

2010

Mary Ann Jenkins and Gary D. Jenkins  
v. ADVANTAGE PAWN RENTAL, dba  
ADVANTAGE RENTAL and/or ADVANTAGE  
RENTAL & TRADING POST, and BIG BUBBA'S  
TRAILER MFG.. dba BIG BUBBA'S TRAILER  
SALES and/or BIG BUBBA'S TRAILER SALES &  
MFG.. : Reply Brief

Utah Court of Appeals

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**IN THE COURT OF APPEALS OF THE STATE OF UTAH**

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MARY ANN JENKINS and	)	
GARY D. JENKINS,	)	
	)	<b>REPLY BRIEF OF APPELLANT</b>
Plaintiffs/Appellees,	)	<b>BIG BUBBA'S TRAILERS</b>
	)	
vs.	)	
	)	
ADVANTAGE PAWN RENTAL,	)	CASE NO. 20100774-CA
dba ADVANTAGE RENTAL and/or	)	
ADVANTAGE RENTAL &	)	
TRADING POST, and <u>BIG</u>	)	
<u>BUBBA'S TRAILER MFG., dba</u>	)	
<u>BIG BUBBA'S TRAILER SALES</u>	)	
<u>and/or BIG BUBBA'S TRAILER</u>	)	
<u>SALES &amp; MFG.,</u>	)	
	)	
Defendants/ <u>Appellants</u> .	)	

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**APPEAL FROM THE SECOND JUDICIAL DISTRICT COURT,  
WEBER COUNTY, STATE OF UTAH  
HONORABLE MICHAEL D. DIREDA**

---

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**ORAL ARGUMENT AND PUBLISHED DECISION REQUESTED**

**FILED  
UTAH APPELLATE COURTS  
MAR 28 2011**

MARY ANN JENKINS and )  
GARY D. JENKINS, )  
 )  
Plaintiffs/Appellees, )  
 )  
vs. )  
 )  
ADVANTAGE PAWN RENTAL, )  
dba ADVANTAGE RENTAL and/or )  
ADVANTAGE RENTAL & )  
TRADING POST, and BIG )  
BUBBA’S TRAILER MFG., dba )  
BIG BUBBA’S TRAILER SALES )  
and/or BIG BUBBA’S TRAILER )  
SALES & MFG., )  
 )  
Defendants/Appellants. )

**REPLY BRIEF OF APPELLANT  
BIG BUBBA’S TRAILERS**

CASE NO. 20100774-CA

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## ORAL ARGUMENT AND PUBLISHED DECISION REQUESTED

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## **SUMMARY OF ARGUMENT**

Judgments by default have long been disfavored under Utah law. As a default certificate is merely “a first step” on the path towards a default judgment, Utah appellate courts have instructed that the “good cause” standard of Rule 55(c) be applied liberally and that all doubts be resolved in favor of the defaulting party.

In this case, the trial court failed to apply the factors most courts find relevant in determining whether “good cause” has been shown. Instead, the trial court applied a rigid time-based test, and concluded that a nine (9) month delay in answering Plaintiff’s Amended Complaint was simply too long to constitute “good cause.” Under the circumstances of this case, Big Bubba’s submits that the trial court abused its discretion.

## **ARGUMENT**

### **I. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING BIG BUBBA’S MOTION TO SET ASIDE DEFAULT CERTIFICATE.**

There is no dispute that trial courts have broad discretion in deciding whether to set aside defaults. See Miller v. Brocksmit, 825 P.2d 690, 693 (Utah Ct. App. 1992). However, Utah appellate courts have been careful to remind that a trial court’s discretion in considering whether to set aside a default, whether it be a default judgment under Rule 60(b) or a default certificate under Rule 55(c), is not without limitation. See Davis v. Goldsworthy (Davis I), 2008 UT App 145, ¶10,

184 P.3d 626; Lund v. Brown, 2000 UT 75, ¶9, 11 P.3d 277 (explaining that a trial court’s discretion, though broad, “is not unlimited”).

**A. The Abuse Of Discretion Standard Under Rule 55(c).**

In her brief, Plaintiff argues that the trial court did not abuse its discretion in denying Big Bubba’s Motion because its decision was not “arbitrary, capricious, or whimsical.” (Pl.’s Br., pp. 5-6.) Quoting from the case, Hendry v. Schneider, 116 F.3d 446, 449 (10th Cir. 1997), Plaintiff asserts that “[t]he trial court abuses its discretion in determining whether there is ‘good cause’ if its decision is arbitrary, capricious, or whimsical.” (Pl.’s Br., p. 5.) Plaintiff’s reliance on Hendry is misplaced.

Hendry involved a question of whether there was “good cause” for the plaintiff’s failure to serve the defendant with a summons and complaint within the time period required under Rule 4 of the Federal Rules of Civil Procedure. Citing to the case, Cox v. Sandia Corp., 941 F.2d 1124, 1125 (10th Cir. 1991), the Hendry court explained that a trial court abuses its discretion in determining whether there is “good cause” if its decision is “arbitrary, capricious, or whimsical.” Hendry, 116 F.3d at 449.<sup>1</sup>

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<sup>1</sup> The version of Rule 4 applied by the court in Hendry provided:

Summons: Time Limit for Service. If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was

Hendry did not involve a determination of whether “good cause” had been established under Rule 55(c). A review of the Hendry decision and the authority it cites makes it clear that its analysis of what constitutes an abuse of discretion in determining “good cause” was limited to the “good cause” referred to in Rule 4 of the Federal Rules of Civil Procedure, not Rule 55(c). See id. at 449. See also, Cox, 941 F.2d at 1125 (“The legislative history of [Rule 4] cites a defendant’s evasion of service as the sole example of ‘good cause.’”)

In the context of Rule 60(b), Utah appellate courts have stated, “[a]s a threshold matter, a court’s ruling must be ‘based on adequate findings of fact’ and ‘on the law.’” Lund, 2000 UT 75, ¶9 (quoting May v. Thompson, 677 P.2d 1109, 1110 (Utah 1984) (per curiam)). “A decision premised on flawed legal conclusions, for instance, constitutes an abuse of discretion.” Lund, 2000 UT 75, ¶9.<sup>2</sup> The Utah Supreme Court has explained that the equitable nature of the rule

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required cannot show *good cause* why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court’s own initiative with notice to such party or upon motion.

Hendry, 116 F.3d at 447, n.1 (emphasis added).

<sup>2</sup> This is consistent with the approach taken by courts applying the federal counterpart of Rule 55(c). See e.g., Keegel v. Key West & Caribbean Trading Co., 627 F.2d 372, 374 (D.C. Cir. 1980) (“Absence of record indication that proper standards were applied in refusing to set aside a default has been held sufficient in itself to warrant reversal.”); Coon v. Grenier, 867 F.2d 73, 78 (1st Cir. 1989) (“Judicial discretion is necessarily broad – but it is not absolute.

provides further limits on the trial court's discretion. See id. at ¶10 (quoting 11 Charles Alan Wright et al., Federal Practice and Procedure § 2857, at 257-58 (2d ed. 1995) ("based on the remedial nature of Rule 60(b), the discretion of the district court to deny a motion for relief is limited")).

While few Utah appellate courts have had occasion to consider whether a trial court's decision to set aside a default under Rule 55(c) constituted an abuse of discretion, those that have often refer to prior appellate decisions applying Rule 60(b). See e.g., Davis I, 2008 UT App 145, ¶10; Roth v. Joseph, 2010 UT App 332, 244 P.3d 391. However, this does not mean that the two rules, or the abuse of discretion standards applied to them, are the same.

In Roth, this Court considered whether a trial court had abused its discretion in vacating a default certificate under Rule 55(c). Referring to prior decisions involving default judgments under Rule 60(b), the Roth court stated:

Speaking of a default *judgment*, our supreme court has stated that a trial court should 'incline towards granting relief in a doubtful case to the end that the party may have a hearing.' *Lund v. Brown*, 2000 UT 75, ¶10, 11 P.3d 277 (internal quotation marks omitted). This is because 'if default is issued when a party genuinely is mistaken to a point where, absent such mistake, default would not have occurred, the equity side of the court would grant relief.' *May v. Thompson*, 677 P.2d 1109, 1110 (Utah 1984) (*per curiam*). Thus, 'it is quite

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Abuse occurs when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed, but the court makes a serious mistake in weighing them.") (additional citations omitted).

uniformly regarded as an abuse of discretion to refuse to vacate a default judgment where there is a reasonable justification or excuse for the . . . failure . . . and timely application is made to set it aside.’ *Menzies v. Galetka*, 2006 UT 81, ¶63, 150 P.3d 480 (omissions in original) (quoting *Lund*, 2000 UT 75, ¶11, 11 P.3d 277).

2010 UT App 332, ¶17 (emphasis original). The court went on to hold that the principles supporting the setting aside of default judgments are even stronger when appellate courts review a trial court’s decision concerning the setting aside of a default certificate. See Roth, 2010 UT App 332, ¶17 (“Inasmuch as a default certificate is merely a ‘first step’ towards obtaining a default *judgment*, we hold that these principles apply a fortiori to appellate review of a trial court’s order setting aside a default *certificate*.”) (emphasis original; internal citation omitted). See also, Coon, 867 F.2d at 73 (explaining that considerations favoring the resolution of actions on their merits “are at their zenith in the *Rule 55(c)* milieu”).

**B. “Excusable Neglect” Under Rule 60(b) Is Not The Same As “Good Cause” Under Rule 55(c).**

Referring to “excusable neglect” under Rule 60(b) and “good cause” under Rule 55(c) as though they were one and the same, Plaintiff argues that the trial court did not err by refusing to consider other factors indicative of “good cause” once it concluded that “excusable neglect” had not been established. (Pl.’s Br., pp. 7-8.) Relying on the case Miller v. Brocksmith, 825 P.2d 690 (Utah Ct. App. 1992), Plaintiff asserts that if excusable neglect cannot be shown, then there is no need for a trial court to consider other factors, such as whether the defendant can

demonstrate a meritorious defense. (Pl.’s Br., p. 7.) Plaintiff’s application of Miller blurs the distinctions between Rule 60(b) and Rule 55(c) and does not reflect the current approach adopted by a majority of courts, including this Court, in applying the “good cause” standard of Rule 55(c).

In Miller, the defendant attempted to have a default set aside under Rule 55(c) in a lawsuit seeking the annulment of an adoption decree. The trial court denied the defendant’s motion. On appeal, a panel of this Court stated that “[w]hile Rule 55(c) distinguishes between the setting aside of a default and the setting aside of a default judgment under Rule 60(b), ‘the factors described in Rule 60(b) are relevant to [a] determination of whether defendant has shown ‘good cause.’” Miller, 825 P.2d at 693 (additional citations omitted). The court explained that the factors to be considered include whether the defendant’s failure constitutes excusable neglect and whether the defendant has presented a meritorious defense to the action. See id. Referencing prior decisions involving Rule 60(b), the court went on to explain that “the question of a meritorious defense arises only if excusable neglect has been shown.” Id. (citing State v. Musselman, 667 P.2d 1053, 1056 (Utah 1983); Board v. Educ. of Granite School Dist. v. Cox, 384 P.2d 806 (Utah 1963)).<sup>3</sup>

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<sup>3</sup> Following Miller, there was some uncertainty over whether a finding of no “excusable neglect” precluded the consideration of other factors relevant in establishing “good cause” under Rule 55(c), such as the existence of a meritorious

The Miller court’s recognition of the Rule 60(b) factors (e.g., “excusable neglect”) as being “relevant” in determining whether “good cause” exists under Rule 55(b) does not mean that the two standards are the same or that a lack of “excusable neglect” precludes a finding of “good cause.” Decisions by courts interpreting the federal counterpart of Rule 55(c) make this clear.<sup>4</sup>

In Dennis Garberg & Assocs., Inc. v. Pack-Tech Int’l Corp., 115 F.3d 767, 775, n.6 (10th Cir. 1997), the United States Court of Appeals for the Tenth Circuit stated, “it is well established that the good cause required by Fed. R. Civ. P. 55(c) for setting aside entry of default poses a lesser standard for the defaulting party than the excusable neglect which must be shown for relief from judgment under Fed. R. Civ. P. 60(b).” See also, Saunders v. Morton, 269 F.R.D. 387 (D. Vt. 2010) (recognizing the “excusable neglect” standard under Rule 60(b) as being “more onerous” than the “good cause” standard under Rule 55(b)).

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defense. See Davis v. Goldsworthy (Davis II), 2010 UT App 78, ¶8, 233 P.3d 496. As set forth below, federal courts generally recognize “excusable neglect” as being a more rigorous standard than “good cause,” and the Court’s recent decision in Roth, 2010 UT App 332, ¶16, seems to clearly indicate that establishing “excusable neglect” is not a prerequisite to establishing “good cause.”

<sup>4</sup> Because Rule 55(c) of the Utah Rules of Civil Procedure and Rule 55(c) of the Federal Rules of Civil Procedure are substantively identical, “[Utah courts] freely refer to authorities which have interpreted the federal rule.” Miller, 825 P.2d at 693 (citing Gold Standard, Inc. v. American Barrick Resources Corp., 805 P.2d 164, 168 (Utah 1990)). See also, Wilson v. Lambert, 613 P.2d 765, 767, n.2 (Utah 1980) (recognizing the applicability of federal interpretations of rules that are nearly identical to state rules).



In Sims v. EGA Prods., Inc., 475 F.3d 865, 868 (7th Cir. 2007), the Seventh Circuit Court of Appeals explained:

Defaults may be set aside for ‘good cause’. Damages disproportionate to the wrong afford good *cause* for judicial action, even though there is no good *excuse* for the defendant’s inattention to the case. *Rule 55(c)* requires ‘good cause’ for the judicial action, not ‘good cause’ for the defendant’s error; as used in this Rule, the phrase is not a synonym for ‘excusable neglect.’ See *Redfield v. Continental Casualty Corp.*, 818 F.2d 596, 601 (7th Cir. 1987). (Another way to see this is that *Rule 55(c)* uses the ‘good cause’ standard for relief before judgment has been entered, while referring to the standard under *Rule 60(b)* for relief after judgment. *Rule 60(b)* allows relief on account of mistake and inadvertence in addition to excusable neglect; the ‘good cause’ standard in *Rule 55(c)* must be easier to satisfy.)

(emphasis original). See also, United States v. One Parcel of Real Property, 763 F.2d 181, 183 (5th Cir. 1985) (“Although a motion to set aside a default decree under Fed. R. Civ. P. 55(c) is somewhat analogous to a motion to set aside a judgment under Rule Fed. R. Civ. P. 60(b), the standard for setting aside a default decree is less rigorous than setting aside a judgment for excusable neglect.”); Chrysler Credit Corp. v. Macino, 710 F.2d 363, 368 (7th Cir. 1983) (“Although the elements for relief under Rule 55(c) and Rule 60(b) are substantially the same, the standards are applied more stringently when considering a motion to vacate a default judgment under Rule 60(b)); EEOC v. Mike Smith Pontiac GMC, Inc., 896 F.2d 524, 528 (11th Cir. 1990) (“The excusable neglect standard that courts apply in setting aside a default judgment is more rigorous than the good cause standard that is utilized in setting aside an entry of default.”); Hinson v. Webster Indus., 240

F.R.D. 687 (M.D. Ala. 2007) (explaining that plaintiff's argument in favor of upholding the default mistakenly evaluated the legal sufficiency of defendant's excuse through the narrow lens of "excusable neglect," rather than the wider-angled lens of "good cause"); Broglie v. Mackay-Smith, 75 F.R.D. 739, 742 (W.D. Va. 1977) ("When the issue is one of whether to set aside an entry of default so that the 'good cause' standard of *Rule 55(c)* is applicable, it is not absolutely necessary that the neglect or oversight offered as reason for the delay in filing a responsive pleading be excusable.") (italics original).

The difference in the level of scrutiny applied to defaults under the "good cause" standard of Rule 55(c) and the "excusable neglect" standard of Rule 60(b) is an important one and is rooted in public policy. While it is well established that defaults are not favored, as they are not in the interest of justice and fair play (see Heathman v. Fabian & Clendenin, 377 P.2d 189, 190 (Utah 1962)), principles of justice and fair play can be tempered somewhat by competing principles of finality of litigation when a default judgment has been entered. In United States v. \$22,050.00 United States Currency, the Sixth Circuit Court of Appeals explained:

[I]t is important to distinguish between an entry of default and a default judgment. That is, a stricter standard of review applies for setting aside a default once it has ripened into a judgment. Specifically, once the court has determined damages and a judgment has been entered, the district court's discretion to vacate the judgment is circumscribed by public policy favoring finality of judgments and termination of litigation as reflected in Rule 60(b).

595 F.3d 318, 324 (6th Cir. 2010) (additional citations omitted). See also, Enron Oil Corp. v. Diakuhara, 10 F.3d 90, 96 (2d Cir. 1993) (explaining that the factors examined in deciding whether to set aside a default judgment are more rigorously applied based on the concepts of finality and litigation repose).

Because Rule 55(c) involves a less stringent standard than Rule 60(b), federal appellate courts apply a modified standard of review. See Coon, 867 F.2d at 76 (“[A] reviewing tribunal should not stay its hand if the district court errs by reading ‘good cause’ too grudgingly. Nor does ‘an abuse of discretion need [to] be glaring to justify reversal . . . .’”) (internal citations omitted). In Shepard Claims Serv. v. Darrah & Assocs., 796 F.2d 190, 193 (6th Cir. 1986), the court stated:

Since entry of default is just the first procedural step on the road to obtaining a default judgment, the same policy of favoring trials on the merits applies whether considering a motion under Rule 55(c) or Rule 60(b). *In practice a somewhat more lenient standard is applied to Rule 55(c) motions where there has only been an entry of default than to Rule 60(b) motions where judgment has been entered.*

(emphasis added). This approach is consistent with the view expressed in Roth where the court explained that because a default certificate is merely “a first step” towards obtaining a default judgment, the general principles which support granting relief from default judgments apply “a fortiori” to the appellate review of a trial court’s decision involving default certificates. 2010 UT App 332, ¶17.

**C. The Trial Court Abused Its Discretion When It Denied Big Bubba's Motion By Ignoring The Factors Relevant In Determining "Good Cause" Under Rule 55(c).**

The trial court denied Big Bubba's Motion to Set Aside Default Certificate, finding that Big Bubba's had failed to establish good cause or excusable neglect for its failure to timely answer Plaintiff's Amended Complaint. (R. 134.) The only basis articulated by the trial court for its decision was that "the nine-month delay [in answering Plaintiff's Amended Complaint] does not constitute good cause." (R. 197, p. 25.) The trial court further stated, "when the Court looks back at the factors in 60(b) which are certainly to be considered under a 55(c) analysis, the Court cannot find that a nine-month delay constitutes excusable neglect. And so the Court would deny the motion." (R. 197, p. 25.) The trial court's ruling, that a nine-month delay cannot constitute "good cause" or "excusable neglect," reflects a standard of absoluteness found nowhere in Rule 55(c) or in the cases that have interpreted it.

As set forth in Big Bubba's opening brief, this Court recently identified several factors relevant in determining whether "good cause" exists under Rule 55(c). Those factors include:

[1] whether the default was willful, [2] whether the defendant alleges a meritorious defense, [3] whether the defendant acted expeditiously to correct the default, [4] whether setting the default aside would prejudice the plaintiff, and [5] the extent, if any, to which the public interest is implicated.

Roth, 2010 UT App 332, ¶16 (citing Beitel v. OCA, Inc. (In re OCA, Inc.), 551 F.3d 359, 369 (5th Cir. 2008)) (brackets added). During the hearing on Big Bubba’s Motion, the trial court was urged to consider the three factors most commonly applied by the federal courts (willfulness, meritorious defenses, and prejudice) in determining whether “good cause” had been shown. (R. 197, p. 7.)<sup>5</sup>

Rather than applying the relevant factors for “good cause” under Rule 55(c), the trial court focused solely on the amount of time that had passed since the filing of Plaintiff’s Amended Complaint. Respectfully, Big Bubba’s submits that this constituted an abuse of discretion. See Lund, 2000 UT 75, ¶9 (“A decision premised on flawed legal conclusions, for instance, constitutes an abuse of discretion.”) See also, Coon, 867 F.2d at 78 (“Abuse occurs when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed, but the court makes a serious mistake in weighing them.”) (additional citations omitted).

In addition to not applying the relevant factors, the trial court in this case erred by failing to make adequate findings of facts in support of its ruling. The recent case, Cheap-O-Rooter v. Marmalade Square, 2009 UT App 329, 221 P.3d 898, illustrates this point.

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<sup>5</sup> As indicated in Big Bubba’s opening brief, the Roth decision was released approximately three months after the trial court had denied Big Bubba’s Motion and identified two additional factors relevant in determining “good cause”: expeditious corrective action and public interest.

In the context of the “excusable neglect” standard of Rule 60(b), the trial court set aside a default judgment that had been entered against the defendant. The plaintiff appealed, arguing that the defendant had not met the standard for “excusable neglect.” Recognizing that while trial courts have broad discretion in ruling on a motion to set aside a default judgment, the court explained that such discretion is not without limits. Quoting the Utah Supreme Court’s decision in Menzies v. Galetka, 2006 UT 81, ¶55, 150 P.3d 480, the court in Cheap-O-Rooter stated:

[A] district court’s ruling on a motion to set aside a default judgment ‘must be based on adequate findings of fact and on the law.’ We review a district court’s findings of fact under a clear error standard of review. We review a district court’s conclusions of law for correctness, affording the trial court no deference.

2009 UT App 329, ¶9.

The court explained that there are four factors to consider in determining whether “excusable neglect” has been shown, “[i] the danger of prejudice to [the nonmoving party], [ii] the length of the delay and its potential impact on judicial proceedings, [iii] the reason for the delay, including whether it was within the reasonable control of the movant, and [iv] whether the movant acted in good faith.” Id. at ¶12. The appellate court indicated that it could not review the trial court’s assessment of these factors because the lower court had failed to provide findings of fact and had failed to state a basis for its ruling setting aside the default

judgment. Accordingly, court found that the trial court had erred and remanded the case for further proceedings. Id. at ¶14.

In this case, the trial court made no findings of fact concerning its assessment of the factors relevant in determining “good cause” under Rule 55(c).<sup>6</sup> (R. 133.) Furthermore, a review of the findings of fact actually made by the trial court reveal that, had the relevant factors been applied, “good cause” would have been shown.

**II. THE FINDINGS OF FACT MADE BY THE TRIAL COURT AND THE UNDISPUTED FACTS OF THIS CASE DEMONSTRATE THAT “GOOD CAUSE” EXISTS FOR SETTING THE DEFAULT ASIDE.**

Plaintiff contends that even if the factors relevant in determining “good cause” were applied in this case, these factors do not support setting aside the default certificate entered against Bib Bubba’s. (Pl.’s Br., pp. 9-10.) In essence, Plaintiff’s argument asks that this Court make findings of facts which were either not made by the trial court or which directly contradict the findings of fact that were made.

**1. Big Bubba’s Failure To Timely Answer The Amended Complaint Was Not Willful.**

Plaintiff argues that Big Bubba’s failure to timely answer Plaintiff’s Amended Complaint was willful or culpable. (Pl.’s Br., p. 11.) Quoting Meadows

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<sup>6</sup> Indeed, the trial court also made no findings of fact concerning the relevant factors articulated in Cheap-O-Rooter relating to “excusable neglect.” (R. 133.)

v. Dominican Republic, 817 F.2d 517, 521 (9th Cir. 1987), Plaintiff asserts, “[a] defendant’s conduct is culpable if he has received actual or constructive notice of the filing of the action and failed to answer.” (Pl.’s Br., p. 11.) However, as set forth in Big Bubba’s opening brief, in determining whether a defendant’s conduct is willful or culpable, most courts look to whether the defendant’s conduct was *intentional*. As observed by the Ninth Circuit Court of Appeals in TCI Group Life Ins. v. Knoebber, 244 F.3d 691, 697 (9th Cir. 2001), “[t]he usual articulation of the governing standard, oft repeated in our cases, is that a defendant’s conduct is culpable if he had received actual or constructive notice of the filing of the action and *intentionally* failed to answer.” (emphasis in original; internal citations omitted).

In the specific context of Rule 55(c), “mere negligence or failure to act reasonably is not enough to sustain a default.” \$22,050.00 United States Currency, 595 F.3d at 327. “[F]or the defendant to be deemed culpable for the default, he ‘must display either an intent to thwart judicial proceedings or a reckless disregard for the effect of its conduct on judicial proceedings.’” Id. (quoting Thompson v. Am. Home Assur. Co., 95 F.3d 429, 433 (6th Cir. 1996).

In this case, Big Bubba’s failure to timely answer the Amended Complaint was not intentional, nor was it done with reckless disregard or an intent to thwart judicial proceedings. Big Bubba’s was moving its business location at the time it



was served with the summons and a copy of the Amended Complaint. (R. 134, ¶3.) Through the mistake and inadvertence of one of its employees, the summons and Amended Complaint were misplaced and forgotten. (R. 134, ¶4.) Plaintiff made no attempt to controvert these facts before the trial court. Moreover, the trial court accepted these facts and specifically incorporated them as findings of fact in its Order. (R. 133-134.)<sup>7</sup>

Plaintiff's argument that Big Bubba's inaction was the result of willful or culpable conduct ignores the undisputed facts of this case and the findings of fact made by the trial court.

## **2. Big Bubba's Has Alleged Meritorious Defenses.**

Plaintiff argues that Big Bubba's "has not *proven* that its defenses are meritorious, and therefore cannot justify a reversal of the trial court's decision." (Pl.'s Br., p. 13.) (emphasis added). Plaintiff's argument misconstrues what is required to satisfy the meritorious defense standard.

Courts applying Rule 55(c) have explained that "if any defense relied upon states a defense good at law, then a meritorious defense has been advanced." Keegel, 627 F.2d at 374. See also, United Coin Meter Co., Inc. v. Seaboard Coastline R.R., 705 F.2d 839, 845 (6th Cir. 1983). "[E]ven a hint of a suggestion

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<sup>7</sup> Despite being only one of the five relevant factors to be considered in determining whether "good cause" exists under Rule 55(c), Plaintiff's conclusion that Big Bubba's acted willfully or culpably is a theme Plaintiff uses throughout her brief and her analysis of the remaining four factors.

of a defense is sufficient if proven at trial.” In re William F. Antonick, 124 B.R. 750, 754 (Bankr. S.D. Ohio 1991) (internal quotations and additional citations omitted). “The meritorious defense component of the test for setting aside a default does not go so far as to require that the movant demonstrate a likelihood of success on the merits. Rather, a party’s averments need only plausibly suggest the existence of facts which, if proven at trial, would constitute a cognizable defense.” See Coon, 867 F.2d at 77 (internal quotations omitted).

Here, Big Bubba’s has alleged several affirmative defenses in its Answer which, if proven, would constitute cognizable defenses. (R. 43-48.) Among others, Big Bubba’s has alleged that Plaintiff’s own negligence or fault was the proximate cause of her injuries and damages. Big Bubba’s has also alleged that the subject trailer was built in accordance with industry standards and is presumed to not be defective. See Kryzak v. Dresser Indus., 118 F.R.D. 12, 14 (D. Me. 1987) (recognizing both compliance with industry standards and comparative negligence as meritorious defenses).

Plaintiff has also given conflicting and contradictory accounts of how she was injured. As set forth in Big Bubba’s opening brief, on the day of the accident, Plaintiff reported to medical staff at McKay-Dee Hospital that she was injured by a fall. (See McKay-Dee Hosp. Ctr., Emergency Dep’t Report, April 2, 2007, attached as Ex. 10 to Pet. for Interlocutory Appeal.) Nowhere in the medical

records from the day of the accident does it indicate Plaintiff was injured in a trailer accident. In her brief, Plaintiff attempts to dismiss this point by arguing that when she presented at the hospital, she suffered from “headaches, *confusion*, and neck pain.” (Pl.’s Br., p. 13.) (emphasis original). Unfortunately, there are no eyewitnesses to the accident and no one who can independently verify Plaintiff’s allegations of what happened. The fact that Plaintiff initially told her medical providers that she was injured by a fall, and then later changed her story, is significant for purposes of liability in this case.

Finally, it is worth noting that Plaintiff’s own safety expert, F. David Pierce, has expressed no opinions that would support Plaintiff’s claim that this trailer was defectively designed or manufactured, as alleged in Plaintiff’s Amended Complaint. (R. 179-80.) Mr. Pierce’s expert report focuses exclusively on perceived short-comings in the warnings given by Defendant Advantage Rental to customers who rent their trailers, and expresses no opinions directly against Defendant Big Bubba’s. (See id.)

Clearly, Big Bubba’s has meritorious defenses that, if proven, would constitute defenses to Plaintiff’s action. While Plaintiff asks this Court to summarily reject these defenses, it is important that the trial court made no findings whatsoever that would support Plaintiff’s assertion that Big Bubba’s has not alleged meritorious defenses in this case. (R. 133.)

### **3. Big Bubba's Acted Expeditiously To Correct The Default.**

Plaintiff argues that “[i]t is impossible to believe that [Big Bubba's] acted expeditiously in this case, given that it filed its motion *nine months* after the complaint was served upon it, and *six months* after the default certificate [was] entered.” (Pl.'s Br., p. 14.) (emphasis original). Plaintiff's argument fails to recognize that, until it received notice of the default from Defendant Advantage Rental, Big Bubba's had not realized its mistake in misplacing and forgetting about the summons and Amended Complaint.

Big Bubba's has never denied that it was served with a summons and copy of the Amended Complaint. As previously indicated, at the time it was served, Big Bubba's was in the process of moving its business location. (R. 134, ¶ 3.) Through the mistake and inadvertence of one of Big Bubba's employees, the summons and Amended Complaint were misplaced and forgotten. (R. 134, ¶ 4.) During the week of April 19, 2010, a representative of Advantage Rental contacted Big Bubba's and informed it that a default had been entered against it. (R. 134, ¶ 5.) By the end of that same week, counsel for Big Bubba's had entered an appearance, filed an answer, and moved to have the certificate of default set aside. (R. 37, 39, 50, 52, respectively.) These facts have never been disputed by Plaintiff and were accepted by the trial court and incorporated into the findings of fact in its Order. (R. 133-34.)

Whether Big Bubba's acted expeditiously to correct the default must be determined based on when Big Bubba's received notice of the default. In this case, the undisputed facts demonstrate that Big Bubba's took immediate action to correct the default as soon as it discovered that a default had been entered against it. See Menzie v. Galetka, 2006 UT 81, ¶ 69 (holding that even though sixteen months had passed before the defendant filed a memorandum in support of his 60(b) motion, defendant's motion was timely under the circumstances where defendant was unaware of his prior counsel's failure to file the memorandum and his new counsel took prompt corrective action).

#### **4. Plaintiff Will Not Be Prejudiced If The Default Is Set Aside.**

Plaintiff asserts that she "was injured over three years ago and has suffered multiple delays at the hand of [Big Bubba's] herein." (Pl.'s Br., p. 16.) Plaintiff further asserts that she has also been prejudiced by delays caused by the appeal process. (See id.) Both factually and legally, Plaintiff's assertions miss the point of the prejudice standard under Rule 55(c).

Factually, Plaintiff fails to recognize that while her alleged injuries occurred over three years ago, Plaintiff chose to wait until two years after the accident to file suit. (R. 1.) See Coon, 867 F.2d at 77 ("We will not infer prejudice merely from the passage of the amount of time involved here – especially in a case like this one, where plaintiff was apparently content to wait for close to a year and a half before

instituting suit, and then waited for over another full year between effecting substituted service and requesting entry of default.”) Additionally, Plaintiff fails to recognize that from the beginning of this case, Defendant Advantage Rental has been actively litigating and defending against Plaintiff’s claims. As such, Plaintiff cannot be heard to complain of any delay caused by Big Bubba’s because, at least thus far, there has been no delay.

Legally, courts have held that “delay in the adjudication process is not a sufficient basis for establishing prejudice.” In re Antonick, 124 B.R. at 754. See also, United Coin, 705 F.2d at 845. See also, Davis v. Musler, 713 F.2d 907, 916 (2d Cir. 1983) (holding that delay alone is insufficient; delay must result in loss of evidence, create increased difficulties of discovery, or provide greater opportunity for fraud). “[T]his definition of prejudice means that the party opposing the motion will no longer be able to present, or will be unduly burdened in attempting to present, the claim(s) advanced in the original pleadings as a result of the action, or more commonly the inaction, of the party against whom the default judgment was obtained.” In re Antonick, 124 B.R. at 754 (internal quotations omitted).

In this case, the trial court made no findings of fact that would support Plaintiff’s assertion that she would suffer prejudice if the default against Big Bubba’s was set aside (R. 133-34), nor could it under the circumstances of this case.

## **5. The Public Interest Supports Setting Aside The Default In This Case.**

Plaintiff argues that the public interest does not support setting the default aside because Big Bubba's still has an opportunity to litigate the damages portion of the case. (Pl.'s Br., p. 17.) Litigating over the amount of damages only does not provide a full and complete opportunity for Big Bubba's to have this case decided on the merits. See Heathman, 377 P.2d at 190 ("The courts, in the interest of justice and fair play, favor, where possible, a full and complete opportunity for a hearing on the merits of every case.")

If the default certificate entered is not set aside, the eventual judgment entered against Big Bubba's will be a judgment by default and not one based on the merits. Judgments by default are the most severe sanction that can be imposed on a party in civil litigation. See Utah Dep't of Transp. v. Osguthorpe, 892 P.2d 4, 12 (Utah 1995). Utah appellate courts have repeatedly expressed their disfavor of default judgments. See Davis I, 2008 UT App 145, ¶10 ("The law disfavors default judgments"); Darrington v. Wade, 812 P.2d 452, 456 (Utah Ct. App. 1991) ("[D]efault judgment is an unusually harsh sanction that should be meted out with caution[.]")

In close cases, Utah trial courts have been instructed that all doubts should be resolved in favor of the defaulting party. See Miller, 825 P.2d at 693 ("The setting aside of a default under Rule 55(c) lies within the 'sound discretion of the

trial court, applying a standard of liberality and resolving all doubts in favor of the defaulting party.”) (internal citations omitted). Here, the trial court expressed that whether to set aside the default in this case was a “close call,” but denied Big Bubba’s Motion nevertheless. (R. 197, p. 23.)

Allowing Big Bubba’s to defend itself against Plaintiff’s claims would serve the public interest favoring the resolution of cases based on the merits. It would also comport with the principles espoused in Utah appellate decisions that all doubts be resolved in favor of the defaulting party.

### **III. THE TRIAL COURT’S DECISION WILL CREATE CONFUSION AND A RISK OF INCONSISTENT JUDGMENTS.**

Plaintiff discounts Big Bubba’s argument that the trial court’s ruling will create confusion and a risk of inconsistent judgments by arguing that the trial court will be able to appropriately instruct the jury and the jury can be trusted to be “knowledgeable enough to understand the difference between the two defendants’ positions in this case . . . .” (Pl.’s Br., p. 19.) Plaintiff’s argument ignores the fact that the defendants’ positions in this case are virtually the same.

Plaintiff’s Amended Complaint asserts that Big Bubba’s manufactured an unreasonably dangerous trailer, and that Advantage Rental rented Plaintiff an unreasonably dangerous trailer. (R. 10, ¶30; R. 9, ¶17, respectively.) Both Big Bubba’s and Advantage Rental have denied Plaintiff’s allegations that the trailer



was unreasonably dangerous. (R. 42, ¶30; R. 18, ¶4, respectively.) The theories of liability against Big Bubba's and Advantage Rental, while not identical, are largely the same. The damages Plaintiff seeks against Big Bubba's and Advantage Rental are also the same. Because of this, Big Bubba's and Advantage Rental have taken similar defense positions and have even retained joint experts in liability and damages.

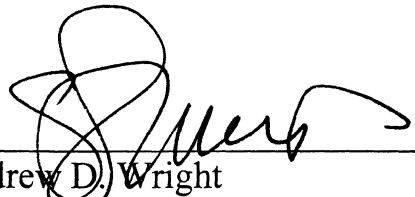
If liability is now established against Big Bubba's as a result of the default, the jury will likely find it difficult to understand that Plaintiff must still prove the trailer was unreasonably dangerous as to Advantage Rental. Such a scenario also creates the potential for inconsistent judgments. Despite Plaintiff's assertion to the contrary, this is a real danger and has caused some courts to hold that a default judgment cannot be maintained against one defendant if it would be inherently inconsistent with a judgment entered against a similarly situated co-defendant. See Gulf Coast Fans, Inc. v. Midwest Elecs. Imps., Inc., 740 F.2d 1499, 1512 (11th Cir. 1984) (vacating default judgment against exporter because plaintiff failed on its related claims against importer); In re First T.D. & Invest., Inc., 253 F.3d 520, 531-32 (9th Cir. 2001) (stating that "[i]t would likewise be incongruous and unfair to allow the Trustee to prevail against Defaulting Defendants on a legal theory rejected by the bankruptcy court with regard to the Answering Defendants in the same action").

## CONCLUSION

For the reasons set forth above, Big Bubba's respectfully requests that the decision of the trial court denying its Motion to Set Aside Default Certificate be reversed.

DATED this 28<sup>th</sup> day of March, 2011.

STRONG & HANNI

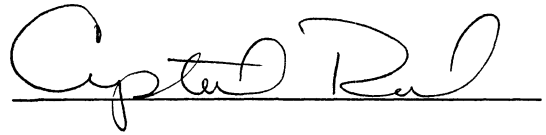
By   
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*Big Bubba's Trailers*

### CERTIFICATE OF SERVICE

I hereby certify that on this 20<sup>th</sup> day of March, 2011, a true and correct copy of the foregoing **Reply Brief of Appellant Big Bubba's Trailers** was served by the method indicated below, to the following:

W. Scott Lythgoe	(x)	U.S. Mail, Postage Prepaid
Deven J. Coggins	( )	Hand Delivered
Addison D. Larreau	( )	Overnight Mail
COGGINS, LARREAU & LYTHGOE	( )	Facsimile
289 24th Street		
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Dale J. Lambert	(x)	U.S. Mail, Postage Prepaid
CHRISTENSEN & JENSEN	( )	Hand Delivered
15 W South Temple, #800	( )	Overnight Mail
Salt Lake City, UT 84101	( )	Facsimile

  
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