against Defendant/Appellant Wheeler RV Las Vegas, LLC, as such failure is contrary to Utah's strong policy of adjudicating matters on the merits, as opposed to the default process?

Standard of Review: Abuse of Discretion/Clear Error. Swallow v. Kennard, 2008 UT App 134, ¶19, 183 P.3d 1052.

This issue was preserved in the trial court. See pp. 30-33 of the record.

### III.

#### STATEMENT OF THE CASE

In or around December 2002, Plaintiffs/Respondents (hereinafter, "Plaintiffs") purchased a Recreational Vehicle (hereinafter, "RV") from Wheelers RV Las Vegas from Defendant/Appellant's (hereinafter, "Defendant") predecessor in interest. (See pg. 2 of the record, ¶ 7.) In or around December 2004, Defendant acquired the assets, but not the liabilities for prior sales, of Wheelers RV Las Vegas. (See pg. 121 of the record, ¶ 3.) In the Fall of 2007, Defendant was served with a Complaint. (See pp. 1-15 of the record.) Plaintiffs allege that the RV sold to them was a "manufacturer's buyback" with a "history of problems". (See pg. 2 of the record, ¶ 7.) Further, Plaintiffs allege that, although they were able to sell the subject RV, following that sale, the subject RV was found to be a "manufacturer's buyback" with a "history of problems", and that Plaintiffs were then obligated to re-purchase the RV, sustaining monetary damages. (See Pg. 3 of the record, ¶¶ 12-16.)

documents were provided, Plaintiffs' counsel requested additional documentation. (See pg. 38 of the record, ¶¶ 4-7.) Plaintiffs' counsel requested one particular document, the purchase and sale agreement, without redactions pertaining to the financial condition of the parties to the purchase of the Wheelers RV Las Vegas, LLC dealership, despite the fact that the financial condition of the parties was wholly irrelevant. (See pg. 38 of the record, ¶¶ 5-6.) In an effort to cooperate with Plaintiffs' counsel, Defendant was willing to provide the document in its entirety if Plaintiffs' counsel would sign a confidentiality agreement to keep the proprietary and private information pertaining to financial condition confidential. (See pg. 38 of the record, ¶ 6.) Plaintiffs' counsel refused to sign the agreement, and continued to insist upon the unredacted document. (See pg. 38 of the record, ¶ 6.)

Plaintiffs' counsel and general counsel for Defendant continued to attempt to work through their concerns via correspondence, mainly via facsimile. (See pg. 38 of the record, ¶¶ 4-7.) Plaintiffs' counsel, without prior notification to general counsel for Defendant, and *via mail*, without any phone call or email, dispatched a Notice of Application for Entry of Default on or about November 27, 2007, knowing that the document would be subject to out-of-state mailing during a peak holiday mailing period, and with an intervening weekend. (See pg. 38 of the record, ¶ 7.) Counsel for Defendant did not receive the document until approximately December 5, 2007. (See pg. 38 of the record, ¶ 8.) By that time, Plaintiffs had already taken a Default Judgment against Defendant, despite the fact that Plaintiffs' counsel never notified general counsel for Defendant that the open extension of time in which to answer had been rescinded. (See pg. 38 of the record, ¶ 10.)

have sued the wrong party, and have failed to demonstrate a proper basis for personal jurisdiction.

Additionally, the Trial Court erred in failing to set aside the default judgment as the judgment was obtained through mistake, inadvertence, surprise, or excusable neglect. In this regard, sometime in Fall 2007, Plaintiffs' counsel granted Sharon Nelson, Nevada counsel for Defendant, an open-ended extension in which to answer the Complaint. Ms. Nelson understood the phrase "open-ended extension" to mean exactly that. However, Plaintiffs' counsel mailed an Application for Entry of Default against Defendant without first informing Defendant that its extension of time within which to answer was being rescinded. Thus, Defendant's failure to answer the Complaint is excused by mistake, inadvertence, surprise and/or excusable neglect.

Lastly, Utah has a strong policy of adjudicating matters on the merits, as opposed to the default process. Thus, the Trial Court erred when it denied Defendant's Motion to Set Aside Default Judgment.

## VI.

### ARGUMENT

#### **A. THE TRIAL COURT ERRED IN FAILING TO SET ASIDE THE DEFAULT JUDGMENT AGAINST DEFENDANT PURSUANT TO UTAH RULE OF CIVIL PROCEDURE 60(b)(4), BECAUSE THE JUDGMENT WAS VOID FOR WANT OF PERSONAL JURISDICTION OVER DEFENDANT**

At the outset of this case, and in Defendant's Motion to Set Aside Default Judgment, Defendant disputed in personam jurisdiction for the reasons that follow. By appearing via a 60(b) Motion, Defendant has not submitted to the jurisdiction of Utah

matter offends traditional notions of fair play and substantial justice. See generally, International Shoe Co. v. Washington, supra, 326 U.S. 310.

In World-Wide Volkswagen Corp. v. Woodson, Defendants World-Wide Volkswagen Corp., a regional distributor for Volkswagen, Inc. in New York, and Seaway Volkswagen, a dealership in New York, asked to be removed from the suit on the grounds that the forum state (Oklahoma) had no personal jurisdiction over them. The Court agreed, stating that because World-Wide and Seaway merely sold the vehicle in which the Plaintiff was injured, and they had done nothing to solicit the business of the out-of-state Plaintiff, the two corporations did not avail themselves of any of the privileges or benefits of Oklahoma law and thus, did not have minimum contacts in Oklahoma.

Here, likewise, Defendant, a limited liability company, was formed in Minnesota, and is operated from a location in Nevada. Defendant was served with the Complaint at its business address in Nevada. Defendant conducts all of its business in the State of Nevada. The purchase and sale of the subject RV occurred in the State of Nevada. Defendant has never operated any retail or wholesale establishment in the State of Utah, nor did it solicit Plaintiffs' business via mail, television, radio, or any other manner in the State of Utah. Thus, as Defendant did not avail itself of the privileges of conducting business in the State of Utah, it does not have the requisite minimum contacts with Utah to give Utah courts personal jurisdiction over it in this matter.

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predecessor-in-interest, including any liability for prior sales, is not attributable to Defendant. Thus, Plaintiff has sued the wrong party.

As the Trial Court's default judgment was rendered without personal jurisdiction over Defendant, it was void. Therefore, the Trial Court's failure to set aside that default judgment was in error.

**B. THE TRIAL COURT ERRED IN FAILING TO SET ASIDE THE DEFAULT JUDGMENT AGAINST DEFENDANT PURSUANT TO UTAH RULE OF CIVIL PROCEDURE 60(b)(1), BECAUSE THE JUDGMENT WAS OBTAINED THROUGH MISTAKE, INADVERTANCE, SURPRISE, AND/OR EXCUSABLE NEGLIGENCE**

The Motion to Set Aside Default Judgment was brought on the grounds that the default judgment rendered by the Trial Court was obtained through mistake, inadvertence, surprise, and/or excusable neglect, among other grounds. Utah Rule of Civil Procedure 60(b)(1) states, in applicable part:

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.... 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.

Utah R. Civ. P. 60(b)(1). Here, the Trial Court's denial of Defendant's Motion to Set Aside Default Judgment was in error as it was obtained based upon a mistake, surprise, and the excusable neglect of Defendant. Additionally, Defendant filed its Motion within three months after the Default Judgment was entered.

///

documents were provided, Plaintiffs' counsel requested additional documentation. Plaintiffs' counsel requested one particular document, the purchase and sale agreement, without redactions pertaining to the financial condition of the parties to the purchase of the Wheelers RV Las Vegas, LLC dealership, despite the fact that the financial condition of the parties was wholly irrelevant. In an effort to cooperate with Plaintiffs' counsel, Defendant was willing to provide the document in its entirety if Plaintiffs' counsel would sign a confidentiality agreement to keep the proprietary and private information pertaining to financial condition confidential. Plaintiffs' counsel refused to sign the agreement, and continued to insist upon the unredacted document.

Plaintiffs' counsel and Defendant's general counsel continued to attempt to work through their concerns via correspondence, mainly via facsimile. However, 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 Olsen v. Cummings 1977 UT LEXIS 1172, 565 P.2d 1123, the Court was asked to consider whether the trial court erred in denying a Motion to Vacate a default judgment, made under U.R.C.P. 60(b)(1), where the Motion was timely made. The Court

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.

**C. THE TRIAL COURT ERRED IN FAILING TO SET ASIDE THE DEFAULT JUDGMENT AGAINST DEFENDANT BECAUSE FAILURE TO DO SO WAS CONTRARY TO UTAH'S STRONG POLICY OF ADJUDICATING MATTERS ON THE MERITS, AS OPPOSED TO THE DEFAULT PROCESS**

The Motion to Set Aside Default Judgment was brought on the grounds that the Default Judgment rendered by the Trial Court was in error as it was contrary to Utah's clearly-established policy of adjudicating matters on the merits, as opposed to the default process. At least as early as 1909 courts have stated that, although the matter of setting aside defaults is within the discretion of the trial courts, Utah's general rule is to bring about a judgment on the merits. Utah Courts are generally in accord with the doctrine that "the courts should be liberal in granting relief against judgments taken by default to the end that controversies may be tried on the merits." State of Utah v. Musselman, 1983 UT LEXIS 1086, ¶5, 667 P.2d 1053; Quealy v. Willardson, 1909 UT LEXIS 32, ¶11, 100 P. 930 ("In all doubtful cases the general rule of courts is to incline towards granting relief from the default and to bring about a judgment on the merits.").

The Quealy court stated further that, "while courts have a right to require all litigants to come into court and to present their claims and defenses in accordance with the law and rules of procedure, and in case of inexcusable neglect to refuse them a hearing, still these rules should be enforced so as to reflect justice between the parties to

## VII.

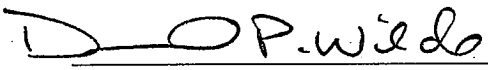
### CONCLUSION

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. 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 by Plaintiffs. Finally, Utah has a strong policy of adjudicating matters on the merits, as opposed to the default process. Thus, the Trial Court erred when it denied Defendant's Motion to Set Aside Default Judgment.

Respectfully submitted,

Law Offices of Steven R. Bangerter

DATED: December 2, 2008

  
DANIEL P. WILDE  
Attorney for Defendant/Appellant,  
WHEELER RV LAS VEGAS, LLC

## ADDENDUM

- Exhibit 1: Complaint - filed in or about August 2007
- Exhibit 2: Defendant's Motion to Set Aside Default Judgment and Request for Hearing – filed February 29, 2008
- Exhibit 3: Affidavit of Sharon Nelson in Support of Defendant's Motion to Set Aside Default Pursuant to Rule 60(b) of the Utah Rules of Civil Procedure – filed February 29, 2008
- Exhibit 4: Affidavit of William E. Frazier in Support of Defendant's Motion to Set Aside Default Pursuant to Rule 60(b) of the Utah Rules of Civil Procedure – filed February 29, 2008
- Exhibit 5: Plaintiffs' Proposed Findings, Conclusions and Order regarding Defendant's Motion to Set Aside Default Judgment, which was ultimately the Court's final ruling – Filed June 25, 2008
- Exhibit 6: Defendant/Appellant's Statement of Evidence Pursuant to Utah Rule of Appellate Procedure 11(g) – filed on July 25, 2008
- Exhibit 6(A): A true and correct copy of Defendant's [Proposed] Order regarding its Motion to Set Aside Default Judgment which was filed on February 29, 2008, but was subsequently discarded by the Court because the Court used Plaintiffs' [Proposed] Order instead
- Exhibit 6(B): Plaintiffs' Proposed Findings, Conclusions and Order regarding Defendant's Motion to Set Aside Default Judgment, which was ultimately the Court's final ruling – Filed June 25, 2008
- Exhibit 7: Defendant/Appellant's Certificate of Non-request of Transcripts or Proceedings Pursuant to Utah Rule of Appellate Procedure 11(e)(1) – filed on July 25, 2008
- Exhibit 8: Defendant/Appellant's Request for Stay of Default Judgment and Determination of Amount Payable to Court for Security Purposes in Lieu of Supersedeas Bond Pursuant to URCP 62, or in the Alternative, Request for Supersedeas Bond, and Request for Hearing – filed October 2, 2008



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FIFTH DISTRICT COURT  
WASHINGTON COUNTY, STATE OF UTAH

WILLIAM JUDSON and DONNA	)	
JUDSON, husband and wife,	)	
	)	COMPLAINT
Plaintiffs,	)	
	)	
v.	)	Civil No.
	)	
WHEELER RV LAS VEGAS, LLC, a	)	
Nevada foreign limited liability company,	)	Judge
dba WHEELER'S LAS VEGAS RV,	)	
	)	
Defendant.	)	

Plaintiffs, for their Complaint against the Defendant, complain and allege as follows:

1. Plaintiffs are residents of Washington County, Utah.
2. Defendant is a Minnesota limited liability company doing business as Wheeler's Las Vegas RV in Clark County, Nevada.
3. This Court has subject matter jurisdiction, personal jurisdiction and venue over this matter
4. During 2002, the Plaintiffs met with the Defendant to discuss purchasing a 2000 Journey RV, VIN No. 4UZ6XFBC8YCG43267 (the "RV").

5. After such discussion, the Plaintiffs entered into an agreement with the Defendant to purchase the RV for the sum of \$124,527.50.

6. As part of the purchase of the RV, the Plaintiffs traded in another recreational vehicle with which resulted in a net trade-in allowance of \$21,597.00. Plaintiffs also paid to Defendant a down payment of \$7,500. Based thereon, Plaintiffs were required to obtain a loan of \$95,900.00 for the remaining purchase price for the RV. Documents evidencing the purchase of the RV by Plaintiffs are attached hereto as Exhibit A and by reference incorporated herein.

7. At no time during the negotiation or sale of the RV to Plaintiffs did the Defendant inform the Plaintiffs that there was any history of problems with the RV nor that the RV had been a manufacturer's buyback vehicle.

8. At no time during the negotiation or sale of the RV to Plaintiffs did the Defendant execute or deliver to the Plaintiffs a written disclosure of the buyback status of the RV as required by state and federal law, nor obtain the Plaintiffs' acknowledgment of such notice.

9. At no time during the negotiation or sale of the RV to Plaintiffs did the Defendant deliver to the Plaintiffs a written disclosure that the title to the RV would be permanently inscribed with the notation "Lemon Law Buyback" as required by state and federal law.

10. At no time did the Defendant place a decal on the left doorframe of the RV stating that the RV was a "Lemon Law Buyback" as required by state and federal law.

11. As part of the purchase of the RV, the only document which the Defendant presented to the Plaintiffs, without discussion or disclosure, was a limited warranty for repurchased vehicles, a true and correct copy of which is attached hereto as Exhibit B. However,

the Defendant did not disclose to the Plaintiffs the fact that the RV was a manufacturer's buyback, nor did the Defendant execute the dealer portion of the limited warranty.

12. After several years, the Plaintiffs decided to sell the RV and placed the same on consignment with Hurricane Valley Auto Mall in Hurricane, Utah.

13. The RV was subsequently sold from the Hurricane Valley Auto Mall lot. At the time of such sale, the Plaintiffs were required to pay the sum of \$6,000.00 to pay the remaining lien on the RV and provide clear title.

14. Shortly after the sale of the RV from the Hurricane Valley Auto Mall lot, demand was made upon Hurricane Valley Auto Mall to repurchase the vehicle since the fact that the RV was a manufacturer's buyback had not been disclosed at the time the RV was sold under the consignment.

15. Based upon such notice and demand, Hurricane Valley Auto Mall demanded that the Plaintiffs repurchase the RV from Hurricane Valley for the same amount which Hurricane Valley was required to pay to repurchase the RV. This was the first time the Plaintiffs were ever informed of the status of the RV as a manufacturer's buyback.

16. In order to repurchase the RV, the Plaintiffs were required to pay a down payment of \$6,100.00 and obtain a loan in the sum of \$84,700.00. Based upon such loan, the Plaintiffs have been required to make monthly payments of \$849.62 since December 2006.

**FIRST CAUSE OF ACTION**  
**(Breach of Contract)**

17. Plaintiffs incorporate the allegations of paragraphs 1 through 16 above as if fully set forth herein.

18. Under the terms of the agreement between the parties, Defendant was to deliver to Plaintiffs clean title to the RV to the Plaintiffs.

19. Defendant breached its express and implied obligations under the agreement by acting in bad faith, not disclosing the defects in the title for the RV and not providing the Plaintiffs with a clean title to the RV.

20. Defendant's breach of the agreement has caused damage to the Plaintiffs in an amount to be proven at trial, and including the lost value of the Plaintiffs' trade-in vehicle, amounts paid by Plaintiffs for the loan on the RV, payment to sell the RV through Hurricane Valley, costs to finance the repurchase of the RV, monthly payments made by the Plaintiffs due to the Defendant's breach, and costs and attorney fees incurred by the Plaintiffs in an amount of no less than \$147,274.08.

**SECOND CAUSE OF ACTION**  
**(Fraudulent Misrepresentation)**

21. Plaintiffs incorporate the allegations of paragraphs 1 through 20 above as if fully set forth herein.

22. As a material part of the negotiations between the parties, Defendant represented to the Plaintiffs that the title to the RV was not branded.

23. At the time of the representations, Defendant knew or had reason to know that such statements were false, or had complete disregard for whether the representations were true or not.

24. The representations made by Defendant to the Plaintiffs were made by Defendant in order to deceive the Plaintiffs and cause them to enter into the transaction with Defendant.

25. The Plaintiffs reasonably relied on Defendant's misrepresentations and entered into the agreement with Defendant based thereon.

26. Due to the misrepresentations, and in order to protect their interests, Plaintiffs have been required to incur indebtedness and make payments thereon substantially in excess of the actual value of the RV and have been required to retain an attorney to seek damages caused by the Defendant's misrepresentations. This has caused Plaintiffs damages and increased expenses in an amount to be proven at trial, but in an amount of no less than \$147,274.08.

**THIRD CAUSE OF ACTION**  
**(Negligent Misrepresentation)**

27. Plaintiffs incorporate the allegations of paragraphs 1 through 26 above as if fully set forth herein.

28. As a material part of the negotiations between the parties, Defendant represented to the Plaintiffs that the title to the RV was not branded.

29. The Plaintiffs reasonably relied on Defendant's misrepresentations and entered into the agreement with Defendant based thereon.

30. Due to the misrepresentations, and in order to protect their interests, Plaintiffs have been required to incur indebtedness and make payments thereon substantially in excess of the actual value of the RV and have been required to retain an attorney to seek damages caused by the Defendant's misrepresentations. This has caused Plaintiffs damages and increased expenses in an amount to be proven at trial, but in an amount of no less than \$147,274.08.

**FOURTH CAUSE OF ACTION**  
**(Violation of State and Federal Law)**

31. Plaintiffs incorporate the allegations of paragraphs 1 through 30 above as if fully set forth herein.

32. State and federal law requires that in the sale of a vehicle which qualifies as a manufacturer's buyback, the dealer must:

a. execute and deliver to the purchaser at the time of sale a notice that the vehicle being sold is a manufacturer's buyback and obtain the purchaser's acknowledgment of such notice;

b. deliver to the purchaser and have the purchaser execute a written disclosure regarding the manufacturer's repurchase of the vehicle and notifying the purchaser that the title for such vehicle will be permanently inscribed with the notation "Lemon Law Buyback;" and

c. affix a deal to the left front doorframe specifying that the certificate of title for the vehicle is inscribed with the notation "Lemon Law Buyback."

33. Defendant failed to comply with any of these requirements in connection with the sale of the RV to the Plaintiffs.

34. Defendant's failure to comply with its statutory obligations has damaged Plaintiffs in an amount to be proven at trial, and no less than \$147,274.08.

**FIFTH CAUSE OF ACTION**  
**(Punitive Damages)**

35. Plaintiffs incorporate the allegations of paragraphs 1 through 34 above as if fully set forth herein.

36. Despite Defendant's obligations to do otherwise, Defendant failed to comply with the terms of the parties' agreement, fraudulently misrepresented facts to the Plaintiffs in order to induce them into an agreement with Defendant, and failed to comply with statutory requirements.

37. As a direct and proximate result of Defendant's willful, malicious, reckless, and blatant disregard for the rights and interests of the Plaintiffs, Plaintiffs have incurred and will continue to incur damages.

38. Defendant should be ordered to pay punitive damages to the Plaintiffs in an amount reasonable in the premises.

WHEREFORE, Plaintiffs pray that the Court enter a judgment in favor of Plaintiffs and against Defendant as follows:

1. For damages in an amount proven at trial and no less than \$147,274.08 for Defendant's breach of contract.
2. For damages in an amount proven at trial and no less than \$147,274.08 for Defendant's fraudulent misrepresentations.
3. For damages in an amount proven at trial and no less than \$147,274.08 for Defendant's negligent misrepresentations.

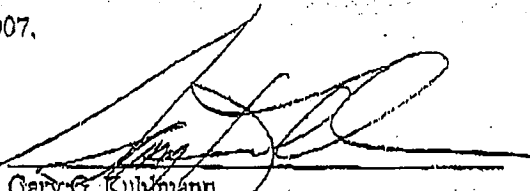
4. For damages in an amount proven at trial and no less than \$147,274.08 for Defendant's failure to comply with statutory requirements.

5. For punitive damages in an amount reasonable under the circumstances.

6. For Plaintiffs' costs and attorney fees incurred herein; and

7. For such other and further relief as the Court deems just.

DATED this 15<sup>th</sup> day of August, 2007.



Gary G. Kuhlmann  
Attorney for Plaintiffs

Plaintiffs' address:  
30 Red Bluff Drive  
Hurricane, Utah 84737

## EXHIBIT A

08/19/2007 10:58 FAX 1702814074

WHEELER'S LAS VEGAS WALTER

0004

## RETAIL BUYER'S ORDER

Birth Date  
GVWSales  
Order

WHEELER'S RV

13175 LAS VEGAS BLVD. 80. • LAS VEGAS, NV 89124  
(702) 898-9000 • FAX (702) 898-9001

21128

18066

Stock No. 4919

Seller PRIOR CUSTOMER

Shimpoan VC

Date 05/19/02

Phone 35-879-200

Purchaser WILLIAM E HUDSON &amp; DONNA HUDSON

Address 20 RED BLUE DR.

HURRICANE

EQIN

Sq 737

Enter my order for the vehicle, accessories and insurance as listed below under the terms and conditions set forth below and on reverse side.

NEW ☐ USED ☒ COLOR

Approximate Delivery Date

Year 2000 Model JOURNEY 361

Serial No.

4026XFBG8YCG43267

MILES

45193

## DELIVERY AGREEMENT

Delivery of this vehicle is accepted by purchaser subject to credit approval by a financing institution, and in the event of a credit report unacceptable to the financing institution, the purchaser will return the vehicle within 30 days of delivery to the dealer.

Signature

## DISCLAIMER OF WARRANTIES

THE SELLER, WHEELER'S LAS VEGAS RV, HEREBY EXPRESSLY DISCLAIMS ALL WARRANTIES, EITHER EXPRESS OR IMPLIED, INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, AND WHEELER'S LAS VEGAS RV HEREBY DISCLAIMS ANY AUTHORITY ANY OTHER PERSON TO ASSUME FOR IT ANY LIABILITY IN CONNECTION WITH THE SALE OF THE VEHICLE.

DEALER PREP FEE INCLUDES, BUT NOT LIMITED TO, DOD FEE, WALK THRU, OIL CERTIFICATE, FLUIDS, FULL TANK OF PROPANE, BATTERY PACKAGE, WASH OUTSIDE, CLEAN INSIDE, LABOR, MECHANICAL, AND LEGAL DOCUMENTS ON THE ASSEMBLY UNIT.

DEALER INSTALLED

DEALER REMOVED

YEAR 74 MAKE Ford Model 341  
TRADE-IN ALLOWANCE \$5000.00 LESS PAY-OFF \$3405.00  
PAY-OFF TO

In the event that the buyer quoted by the purchaser is not correct and is greater than the amount shown in this order, the purchaser hereby agrees to pay the excess on demand. If the purchaser is unable to pay this excess on demand, the dealer is hereby permitted to add the excess amount to the contract in event the vehicle is financed.

I have read the matter printed on the back hereof and agree to it as a part of this order the same as if it were printed above my signature. Entire agreement is expressed herein in writing. No other terms or conditions, oral or written, will be recognized. All used vehicles sold "AS IS" and without guarantee as to condition, mileage, year or model, unless otherwise specified in writing. Salesperson cannot accept this order or deliver vehicle in any manner whatsoever. Order is not binding to Seller until accepted in writing by authorized representative of Seller and until Purchaser's credit has been approved. I certify that I am of legal age, have read the foregoing order in full and agree to sign a Contract of Conditional Sale covering this order by my signature below.

I/We hereby voluntarily choose \_\_\_\_\_ as Agent or Broker to procure the insurance listed above. The choice of above Agent or Broker was not made a condition precedent to this sale.

The name of Agent or Broker must be filled in by Purchaser in his own handwriting.

NOTICE TO BUYER: (1) Do not sign this agreement before you read it or if it contains any blank spaces to be filled in. (2) You are entitled to a complete refund of this agreement. (3) Under the law you have the right to pay off in advance the full amount due and under certain conditions to obtain a partial refund of the finance charge. (4) If you default in the performance of your obligation under this agreement, the vehicle may be repossessed and you may be subject to suit and liability for the unpaid indebtedness evidenced by this agreement.

RECEIPT OF A FILLED-IN COPY OF THIS AGREEMENT IS HEREBY ACKNOWLEDGED BY PURCHASER.

Accepted: (Seller) WHEELER'S LAS VEGAS RV

Purchaser's Signature

By

CASH PRICE OF RV AND ACCESSORIES	\$24327.50
DEALER PREP	\$ 449.50
SALES TAX	\$ N/A
SALES TAX CREDIT	\$
TOTAL CASH PRICE	\$24777.00
NET TRADE IN	\$2502.00
CASH DISCOUNT	\$7500.00
CASH ON DELIVERY	\$
TOTAL DOW PAYMENT	\$ 20.00
UNPAID BALANCE ON CASH PRICE	\$24757.00
SERVICE CONTRACT	\$
TOTAL UNPAID BALANCE	\$
FINANCE CHARGE	\$
CONTRACT BALANCE	\$
ANNUAL PERCENTAGE RATE	\$

CONTRACT BALANCE PAYABLE IN

INSTALLMENTS AS FOLLOWS:

\$ \_\_\_\_\_ on \_\_\_\_\_ 20 \_\_\_\_\_ \$ \_\_\_\_\_ on \_\_\_\_\_ 20 \_\_\_\_\_

and \_\_\_\_\_ monthly installments of \$ \_\_\_\_\_ each,

beginning on the \_\_\_\_\_ day of \_\_\_\_\_ 20 \_\_\_\_\_

09/19/2006 11:02 FAX 1703814

WEISLER'S LY BY # WALTER

002

Buyer's Name: <b>JOHN J. JORDAN</b>	Seller's Name: <b>STUBBS, W. &amp; SONS</b>
Address: <b>PO BOX 10000</b>	Address: <b>3175 S. VEGAS BLVD</b>
City: <b>RENO, NV</b>	City: <b>LAS VEGAS, NV</b>
State: <b>NEVADA</b>	State: <b>NEVADA</b>
Zip: <b>89402</b>	Zip: <b>89102</b>
Phone: <b>725-4413</b>	Phone: <b>392-1000</b>
Stocks: <b>10000</b>	Stocks: <b>10000</b>

**SECRET**

[illegible]

<b>ANNUAL PERCENTAGE RATE</b>	10.99%	<b>FINANCIAL CHARGE</b>	\$75.18
<b>Amount Financed</b>	\$600.00	<b>Total Payments</b>	\$675.18
<b>Total Sales Price</b>	\$21.91		

SECRET

1. The following information is being provided to you for your information only. It is not intended to be used for any other purpose. It is not intended to be used for any other purpose. It is not intended to be used for any other purpose.

NEW OR USED (US\$) 1240270

100

\_\_\_\_\_

THE UNIVERSITY OF CHICAGO

[illegible]

THE UNIVERSITY OF CHICAGO PRESS

☐ **Chloroform**

\_\_\_\_\_



09/19/2006 11:00 FAX 1702814 4

WHEELER'S LV RV: WALTER

0006

## ODOMETER DISCLOSURE STATEMENT

Federal Law (and State Law, if applicable) requires that you state the mileage upon transfer of ownership. Failure to complete or providing a false statement may result in fines and/or imprisonment.

WHEELER'S RV

45582

state that the odometer

the actual mileage of the vehicle disclosed below, unless one of the following statements is checked.

- ☐ (1) I hereby certify that to the best of my knowledge the odometer reading reflects the actual mileage in absence of its mechanical fault.
- ☐ (2) I hereby certify that the odometer reading is NOT the actual mileage. REASON: ODOMETER INACCURACY.

MAKE	MODEL	SUBTYPE	VIN	YEAR
FOURNBY	36L	CLASE A MOTO	4U26XP8C8YCG41267	2000

Transferor's (Seller's) Name (Printed) WHEELER'S RV

Transferor's (Seller's) Address

Transferor's Signature

A hand-printed name

Transferor's Date of Signature

Transferor's Date of Signature

Transferor's Date of Signature

Transferor's Date of Signature

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Transferor's Date of Signature

Transferor's Date of Signature

13175 S. LAS VEGAS BLVD., LAS VEGAS N.V. 89124

Date of Signature

19 MAY 02

WILLIAM E JUDSON AND/OR DONNA JUDSON

HURRICANE, OR 97131

Transferor's Date of Signature

Transferor's Date of Signature

Transferor's Date of Signature

Transferor's Date of Signature

Transferor's Date of Signature

Transferor's Date of Signature

Transferor's Date of Signature

Transferor's Date of Signature

Transferor's Date of Signature

Transferor's Date of Signature

Transferor's Date of Signature

Transferor's Date of Signature

Record of Copy Attached

WHEELER'S RV

WHEELER'S RV

WHEELER'S RV

WHEELER'S RV

WHEELER'S RV

WHEELER'S RV

WHEELER'S RV

WHEELER'S RV

WHEELER'S RV

WHEELER'S RV

## EXHIBIT B

# LIMITED WARRANTY FOR REPURCHASED VEHICLES

## WARRANTY REGISTRATION FORM

Vehicle Identification Number:

Winnebago Industries Serial Number:

This Warranty is authorized by:

Winnebago Representative

(Type or Print Name)

4426XFB28YC643267  
10P87A296394

Signature

Date

Customer Identification (To Be Completed by Selling Dealer)

Name: DONNA JO WILSON

Address: 30 RED BLUFF DR.

City: HURRICANE State: UT Zip: 84737

The Customer hereby acknowledges that the provisions of the attached Limited Warranty for Repurchased Vehicles are understood and accepted. This Limited Warranty becomes effective from the date and mileage indicated on this form.

Effective Date of Warranty (Selling Dealer) 5-20-07

Odometer Reading (Selling Dealer) 45,598

Dealer Identification (To Be Completed by Selling Dealer)

Dealer Code:

Dealership Name:

City:

State:

Phone:

The dealer certifies that the vehicle identified herein has been inspected and any services or repairs that may have been necessary were performed, and further certifies that the title will or lease and delivery of the subject vehicle to the retail customer recorded on this form.

The dealer also certifies that he has communicated to the retail customer material facts relating to the history of this vehicle, such as the fact that the vehicle was repurchased from a prior owner classified with it, or that it was repurchased under a State's Lemon Law.

(Authorized Dealer Signature)

(Date)

NOTE TO DEALER: Complete all the information on this form and mail to White registration copy, notice - handle disclosure of vehicle and warranty copy to:

Winnebago Industries, Inc., P.O. Box 152, 605 West Crystal Lake Road, Forest City, Iowa 50536  
Attn: Legal Dept.

White: Warranty Registration Copy Pink: Dealer Copy Green: Customer Copy



FILED

FEB 29 2008

FIFTH JUDICIAL DISTRICT COURT  
WASHINGTON COUNTY

STEVEN R. BANGERTER (Utah Bar No. 10051)  
WILLIAM E. FRAZIER (Utah Bar No. 11447)  
LAW OFFICES OF STEVEN R BANGERTER  
720 South River Road, Suite A-200  
St. George, UT 84790  
Telephone: (435) 628-7004  
Facsimile: (435) 673-1964

Attorneys for Defendant,  
WHEELER RV LAS VEGAS, LLC.

---

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.

**MOTION TO SET ASIDE DEFAULT  
JUDGMENT AND REQUEST FOR  
HEARING**

Civil No.: 070501867

Judge: Eric A. Ludlow

COMES NOW Defendant, WHEELER RV LAS VEGAS, LLC, by and through its attorneys, Law Offices of Steven R. Bangerter, and moves the court to set aside the default judgment entered against it on or about December 5, 2007.

This Motion is brought pursuant to Rule 60(b)(1) and 60(b)(6) of the Utah Rules of Civil Procedure. This motion is supported by the attached affidavits of Sharon Nelson and William E.

Frazier, the Memorandum of Points and Authorities below, the court filings to date, and any oral argument pertaining to this Motion.

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S**

**MOTION TO SET ASIDE DEFAULT**

**I.**

**SETTING ASIDE THE DEFAULT IN THE INSTANT CASE IS PERMISSIBLE UNDER**

**RULE 60(B) OF THE UTAH RULES OF CIVIL PROCEDURE**

**Rule 60(B) of the Utah Rules of Civil Procedure sets forth, in pertinent part:**

(b) 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; (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. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Here, as set forth in the Affidavit of Sharon Nelson in Support of this Motion, the subject judgment was issued subsequent to mistake, inadvertence, surprise, and excusable neglect. The Affidavit of Sharon Nelson is hereby

incorporated by reference. Pursuant to Rule 60(b), this Motion is brought within three months of entry of judgment, which occurred on or about December 5, 2007.

Rule 60(B) has been consistently interpreted by the Utah Supreme Court and Court of Appeals to permit judge's, in their discretion, to grant relief from default judgments in instances where there has been no undue delay, the judgment was a result of mistake or inadvertence, and the interests of justice would be served by granting the requested relief. "The rule that the 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, the interests of justice would be met by granting this Motion to Set Aside Default. The evidence will show that Plaintiffs have sued the wrong party. Defendant attempted to demonstrate this to Plaintiffs' counsel, but Plaintiffs' counsel proceeded with securing a default judgment anyway. Defendants did not

own the subject dealership when Plaintiffs purchased the recreational vehicle.

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.

## II.

### CONCLUSION

Based on the foregoing, Defendant respectfully requests that the Default

Judgment entered against it on or about December 5, 2007 be set aside, due to mistake, inadvertence, excusable neglect, and surprise. Defendant has legitimate

and valid legal defenses, including misjoinder and lack of personal jurisdiction.

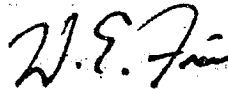
This motion is made in accordance with Rule 60(B), and the case law spawned thereby.

## REQUEST FOR HEARING

Defendant hereby requests a hearing be scheduled on this Motion to Set Aside Default Judgment.

DATED this 29<sup>th</sup> day of February, 2008.

LAW OFFICES OF STEVEN R. BANGERTER



---

William E. Frazier  
Attorneys for Defendant,  
WHEELER RV LAS VEGAS, LLC

3

**FILED**

**FEB 29 2008**

**FIFTH DISTRICT COURT  
WASHINGTON COUNTY**

Steven R. Bangerter (State Bar No. 10051)  
William E. Frazier (State Bar No. 11447)  
LAW OFFICES OF STEVEN R BANGERTER  
720 S. River Rd., Suite A-200  
St. George, UT 84790  
Telephone: (435) 628-7004  
Facsimile: (435) 673-1964

Attorney for Defendant,  
WHEELER RV LAS VEGAS, LLC

**IN THE FIFTH JUDICIAL DISTRICT COURT  
OF WASHINGTON COUNTY, STATE OF UTAH**

Washington County Hall of Justice, 200 North 200 East, St. George, Utah 84770

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.

**AFFIDAVIT OF SHARON NELSON IN  
SUPPORT OF DEFENDANT'S MOTION  
TO SET ASIDE DEFAULT PURSUANT  
TO RULE 60(B) OF THE UTAH RULES  
OF CIVIL PROCEDURE**

Civil No.: 070501867

Judge: Eric A. Ludlow

**I, SHARON NELSON, DECLARE AS FOLLOWS:**

1. I am an attorney in good standing in the State of Nevada. I am general counsel for  
WHEELER RV LAS VEGAS, LLC in Nevada.
2. I have personal knowledge of the contents of this affidavit, and if called as a witness,  
could testify competently thereto.

- 1 3. It is my understanding that the subject complaint was served upon WHEELER RV LAS  
2 VEGAS, LLC sometime in late 2007.
- 3 4. Sometime in the fall of 2007, I contacted Plaintiffs' counsel to inform him that the  
4 company he sued was not the company from which his clients purchased their  
5 recreational vehicle, explaining that the dealership had changed ownership.
- 6 5. Based upon our conversation, certain documentation was requested by Plaintiffs' counsel,  
7 which I provided. During the exchange of documentation, it was understood that  
8 WHEELER RV LAS VEGAS, LLC would be given an open extension to answer.
- 9 6. Despite the fact that the amount of money involved in the exchange between the prior  
10 dealership group (from which Plaintiffs purchased their recreational vehicle) and the new  
11 ownership group (Defendants) is wholly irrelevant to this proceeding, Plaintiffs' counsel  
12 demanded this information, and refused to sign a confidentiality agreement to cover any  
13 unredacted portions of documents pertaining to amounts paid for the dealership.
- 14 7. Despite the fact that I continued to speak with Plaintiffs' counsel regarding the confusion  
15 of identities of the proper Defendant, Plaintiffs' counsel mailed an Application for Entry  
16 of Default against WHEELER RV LAS VEGAS, LLC.
- 17 8. I did not receive the Application for Entry of Default until approximately December 5,  
18 2007, due to an intervening weekend and out-of-state mailing.
- 19 9. Immediately upon my receipt of the Application for Entry of Default, I endeavored to  
20 retain Utah counsel, eventually locating the Law Offices of Steven R. Bangerter.
- 21 10. Unfortunately, I learned that Default was entered against WHEELER RV LAS VEGAS,  
22 LLC in the short period of time between the Application for Entry of Default Judgment  
23 and my retention of the Law Offices of Steven R. Bangerter.
- 24  
25  
26  
27  
28

1 11. The evidence in this matter will show that the present owners of WHEELER RV LAS  
2 VEGAS, LLC did not acquire liabilities such as the claim of Plaintiffs, and that the  
3 proper Defendants are the prior owners of the dealership.

4 12. The Default entered against WHEELER RV LAS VEGAS was surprising, given the  
5 ongoing nature of conversations I had with Plaintiff's counsel regarding the issue of  
6 joinder of proper parties.

7  
8 13. I believed that the issue would be resolved short of litigation due to the fact that Plaintiffs  
9 purchased their recreational vehicle in 2002, and the sale of the dealership occurred at the  
10 end of 2004.

11 14. Default was entered against WHEELER RV LAS VEGAS as a result of a  
12 misunderstanding between myself and opposing counsel, inadvertence, mistake, and/or  
13 surprise.

14  
15 15. I have been advised by Utah counsel that valid legal defenses exist; namely, problems  
16 related to the joinder of the proper Defendant. It is anticipated that this deficit will be  
17 addressed through a 12(b) Motion to Dismiss.

18  
19 16. I am also advised that there are significant personal jurisdictional issues as well; namely,  
20 Plaintiffs have not demonstrated with sufficient particularity the basis for personal  
21 jurisdiction. Defendant operates its business in Nevada, while Plaintiffs reside in Utah.  
22 Defendant does not purposely avail itself to the benefits and laws of the state of Utah. As  
23 such, a 12(b) Motion to Dismiss on this subject is anticipated in the event that the default  
24 is set aside.

25  
26 17. I sincerely apologize to the court for misunderstanding the intent of Plaintiffs' counsel. I  
27 acted as quickly as possible upon receipt of notification that Plaintiffs' counsel intended  
28

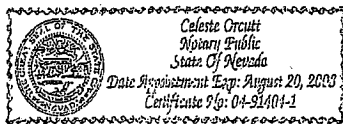
1 to seek a Default Judgment. Due to delays with the mail, and the nature of out-of-state  
2 mail mailed from St. George, Utah, by the time I received the Application for Entry of  
3 Default Judgment and retained counsel, the Judgment was entered.  
4

5 Dated: 2/28/08 Signed: Sharon Nelson  
6 SHARON NELSON  
7

8 State of Nevada

9 County of Clark  
10  
11

12 Sharon Nelson, appeared before me this 28<sup>th</sup> day of February, 2008, and proved.  
13 to me her identity in the form of a Driver's License. After being sworn and while under oath,  
14 Sharon Nelson stated that she had read this document, understood the contents, and that the contents  
15 were true of her own personal knowledge. Sharon Nelson then signed this document in my  
16 presence.  
17  
18



22 Celeste Orcutt  
Notary Public  
23  
24  
25  
26  
27  
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Steven R. Bangerter (State Bar No. 10051)  
William E. Frazier (State Bar No. 11447)  
LAW OFFICES OF STEVEN R BANGERTER  
720 S. River Rd., Suite A-200  
St. George, UT 84790  
Telephone: (435) 628-7004  
Facsimile: (435) 673-1964

**FILED**

**FEB 29 2008**

**FIFTH DISTRICT COURT  
WASHINGTON COUNTY**

Attorney for Defendant,  
WHEELER RV LAS VEGAS, LLC

**FIFTH DISTRICT COURT  
WASHINGTON COUNTY**

**IN THE FIFTH JUDICIAL DISTRICT COURT  
OF WASHINGTON COUNTY, STATE OF UTAH**

Washington County Hall of Justice, 200 North 200 East, St. George, Utah 84770

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.

**AFFIDAVIT OF WILLIAM E. FRAZIER  
IN SUPPORT OF DEFENDANT'S  
MOTION TO SET ASIDE DEFAULT  
PURSUANT TO RULE 60(B) OF THE  
UTAH RULES OF CIVIL PROCEDURE**

**Civil No.: 070501867**

**Judge: Eric A. Ludlow**

**I, WILLIAM E. FRAZIER, DECLARE AS FOLLOWS:**

1. I am an attorney in good standing in the State of Utah. I was retained in mid-December 2007 to represent WHEELER RV LAS VEGAS, LLC.
2. I have personal knowledge of the contents of this affidavit, and if called as a witness, could testify competently thereto.

- 1 3. After I was retained, I contacted Plaintiffs' counsel. After some delay in connecting with  
2 him, I learned in January 2008 that he had in fact secured a default judgment against  
3 Defendant.
- 4 4. I discussed the possibility of setting aside the default judgment via stipulation due to the  
5 apparent misjoinder of parties, explaining the nature of transfers between the prior owner  
6 of WHEELER RV LAS VEGAS and the new owners.
- 7 5. Plaintiffs' counsel indicated that he required unredacted documents demonstrating a non-  
8 transfer of liability, including all financial details of the transfer.
- 9 6. During my conversation with Plaintiffs' counsel, he indicated that he did not want to sign  
10 the confidentiality agreement originally proposed by Attorney Sharon Nelson to keep the  
11 financial details of the transaction confidential.
- 12 7. I contacted the office of Plaintiffs' counsel again on February 27, 2008, offering to  
13 provide a redacted agreement regarding the non-transfer of liability and proceeding to set  
14 aside this default by stipulation. I have received no response to my call.
- 15 8. A review of the file indicates that substantial valid legal defenses exist, including  
16 misjoinder and lack of personal jurisdiction, among others.

17 ///

18 ///

19 ///

20 ///

21 ///

22 ///

23 ///

1 9. Based upon my review of the file and correspondence, it appears that the timing of the  
2 events of this matter, and the discussions between Plaintiffs' Nevada counsel, as well as  
3 delays in the receipt of the Application for Entry of Default Judgment, resulted in a  
4 Default Judgment that was the result of inadvertence, mistake, surprise, and excusable  
5 neglect.  
6

7  
8 Dated: 2/28/08 Signed: W.E. Frazier  
9 WILLIAM E. FRAZIER

10 State of UTAH

11 County of ELK WASHINGTON  
12  
13

14 William E. Frazier, appeared before me this 28 day of February, 2008, and  
15 proved to me his identity in the form of a UT DL. After being sworn and while under  
16 oath, William E. Frazier stated that ~~he~~ she had read this document, understood the contents, and that the  
17 contents were true of his own personal knowledge. William E. Frazier then signed this document in  
18 my presence.  
19  
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Kara Lynn Ward  
Notary Public

5

FILED  
FIFTH DISTRICT COURT

2008 JUN 25 PM 3:04

WASHINGTON COUNTY

FILED

FIFTH DISTRICT COURT

2008 JUN 13 PM 4:42

WASHINGTON COUNTY

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,

v.

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

Defendant.

PLAINTIFFS' ~~PROPOSED~~ FINDINGS,  
CONCLUSIONS AND ORDER

Civil No. 070501867

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**

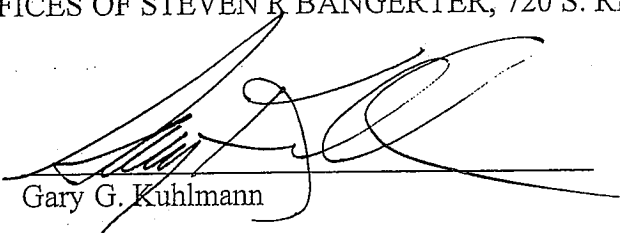
1. The defendant's Motion to Set Aside Default Judgment is denied.
2. The plaintiffs are awarded their costs and reasonable attorney fees incurred in responding to the defendant's motion, with such amount to be established by affidavit of plaintiffs' counsel.

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

6

FILED  
FIFTH DISTRICT COURT  
2008 JUL 25 AM 10: 50  
WASHINGTON COUNTY

STEVEN R. BANGERTER (Utah Bar No. 10051)  
WILLIAM E. FRAZIER (Utah Bar No. 11447)  
LAW OFFICES OF STEVEN R BANGERTER  
720 South River Road, Suite A-200  
St. George, UT 84790  
Telephone: (435) 628-7004  
Facsimile: (435) 673-1964

Attorneys for Defendant,  
WHEELER RV LAS VEGAS, LLC

BY \_\_\_\_\_

IN THE FIFTH JUDICIAL DISTRICT OF WASHINGTON COUNTY  
STATE OF UTAH

WILLIAM JUDSON and DONNA  
JUDSON, husband and wife  
(RESPONDENTS),

Plaintiffs,

vs.

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

Defendant.

**DEFENDANT/APPELLANT'S  
STATEMENT OF EVIDENCE  
PURSUANT TO UTAH RULE OF  
APPELLATE PROCEDURE 11(G)**

**Civil No.: 070501867**

**Judge: Eric A. Ludlow**

Notice is hereby given that defendant and appellant WHEELER RV LAS VEGAS, LLC, through counsel, Law Offices of Steven R. Bangerter, provides the following Statement of Evidence, pursuant to Utah Rule of Appellate Procedure 11(g).

In addition to the Complaint filed by Plaintiffs, the Motion to Set Aside Default filed by Defendants, and opposition papers related thereto, there were competing Proposed Orders filed after the conclusion of oral argument on Defendant's Motion to Set Aside Default. Based upon conversations with court personnel, it was discovered that Defendant's Proposed Order was discarded by the court when it opted to sign Plaintiffs' Proposed Order. As such, a true and correct copy of Defendant's Proposed Order is attached hereto as "Exhibit A."

The oral argument on Defendant's Motion to Set Aside Default under Utah Rule of Civil Procedure 60 *et seq* came for hearing on May 15, 2008. There exists no transcript of the oral argument, as a court reporter was not present. During the hearing, counsel for Defendant asserted that the Default Judgment was procured by Plaintiff via mistake, surprise, inadvertence, or excusable neglect; namely, due to the rescission of Plaintiffs' counsel's agreement to provide Defendant's prior counsel with an open extension to answer the complaint without timely notifying Defendant's prior counsel of his intention. Plaintiffs' counsel did not fax, call, or email Defendant's former counsel, but rather, mailed documents seeking entry of default with knowledge that the mailing was destined for an out-of-state address with an intervening weekend.

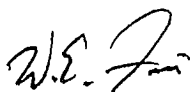
Further, it was argued that the trial court had no jurisdiction over Defendant. As briefed, Defendant has no meaningful or significant contacts with the state of Utah, and does not purposefully avail itself to the benefits of the laws of the state of Utah. Defendant does not advertise or otherwise maintain a presence in the state of Utah.

Finally, Defendant argued that Plaintiffs' Default Judgment against Defendant should be set aside under traditional principles of equity and estoppel. Plaintiffs should have been estopped from the entry of a default judgment due to the agreement between Plaintiffs' counsel and former counsel for the defense that an open-extension was granted. Such agreement was not rescinded in a manner that gave Defendant reasonable time to file a responsive pleading to the complaint. Additionally, the state of Utah has a long-standing preference to have matters adjudicated on the merits, as opposed to via default; especially in light of the fact that the trial court had no personal jurisdiction over Defendant, and Defendant raised this issue in its first court submission.

The court took the matter under submission and requested proposed orders from both parties. Defendant's proposed order is attached hereto as Exhibit "A." Plaintiff's proposed order, which was eventually signed by the court, is attached hereto as Exhibit "B."

DATED: July 25, 2008

Law Offices of Steven R. Bangerter, PC



By: WILLIAM E. FRAZIER, ESQ.

**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of the foregoing **DEFENDANT/APPELLANT'S STATEMENT OF EVIDENCE PURSUANT TO UTAH RULE OF APPELLATE PROCEDURE 11(G)**

was mailed, postage prepaid on July 25, 2008 to the following:

Gary G. Kuhlmann  
GARY G. KUHLMANN & ASSOCIATES, PC  
113 East 200 North, Suite 1  
P.O. Box 910387  
St. George, UT 84791

  
\_\_\_\_\_  
Abbie Thorpe

# EXHIBIT

## “A”

STEVEN R. BANGERTER (Utah Bar No. 10051)  
WILLIAM E. FRAZIER (Utah Bar No. 11447)  
LAW OFFICES OF STEVEN R BANGERTER  
720 South River Road, Suite A-200  
St. George, UT 84790  
Telephone: (435) 628-7004  
Facsimile: (435) 673-1964

Attorneys for Defendant,  
WHEELER RV LAS VEGAS, LLC

---

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.

\_\_\_\_\_  
Honorable Eric A. Ludlow

# EXHIBIT

## “B”

FILED  
FIFTH DISTRICT COURT  
2008 JUN 25 PM 3:04

FILED  
FIFTH DISTRICT COURT  
2008 JUN 13 PM 4:42  
WASHINGTON COUNTY

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,

v.

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

Defendant.

PLAINTIFFS' ~~PROPOSED~~ FINDINGS,  
CONCLUSIONS AND ORDER

Civil No. 070501867

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

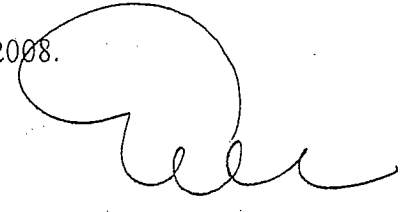
entered." Thus, even if the Court were to find the existence of a mistake, inadvertence, excusable neglect or surprise, the defendant's motion is deficient and should be denied.

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

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,

v.

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

Defendants.

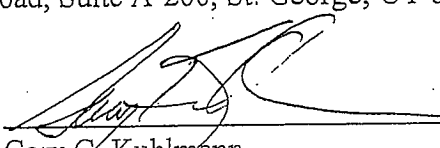
CERTIFICATE OF SERVICE

Case No. 070501867

Judge Eric A Ludlow

The plaintiffs hereby certify that a signed copy of Plaintiffs' Findings, Conclusions and  
Order was mailed first class, postage prepaid, this 1<sup>st</sup> day of July, 2008, to: William E. Frazier,

Law Offices of Steven R. Bangerter, 720 S. River Road, Suite A-200, St. George, UT 84790.

  
Gary G. Kuhlmann  
Attorney for Plaintiffs

7

FILED  
FIFTH DISTRICT COURT  
2008 JUL 25 AM 10:50  
WASHINGTON COUNTY

STEVEN R. BANGERTER (Utah Bar No. 10051)  
WILLIAM E. FRAZIER (Utah Bar No. 11447)  
LAW OFFICES OF STEVEN R BANGERTER  
720 South River Road, Suite A-200  
St. George, UT 84790  
Telephone: (435) 628-7004  
Facsimile: (435) 673-1964

BY \_\_\_\_\_

Attorneys for Defendant,  
WHEELER RV LAS VEGAS, LLC

IN THE FIFTH JUDICIAL DISTRICT OF WASHINGTON COUNTY  
STATE OF UTAH

WILLIAM JUDSON and DONNA  
JUDSON, husband and wife  
(RESPONDENTS),

Plaintiffs,

vs.

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

Defendant.

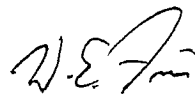
DEFENDANT/APPELLANT'S  
CERTIFICATE OF NON-REQUEST OF  
TRANSCRIPTS OR PROCEEDINGS  
PURSUANT TO UTAH RULE OF  
APPELLATE PROCEDURE 11(E)(1)

Civil No.: 070501867

Judge: Eric A. Ludlow

Notice is hereby given that defendant and appellant WHEELER RV LAS VEGAS, LLC, through counsel, Law Offices of Steven R. Bangerter, does not request any transcripts of proceedings, as it is believed that no such transcripts exist.

DATED: July 25, 2008 Law Offices of Steven R. Bangerter, PC

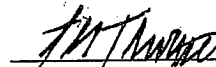


By: WILLIAM E. FRAZIER, ESQ.

### CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing DEFENDANT/APPELLANT'S CERTIFICATE OF NON-REQUEST OF TRANSCRIPTS OR PROCEEDINGS PURSUANT TO UTAH RULE OF APPELLATE PROCEDURE 11(E)(1) was mailed, postage prepaid on July 25, 2008 to the following:

Gary G. Kuhlmann  
GARY G. KUHLMANN & ASSOCIATES, PC  
113 East 200 North, Suite 1  
P.O. Box 910387  
St. George, UT 84791

  
Abbie Thorpe

8

FILED  
DISTRICT COURT  
2022 OCT -2 PM 4:25  
WASHINGTON COUNTY

STEVEN R. BANGERTER (Utah Bar No. 10051)  
WILLIAM E. FRAZIER (Utah Bar No. 11447)  
LAW OFFICES OF STEVEN R BANGERTER  
720 South River Road, Suite A-200  
St. George, UT 84790  
Telephone: (435) 628-7004  
Facsimile: (435) 673-1964

BY \_\_\_\_\_

Attorneys for Defendant,  
WHEELER RV LAS VEGAS, LLC

COPY

IN THE FIFTH JUDICIAL DISTRICT OF WASHINGTON COUNTY  
STATE OF UTAH

WILLIAM JUDSON and DONNA  
JUDSON, husband and wife  
(RESPONDENTS),

Plaintiffs,

vs.

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

Defendant.

REQUEST FOR STAY OF DEFAULT  
JUDGMENT AND DETERMINATION  
OF AMOUNT PAYABLE TO COURT  
FOR SECURITY PURPOSES IN LIEU  
OF SUPERSEDEAS BOND PURSUANT  
TO URCP 62, OR IN THE  
ALTERNATIVE, REQUEST FOR  
SUPERSEDEAS BOND, AND REQUEST  
FOR HEARING

Civil No.: 070501867

Judge: Eric A. Ludlow

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Notice is hereby given that defendant and appellant WHEELER RV LAS VEGAS, LLC, through counsel, Law Offices of Steven R. Bangarter, will move the Court, pursuant to Utah Rule of Civil Procedure 62 (i)(2) to permit the deposit of money in court in lieu of giving a Supersedeas Bond, or in the alternative, the filing of a Supersedeas Bond to stay attempts at executing upon the Default Judgment obtained by Plaintiffs in this matter.

Defendant/Appellant continues to assert that this Court has no jurisdiction over it, and therefore, nothing in this filing should be construed as assent to the exercise of *in personam* jurisdiction over Defendant.

I.

THE COURT HAS AUTHORITY TO PERMIT THE DEPOSIT OF A SUM OF MONEY WITH THE COURT IN LIEU OF A SUPERSEDEAS BOND PURSUANT TO UTAH RULE OF CIVIL PROCEDURE 62(i)(2)

Utah Rule of Civil Procedure 62(i)(2) sets forth "Upon motion and good cause shown, the court may permit a deposit of money in court or other security to be given in lieu of giving a Supersedeas Bond under Subdivision (d)." URCP 62(i)(2). An appellant may, "by giving a Supersedeas Bond may obtain a stay, unless such a stay is otherwise prohibited by law or these rules. The bond may be given at or after the time of filing the Notice to Appeal. The stay is effective when the Supersedeas Bond is approved by the court." URCP 62(d).

Here, Defendant/Appellant Wheeler RV Las Vegas, LLC filed a timely Notice of Appeal, and all other documents as set forth by the Utah Rules of Appellate Procedure. Plaintiffs have attempted to execute on the Default Judgment during the pendency of the Appeal, thus necessitating this Motion.

WHEELER RV LAS VEGAS, LLC is owned by Freedom Roads, LLC. WHEELER RV LAS VEGAS, LLC, acquired the assets of L.V.R.V., Inc., a Nevada corporation years after Plaintiffs acquired the recreational vehicle that is the subject of this litigation from L.V.R.V.,

Inc. Because the relevant financial inquiry for this Motion pertains to the present Defendant/Appellant, all assertions relate to Defendant/Appellant.

Rule 62 (j)(1) states, "...a court shall set the Supersedeas Bond in an amount that adequately protects the judgment creditor against loss or damage occasioned by the Appeal and assures payment in the event the judgment is affirmed. In setting the amount, the court may consider any relevant factor, including: (a) the judgment debtor's ability to pay the judgment; (d) the judgment debtor's likelihood of success on appeal. URCP 62(j)(1), *et seq.*

The presumptive amount of Supersedeas Bonds is set as the amount of compensatory damages plus costs and attorney fees plus three years of interest at the applicable rate. URCP Rule 62(j)(2)(a). As referenced earlier, the Court may, upon good cause shown, allow a deposit in lieu of a Supersedeas Bond. URCP 62(i)(2).

It is in the interests of both parties to preserve as much capital as possible to pay toward any judgment that may be affirmed by the Utah Appellate Courts. Here, if Defendant were required to post a bond, funds would be necessary to pay an appropriate surety. Further, Wheeler RV Las Vegas, LLC, as demonstrated in the Affidavit of Brent Moody filed herewith, is a fiscally solvent limited liability company capable of paying any judgment that may be eventually affirmed by an appeals court, with most recent financial reports revealing assets exceeding liabilities by over \$2,000,000 in the most recent financial report. Because Wheeler RV Las Vegas, LLC is adequately solvent to pay any eventual judgment, and has so demonstrated, it would be of little value for the Court to require a six-figure deposit of funds that would remain stagnant.

II.

PRAYER

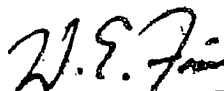
Defendant/Appellant respectfully requests an amount equal to ten (10) percent of all amounts set forth in compensatory damages and attorney fees obtained by Plaintiff to date, which total \$151,931.61. As such, Defendant/Appellant requests to file with the court the sum of \$15,193.16 for security, in lieu of a Supersedeas Bond.

In the alternative, appellant requests that an amount for a Supersedeas Bond be set in an amount below the presumptive amount in the interests of preserving capital for potential settlement negotiations during the pendency of the Appeal.

If the court is unable to grant any request contained herein, appellant requests that an amount be set for a Supersedeas Bond.

Respectfully Submitted,

DATED: October 2, 2008 Law Offices of Steven R. Bangerter, PC



By: WILLIAM E. FRAZIER, ESQ.

### CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Notice of Appeal was mailed,  
postage prepaid on October 2, 2008 to the following:

Gary G. Kuhlmann

GARY G. KUHLMANN & ASSOCIATES, PC

113 East 200 North, Suite 1

P.O. Box 910387

St. George, UT 84791

  
Abbie Thorpe

9

STEVEN R. BANGERTER (Utah Bar No. 10051)  
WILLIAM E. FRAZIER (Utah Bar No. 11447)  
LAW OFFICES OF STEVEN R. BANGERTER  
720 South River Road, Suite A-200  
St. George, UT 84790  
Telephone: (435) 628-7004  
Facsimile: (435) 673-1964

Attorneys for Defendant,  
WHEELER RV LAS VEGAS, LLC

COPY

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 GRANTING  
DEFENDANT'S REQUEST FOR STAY  
OF EXECUTION OF DEFAULT  
) JUDGMENT, DETERMINATION OF  
AMOUNT PAYABLE FOR SECURITY  
PURPOSES IN LIEU OF SUPERSEDEAS  
BOND PURSUANT TO URCP 62, OR IN  
THE ALTERNATIVE, REQUEST FOR  
SUPERSEDEAS BOND

Civil No.: 070501867

Judge: Eric A. Ludlow

Defendant, WHEELER RV LAS VEGAS, LLC's Request for Stay of Execution of  
Default Judgment, Determination of Amount Payable for Security Purposes in Lieu of  
Supersedeas Bond Pursuant to URCP 62, or in the alternative, Request for Supersedeas Bond  
came for review and/or hearing. After consideration of the pleadings, court file, and oral  
arguments thereon, and good cause having been shown therefor, the Court rules as follows:

//I

[PROPOSED] ORDER GRANTING DEFENDANT'S REQUEST FOR STAY OF EXECUTION OF DEFAULT  
JUDGMENT, DETERMINATION OF AMOUNT PAYABLE FOR SECURITY PURPOSES IN LIEU OF  
SUPERSEDEAS BOND PURSUANT TO URCP 62, OR IN THE ALTERNATIVE, REQUEST FOR SUPERSEDEAS  
BOND

Defendant's Request to Stay Execution of execution of is GRANTED. Defendant, shall within thirty (30) days of this Order deposit/lodge the following with the Court (check one):

**\$15,193.16 Payment for Security**

**Supersedeas Bond in the amount of \$\_\_\_\_\_**

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

\_\_\_\_\_  
Honorable Eric A. Ludlow

10

FILED  
DISTRICT COURT  
2009 OCT -2 PM 4:26

WASHINGTON COUNTY

BY \_\_\_\_\_

Steven R. Bangerter (State Bar No. 10051)  
William E. Frazier (State Bar No. 11447)  
LAW OFFICES OF STEVEN R BANGERTER  
720 S. River Rd., Suite A-200  
St. George, UT 84790  
Telephone: (435) 628-7004  
Facsimile: (435) 673-1964

Attorney for Defendant,  
WHEELER RVLAS VEGAS, LLC

COPY

IN THE FIFTH JUDICIAL DISTRICT COURT  
OF WASHINGTON COUNTY, STATE OF UTAH

Washington County Hall of Justice, 200 North 200 East, St. George, Utah 84770

WILLIAM JUDSON and DONNA JUDSON,  
husband and wife,

Plaintiffs,

vs.

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

Defendant.

AFFIDAVIT OF BRENT MOODY IN  
SUPPORT OF DEFENDANT'S REQUEST  
FOR STAY OF EXECUTION ON  
DEFAULT JUDGMENT AND  
DETERMINATION OF AMOUNT  
PAYABLE TO COURT FOR SECURITY  
PURPOSES IN LIEU OF SUPERSEDEAS  
BOND PURSUANT TO URCP 62, OR IN  
THE ALTERNATIVE, REQUEST FOR  
SUPERSEDIAS BOND

Civil No.: 070501867

Judge: Eric A. Ludlow

I, BRENT MOODY, DECLARE AS FOLLOWS:

1. I am the Executive Vice President of Business Development and General Counsel for  
Freedom Roads, LLC, the parent company of Wheeler RV Las Vegas, LLC.

AFFIDAVIT OF BRENT MOODY IN SUPPORT OF DEFENDANT'S REQUEST FOR STAY OF EXECUTION ON  
DEFAULT JUDGMENT AND DETERMINATION OF AMOUNT PAYABLE TO COURT FOR SECURITY PURPOSES  
IN LIEU OF SUPERSEDEAS BOND PURSUANT TO URCP 62, OR IN THE ALTERNATIVE, REQUEST FOR  
SUPERSEDIAS BOND

1 2. I have personal knowledge of the contents of this affidavit, and if called as a witness,  
2 could testify competently thereto.

3 3. Wheelers RV Las Vegas, LLC acquired the assets of L.V.R.V., Inc., on or around  
4 November 29, 2004.

5 4. I have personal knowledge of the financial condition of Wheeler RV Las Vegas, also  
6 known as Las Vegas RV, based upon my position within the company and the parameters  
7 of my oversight of the dealership.

8 5. For the calendar year ending December 31, 2007, the last year for which there is a  
9 complete annual accounting, Las Vegas RV had total assets of \$16,316,650, with total  
10 liabilities of \$13,984,514.

11 6. Attached hereto as Exhibit "A" is a true and correct copy of the most recent annual  
12 accounting, depicting the figures set forth above.

13 7. I am intimately familiar with the finances of Las Vegas RV, and attest that there are  
14 presently no defaults in financial obligations or plans for filing for any type of relief in  
15 bankruptcy.

16 8. In the event that Defendant/Appellant is unsuccessful at all levels of available appeals,  
17 Las Vegas RV, based on its current financial condition and my personal knowledge  
18 thereof, would be able to satisfy the judgment that is the subject of the pending appeal.  
19

20 Dated: 10/2/08

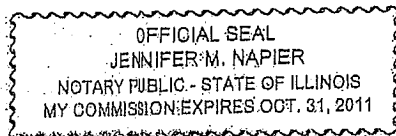
21 Signed: Brent Moody

22 BRENT MOODY  
23  
24  
25  
26  
27  
28

1 State of Illinois

2 County of Lake

3  
4  
5 Brent Moody, appeared before me this 2nd day of October, 2008, and proved  
6 to me his identity in the form of a Drivers License. After being sworn and while under oath,  
7 Brent Moody stated that he had read this document, understood the contents, and that the contents  
8 were true of his own personal knowledge. Brent Moody then signed this document in my presence.  
9  
10



14 Jennifer Napier  
Notary Public

EXHIBIT  
“A”

