

2010

Mary Ann Jenkins and Gary D. Jenkins, husband
and wife v. ADVANTAGE PAWN RENTAL, dba
ADVANTAGE RENTAL and/or ADVANTAGE
RENTAL & TRADING POST, and BIG BUBBA'S
TRAILER SALES and/or BIG BUBBA'S
TRAILER SALES & MFG. and JOHN DOES I-IV,
: Brief of Appellee

Utah Court of Appeals

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Recommended Citation

Brief of Appellee, *Jenkins v. Advantage Pawn Rental*, No. 20100774 (Utah Court of Appeals, 2010).
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IN THE COURT OF APPEALS OF THE STATE OF UTAH

MARY ANN JENKINS and GARY D.
JENKINS, husband and wife,

Plaintiffs/Appellees,

v.

ADVANTAGE PAWN RENTAL, dba
ADVANTAGE RENTAL and/or
ADVANTAGE RENTAL & TRADING
POST, and BIG BUBBA'S TRAILER
SALES and/or BIG BUBBA'S TRAILER
SALES & MFG. and JOHN DOES I-IV,

Defendants/Appellants.

BRIEF OF APPELLEES

Case No.: 20100774-CA

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

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FILED
UTAH APPELLATE COURTS

FEB 23 2011

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Utah Rule of Civil Procedure Rule 60(b)	<i>passim</i>
Utah Rule of Civil Procedure 55(c).....	<i>passim</i>

STATEMENT OF THE ISSUES

Did the trial court err when it found that the Defendant did not establish “good cause” for setting aside the default certificate?

STATEMENT OF THE CASE

Plaintiff Gary D. Jenkins leased one of Defendant Big Bubba’s trailers. Later Plaintiff, Mary Ann Jenkins, attempted to lower the trailer ramp and suffered injuries when the ramp suddenly fell and struck her on the head. Ms. Jenkins went to the emergency room at McKay-Dee Hospital, presenting with neck pain, headache, and confusion. Ms. Jenkins has since been diagnosed with chronic post concussive syndrome, including short-term memory loss, concentration problems, tinnitus, and poor judgment; which has resulted in a 12% whole person impairment rating.

On April 15, 2009, Plaintiff sent a demand letter to Defendant, but received no response. On April 21, 2009, Plaintiff sent a second demand letter to Defendant, but again received no response. Defendant’s manager was served with a summons and complaint at its new business location on July 10, 2009. Due to circumstances completely within its control, Defendant did not file an answer to the complaint and on October 27, 2009, a certificate of default was entered against Defendant. On April 23, 2010, after having the complaint in its possession for over nine months, Defendant filed an answer and moved to have the default certificate set aside. Both Plaintiff and Defendant submitted memoranda, and after hearing, the trial court ruled that pursuant to Utah Rules of Civil Procedure 55(c)

and applicable case law, the Defendant had not established good cause or excusable neglect for its inaction. Consequently, the default certificate was not set aside.

Despite having knowledge of Plaintiff's claims for a period of over twelve months and the complaint for a period of nine months, and despite its pattern of ignoring those claims, Defendant argues that the default should be set aside for circumstances over which it had complete control.

STATEMENT OF FACTS

1. On April 2, 2007, Plaintiff Mary Ann Jenkins was attempting to lower the ramp on a trailer that was manufactured by Defendant Big Bubba's Trailers. (R. 8)

2. Ms. Jenkins pulled the trailer ramp locking pin, and the ramp immediately fell and struck her on the head, knocking her unconscious to the ground. (R. 8)

3. Ms. Jenkins was treated at the McKay-Dee Hospital emergency room for neck pain, headache, and confusion. (Exhibit 10 to Petition for Interlocutory Appeal)

4. Ms. Jenkins was later diagnosed by Dennis J. Wyman, M.D. with chronic post concussive syndrome, including short-term memory loss, concentration problems, tinnitus, and poor judgment; which has resulted in a 12% whole person impairment rating. (R. 158 - 163)

5. Prior to filing their Complaint, Plaintiffs sent a demand letter to Defendant's Registered Agent, James Hockersmith on April 15, 2009. (R. 19; attached Addendum A)

6. On April 21, 2009, Plaintiffs sent another copy of the demand letter to Defendant's

business location at 123 West 12th Street, Ogden, Utah. (R. 19; attached Addendum A)

7. On July 10, 2009, Defendant was served a Summons and the Amended Complaint at its *new* place of business. (R. 15)

8. Matt McDonald, manager at Big Bubba's accepted service on behalf of Defendant's Registered Agent. (R. 15)

9. On October 27, 2009, three months after Defendant's answer was due, a Certificate of Default was entered against Defendant. (R. 32)

10. Six months after the Certificate of Default was entered, the Defendant filed a motion to have the certificate set aside. (R. 50)

11. At the oral argument on Defendant's motion, the parties agreed that the "good cause" standard of Utah R. Civ. P. 55(c) was controlling in this case. (R. 197, p. 12)

12. The trial court determined that under Utah case law, the factors used in considering Rule 60(b) motions are analogous to the consideration of Rule 55(c) motions. (R. 197, p. 6)

13. After applying the Rule 60(b) factors to the facts and circumstances of this case, the trial court ordered that neither "good cause" nor "excusable neglect" existed and therefore denied the Defendant's motion. (R. 197, pp. 23 - 25)

14. On November 15, 2010, Plaintiffs identified F. David Pierce as an expert witness regarding safety of the Defendant's trailer. (R. 175)

15. In his report, Mr. Pierce discusses the design of the trailer that was used by the

Jenkins', concluding that this trailer was not designed for use by the general public but that no such warnings or signs were posted on the trailer. (R. 179 - 180)

16. At the hearing for oral argument, a discussion amongst the parties occurred regarding discovery deadlines. The original scheduling order stated that fact discovery cut-off was May 3rd, 2010. (R. 25)

17. In addition to Plaintiff's request, Defendants also needed an extension of time for taking the depositions of Plaintiffs' sons, Mike and Rick Jenkins, who were deposed on October 19th, 2010. (R. 141)

SUMMARY OF THE ARGUMENT

While Rule 55(c) does not set forth a specific test as to what constitutes good cause for setting aside a default certificate, Utah courts have provided a standard to follow. This standard focuses on the issue of excusable neglect, including whether the moving party has control over the circumstances that led to the default certificate being entered. See *Miller v. Brocksmith*, 825 P.2d 690 (Utah App. 1992); *Davis v. Goldsworthy*, 184 P.3d 626 (Utah App. 2008). While Rule 55(c) deals with certificates of default and Rule 60(b) deals with default judgments, Utah courts have held that the factors described in Rule 60(b) are relevant to the good cause determination under Rule 55(c). *Id.* One of these factors is whether defendant can show excusable neglect, which means that the party had no control over the circumstances leading to the entry of the default certificate. *Miller* at 693. If excusable neglect is not shown, then the court does not need to go further and consider any additional

factors. *Miller* at 694.

In this case, after considering written memoranda and oral arguments of both parties, the trial court determined that Defendant's failure to respond to Plaintiff's complaint did not constitute good cause under Rule 55(c). The trial court followed controlling Utah law; therefore, it did not abuse its discretion.

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING DEFENDANT'S MOTION TO SET ASIDE CERTIFICATE OF DEFAULT

A. Trial courts are granted considerable discretion when deciding to grant or deny motions to vacate defaults, and Defendant cannot show an abuse of this discretion.

When reviewing decisions made by trial courts, appellate courts should "not disturb the trial court's decision in such matters absent a clear abuse of such discretion". *Fackrell v. Fackrell*, 740 P.2d 1318, 1320. (Utah 1987). Rule 55 provides procedures regarding defaults, and states that "for good cause shown, the court *may* set aside an entry of default". Utah R. Civ. P. 55(c) (emphasis added). "It is, of course, well-established that 'good cause' determinations entail discretionary conclusions by the district court and will not be disturbed absent an abuse of discretion". *Hendry v. Schneider*, 116 F.3d 446, 449 (10th Cir. 1997). The *Hendry* court further held that "[t]he trial court abuses its discretion in determining whether there is 'good cause' if its decision is arbitrary, capricious, or whimsical". *Id.* In the instant case, the trial court's decision was based on the undisputed facts after both parties had briefed and orally argued the issue. Thus, the decision was not arbitrary, capricious or

whimsical and should be affirmed.

The Utah Court of Appeals has also addressed the issue of setting aside an entry of default certificate, specifically discussing Utah R. Civ. P. 55(c), holding that the trial court has discretion in setting aside a default, and that all doubts should be resolved “in favor of the defaulting party”. *Miller v Brocksmith*, 825 P.2d 690 (Utah App. 1992). However, resolving doubts in favor of the defaulting party does not mean that the court must always set aside a default certificate. “[B]efore we will interfere with the trial court’s exercise of discretion, abuse of that discretion must be clearly shown”. *Katz v Pierce*, 732 P.2d 92, 93 (Utah 1986). The *Katz* court further held that simply because Defendant can provide a reason that the default should be set aside “does not require the conclusion that the court abused its discretion in refusing to do so, when facts and circumstances support the refusal”. *Id.*

In this case, the trial court did not simply consider one factor in its decision. It issued its order after considering both written and oral arguments, and found that under the facts and circumstances of this case, Defendant “failed to show sufficient grounds to establish good cause or excusable neglect” and therefore denied Defendant’s motion. (See Order on Defendant’s, Big Bubba’s Trailer Mfg, Motion to Set Aside Default Certificate, R. 133.) In doing so, the trial court did not abuse its discretion and its decision should not be disturbed.

B. Utah Courts have interpreted Rule 55(c) so there is no need to apply law from outside of this jurisdiction.

Defendant asserts that the trial court applied an erroneous standard when ruling on the

motion to set aside the certificate of default. In support of this assertion, Defendant goes to great lengths to cite cases from circuit courts outside of the 10th Circuit regarding the interpretation of Utah R. Civ. P. 55(c).

However, Utah courts have clearly discussed “good cause” in the context of Rule 55(c), and have applied it to various cases. As held in *May v. Thompson*, 677 P.2d 1109 (Utah 1984), an order must be “based on adequate findings of fact” and “on the law”. In this case, the trial court issued clear findings of fact and an order that specifically cites to and follows controlling Utah law and therefore, it did not abuse its discretion.

There is no specific test to apply in order to determine what is good cause for vacating a default certificate. Utah courts have held that Rule 60(b) is relevant to this question. In *Miller v. Brocksmith*, 825 P.2d 690 (Utah App. 1992), the appellate court upheld the trial court’s denial of a motion to set aside a certificate of default under Utah R. Civ. P. 55(c). That court held that Rule 60(b) was relevant, and thus some of the “factors to be considered include whether [defendant]’s failure constitutes excusable neglect and whether [defendant] has presented a meritorious defense to the action”. *Miller* at 693. The *Miller* court further stated that, having determined that no excusable neglect existed, it was not necessary to go further and examine whether a meritorious defense existed. *Miller* at 694.

In applying *Miller* to the case at bar, the trial court held that no excusable neglect existed. The trial court determined Defendant was properly served at its business address and ignored the complaint for a period of nine months, which was simply too long to be excused.

Based upon this finding, the trial court followed *Miller* and, having determined that no excusable neglect existed, determined that it was not necessary to go further and examine whether a meritorious defense existed.

In their oral arguments before the trial court, the parties also discussed *Davis v Goldsworthy*, 184 P.3d 626 (Utah App. 2008). That court also used the Rule 60(b) factors in making its decision regarding a default, holding that in order to demonstrate 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*”. *Goldsworthy* at 630. (citing *Black’s Title, Inc.*, 1999 UT App 330) (emphasis added). There are no such circumstances in this case such as intervening action of a third party, natural disaster place of business destroyed by circumstances beyond its control, etc. Defendant was completely in control of its own circumstances, and its pattern of inaction should not be excused.

Certainly, moving a business is difficult with things being misplaced and disorder occurring for a period of time, causing a deadline to be missed for a short amount of time. However, there is no dispute that Defendant was served at its new business address, that its manager properly accepted service, that it had nine months to correct its error and only did so after being notified by a co-defendant.

Moreover, Defendant is a business establishment that has a responsibility to act in a business like manner. When it fails to act in a business like manner, as in this case, Plaintiffs should not carry the burden of this failure. The trial court’s decision was supported by

findings of fact and by case law. and the default resulted from events entirely within the control of the Defendant. Consequently, the Defendant has not provided any justification for this Court to find that the trial court abused its discretion.

II. EVEN IF FEDERAL LAW IS APPLIED TO THIS CASE, DEFENDANT HAS NOT SHOWN GOOD CAUSE WHY THE DEFAULT SHOULD BE SET ASIDE

Defendant cites heavily to various federal cases, mostly from jurisdictions outside the 10th Circuit, but also to one 10th Circuit case that was decided after the time that Defendant filed this interlocutory appeal. Plaintiff submits that Utah law exists that addresses the exact facts and circumstances that are addressed by the case at bar, and are therefore controlling. However, in the event that this Court is inclined to follow the cases cited by Defendant, Plaintiff will address those issues here.

A. Rule 55(c) does not contain a specific test for determining “good cause”, therefore this Court is not required to consider any or all of the factors cited by Defendant.

In all of the cases cited by Defendant, the courts have considered the same general factors in determining whether good cause exists for setting aside a default. These factors are: (1) whether the default was willful; (2) whether a meritorious defense exists; and (3) whether the nondefaulting party will be prejudiced. *Marziliano v Heckler*, 728 F.2d 151, 156 (2d Cir. 1984).

It is interesting to note that many courts, including a number of those cited in

Defendant's brief, have applied the same factors to the setting aside of default certificates under Rule 55(c) as they do to setting aside default judgments under Rule 60(b). See *United Coin Meter Co., Inc. v. Seaboard Coastline R.R.*, 705 F.2d 839 (6th Cir. 1983); *Gold Kist, Inc. v. Laurinburg Oil Co., Inc.*, 756 F.2d 14 (3d Cir. 1985); *CJC Holdings, Inc. v. Wright & Lato, Inc.*, 979 F.2d 60 (5th Cir. 1992); *Pretzel & Stouffer, Chartered v. Imperial Adjusters, Inc.*, 28 F.3d 42 (7th Cir. 1994). Even considering that the standard for "good cause" under Rule 55(c) is lower than that of Rule 60(b), these three factors do not support Defendant's contention that the trial court abused its discretion when it refused to set aside the default.

In addition to these three factors, Defendant cites to the recent case of *Roth v. Joseph* 2010 UT App 332, ___ P.3d ___. The *Roth* case is not factually comparable to the instant case and thus has little relevance here.¹ However, because Defendant has relied on the *Roth* factors, Plaintiff will address the additional factors that court used in its decision.

Whatever this Court determines the list of factors to be, it does not need to consider all factors, and may even consider other factors. *In re Dierschke*, 975 F.2d 181, 183 (5th Cir. 1992). "Whatever factors are employed, the imperative is that they be regarded simply as a means of identifying circumstances which warrant the finding of 'good cause' to set aside

¹ In the *Roth* case, the defendant hospital filed its answer only twelve days late, due to a clerical error on the part of the hospital's attorney. Further, the answer was filed only three days after the default certificate was entered. Thus, the court determined that the defendant acted expeditiously and that the plaintiff was not prejudiced. *Roth v. Joseph*, 2010 UT App 332, ___ P.3d ___. The facts of the instant case are significantly different, in that the time delay was nine *months* and the error was completely within the control of the Defendant.

a default.” *Id.* at 184. Further, if the court finds that the Defendant’s willful conduct resulted in the entry of default, the court may refuse to set aside the default *on that basis alone* and without considering any other factors. *Id.* (emphasis added). Consequently, if this Court determines that Defendant’s pattern of inaction that led to the certificate of default was entirely within Defendant’s control, the Court need not consider any further factors.

B. The default judgment should not be set aside, because of Defendant’s culpable conduct.

The first factor courts have considered is whether Defendant’s conduct is willful, which courts have also discussed as “culpable conduct”. *Meadows v Dominican Republic*, 817 F.2d 517 (9th Cir. 1987) ; *United States v Timbers Preserve, Routt County, Colo.*, 999 F.2d 452 (10th Cir. 1993). “A defendant’s conduct is culpable if he has received actual or constructive notice of the filing of the action and failed to answer”. *Meadows* at 521.

In the case at bar, Defendant received actual notice of the complaint, as its manager was served at its *new* business location in Ogden, Utah. However, Defendant failed to respond and thus the default certificate was entered. Defendant alleges that its failure to respond was due to the mistake or inadvertence of one of its employees, during the time it was moving business locations.

However, no dispute exists as to whether the Defendant was actually served with the complaint. Defendant does not allege that its failure to answer was due to circumstances beyond its control, such as a natural disaster or act of God. The only excuse it has proffered is that it failed to manage its paperwork and employees, circumstances that are completely

within Defendant's control. Defendant's failure to respond to the complaint, after being properly served, can only be construed as culpable conduct.

C. Defendant has not met its burden of showing that it has a meritorious defense.

The second factor to be discussed is whether the Defendant has a meritorious defense. Under Utah law, the Court does not even need to consider this factor, because excusable neglect does not exist. *Miller v. Brocksmith*, 825 P.2d 690, 694 (Utah App. 1992); *State v. Musselman*, 667 P.2d 1053, 1056 (Utah 1983). The *Miller* court held that since it "found no excusable neglect, it is not necessary to determine whether [the moving party] had a meritorious defense". 825 P.2d at 694. "Accordingly, since the trial court properly ruled that there had been no excusable neglect, it clearly did not abuse its discretion in denying [the] motion to set aside the default". *Id.* In the instant case, the trial court determined that excusable neglect did not exist; therefore, under *Miller*, the trial court did not abuse its discretion and its decision should be upheld.

However, even if this Court chooses to consider whether Defendant has a meritorious defense, the Defendant has not met its burden. Defendant alleges thirty defenses in its Answer, and alleges in its brief that these are meritorious defenses. Admittedly, the burden to show a meritorious defense is not a substantial burden.

Though not substantial, a party must at least "plausibly suggest the existence of facts which, if proven at trial, would constitute a cognizable defense". *Coon v. Grenier*, 867 F.2d 73, 77 (1st Cir. 1989). However, the Defendant has not proven any facts or circumstances

that would support its defenses. These are simply blanket defenses that it has asserted, then asks this Court to consider them meritorious. “[A] conclusory allegation of a defense, unsupported by facts underlying that defense, will not sustain the burden of the defaulting party.” *Gomes v. Williams*, 420 F.2d 1364, 1366 (10th Cir. 1970). Defendant has not proven that its defenses are meritorious, and therefore cannot justify a reversal of the trial court’s decision.

Likewise, Defendant incorrectly represents that Plaintiff’s own expert, David Pierce, has expressed no opinions that would support Plaintiff’s allegations that the trailer was improperly manufactured or designed. Defendant fails to understand that Mr. Pierce stated in his report that the trailer was not designed for use by the general public and that no warning signs were posted on the trailer to advise the unsuspecting public of its dangers. (R. 179-180).

Further, Defendant uses an emergency room report to allege that Plaintiff’s representation of how she was injured are not supported by said report. Again, Defendant fails to understand what a report states. The emergency report states that Plaintiff presented herself because of headaches, *confusion*, and neck pain. (Mckay-Dee Hosp. Ctr., Emergency Dep’t Report, April 2, 2007, attached as Ex. 10 to Pet. for Interlocutory Appeal, emphasis added.) This record correlates with Petitioner’s own medical expert, Dennis Wyman, M.D., who diagnosed Plaintiff with post concussive syndrome, including short-term memory loss, concentration problems, tinnitus, and poor judgment. (R. 158-163). These reports are

completely consistent with the type of injury Plaintiff has suffered from the accident in question. Therefore, Defendant's representation of the above reports have not supported its argument that it has alleged meritorious defenses.

D. Defendant did not act expeditiously in this case, but waited nine months to correct its error and consequently, the default should not be set aside.

The third factor, as discussed in *Roth v. Joseph*, is whether the Defendant acted expeditiously in correcting its error. 2010 UT App 332, ___ P.3d ___. It is impossible to believe that Defendant 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 entered.

Interestingly, Defendant asks this Court to apply a practical and commonsense application of this factor, but if waiting nine months to correct its own error is considered expeditious, such a determination would directly contradict the trial court's practical and commonsense application of the time delay. The delay in this instance which led to the certificate of default was entirely within the control of the Defendant. The complaint was properly served upon Defendant's manager at its new business location. In fact, had it not been notified of the certificate of default by a co-defendant, Defendant's delay would have almost certainly been longer.

Further, the fact that Plaintiffs did not notify Defendant of the entry of the certificate of default is no excuse for Defendant's inaction. The Rules of Civil Procedure do not impose a duty upon Plaintiff to provide an additional notice, only that Defendant answer the

summons and complain in the required time. Additionally, the Defendant is not arguing that it did not have notice of the complaint: in fact, it admits that it was properly served and therefore had notice of its deadline to respond. Therefore, Defendant was on notice that if it ignored the complaint, that a default could be entered against it.

The delay was entirely within the control of the Defendant, and the fact that it hired counsel as soon as it learned of the default certificate should not mitigate its actions in completely ignoring the multiple demand letters and complaint that was served upon it. The cases to which Defendant cites do not offer a basis for relief in this instance. In *Roth*, the defendant took corrective action within twelve days of missing the deadline and in *Menzies*, the court focused on the fact that defendant was ineffectively represented and that defendant's counsel misled him regarding the missed deadline. *Roth v. Joseph*, 2010 UT App. 332; *Menzies v. Galetka*, 150 P.3d 480 (Utah 2006).

Similar facts do not exist in this case -- this Defendant was properly served, it had constructive notice of the default certificate, and has willfully disregarded the judicial process, waiting nine months before responding to the complaint. Defendant's actions simply cannot be construed as expeditious in any sense of the word.

E. Defendant's delays have prejudiced the Plaintiffs in this case and as a result, the default should not be set aside.

Courts have also considered whether Plaintiff will be prejudiced if the default is set aside. Defendant states that Plaintiff would not suffer substantial prejudice if the default is set aside. However, this is simply not true and is not supported by the facts and

circumstances of this case.

As discussed previously, Plaintiff was injured over three years ago and has suffered multiple delays at the hand of the Defendant herein. Defendant did not respond to multiple demand packages, and did not respond to the complaint that was served upon it. Plaintiff was eventually able to establish liability against Defendant and then, nine months after the default was entered, Defendant finally responded to Plaintiff's service of its complaint.

In its own interest, Defendant would have this Court believe that this delay has not prejudiced the Plaintiff. However, Plaintiff believes that if Defendant were to suffer similar delays at the hands of its business vendors and suppliers, that it would consider the delay prejudicial to its business affairs and economical well-being.

Further, in addition to the delays already suffered, the appeal process has further prejudiced Plaintiff. But for the fact that Defendant ignored the complaint that was served upon it, Plaintiff would not be in the position she finds herself in. Plaintiff has worked within the procedures established by the Rules of Civil Procedure, and it is only fair to expect the Defendant to do the same. Justice only works if it is orderly, the rules exist for a reason, and Defendant deliberately chose not to follow the rules.

Defendant wants to excuse its own culpable behavior by pointing to the Plaintiff and its request for an extension of a deadline. Defendant omits that Defendants needed additional time to depose Plaintiffs' sons, Mike and Rick Jenkins, and did so more than three months after the original discovery cut-off date. (R. 25, 141). Certainly, there is a difference

between working within the parameters of discovery deadlines and requesting extensions when dates previously agreed to will not work due to unforeseen circumstances. versus Defendant's failure to acknowledge a served complaint for nine months. To allow Defendant to flaunt the rules is bad precedent: therefore, the default certificate should not be set aside.

F. Public interest does not support setting aside the default.

The final factor Defendant would have this court consider is whether public interest is implicated. Although courts may “favor, where possible, a full and complete *opportunity* for a hearing on the merits of every case”. Defendant has not shown that he has been denied an opportunity for hearing at all. *Heathman v Fabian & Clendenin*, 377 P.2d 189 (Utah 1962) (emphasis added).

In fact, not only did Defendant have an opportunity for hearing, its culpable conduct is the reason for this proceeding. Ms. Jenkins was injured over three years ago, and properly served the Defendant who ignored the complaint for over nine months. Defendant had a fair opportunity to have its case heard, and due to Defendant's own inaction, the default certificate was entered.

Additionally, the default certificate has only established liability against the Defendant. No judgment has been entered against the Defendant, and it still has the opportunity to litigate the damages portion of this case. Thus, this case differs from those relied on by Defendant, which deal with default *judgments*. Defendant has not been ordered to pay a judgment in this case, nor has Plaintiff moved for a judgment to be entered. The

default certificate only establishes liability against Defendant, there is still the damages portion of this litigation in which Defendant has full opportunity to defend itself. Therefore, public interest does not mandate that the trial court's decision be overturned.

On the contrary, public interest actually supports upholding the trial court's decision. The public interest favors expecting parties in a lawsuit to be bound by the Rules of Civil Procedure. It also favors expecting a business to act appropriately in its affairs. In this case, the Defendant disregarded Ms. Jenkins' claims, it culpably ignored the complaint that was properly served upon it, and it now complains of injustice for its own failure. Contrary to Defendant's claim, public interest is served by following the procedures and orders of the court, not by disregarding the judicial process.

III. THE ENTRY OF THE DEFAULT CERTIFICATE WILL NOT LEAD TO CONFUSION AND INCONSISTENCY

Defendant's final allegation contained its brief is that the trial court's denial of the motion to set aside the default certificate will lead to inconsistent judgment. However, Defendant's allegations are misplaced. In the 1872 case upon which Defendant relies, *Frow v. De La Vega*, 82 U.S. 552, the parties were accused of joint fraud. That case cannot be reasonably applied to the facts of the instant case.

In the present case, Plaintiff has brought separate causes of action against each of the defendants. Consequently, each defendant can be found separately liable, and a judgment against one defendant will not automatically lead to a judgment against both. Defendant's argument assumes that at trial, the court will not be able to issue appropriate jury instructions

to inform the jury of the different causes of action and what must be proved as to each defendant.

Further, Defendant's argument assumes that members of a jury will not be knowledgeable enough to understand the difference between the two defendants' positions in this case, or that the jury would not be able to understand the trial court's instructions pertaining to the circumstances of this case. Such assumptions are dangerous and are not credible, because they undermine the competency of our judicial system. Procedures exist in our system by which this case can proceed, resulting in a trial and judgments that are consistent as to each defendant. Consequently, the trial court's decision should be upheld.

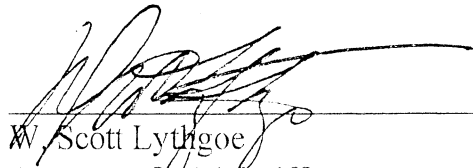
CONCLUSION

In sum, Defendant has failed in its attempt to establish "good cause" for vacating the default. The only harm cited is the trial court's refusal to see things Defendant's way, which is not sufficient reason for this Court to reverse the trial court's order. The Defendant culpably ignored, delayed and frustrated the legal process that Plaintiff instituted against it and did not act expeditiously to correct its inaction. Further, Defendant was in complete control of its own actions, and it has failed to allege any facts and circumstances by which this Court could consider that excusable neglect exists. Under Utah law the Court need not consider any further factors and the trial court's decision should be upheld. Consequently, the facts and circumstances of this case demand that the Defendant be held responsible for its own actions.

WHEREFORE, Plaintiff submits that the Defendant has not shown that the trial court abused its discretion and respectfully requests that this Court deny Defendant's Appeal of the Interlocutory Order.

DATED this 23 day of February, 2011.

COGGINS, LARREAU & LYTHGOE, PC

A handwritten signature in black ink, appearing to read 'W. Scott Lythgoe', is written over a horizontal line.

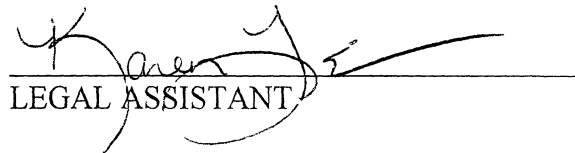
W. Scott Lythgoe
Attorneys for Plaintiff

CERTIFICATE OF MAILING

I hereby certify that on this 23rd day of February, 2011, I mailed a true and correct copy of the foregoing *Appellee's Brief*, first class postage prepaid, to the following:

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CHRISTENSEN & JENSEN
15 West South Temple, Suite 800
Salt Lake City, UT 84101


LEGAL ASSISTANT

Tab A

LAW OFFICE
OF
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289 24TH STREET, SUITE 1;
OGDEN, UTAH 84401

DEVEN J COGGINS
ADDISON D LARREAU
W SCOTT LYTHGOE

April 15, 2009

"Big Bubba" Hockersmith
Big Bubba's Trailer Mfg."
1225 Wall Avenue
Ogden UT 84401

Re: My Client : Mary Ann Jenkins
Other Co. Names : dba Big Bubba's Trailer Sales and/or Big Bubba's
Trailer Sales and Mfg
Date of Loss : April 2, 2007

Dear Mr. Hockersmith:

This office represents Mary Ann Jenkins with regard to injuries she sustained on April 2, 2007, after the ramp of a 20 foot tandem-axle 10K trailer designed and built by your company fell on her head. My client rented this trailer from Advantage Pawn Rental and was clearly marked with your manufacturing name. When the ramp fell on her head, she suffered and permanent injuries.

I am submitting this settlement brochure to present the facts of this claim on behalf of my client and to inform you of the extent of her injuries as I feel that we are now in a position to try to resolve this matter. As we were approaching the statute of limitations for product liability, we have filed a complaint but will hold off service as I am hopeful that we can work out a mutually acceptable settlement on this matter.

Please notify us immediately of your insurance carrier information and forward a copy of this Demand to same.

This brochure is submitted only for the purpose of settlement negotiations, not by way of admission against interest. I therefore submit it only on the condition that the Settlement Brochure and the materials herein are not to be used as admission against interest in the event this matter has to be tried before a jury. This original and any copies of any pictures, reports or other materials herein are the property of W. Scott Lythgoe of Coggins, Larreau & Lythgoe, P.C., and are not to be copied nor shared with other interests and are to be returned to this office once negotiations are completed or at my request.

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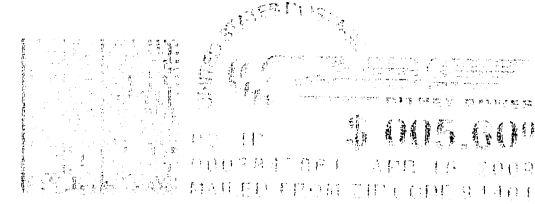
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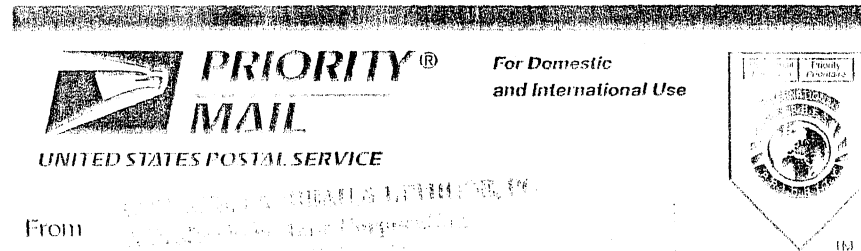
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Attn: Big Bubba Hackersmith
1225 Wall Ave
Ogden, UT 84401

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DEVEN J COGGINS
ADDISON D LARREAU
W SCOTT LYTHGOE

April 21, 2009

James Hockersmith, Registered Agent
Big Bubba's Trailer Mfg."
123 West 12th Street
Ogden UT 84404

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Re: My Client : Mary Ann Jenkins
Other Co. Names : dba Big Bubba's Trailer Sales and/or Big Bubba's
Trailer Sales and Mfg
Date of Loss : April 2, 2007

Dear Mr. Hockersmith:

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James Hackersmith
Big Bubba's Traders
123 West 12th Street
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