

2002

# Jackson Construction Company Inc. v. Robert C. Marrs, Douglas R. Marrs, and John Does I-V : Brief of Appellee

Utah Supreme Court

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IN THE UTAH SUPREME COURT

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JACKSON CONSTRUCTION  
COMPANY, INC.,

Plaintiff/Appellee,  
v.

ROBERT C. MARRS, DOUGLAS R.  
MARRS, and JOHN DOES I-V.

Defendants/Appellants.

Court of Appeals No. 20020745

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BRIEF OF APPELLEE

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Appeal from the Order Dismissing Defendants' 60(b)(4) Motion to Quash Service and Set  
Aside Default Judgment of the District Court of the Fifth Judicial District, the Honorable  
James L. Shumate Presiding.

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## JURISDICTIONAL STATEMENT

The Utah Supreme Court has jurisdiction over this appeal pursuant to Utah Code Ann. §78-2-2(3)(j) (2002).

### STATEMENT OF ISSUE AND STANDARDS OF REVIEW

Plaintiff/Appellee (hereinafter “Plaintiff”) disagrees somewhat with the statement of the issues presented by Defendants/Appellants (hereinafter “Defendants”).

#### **I. FIRST ISSUE**

The first issue for review in this case is the same that was presented to the Utah Court of Appeals in *Bonneville Billing v. Whatley*, 949 P.2d 768,771 (Utah App. 1997):

[W]hether the trial court correctly denied [Defendants’] Rule [60(b)(4)] motion to vacate the default judgment by holding that the trial court properly granted alternative service of process based upon the affidavit and record before it.

This statement of the issue is roughly analogous to the first issue presented by Defendants in their *Brief of Appellant*. (See *Brief of Appellant*, at 1, of record.)

The proper standard of review is double-faceted. See *id.* at 771-772. De novo review is proper when “determining whether an affidavit supporting service is false and[/or] determining whether due diligence has been exercised[.]” *Bonneville Billing*, 949 P.2d at 772. Such questions are “essential to resolving whether a trial court has personal jurisdiction over the defendant.” *Id.* However, “whether the trial court should have ordered a certain type of process it had decided met the constitutional requirements” is reviewed under an abuse of discretion standard. *Id.* (citing *Carlson v. Bos*, 740 P.2d 1269, 1277 (Utah 1987)).

In their *Brief of Appellant*, Defendants only challenge the trial court's determination of reasonable diligence and not the type of process ordered by the Court. Thus, this Court must decide whether the trial court *should* have granted alternative service of process based upon the affidavit and record before it. This is a question of law, reviewed for correctness.

## **II. SECOND ISSUE**

Was the trial court's consideration of Plaintiff's redemption of the property at two previous tax sales and Defendants' reliance on a single phone call in 1986 proper in determining whether Plaintiff exercised reasonable diligence to warrant an order for alternative process under the totality of circumstances in this case?

This issue is reviewed under an abuse of discretion standard. *See Parker v. Ross*, 217 P.2d 373 (Utah 1950).

## **III. THIRD ISSUE**

Assuming that service of process by publication was effective to bring Defendants under the jurisdiction of the Court, was the trial court correct in entering default judgment against Defendants based upon the contents of Plaintiff's Complaint?

This is essentially the third issue presented by Defendants in their *Brief*. Plaintiff agrees that the standard of review is de novo.

## **STATEMENT OF THE CASE**

After nearly two decades of inactivity, indifference, and evasion, Defendants are now attempting to wrest from Plaintiff's control real property to which Plaintiff is statutorily

entitled, having met the requirements to adversely possess the same, having spent considerable time, money, and effort improving, redeeming, and possessing the same, and having obtained a properly entered default judgment granting Plaintiff title to the same. Defendants have managed to avoid the responsibility, but now seek the benefits of land ownership in Utah by belatedly attacking the entry of default judgment against them.

Semantic nuances aside, Plaintiff essentially agrees with the Statement of the Case as it is presented in the *Brief of Appellant*. (See *Brief of Appellant*, at 3-9, of record.) With regard to the contents of Plaintiff's *Ex Parte Motion for Notice by Publication* (hereinafter "*Ex Parte Motion*") (R. at 9-12) and *Affidavit of Counsel in Support of Service by Publication* (hereinafter "*Affidavit*") (R. at 15-17), which Defendants purport to summarize in their Statement of the Case, Plaintiff asserts that the pleadings speak for themselves.

### **SUMMARY OF THE ARGUMENT**

The trial court properly ordered service of process by publication. Rule 4(d)(4)(A) of the Utah Rules of Civil Procedure and relevant case law interpreting the Rule require that a plaintiff who desires to serve a defendant through alternative means of service first demonstrate that the whereabouts of the defendant are unknown and that plaintiff has exercised reasonable diligence in attempting to locate the defendant. Plaintiff's *Ex Parte Motion* and *Affidavit* set forth a sufficient basis for the trial court to conclude that Defendants whereabouts were unknown and that Plaintiff had exercised reasonable diligence in attempting to locate Defendants before turning to the court for leave to pursue alternative

means of service of process. Plaintiff was not required to pursue all means possible or in hindsight conceivable to locate Defendants, but only to exercise reasonable diligence, which it did. It was not error for the trial court to find that reasonable diligence was exercised by Plaintiff in attempting to locate Defendants. Therefore, Plaintiff having complied with Rule 4(d)(4)(A) of the Utah Rules of Civil Procedure, service by publication was effective in bringing Defendants under the jurisdiction of the trial court. The default judgment was properly entered against Defendants, and Defendants' *Rule 60(b)(4) Motion* was properly denied by the trial court.

The trial court properly considered the totality of the circumstances in its determination that Plaintiff exercised reasonable diligence in attempting to locate Defendants. Utah law has established that the exact contours of the reasonable diligence standard fluctuate depending on the circumstances of each case. In its reasonable diligence determination, it was not an abuse of discretion for the trial court to consider the facts that Plaintiff had redeemed the property twice in the past from tax sales, nor that Defendants relied on a single alleged telephone conversation in 1986, as both facts are relevant to the degree of effort necessary to satisfy the reasonable diligence requirement. It was not an abuse of discretion for the trial court to consider all relevant information in its reasonable diligence determination. Thus, jurisdiction was properly invoked over the Defendants, the default judgment was properly entered, and Defendants' *Rule 60(b)(4) Motion* was properly denied.

Finally, assuming that the trial court properly exercised jurisdiction over the Defendants, default judgment was properly entered by the trial court below. The allegations set forth in Plaintiff's Complaint were sufficient to state a cause of action against the Defendants for quiet title and adverse possession. After valid service by publication, Defendants failed to answer timely, their default was properly entered, and a default judgment was properly entered against them. The trial court correctly entered the default judgment against Defendants based upon the allegations contained in Plaintiff's Complaint. Therefore, the trial court properly denied Defendants' *Rule 60(b)(4) Motion*.

Because the trial court properly denied Defendants' *Rule 60(b)(4) Motion* below, this Court ought to affirm the trial court's order and allow Plaintiff the peace of mind and finality of a properly obtained default judgment.

### **ARGUMENT**

#### **I. THE TRIAL COURT CORRECTLY DENIED DEFENDANTS' RULE 60(B)(4) MOTION TO VACATE THE DEFAULT JUDGMENT BY HOLDING THAT THE TRIAL COURT PROPERLY GRANTED ALTERNATIVE SERVICE OF PROCESS BASED UPON THE AFFIDAVIT AND RECORD BEFORE IT.**

##### **A. Reasonable diligence standard of Rule 4(d)(4)(A) of the Utah Rules of Civil Procedure.**

In their *Brief*, Defendants correctly state the general standard for service by publication as set forth in the Utah Rules of Civil Procedure and federal and Utah case law. (*See Brief of Appellant*, at 11-12, of Record.) Rule 4(d)(4)(A) of the Utah Rules of Civil

Procedure states:

Where the identity or whereabouts of the person to be served are unknown and cannot be ascertained through reasonable diligence, where service upon all of the individual parties is impracticable under the circumstances, or where there exists good cause to believe that the person to be served is avoiding service of process, the party seeking service of process may file a motion supported by affidavit requesting an order allowing service by publication or by some other means. The supporting affidavit shall set forth the efforts made to identify, locate or serve the party to be served, or the circumstances which make it impracticable to serve all of the individual parties.

Thus, before a trial court may properly order alternative service of process, it must be shown that the “identity or whereabouts of the person to served are unknown and cannot be ascertained through reasonable diligence.” *Id.*

As correctly pointed out by Defendants in their *Brief of Appellant*, this reasonable diligence standard has its basis in the United States Supreme Court case of *Mullane v. Century Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). In *Mullane*, the United States Supreme Court notes that the circumstances of each case are important to the determination of the propriety of alternative service, and that the underlying standard is reasonableness:

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice *reasonably* calculated, *under all circumstances*, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections...The notice must be of such nature as *reasonably* to convey the required information...and it must afford a *reasonable* time for those interested to make their appearance...But if with due regard for the *practicalities and peculiarities* of the case these conditions are *reasonably* met, the constitutional requirements are satisfied.

339 U.S. at 314 (emphasis added) (citations omitted).

**B. Plaintiff's *Affidavit* and *Ex Parte Motion* were sufficient to satisfy the reasonable diligence requirement of Rule 4(d)(4)(A) of the Utah Rules of Civil Procedure.**

Plaintiff is entitled to the finality and peace of mind associated with a properly obtained default judgment, since the *Affidavit* and *Ex Parte Motion* submitted by Plaintiff and relied upon by the trial court to authorize service by publication were sufficient to satisfy the reasonable diligence requirement of Rule 4(d)(4)(A) of the Utah Rules of Civil Procedure.

The requirements for an affidavit supporting a motion for alternative service of process upon a defendant are well-established. *Downey State Bank v. Major-Blakeney Corporation*, 545 P.2d 507, 509 (Utah 1976), cited by Defendants, states that, to be sufficient, an affidavit supporting a motion for alternative service of process needs to set forth more than “mere conclusions as to diligent search and inquiry.” Further, the affidavit “must set forth facts upon which the court can base a judgment as to whether such diligence has been exercised to meet that requirement.” *Id.* Importantly, the *Downey* Court concludes: “But when he has done so, his judgement thereon is entitled to the same presumptions of verity as other judicial determinations.” *Id.*

Defendants rely heavily upon *Bonneville Billing v. Whatley*, 949 P.2d 768 (Utah App. 1997), a case in which the Utah Court of Appeals found that an affidavit supporting a motion for alternative service of process was insufficient to show the exercise of reasonable diligence. *Bonneville Billing* is distinguishable in several important aspects. In analyzing

*Bonneville Billing*, Defendants assert in their *Brief of Appellant*: “Particularly damaging to plaintiff’s case was its failure to set forth in its affidavit any efforts made to locate the defendant once it learned that he might be living in California.” (*Brief of Appellant*, at 13 (citing *Bonneville Billing*, 949 P.2d at 775).) A review of the case, however, discloses that the Utah Court of Appeals was most concerned that the affidavit was misleading and fraudulent, an allegation that has not been made in the instant case. *Bonneville Billing*, 949 at 773-774. It is also notable that in *Bonneville Billing*, the Utah Court of Appeals found that the plaintiff failed to follow up on leads garnered from an attempted service of process, again a concern not alleged in the instant case. *Id.* at 775. Finally, Defendants state in their brief that the Court of Appeals “required, at a minimum, that once a plaintiff had notice that the original address was ineffective, the plaintiff was under an obligation to make an effort to locate the defendant’s present address.” (*Brief of Appellant*, at 14 (citing *Bonneville Billing*, 949 at 775).) However, the Utah Court of Appeals never so holds. The Court merely holds, based upon the particular fact in *Bonneville Billing* that the plaintiff was made aware of another probable location of the defendant, that the plaintiff had to further explore that location. *Bonneville Billing*, 949 at 775. Because the nature of a reasonable diligence inquiry is fluid and very fact-intensive, *Bonneville Billing* must be viewed in light of its underlying facts, which are distinguishable from the facts of the instant case.

A more analogous case than *Bonneville Billing* is *Downey State Bank v. Major-Blakeney Corporation*, 545 P.2d 507, 509 (Utah 1976). In *Downey State Bank*, the

defendant, an assignee of the defendant corporation's interest in the subject foreclosed property, attacked the trial court's denial of his motion to set aside a default judgment which foreclosed the property seven months earlier. The defendant in *Downey State Bank* claimed that "the plaintiff's affidavit [supporting a motion for alternative service of process] was insufficient to justify an order to publish summons; and...that no diligent search and inquiry was in fact made." *Id.* at 508.

The *Downey* Court found that the "plaintiff's attorney contacted the last registered Utah agent of Major-Blakeney Corporation and obtained the most recent address of [the defendant,]" at which address the defendant could not be found. *Id.* On this basis "and the further facts...that [the defendant's] assignor, Major-Blakeney Corporation, had ceased doing business in Utah, had discontinued its post office box address in California, and that there had been a bona fide attempt to serve [the defendant] at the only address known to or reasonably obtainable by the plaintiff," this Court affirmed the lower court's decision to deny the defendant's motion to set aside the judgment. *Id.* at 509. The Court explained:

It is true that the plaintiff did not exhaust all possibilities pointed out by the defendant that it appears by hindsight might have been used as a means of finding and serving him. *But that is not what is required. The requirement is that there be exercised reasonable diligence in good faith.*

*Id.* (emphasis added).

As in *Downey*, this Court in *Parker v. Ross*, 217 P.2d 373 (Utah 1950), upheld the trial court's determination that service by publication was proper under the circumstances. In *Parker*, appellant argued that an "affidavit for publication was deficient by reason of

failure of plaintiff to show due diligence to locate [defendant] or to ascertain whether she was deceased.” 217 P.2d at 376. Appellant argued that “locating an address of a nonresident [defendant] and merely attempting to correspond with such nonresident without success, does not constitute due diligence; that investigation must go further, and be conducted outside the state where such person was once known to reside[.]” *Id.* The Supreme Court disagreed:

The respondent in the instant case having shown by his affidavit for publication facts sufficient to find that he had used due diligence to ascertain whether defendant was within the state and not being able to find her there and also having caused mail to be sent to her outside of the state to addresses it was reasonable to believe would reach her and having received no reply, did all that was necessary to try to find the whereabouts of the record owner of the land to which he sought to quiet title. Our statutes do not require either in spirit or intent that more be done than respondent did in the present case to try to give actual notice to the record owner of the pending suit.

*Id.* at 377.

In the case at hand, there is found in Plaintiff’s *Ex Parte Motion* and the supporting *Affidavit* more than “mere conclusions as to diligent search and inquiry.” (See R. at 9-12, 15-17.) Plaintiff alleges in its *Ex Parte Motion* that the addresses and locations of Defendants were unknown at the time of the filing of the Complaint, and therefore personal service would have been ineffective. (R. at 9, ¶ 1 ) Further, although Plaintiff had a mailing address for Defendants Robert C. Marrs and Douglas R. Marrs, being 147 Calle Larga, Los Gatos, California, 95030, a letter Plaintiff’s counsel mailed to that address had been returned “undeliverable”. (R. at 10, ¶ 2.) Therefore, service by mailing would have been ineffective as well. (R. at 10, ¶ 2.) True, no service of process was attempted at the only address

available to Plaintiff, but, none is required under Rule 4(d)(4)(A) before service by publication may be authorized by the court, Defendants' assertions to the contrary notwithstanding. (R. at 43.)

As in *Downey State Bank*, Defendants, with the aid of three years of hindsight, have asserted many hypothetical means by which Plaintiff may have uncovered the whereabouts of Defendants at the time of the filing of the Complaint in this action. (*See Brief of Appellant*, at 15; R. at 40-41.) However, as the Court in *Downey State Bank* noted, such an exhaustion of all possibilities is not required. An exercise of reasonable diligence in good faith is sufficient to support a motion for alternative process. Plaintiff asserts that it exercised good faith reasonable diligence to locate Defendants prior to filing its Complaint and Motion for Notice by Publication.

It may be true that Defendants resided at the same residence and worked at the same place for ten years prior to the filing of the Complaint, as alleged by Defendants. (*See Brief of Appellant*, at 15; R. at 38, 40.) Without knowing in which city the Defendants resided, however, Plaintiff could not know which phone book of the State of California to consult to locate the Defendants. Surely Plaintiffs were not required to telephone every person in the United States who shares the same name as either of the Defendants.

Defendants have further alleged that in 1986 the parties exchanged telephone numbers and other information. (R. at 35-36, 40) While not denying flatly that such a conversation may have occurred more than 15 years ago, Plaintiff alleges the details of any such

conversation cannot be recalled, and there is no recollection of whether or not any phone number was given to Plaintiff at that time. (R. at 56, ¶¶ 5-6.) In fact, Rex Jackson, as representative of Plaintiff, testifies that he never at any time recalls having the phone number of either of the Defendants. (R. at 56, ¶ 6.)

Even assuming, however, that Plaintiff, or someone representing Plaintiff, was given a phone number fifteen years ago, that fact alone did not put Plaintiff on notice in 1999 that the Marrs' current address varies with that given in the records of the Washington County Records. Nor is it reasonable that Plaintiff should be required to remember the details of a conversation occurring fifteen years ago or a specific phone number that may have been given to him at that time.

Defendants have further alleged that Plaintiff could have possibly inquired about Defendants' whereabouts through mutual acquaintances, (R. at 36, 40), but do not allege that Plaintiff was aware or had any basis to know of the mutuality of such acquaintances. Just because Defendants knew someone who knew Plaintiff does not necessarily mean that Plaintiff was aware that it knew someone who knew Defendants. Defendants have given no basis on which to impute such knowledge to Plaintiff. In addition, Plaintiff, by and through Rex Jackson, affirmatively represents to this Court that Plaintiff was either unacquainted or merely slightly acquainted with those people listed in Defendants' Memorandum, and has no recollection of any conversation with any of them at any time relative to Defendants or the Property. (R. at 56, ¶ 7.) It would be clearly unreasonable to require Plaintiff to inquire

of all of its acquaintances as to the whereabouts of Defendants, especially when there is no reason to suspect that they may have known. Moreover, Utah law does not require the investigation of possible acquaintances before being granted alternative service of process.

On the other hand, it is obviously reasonable to rely on an address provided to the Washington County Recorder's Office in connection with the subject Property. If Defendants wanted to assert their continuing interest in the Property, it can be expected that they would provide a current address to which the property tax notices could be sent. It would therefore be reasonable in a matter involving such Property and the Defendants' supposed interest therein to rely on an address provided to the Washington County Recorder's Office, which is what Plaintiff did.

In addition to the foregoing, Plaintiff asserts that it would have been impracticable, if not impossible, under the circumstances to locate the Defendants. Based upon information and belief, during the seventeen years of their purported interest in the Property, Defendants did not ever reside on the subject Property. (R. at 4, ¶ 11.) Furthermore, Plaintiff believes that Defendants have never even visited, much less improved the Property. (R. at 4, ¶ 11.) Defendants never attempted any telephonic or written communication with Plaintiff or its representatives during the seventeen years of their purported interest in the Property, (r. at 52, ¶ 4; R. at 56, ¶ 6.), with the possible exception of the purported conversation occurring in 1986, which is disputed. Based on information and belief, Defendants paid no property taxes during the seventeen years of their purported interest in the Property, (R. at 6, ¶ 12; R.

at 52, ¶ 4; R. at 56, ¶ 6), nor did they bother to notify the Washington County Recorder's Office of their alleged change of residence, thus insuring that the tax notices would not reach Defendants. None of the foregoing allegations have ever been refuted by the Defendants.

Plaintiff twice redeemed the Property from tax sale foreclosures without any communication of interest from the Defendants. (R. at 6, ¶ 13.) Were it not for such redemptions, the Property would be in the possession of a third-party purchaser or the County Tax Assessor's Office today. In sum, Defendants made no appreciable efforts at all prior to their belated *60(b)(4) Motion* to show an interest in the Property or to make their whereabouts known either to the County or to the Plaintiff. They have managed to elude all of the responsibilities incident to ownership of property in Washington County by successfully cloaking themselves. In contrast, Plaintiff has always broadcasted its interest in the Property, especially illuminating that interest by publicly filing an action to quiet title and adversely possess the Property.

Despite Defendants' efforts to hide, Plaintiff took reasonable affirmative steps to locate Defendants before the Complaint was filed in this matter. Counsel for Plaintiff reviewed title documents of record and learned of one address for Robert and Douglas Marrs at Los Gatos, California. (R. at 59, ¶ 4.) Further examination of title documents and communication with the Washington County Recorder's Office, Assessor's Office, and Treasurer's Office did not provide any additional information relative to the current addresses of either of the Defendants Marrs other than the Los Gatos, California address.

(R. at 59, ¶ 4.) On or about the 26<sup>th</sup> day of June, 1998, Counsel for Plaintiff sent a certified letter to Robert and Douglas Marrs at their last known address: 147 Calle Larga, Los Gatos, California, 95030. (R. at 59, ¶ 5; R. at 61-62.) The letter was returned to him “undeliverable,” with no forwarding address. (R. at 59, ¶ 5.)

Finally, in its efforts to give Defendants notice, Plaintiff reasonably relied on and faithfully complied with a valid Order for Notice by Publication issued by the Fifth Judicial District Court. (See R. at 18-24.) In the *Ex Parte Motion* and supporting *Affidavit* relied upon by the trial court in ordering that notice by publication, Plaintiff articulated reasonably diligent efforts to locate Defendants at the time of the filing of the Complaint in this matter. Plaintiff did all that was legally and reasonably required to ensure the quiet enjoyment of property to which it was legally entitled. Plaintiff should therefore be entitled to the presumption of verity, finality, and peace of mind incident to a properly granted default judgment. The trial court correctly concluded that reasonable diligence had been exercised by Plaintiff to locate Defendants before moving the trial court for alternative service of process.

**II. THE TRIAL COURT'S CONSIDERATION OF PLAINTIFF'S REDEMPTION OF THE PROPERTY AT TWO PREVIOUS TAX SALES AND DEFENDANTS' RELIANCE ON A SINGLE PHONE CALL IN 1986 WAS PROPER IN DETERMINING WHETHER PLAINTIFF EXERCISED REASONABLE DILIGENCE UNDER THE TOTALITY OF CIRCUMSTANCES IN THIS CASE.**

In their *Brief of Appellant*, Defendants argue that the “District Court erred in its application of a “totality of circumstances” standard to the determination of whether Plaintiff exercised reasonable diligence in attempting to locate defendants and notify them of the action pending against them.” (*See Brief of Appellant*, at 17.) As an initial matter, in light of the language in *Mullane* quoted in section IA above, it is inescapable that the trial court was bound to consider the particular circumstances of the instant case in its determination. That the trial court considered the totality of the circumstances in its determination is not in itself error. The trial court was bound to do so under *Mullane* and other Utah case law interpreting *Mullane* and Rule 4 of the Utah Rules of Civil Procedure.

Specifically, Defendants object to some of the particular circumstances relied upon by the trial court in determining that Plaintiff exercised reasonable diligence in attempting to locate Defendants; namely, that the property was redeemed by Plaintiff at two separate tax foreclosure sales, and that Defendants rely upon a phone call purportedly made by Defendants in 1986 to Plaintiff. (*See Brief of Appellant*, at 17-18; R. at 105, p. 16-17.)

First, there is no indication in the record that the trial court relied solely on these circumstances in rendering its decision. In fact, the trial court explains that the foregoing

circumstances are merely “part of the totality.” (R. at 105, p.16.) Plaintiff’s *Affidavit* and *Ex Parte Motion* set forth additional facts upon which the trial court also assumably relied in rendering its decision.

Second, in *Parker v. Ross*, 217 P.2d 373, 379 (Utah 1950) (Wolfe, J., concurring), upon which Defendants rely, Justice Wolfe states that “[t]he diligence to be pursued and shown by the affidavit is that which is reasonable under the circumstances and not all possible diligence which may be conceived.” Further, “Due diligence must be *tailored to fit the circumstances of the case.*” *Id.* (emphasis added). There is an evident flexibility in the definition of reasonable diligence as it applies to the specific circumstances of a particular case. *Parker* suggests that what is considered reasonably diligent under a specific set of circumstances may fall short under different circumstances. Reasonable diligence is a fluid concept, reacting to the specific contours of a particular case.

At the hearing of this matter below, counsel for Plaintiff offered that “[A]s part of this analysis, the court ought to look at the past conduct of the defendants in determining the reasonability.” (R. at 105, p. 12.) The trial court responded:

That is an interesting way of determining diligence. Because you would define diligence in each individual case in a totality of the circumstance regarding the defendant’s demonstrated efforts toward the property. If you had a defendant that had not let it go to tax sale, had paid the taxes for a period of time the, apparently, has dropped off the face of the earth, at that point, you might have more requirement that you would where there have been two tax sales go by with no effort. That’s what you are asking the court to do in this analysis.

(R. at 12.) The trial court correctly understood the inherent flexibility of the reasonable

diligence standard.

Contrary to the position taken by Defendants, the fact that the property was redeemed twice by Plaintiff at tax foreclosure sales without Defendants' intervention is highly relevant to defining the contours of reasonable diligence in this particular case. The fact that the property was redeemed by the Plaintiff twice without the Defendants' intervention is relevant to defining reasonable diligence in that it tends to show the indifference of Defendants towards the property. Had Plaintiff not redeemed the Property at these tax sales, Utah law would not permit Defendants from now arguing lack of notice of these sales and thereby regain their foreclosed property interests.

The fact that Plaintiff redeemed the Property twice from tax sales also shows that Defendants' whereabouts were not reasonably ascertainable at least twice before when their presence was crucial to the maintenance of their interests in the property. If anything, such indifference to the property shows that Defendants were attempting to evade the responsibilities of land ownership in the State of Utah. This indifference and evasion should be considered in tailoring reasonable diligence to the facts of this case.

The fact that Defendants rely on a single phone call purportedly occurring in 1986 to support their assertion that Plaintiff was aware of their whereabouts is also revealing. It shows that in nearly two decades, Defendants have made no considerable efforts to disclose their location to Plaintiff or to the State of Utah.

In light of the Defendants' seemingly diligent efforts to remain undisclosed, which

is evidenced by their lack of participation at the past tax sales and their reliance upon a single phone call placed in 1986, the diligence exercised by Plaintiff in locating them under the totality of the circumstances was reasonable. The trial court properly considered all of the circumstances in the case when determining reasonable diligence. Such consideration of all relevant evidence is within the trial court's discretion, which it exercised reasonably, and not grounds for reversal.

### **III. THE TRIAL COURT WAS CORRECT IN ENTERING DEFAULT JUDGMENT AGAINST DEFENDANTS BASED UPON THE ALLEGATIONS OF PLAINTIFF'S *COMPLAINT*.**

The allegations contained in Plaintiff's *Complaint* were sufficient to state a cause of action for adverse possession by Plaintiff against a cotenant. Consequently, the trial court correctly entered default judgment against Defendants pursuant to Rule 55 of the Utah Rules of Civil Procedure, and correctly refused to set aside that default judgment.

Plaintiff agrees in principle with Defendants' interpretation of Rule 55 of the Utah Rules of Civil Procedure and applicable case law, but disagrees that Plaintiff's default judgment fails for its failure to state a valid cause of action for adverse possession against a cotenant.

A cotenant may oust another cotenant and effectively adversely possess an entire parcel of land through "acts of the most open and notorious character, [which] clearly show to the world, and to all having occasion to observe the condition and occupancy of the property, that his possession is intended to exclude, and does exclude, the rights of his

cotenant.” *Mathews v. Baker*, 155 P. 427, 428 (Utah 1916) (citing *Elder v. McClaskey*, 70 F. 529, 542 (1895)). *Mathews* provides an excellent example of what conduct meets the preceding standard.

Mathews held land as tenant-in-common with other cotenants. *Mathews*, 155 P. at 428. She sought to quiet title to the property, claiming that she had taken title to the entire property through adverse possession. *Id.* The trial court made several findings of fact that were dispositive of Mathews’ claim of adverse possession. First, Mathews paid all taxes and assessments levied against the property for nearly two decades. *Id.* Second, Mathews made substantial improvements to the property. *Id.* For example, Mathews planted shrubbery, built walks, and constructed various structures on the property. *Id.* Third, Mathews was in exclusive possession of the property for the statutory period. *Id.*

This Court held in *Mathews* that the foregoing findings were sufficient to establish adverse possession. *Id.* at 429. Further, this Court found that actual notice and ouster were not necessary; Mathews’ acts were sufficient to constructively notify the other cotenants of her intention to adversely possess the entire property. *Id.* at 428-429.

*Mathews* is very analogous to the instant case. Plaintiff plead in its *Complaint* allegations very similar to the findings in *Mathews*, (*see* R. at 2-5.), which, in *Mathews*, were sufficient not only to state a cause of action for adverse possession, but to prevail on the merits. Specifically, Plaintiff alleged, as did Mathews, payment of taxes for at least thirty years, substantial improvement of the property, and sole possession of the property for much

more than the statutory period. (*See R.* at 3-5.) In addition, Plaintiff alleges payment and maintenance of insurance on the property for the last thirty or more years, and redemption of the property from two different tax sales without Defendants' interference or involvement. (*See R.* at 4.)

In their *Brief of Appellant*, Defendants cite several cases in support of their contention that Plaintiff has failed to state a cause of action in its *Complaint* for adverse possession against a cotenant. However, each of the cases cited to by Defendants is distinguishable from the instant case.

Defendants first refer to *McCready v. Frederickson*, 136 P. 316 (Utah 1912), which is an example of the failure of one cotenant successfully to establish a claim for adverse possession against another cotenant. *Id.* at 320. *McCready*, however, is distinguishable on its facts. *McCready* dealt with a very specific issue: whether a cotenant extinguishes a tenancy-in-common and ousts his cotenant when he allows the property to be sold at a tax sale, and then purchases it. *Id.* at 318. This Court held that redemption of the property at a tax sale alone was not sufficient to oust a cotenant and establish adverse possession. *Id.* at 320. Furthermore, the language of the opinion suggests the decision is limited to the facts of the case. *See, i.e., id.* at 320, 321. In fact, in his dissenting opinion in *Dillman v. Foster*, 656 P.2d 974, 984 (Utah 1982), Chief Justice Hall distinguished *McCready* on the basis that “[*McCready*’s] holding was merely that the *facts* did not satisfy the requirements of [Utah Code Ann. § 78-12-7].” (Emphasis in original.)

The second decision relied upon by Defendants, *Olwell v. Clark*, 658 P.2d 585 (Utah 1982), is likewise distinguishable on its facts. While it is true that the cotenants seeking to oust the other cotenants had paid taxes on the property in order to preserve the title, *id.* at 589, they had not improved the property, nor did they enclose the property, *id.* at 586. The property consisted of “undeveloped hilly terrain covered by scrub oak.” *Id.* Like *McCready*, *Olwell* seems to indicate that payment of taxes alone is not sufficient to adversely possess against cotenants. Nevertheless, payment of taxes plus additional indicia of possession and exclusion, as is seen in *Mathews*, can be sufficient.

The third case Defendants rely upon in their *Brief of Appellant* is *Sperry v. Tolley*, 199 P.2d 542 (Utah 1948). *Sperry* involved cotenants who owned four tracts of land as tenants-in-common. Heirs of one cotenant claimed to have adversely possessed two of the four tracts of land. The heirs’ claim was based on their sole possession of the two tracts. *Id.* at 545. However, this Court reversed the lower court that had quieted title in the heirs, holding that where cotenants occupy different parts of the whole, one cotenant cannot claim to have adversely possessed that part that he or she possessed unless he or she had acted adversely to the interests of the other cotenants. *Id.* at 546. Although the heirs had advertised the two tracts for sale, which was adverse to the other cotenants’ interest, the statutory length of time for adverse possession had not been fulfilled. *Id.*

*Sperry* is distinguishable from the case at bar because it involved cotenants who were all in possession of the land simultaneously, albeit they possessed different parts of the

whole. Unlike the instant case, the cotenants in *Sperry* also shared in making improvements and in the payment of taxes. Plaintiff in the instant case, however, was in exclusive possession of the entire subject property. Plaintiff was also in a different position because it alone paid all taxes assessed against the subject property, and it alone made improvements to the property. The facts of *Sperry* are sufficiently different from the instant case that it should not control the instant case.

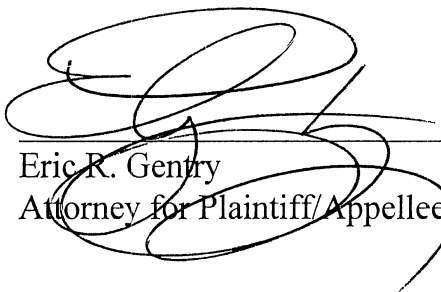
In short, all three cases relied upon by Defendants in their *Brief of Appellant* are distinguishable from the instant case. *Mathews*, however, is more directly on point. The facts are similar, and the conclusion upon review by this Court should likewise be similar. Having alleged facts in its *Complaint* similar to those that were sufficient in *Mathews* to win on the merits, this Court should conclude that Plaintiff plead sufficient facts to state a cause of action for adverse possession against cotenants. The default judgment was thus properly entered below, and the trial court was correct in refusing to set it aside.

### CONCLUSION

For the foregoing reasons, and in the interests of justice, Plaintiff respectfully requests that this Court affirm the trial court's Order dismissing Defendants' Rule 60(b)(4) Motion to Quash Service and Set Aside Default Judgment.

DATED this 30 day of June, 2003.

Respectfully Submitted,  
CHRISTOPHERSON, FARRIS, WHITE & UTLEY, P.C.




Eric R. Gentry  
Attorney for Plaintiff/Appellee

### CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 30<sup>th</sup> day of June, 2003, a true and correct copy of the foregoing **BRIEF OF APPELLEE** was duly served by depositing in the U.S. mail, postage prepaid, addressed as follows:

Russell J. Gallian  
Gallian, Westfall, Wilcox & Welker, L.C.  
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St. George, UT 84770



An Employee of Christopherson, Farris, White & Utley, P C