1990

Brenda Major Weber v. English Inn : Brief of Appellant

Utah Supreme Court

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Robert F. Orton; Virginia Curtis Lee; Marsden, Orton & Cahoon; Attorneys for Apellant.

SUPREME COURT

STATE OF UTAH

BRENDA MAJOR WEBER, Personal Representative of the Estate of ROBERT W. MAJOR, JR., Deceased. Plaintiff/Appellant, vs. ENGLISH INN CO., INC., a Utah Corporation, et al., Defendants, and SNYDERVILLE WEST, Defendant/Appellee.	Supreme Court Docket No. 900540 Utah Court of Appeals Case No. 890599-CA Third District Court, Summit County Case No. 7325

PETITION OF PLAINTIFF/APPELLANT FOR WRIT OF CERTIORARI

PETITION REGARDING DECISION OF A PANEL OF
THE UTAH COURT OF APPEALS,
THE HONORABLE GREGORY K. ORME, RUSSELL W. BENCH
AND REGNAL W. GARFF

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SUPREME COURT

STATE OF UTAH

BRENDA MAJOR WEBER, Personal Representative of the Estate of ROBERT W. MAJOR, JR., Deceased. Plaintiff/Appellant, vs. ENGLISH INN CO., INC., a Utah Corporation; PARK CITY UTAH CORPORATION, a Utah Corporation; CHARLES E. HIRSCH; HAROLD D. HIRSCH; SAM A. HEPNER; EUGENE H. POWERT; MASASHI HASHIDA; J.E. ROBERTS a/k/a JACK E. ROBERTS; FROSTWOOD LIMITED, a Utah Limited Partnership; J. L. KROFCHECK a/k/a JOSEPH L. KROFCHECK; ROBERT L. BARRETT; PARTNERSHIP INVESTMENT OF COLORADO, INC., a Corporation; PARK WEST WATER ASSOCIATION, a Utah Non-Profit Corporation; HALBET ENGINEERING, INC., a California Corporation; HALBET PROPERTIES, INC., a Utah Corporation; MAJOR-BLAKENEY CORPORATION, a California Corporation; ASPEN GROVE, INC., a Utah Corporation; LESTER F. HEWLETT, JR.; RUTH BRAZIER HEWLETT; SNYDERVILLE LAND CO., a Utah Limited Partnership; H. E. BABCOCK and J. E. ROBERTS d/b/a PARKWEST LAND COMPANY; INVESTOR ASSOCIATES, SYNDICATE, a Delaware Unincorporated Association; WILLIAM S. RICHARDS; MURRAY FIRST THRIFT AND LOAN COMPANY, a Utah Corporation; J. ROBERT WEST; LIFE RESOURCES, INC., an Oregon Corporation; KARL C. LESUEUR; H. J. SAPERSTEIN, Trustee;	Supreme Court Docket No. _____ Utah Court of Appeals Case No. 890599-CA Third District Court, Summit County Case No. 7325

PEOPLES FINANCE & THRIFT)
COMPANY OF SALT LAKE CITY, a)
Utah Corporation; WAYLAND P.)
CALKINS; BARBARA CALKINS;)
McGHIE LAND TITLE COMPANY, a)
Utah Corporation; Trustee; AVCO)
FINANCIAL SERVICES OF UTAH,)
INC., a Utah Corporation; JOHN)
CANEPARI; KERRY D. BODILY; SKI)
PARK CITY WEST, INC., a Utah)
Corporation; NATIONAL PROPERTY)
MANAGEMENT, INC., a Utah)
Corporation; ENSIGN COMPANY, a)
California Limited Partnership;)
ROBERT W. ENSIGN; CITY)
DEVELOPMENT CORPORATION, a)
Corporation; WESTERN STATES)
TITLE COMPANY, a Utah Corpora-)
tion; J. TAYLOR LOTT a/k/a JOHN)
TAYLOR LOTT; UTAH TITLE &)
ABSTRACT COMPANY, a Utah)
Corporation; PARK WEST)
ASSOCIATES, a Utah General)
Partnership; JAMES WEBSTER)
ASSOCIATES, INC., a Utah)
Corporation; JAY BAKER d/b/a)
JAY BAKER ELECTRIC; RYDER)
STILLWELL; DIANA L. LESUEUR;)
Z. J. SLAGEL a/k/a ZELLA J.)
SLAGEL; RAY WINN; JOHN MULLER;)
GERALD W. WALTERS; NEW YORK)
INVESTORS, INC., a New York)
Corporation; MICHAEL SPURLOCK;)
DORIE SPURLOCK; MARIA KROFCHECK;)
JOHN DOES 1 THROUGH 24,)
Inclusive; and all other persons)
unknown claiming any right,)
title, or interest in or lien)
against the real property)
described in Plaintiff's)
Complaint adverse to Plaintiff's)
ownership or clouding his title)
thereto; PARK CITY WEST)
ASSOCIATION, a Utah Corporation;)
CITY DEVELOPMENT CO., INC., a)
Utah Corporation; STANDARD)
INVESTMENT CORPORATION, a)
California Corporation; GREAT)

NORTHERN LAND CORPORATION, a California Corporation; INN INVESTORS, a Partnership; TITLE INSURANCE AGENCY, a Utah Corporation; REESE HOWELL; AMERICAN SAVINGS & LOAN, a Utah Corporation; JOE COX; JIM GADDIS; SAM WILSON; HENRY WINKLER; and JOHN DOES 25 through 50, Inclusive,

Defendants,

and

SNYDERVILLE WEST,

Defendant/Appellee.

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TABLE OF AUTHORITIES

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QUESTIONS PRESENTED FOR REVIEW

There are two questions presented for review:

1. Whether the applicability of Section 78-40-2, Utah Code Ann. (1953), may be raised for the first time on appeal.

2. Whether a Utah general partnership, through its managing partner who has both actual and constructive notice of a pending quiet title action affecting seven acres of real property subject to an executory real estate contract, can continue to make payments on that property and acquire legal title to the property, **while the quiet title action is still pending,** from an interloper whose interest in the seven acres is directly challenged in the quiet title action and whose interest is ultimately stipulated by the managing partner, through his attorney, to be nothing and judgment is entered accordingly.

The panel of the Court of Appeals has tacitly decided that the applicability of Section 78-40-2, Utah Code Ann. (1953), may not be raised for the first time on appeal. This tacit decision is in conflict with Cox Rock Products v. Walker Pipeline Construction, 754 P.2d 672 (Utah App. 1988).

Furthermore, the panel of the Court of Appeals has tacitly decided that one who continues to make payments on real property subject to an executory real estate contract and acquires legal title to that property, **while the quiet title action is still pending,** from an interloper whose interest in the

property is directly challenged in the quiet title action and whose interest is ultimately determined to be nothing, acquires that legal title to the property **regardless of the disposition of that property made by the trial court.** This tacit decision is in conflict with these decisions of the Utah Supreme Court:

Tuft v. Federal Leasing, 657 P.2d 1300 (Utah 1982);

Hidden Meadows Development Company v. Mills, 590 P.2d 1244 (Utah 1979); and

Glynn v. Dubin, 369 P.2d 930 (Utah 1962).

This tacit decision is also in conflict with this decision of the Utah Court of Appeals:

Blodgett v. Zions First National Bank, 752 P.2d 901 (Utah App. 1988).

This tacit decision seriously affects the integrity of judicial proceedings in rem. Property which is before the trial court for disposition can be validly alienated away by one before the court whose interest is ultimately determined to be nothing to another who has both actual and constructive notice of those in rem proceedings **while those proceedings are still pending.**

CITATION TO OPINION OF COURT OF APPEALS

The opinion of the panel of the Utah Court of Appeals can be found at 146 Utah Adv. Rep. 40 (Utah App. 1990).

JURISDICTION STATEMENT

The decision of the panel of the Utah Court of Appeals was entered in this case on October 19, 1990. No rehearing was requested. No order granting an extension of time within which to petition for certiorari has been entered.

Section 78-2-2(b), Utah Code Ann. (1989), is believed to confer jurisdiction upon the Utah Supreme Court to review the decision in question by a writ of certiorari.

CONTROLLING STATUTE

Section 78-40-2, Utah Code Ann. (1953) provides:

> In any action affecting the title to, or the right of possession of, real property the plaintiff at the time of filing the complaint or thereafter, and the defendant at the time of filing his answer when affirmative relief is claimed in such answer, or at any time afterward, may file for record with the recorder of the county in which the property or some part thereof is situated a notice of the pendency of the action, containing the names of the parties, the object of the action or defense, and a description of the property in that county affected thereby. **From the time of filing such notice for record only shall a purchaser or encumbrancer of the property affected thereby be deemed to have constructive notice of the pendency of the action,** and only of its pendency against parties designated by their real names. **(Emphasis added.)**

STATEMENT OF THE CASE

A. Nature of the Case

This is an action to quiet title to seven acres of real property located in Summit County, Utah.

B. Course of Proceedings

1. On **April 6, 1983,** Steven W. Major ("Weber")[1] filed a complaint to quiet title to eleven parcels of real estate located in Summit County. Snyderville West ("Snyderville"), a Utah general partnership, and Jim Gaddis ("Gaddis"), Snyderville's managing partner, were two of seventy named defendants. **(R. 0001-0021; 146 Utah Adv. Rep. at 40)**

2. On **April 11, 1983,** Weber recorded a **Lis Pendens** describing the eleven parcels of real property. By Order entered **March 19, 1990,** Judge Regnal W. Garff of the Utah Court of Appeals granted Plaintiff/Appellant's Motion to Supplement the Record to include the **lis pendens. The seven acres were described as Parcel 6 in the Lis Pendens. (R. 0664-0682: ¶ 4; Appendix "A" hereto)**

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1. Steven W. Major died and Brenda Major Weber was named as successor Personal Representative in 1984. **(R. 0378-0383; 146 Utah Adv. Rep. at 43, ft. 1)**

3. By order dated December 17, 1983, the trial court allowed service by publication upon Snyderville and sixteen other named defendants. Counsel for Weber could not determine the identity of any agent to serve on Snyderville's behalf. **(R. 0264-0282; 146 Utah Adv. Rep. at 41 and 43, ft. 6)**

4. The trial court entered a default judgment against Snyderville on August 29, 1985. **(R. 0432-0435, 0444-0454; 146 Utah Adv. Rep. at 41)**

5. On October 2, 1985, following lengthy negotiations among twenty-six of the developer defendants, **Gaddis**, through his attorney, entered into a complex Stipulation for Settlement providing that the seven acres vest in Weber. **(R. 0479-0525)**

6. On January 17, 1986, Judgment was entered quieting title to the seven acres in Weber. **(R. 0552-0572: ¶¶ 2 and 3-Exhibit "C" thereto; R. 0837-0966: ¶¶ 8, 11 and 12)**

C. Disposition in The Lower Courts

1. In the fall of 1988, Snyderville sought to have the default judgment against it set aside. **(R. 0573-0633, 0637-0977; 146 Utah Adv. Rep. at 41)** The district court determined that there was "no adequate explanation . . . [for the] failure to personally serve Snyderville West at its known tax address" and set aside the judgment. **(R. 0979-0989; 146 Utah Adv. Rep. at 41)**

2. In 1989, Snyderville filed a Motion to Dismiss premised on Utah Rule of Civil Procedure 12(b)(5) and 12(b)(6), which was granted. **(R. 0996-1022; 146 Utah Adv. Rep. at 41)**

3. This appeal followed. **(R. 1023-1029; 146 Utah Adv. Rep. at 41)**

4. A panel of the Utah Court of Appeals upheld the trial court, holding that: 1) service of process upon Jim Gaddis in his individual capacity did not effect service of process upon, nor confer jurisdiction over, Snyderville; 2) service by publication was inappropriate where no personal inquiry was made at Snyderville's last known address within the state; 3) since service by publication on Snyderville was not warranted, such service was not sufficient to confer jurisdiction over Snyderville and the default judgment against it was void; and 4) Weber raised no argument demonstrating error in dismissal on Rule 12(b)(5) grounds. **(146 Utah Adv. Rep. 40-43)**

5. The panel found **no merit in Weber's lis pendens argument**, raised for the first time in her reply brief. **(146 Utah Adv. Rep. at 43, ft. 3)**

D. Statement of Relevant Facts

1. From 1978 to the present, Gaddis has held a ten percent interest in Snyderville and has been its managing

partner. (R. 0664-0682: ¶¶ 1 and 2; R. 1031: 11-14; R. 0582-0633, Exhibit "A" thereto (R. 0598); 146 Utah Adv. Rep. at 40)

2. For $120,000, in 1978, Snyderville purchased from **Investor Associates** seven acres, a portion of the property at issue in the quiet title action. Robert W. Major ("Major") executed the pertinent real estate contract on behalf of **Investor Associates.** Major died on March 20, 1980. Immediately thereafter, **Joseph L. Krofchek ("Krofchek")**, an interloper, purportedly transferred to himself all right, title and interest in property belonging to Investor Associates, including the seven acres. Snyderville took possession of the seven acres in 1978 and made timely payments until Major's death; thereafter, payments continued, albeit to different payees, with the **final payment of $32,210.10 being made on July 10, 1983.** In October 1983, Snyderville recorded a **warranty deed** for the seven acres given to it by **Joseph L. Krofchek.** In the quiet title action Krofchek's interest was directly challenged and was ultimately stipulated by Gaddis, through his attorney to be nothing. (R. 0001-0021: ¶¶ 1, 8-10, 14-17 Exhibit "B" thereto; R. 1031: 23-30, Exhibits 3, 6, 7 and 8 thereto; R. 0479-0525, 0552-0572, 0526-0551; 146 Utah Adv. Rep. at 40)

3. Weber paid the real property taxes on the seven acres for the years 1986 and 1987. (R. 0664-0682: ¶ 12;

R. 0653-0658: ¶ 3) When it paid the real property taxes in 1987, Snyderville learned that the trial court had divested it of title by means of the default judgment against it. (R. 0600; 146 Utah Adv. Rep. at 40)

4. From the time it took possession of the subject property in 1978, Snyderville's address had been correctly listed as Gaddis's office address on the Summit County tax records. (R. 0274, 0279, 0600, 0992, 0995; R. 1030: 38-39; R. 1031: 13-14; 146 Utah Adv. Rep. at 40-41)

5. No filing in the appropriate county or state offices revealed the name of any individual affiliated with Snyderville nor did Snyderville have a telephone directory listing. Although Gaddis was served in his individual capacity at his office on May 11, 1983, the summons served upon him was directed to him individually and made no reference to Snyderville except in the lengthy caption listing all seventy defendants. The return of service indicated that Gaddis had been served personally and did not purport that service on Snyderville had been effected through him. By order dated December 17, 1983, the trial court allowed service by publication upon Snyderville and sixteen other named defendants. (R. 1031: 13-15, 22, 32-33, Exhibit 11 thereto; R. 0664-0682: ¶ 3; R. 0731-0825, Exhibit "A" thereto; 146 Utah Adv. Rep. at 41)

6. As a corollary to service by publication, counsel for Weber prepared a summons for mailing to Snyderville at its tax address, i.e., Gaddis's office at 1253 East 2100 South in Salt Lake City. **(R. 1030: 50-54; 146 Utah Adv. Rep. at 41)**

7. The affidavit of mailing listed Snyderville's address as "1253 East 7100 South," incorrectly stating the south coordinate by fifty blocks. Although there is no such address, and, according to a Postal Service supervisor's affidavit, the summons directed to Snyderville should have been returned by the Postal Service, counsel for Weber did not recall that the summons had been returned, although other summonses were returned. The Postal Service does not keep records of returned first class mail and it is therefore unknown if the mailed summons ever reached Snyderville. Gaddis had no recollection of receiving a summons through the mail. **(R. 0300-0330, ¶ 4(e); R. 1030: 13, 54-55; R. 0714-0715; R. 0600; R. 1031: 44-45; R. 0736-0737; 146 Utah Adv. Rep. at 41)**

8. The trial court entered a default judgment against Snyderville on August 29, 1985. Pursuant to negotiations and the Stipulation for Settlement entered by Gaddis, through his attorney, on January 26, 1986, Judgment was entered quieting title to the seven acres in Weber. In the fall of 1988, Snyderville sought to have the judgment set aside. The district

court determined that there was "no adequate explanation . . . [for the] failure to personally serve Snyderville West at its known tax address" and set aside the judgment. In 1989, Snyderville filed a Motion to Dismiss premised on Utah R. Civ. P. 12(b)(5) and 12(b)(6), which was granted. This appeal followed. **(See ¶¶ B.4, B.5, B.6, C.1, C.2 and C.3 hereinabove - Course of Proceedings and Disposition in The Lower Courts)**

9. On appeal to the Utah Court of Appeals, Weber claimed that Snyderville was effectively served through personal service upon Jim Gaddis or, alternatively, that it was properly served by publication. Weber challenged the trial court's order of dismissal in favor of Snyderville as improper under Utah R. Civ. P. 52(a). In her reply brief, Weber also claimed that Section 78-40-2, Utah Code Ann. (1953), was determinative of the action. **(See ¶¶ C.4 and C.5 hereinabove - Disposition in The Lower Courts)**

ARGUMENT

POINT I.

THE APPLICABILITY OF A STATUTE MAY BE RAISED FOR THE FIRST TIME ON APPEAL.

In Cox Rock Products v. Walker Pipeline Construction, 754 P.2d 672 (Utah App. 1988), Judge Orme addressed whether a statute's inapplicability could be raised for the first time on

appeal. Together with Judge Bench and Judge Howard, Judge Orme wrote:

> . . . Appellants have raised for the first time on appeal the inapplicability of the procurement code. Ordinarily, arguments, positions, and issues may not be raised for the first time on appeal. See, e.g., Bangerter v. Poulton, 663 P.2d 100, 102 (Utah 1983); Conder v. A. L. Williams & Assocs., Inc., 739 P.2d 634, 637 n.2 (Utah Ct. App. 1987. That doctrine is not, however, applied in a vacuum. Where some countervailing principle is to be served, the doctrine must occasionally yield. See, e.g., UWC Assoc. v. Home Sav. & Loan, 78 Utah Adv. Rep. 7, 8 (1988).

754 P.2d at 674

In Cox, appellants raised for the first time on appeal the inapplicability of the Utah Procurement Code, Section 63-56-1 to -73, and its payment bond requirements, Section 14-1-13, Utah Code Ann. Judge Orme compared the circumstances in Cox to the case of Robbins v. Sonoma County Flood Control & Water Cons. District, 138 Cal. 291, 292 P.2d 52, 56 (Cal. App. 1956):

> . . . [A] pleading must be tested, not by what it says as to the effect of [public laws and public acts], but by the contents of the laws and acts themselves."

754 P.2d at 675.

See also Maynard Investment Co. v. McCann, 465 P.2d 657, 660-661

(Wash. 1970); and Huntress v. Huntress' Estate, 235 F.2d 205, 209 (7th Cir. 1956).

In Cox, Judge Orme examined the contents of the statutes themselves, held that they were not applicable and reversed the decision of the trial court. The case was remanded for a determination of whether additional evidence should be received.

In James v. Preston, 746 P.2d 799, 801 (Utah App. 1987) Judge Garff articulated principles for determining when and under what circumstances a new issue might be considered:

> . . . In Utah, matters not **raised in the pleadings** nor put in issue at the trial may not be raised for the first time on appeal. Bundy v. Century Equip. Co., 692 P.2d 754, 758 (Utah 1984); Franklin Fin. v. New Empire Dev. Co., 659 P.2d 1040, 1044 (Utah 1983). A matter is sufficiently raised **if** it has been submitted to the trial court and the trial court has had the opportunity to make findings of fact or law. See Turtle Management, Inc. v. Haggis Management, Inc., 645 P.2d 667, 672 (Utah 1982). "Theories or issues which are not apparent or **reasonably discernible from the pleadings**, affidavits and exhibits will not be considered." Minnehoma Fin. Co. v. Pauli, 565 P.2d 835, 838 (Wyo. 1977). In particular, even if pleadings are generously interpreted, if they are not supported by any **factual showing** or by the submission of legal authority, they are not presented for decision. Int'l Business Mach. Corp. v. Lawhorn, 106 Idaho 194, 677 P.2d 507, 510 (1964). Further, the rule that a legal theory may not be raised for the first time on appeal is "to be

> stringently applied when the new theory depends on **controverted factual questions** whose relevance thereto was not made to appear at trial." Bogacki v. Bd. of Supervisors, 5 Cal. 3d 771, 489 P.2d 537, 543-44, 97 Cal. Rptr. 657, 663-64 (1971), cert. denied, 405 U.S. 1030, 92 S.Ct. 1301, 31 L.Ed.2d 488 (1972); see also Campbell v. Graham-Armstrong, 9 Cal.3d 482, 509 P.2d 689, 107 Cal. Rptr. 777 (1973); Church v. Roemer, 94 Idaho 782, 498 P.2d 1255, 1258-59 (1972).

In order for a theory to be considered on appeal, then, certain requirements must be met:

1. The matter must have been either **raised in the pleadings** or put in issue at trial.

2. **If** a matter is put at issue and submitted to the trial court, the trial court must have had an opportunity to make findings of fact or law.

3. The theory or issue must be apparent or **reasonably discernible from the pleadings.**

4. A matter raised in a pleading must be supported either by a **factual showing** or the submission of legal authority.

5. The theory or issue must **not depend on facts that could have been controverted before the trial court.**

Here

In this case, the matter of the Lis Pendens having been recorded on April 11, 1983 was **raised** in Paragraph 4 of Weber's June 3, 1988 Statement of Points and Authorities in Opposition to

Defendant Snyderville West's Motion to Set Aside Default Judgment. **(R. 0664-0682, ¶ 4)**

The fact that the Lis Pendens had been recorded was a basic given before the trial court. **Whether** it had been recorded was never at issue.

The doctrine of lis pendens is readily discernible from the undisputed fact that the Lis Pendens was recorded. The Lis Pendens was recorded pursuant to the provisions of Section 78-40-2. The contents of that statute expressly set forth the doctrine of lis pendens.

In its June 24, 1988 trial court Memorandum in Response, Snyderville did not dispute the fact that the Lis Pendens had been recorded. **(R. 0731-0825)** In fact, on March 20, 1990 Snyderville acknowledged before the Court of Appeals that the April 11, 1983 Lis Pendens was "a document incontrovertibly of record in the Summit County Recorder's Office." **(Memorandum of Points and Authorities in Support of Defendant/Respondent Snyderville West's Motion to Disregard or Strike Reply Brief of Plaintiff/Appellant, p. 4 -- Appendix "C" hereto)** Snyderville's failure to dispute Weber's assertion that the Lis Pendens had been recorded amounted to a factual showing by Weber of the truth of that assertion. Utah law does not require that the recorded Lis Pendens be filed in the action of which it gives notice.

Snyderville could not have controverted the fact of the Lis Pendens having been recorded. The document was uncontrovertibly of record in the Summit County Recorder's Office.

Weber's Reply Brief presented a **purely legal issue** to the Court of Appeals: Section 78-40-2, Utah Code Ann. (1953), governed the action. Where a **purely legal issue** is raised in a case for the first time before an appellate court, that case should be governed by the applicable law. See, e.g., Vintero Corp. v. Corporacion Venezolana de Fomento, 675 F.2d 513, 515 (2d Cir. 1982) (per curiam) (five cases from various circuits cited as authority for appellate consideration of new issues if additional facts not required, or pure legal issue involved; unjust enrichment issue considered when only argument for imposition of constructive trust raised below); Ricard v. Birch, 529 F.2d 214, 216 (4th Cir. 1975) (application of tolling statute could be raised for first time on appeal as exception to rule of nonreviewability); Burns v. State Compensation Ins. Fund, 265 Cal. App. 2d 98, 105-06, 71 Cal. Rptr. 326, 330 (1968) (court cited three prior decisions as precedent for permitting new issues of law to be raised first on appeal); Cronin v. Lindberg, 66 Ill. 2d 47, 61, 360 N.E.2d 360, 366 (1976) (citing two prior decisions that allowed exceptions based on public importance of

legal issues to be raised on appeal); People ex rel. Sterba v. Blaser, 33 Ill. App. 3d 1, 10-11, 337 N.E.2d 410, 416 (1975) (court referred to one prior holding to support new legal issue being raised when all pertinent facts were before the court); Allen v. State Bd. of Elections, 393 U.S. 544, 553-54 (1969) (in interest of judicial economy, applicability of Voting Rights Act provision not precluded from consideration by failure to raise issue below where all facts undisputed); Telco Leasing, Inc. v. Transwestern Title Co., 630 F.2d 691, 693-94 (9th Cir. 1980) (where issue purely one of law and not affected by factual record below appellate court has discretion to consider for first time application of correct state statute concerning attorney's fees); Zinn v. Ex-Cell-O Corp., 148 Cal. App. 2d 56, 82-83, 306 P.2d 1017, 1034 (1957) (court permitted application of conflict of laws doctrine for first time on appeal); Higginbotham v. Ford Motor Co., 540 F.2d 762 (5th Cir. 1976). "[T]he new theory raises a purely legal question. No facts could have been developed to aid our resolution of the issue. . . . Under these circumstances, we believe it would be unjust now to refuse to consider the new argument." Id. at 768 n.10. The Supreme Court of California stated: "[W]hen as here the facts with reference to the contention newly made on appeal appear to be undisputed and that probably no different showing could be made on a new

trial it is deemed appropriate to entertain the contention as a question of law on the undisputed facts and pass on it accordingly." Panopulos v. Maderis, 47 Cal. 2d 337, 341, 302 P.2d 738, 740 (1956); Ware v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 24 Cal. App. 3d 35, 43, 100 Cal. Rptr. 791, 797 (1972) (court permitted new argument based on provision of California Labor Act when all pertinent facts were before the court), aff'd, 414 U.S. 117 (1973).

This is such a case. The integrity of the judicial process in an in rem proceeding should not be subverted by allowing an interloper who is a party to that proceeding to put property beyond the trial court's jurisdiction by means of a spurious deed to a general partnership whose managing partner has both actual and constructive notice that the property is before the court for disposition.

This Court should issue a Writ of Certiorari to the Utah Court of Appeals to review and reverse that court's erroneous decision not to consider Weber's lis pendens argument.

POINT II.

BY VIRTUE OF THE DOCTRINE OF LIS PENDENS SET FORTH IN SECTION 78-40-2, UTAH CODE ANN. (1953), SNYDERVILLE WAS BOUND BY THE STIPULATION FOR SETTLEMENT AND THE JANUARY 17, 1986 JUDGMENT VESTING TITLE TO THE SEVEN ACRES IN WEBER.

The argument supporting this point is set forth in Point I of the Reply Brief of Appellant, which is included as Appendix "D" to this Petition.

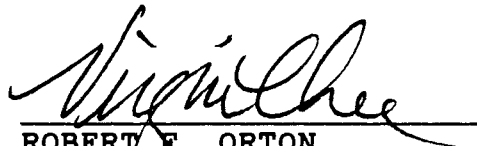
CONCLUSION

The applicability of Section 78-40-2, Utah Code Ann. (1953) and the doctrine of lis pendens contained therein is a purely legal issue which should have been considered by the panel of the Court of Appeals. Snyderville could not have disputed the fact of the Lis Pendens having been recorded on April 11, 1983. The Court of Appeals ordered that Weber's Motion to Supplement the Record to include the Lis Pendens be granted.

This Court should grant Weber's Petition for a Writ of Certiorari to preserve the integrity of the judicial process in quiet title proceedings.

DATED: November 19, 1990.

Respectfully submitted



ROBERT F. ORTON
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Attorneys for Plaintiff/Appellant

CERTIFICATE OF SERVICE

Hand delivered four (4) copies of this Petition of Plaintiff/Appellant for Writ of Certiorari to:

Richard A. Rappaport, Esq.
COHNE, RAPPAPORT & SEGAL
Attorneys for Appellee
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this 19th day of November, 1990. Pursuant to Rules 45 through 49 of the Utah Rules of Appellate Procedure, each of those four (4) copies indicated on its cover the date of filing of the Petition and the Certiorari Docketing Number of the Utah Supreme Court.

APPENDIX

A. Order and Motion to Supplement Record

B. Opinion of the Panel of the Utah Court of Appeals; 146 Utah Adv. Rep. 40.

C. Memorandum of Points and Authorities in Support of Defendant/Respondent Snyderville West's Motion to Disregard or Strike Reply Brief of Plaintiff/Appellant

D. Reply Brief of Appellant (Addendum "F" omitted)

IN THE UTAH COURT OF APPEALS

----ooOoo----

Brenda Major Webb, Personal Representative of the Estate of Robert W. Major, Sr,. Deceased,	)	ORDER
Plaintiff and Appellant,	)	
v.	)	Case No. 890599-CA
English Inn Co., Inc., a Utah corporation, et al.,	)	
Defendants,	)	
and	)	
Snyderville West,	)	
Defendant and Respondent.	)	

This matter is before the court on appellant's motion to supplement the record and respondent's motion to strike portions of appellant's reply brief. Respondent has filed an objection to the motion to supplement the record.

IT IS HEREBY ORDERED THAT the motion to supplement the record is granted.

IT IS FURTHER ORDERED THAT the motion to strike portions of appellant's reply brief is deferred until plenary presentation and consideration of the case.

Dated this 15th day of March, 1990.

FOR THE COURT:

Regnal W. Garff, Judge

CERTIFICATE OF MAILING

I hereby certify that on the 16th day of March, 1990, a true and correct copy of the foregoing ORDER was deposited in the United States mail.

Robert F. Orton
Virgina Curtis Lee
Marsden, orton & Cahoon
Attorneys at Law
68 South Main, Fifth Floor
Salt Lake City, Utah 84101

Richard A. Rappaport
William B. Wray, Jr.,
Cohne, Rappaport & Segal, P.C.
Attorneys at Law
525 East First South
P.O. Box 11008
Salt Lake City, Utah 84147-0008

DATED this 16th day of March, 1990.

By _____
Deputy Clerk

ROBERT F. ORTON - #A2483
VIRGINIA C. LEE - #1923
MARSDEN, ORTON, CAHOON & GOTTFREDSON
68 SOUTH MAIN STREET, FIFTH FLOOR
SALT LAKE CITY, UTAH 84101
TELEPHONE: (801) 521-3800

COURT OF APPEALS

STATE OF UTAH

BRENDA MAJOR WEBER, Personal Representative of the Estate of ROBERT W. MAJOR, SR., Deceased, Plaintiff/Appellant, vs. ENGLISH INN CO., INC., a Utah corporation, et al., Defendants, and SNYDERVILLE WEST, Defendant/Respondent.	Case No. 890599-CA District Court No. 7325 Priority: 14(b) MOTION TO SUPPLEMENT RECORD

Pursuant to Rule 11 of the Rules of the Utah Court of Appeals, Plaintiff/Appellant Brenda Major Weber, Personal Representative of the Estate of Robert W. Major, Jr., Deceased, by and through counsel, hereby moves this Court for an Order Supplementing the Record on Appeal to include the Lis Pendens recorded with respect to this action on April 11, 1983. This Motion is brought for the following reasons:

1. In her Statement of Points and Authorities in Opposition to Defendant Snyderville West's Motion to Set Aside Default Judgment, the Personal Representative set forth in the Statement of Facts that on the 11th day of April, 1983, a Lis Pendens was recorded in the office of the Recorder of Summit County, State of Utah with respect to said action. (R. 0664-0682, ¶ 4)

2. In its Memorandum in Response, Snyderville West did not dispute this fact. (R. 0731-0825)

3. In her Brief of Appellant, the Personal Representative again states the fact that on April 11, 1983, the Personal Representative caused a Lis Pendens regarding the quiet title action to be recorded in the Summit County Recorder's Office. (Brief of Appellant, Fact No. 18)

4. In its Brief of Respondent, Snyderville West does not dispute this fact.

5. Section 78-40-2, Utah Code Ann. (1953) provides for filing a lis pendens for record with the recorder of the county in which the property is situated, but does not require a copy of the lis pendens to be filed with the court in which the action is pending.

6. The Lis Pendens recorded with respect to this

action was styled as a pleading in the action and a copy is attached as **Exhibit "A" hereto.**

7. Appellant believes that the Lis Pendens would be helpful to this Court in definitively establishing the undisputed fact it was recorded and that it concerned the subject seven acres.

8. In her Reply Brief of Appellant, the Personal Representative argues that the recorded Lis Pendens gave Snyderville West constructive notice of the pendency of this action affecting its equitable title to the seven acres, and that together with the actual notice Snyderville West had through its managing partner, James R. Gaddis, Snyderville West is bound by the results set forth in the January 17, 1986 Judgment.

DATED: February 26, 1990.

ROBERT E. ORTON
VIRGINIA C. LEE
MARSDEN, ORTON, CAHOON & GOTTFREDSON

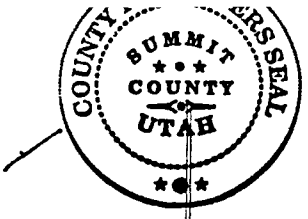
CERTIFICATE OF SERVICE

Mailed a true and correct copy of this Motion to Supplement Record to:

Richard A. Rappaport
William B. Wray, Jr.
COHNE, RAPPAPORT & SEGAL, P.C.
Fifth Floor

525 East First South
P.O. Box 11008
Salt Lake City, Utah 84147-0008

postage prepaid this 27th day of February, 1990.



I, Alan [illegible], County Recorder in and for Summit County, State of Utah, do hereby certify that the annexed and foregoing is a full, true and correct copy of that certain

which is recorded in my office in Book [illegible], Page 236
being Entry No. [illegible].

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal this [illegible] day of [illegible] 1990

[illegible]
Summit County Recorder

ROBERT F. ORTON
T. RICHARD DAVIS
MARSDEN, ORTON & LILJENQUIST
ATTORNEYS FOR PLAINTIFF
68 SOUTH MAIN, FIFTH FLOOR
SALT LAKE CITY, UTAH 84101
TELEPHONE: (801) 521-3800

Entry No 204486
Book M257 Page 236-41
REQUEST OF Robert F. Orton
FEE $ 47.00 ALAN SPRIGGS, SUMMIT CO. RECORDER
By Loretta L. Peterson
RECORDED APR 1 1991 at 4:30 M

IN THE THIRD JUDICIAL DISTRICT COURT OF

SUMMIT COUNTY, STATE OF UTAH

STEVEN W. MAJOR, Personal Representative of the Estate of ROBERT W. MAJOR, JR., Deceased,

Plaintiff,

vs.

ENGLISH INN CO., INC., a Utah Corporation; PARK CITY UTAH CORPORATION, a Utah Corporation, CHARLES E. HIRSCH; HAROLD D. HIRSCH; SAM A. HEPNER, EUGENE H. POWERT; MASASHI HASHIDA; J. E. ROBERTS a/k/a JACK E. ROBERTS, FROSTWOOD LIMITED, a Utah Limited Partnership; J. L. KROFCHECK a/k/a JOSEPH L. KROFCHECK; ROBERT L. BARRETT; SNYDERVILLE WEST; PARTNERSHIP INVESTMENT OF COLORADO, INC., a Corporation; PARK WEST WATER ASSOCIATION, a Utah Non-Profit Corporation; HALBET ENGINEERING, INC., a California Corporation; HALBET PROPERTIES, INC., a Utah Corporation; MAJOR-BLAKENEY CORPORATION, a California

LIS PENDENS

Civil No. 7325

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Corporation; ASPEN GROVE, INC., a Utah Corporation; LESTER F. HEWLETT, JR.; RUTH BRAZIER HEWLETT; SNYDERVILLE LAND CO., a Utah Limited Partnership; H. E. BABCOCK and J. E. ROBERTS d/b/a PARKWEST LAND COMPANY, INVESTOR ASSOCIATES, SYNDICATE, a Delaware Unincorporated Association; WILLIAM S. RICHARDS; MURRAY FIRST THRIFT AND LOAN COMPANY, a Utah Corporation; J. ROBERT WEST; LIFE RESOURCES, INC., an Oregon Corporation; KARL C. LESUEUR; H. J. SAPERSTEIN, TRUSTEE; PEOPLES FINANCE & THRIFT COMPANY OF SALT LAKE CITY, a Utah Corporation; WAYLAND P. CALKINS; BARBARA CALKINS; McGHIE LAND TITLE COMPANY, a Utah Corporation, Trustee, AVCO FINANCIAL SERVICES OF UTAH, INC., a Utah Corporation; JOHN CANEPARI; KERRY D. BODILY; SKI PARK CITY WEST, INC., a Utah Corporation; NATIONAL PROPERTY MANAGEMENT, INC., a Utah Corporation; ENSIGN COMPANY, a California Limited Partnership; ROBERT W. ENSIGN; CITY DEVELOPMENT CORPORATION, a Corporation; WESTERN STATES TITLE COMPANY, a Utah Corporation; J. TAYLOR LOTT a/k/a JOHN TAYLOR LOTT; UTAH TITLE & ABSTRACT COMPANY, a Utah Corporation; PARK WEST ASSOCIATES, a Utah General Partnership; JAMES WEBSTER ASSOCIATES, INC., a Utah Corporation; JAY BAKER d/b/a JAY BAKER ELECTRIC; RYDER STILLWELL; DIANA L. LESUEUR; A. J. SLAGEL a/k/a ZELLA J. SLAGEL; RAY WINN; JOHN MULLER; GERALD W. WALTERS; NEW YORK INVESTORS, INC., a New York Corporation; MICHAEL SPURLOCK; DORIE SPURLOCK; MARIA KROFCHECK; JOHN DOES 1 THROUGH 24, Inclusive; and all other persons unknown claiming any right, title, or :

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interest in or lien against the real property described in Plaintiff's Complaint adverse to Plaintiff's ownership or clouding his title thereto; PARK CITY WEST ASSOCIATION, a Utah Corporation; CITY DEVELOPMENT CO., INC., a Utah Corporation; STANDARD INVESTMENT CORPORATION, a California Corporation; GREAT NORTHERN LAND CORPORATION, a California Corporation; INN INVESTORS, a Partnership; TITLE INSURANCE AGENCY, a Utah Corporation; REESE HOWELL; AMERICAN SAVINGS & LOAN, a Utah Corporation; JOE COX; JIM GADDIS; SAM WILSON; HENRY WINKLER; and JOHN DOES 25 through 50, Inclusive,

Defendants.

TO ALL WHOM IT MAY CONCERN:

Notice is hereby given that an action has been commenced in the above-entitled Court, by the above-named Plaintiff against the above-named Defendants, which suit is now pending; that one of the objects of said suit is to quiet title in the Estate of Robert W. Major, Jr., Deceased, to real property situated in Summit County, State of Utah, specifically described in Exhibit "A" which is attached hereto.

DATED THIS 5th day of April, 1983.

ROBERT F. ORTON
MARSDEN, ORTON & LILJENQUIST
Attorneys for Plaintiff

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STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

On this 5th day of April, 1983, personally appeared before me ROBERT F. ORTON, signer of the foregoing Instrument, who duly acknowledged to me that he executed the same.

Edie DeSpain
NOTARY PUBLIC
Residing at: Salt Lake County, Utah

MY COMMISSION EXPIRES:
9-27-83

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EXHIBIT "A"

Parcel No. 1:

Lot A, Lots 18 thru 19, 22 thru 24, 28 thru 38, PARK CITY WEST SUBDIVISION NO. 1, according to the official plat thereof on file and of record in the office of the Summit County Recorder, State of Utah.

Parcel No. 2:

Lots 1 thru 4, 17 thru 25, PARK CITY WEST SUBDIVISION NO. 2, according to the official plat thereof on file and of record in the office of the Summit County Recorder, State of Utah. Also, THE MALL, PARK CITY WEST SUBDIVISION NO. 2.

Parcel No. 3:

In Section 1, Township 2 South, Range 3 East, Salt Lake Base and Meridian: Beginning at a point which is the NW corner of property conveyed to Spencer Osborne et ux., in a Special Warranty Deed recorded March 31, 1969, as Entry No. 108801, in Book M-20, page 389, O.R., said point being on the North line of said Section 1; thence West along said section line 432 feet; thence South 1° 50' East 715 feet; thence East 410 feet, more or less, to a point which is directly South of the aforesaid beginning point; thence North in a straight line to the said point of beginning 713 feet, more or less. TOGETHER WITH an Easement for ingress, egress and underground utilities as set forth in the first paragraph on page 5 of that certain Judgment on Stipulation recorded as Entry No. 113601, Book M-32, pages 269-276, on July 26, 1971.

Parcel No. 4:

In Section 36, Township 1 South, Range 3 East, Salt Lake Base and Meridian: The North 165 feet of the SW 1/4 of the NE 1/4 of the SW 1/4 of Section 36; and the South 1/2 of the NW 1/4 of the NE 1/4 of the SW 1/4 of Section 36; and the West 100 feet of the N 1/2 of the SW 1/4 of the NW 1/4 of the SE 1/4 of Section 36; and the North 330 feet of the SE 1/4 of the NE 1/4 of the SW 1/4 of Section 36. TOGETHER WITH an Easement for ingress, egress and underground utilities as set forth in the second paragraph on page 5 of that certain Judgment on Stipulation recorded as Entry No. 113601, Book M-32, pages 269-276, on July 26, 1971.

Parcel No. 5:

In Section 36, Township 1 South, Range 3 East, Salt Lake Base and Meridian: Beginning at the Southeast corner of Lot 25, Park City West Plat No. 2; thence North along the East line of said Plat No. 2 for 204 feet; thence East 160 feet; thence South 204.00 feet; thence in a straight line West to the point of beginning. TOGETHER WITH an Easement 27.6 feet wide for ingress, egress and underground utilities, over a land strip lying 13.8 feet each side of a centerline commencing at a point which is 173.8 feet East of the Southeast corner of Lot 25, Park City West Plat No. 2; thence 680.6 feet North, more or less, to a right of way south line, which right of way is known as "Major Drive" within said Park City West Plat No. 2, connecting with Park City West Plat No. 1, said plats being recorded subdivision in the Summit County records.

Parcel No. 6:

Part of the Southwest quarter of Section 31, Township 1 South, Range 4 East, part of the Northwest quarter Section 6, Township 2 South, Range 4 East, and part of Northeast quarter of Section 1, Township 2 South, Range 3 East of the Salt Lake Base and Meridian described as follows: Beginning at the Southwest corner of Section 31, Township 1 South, Range 4 East, Salt Lake Base and Meridian, Summit County, Utah, and running thence North along Section line 502.3 feet; thence East 850.00 feet; thence South 138.00 feet; thence West 482.80

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Parcel No. 7:

The Southeast quarter of the Southwest quarter of Section 36, Township 1 South, Range 3 East, Salt Lake Base and Meridian, less the North 594.0 feet thereof.

Parcel No. 8:

The South half of the West half of the Southwest quarter of the Southeast quarter of Section 36, Township 1 South, Range 3 East, Salt Lake Base and Meridian.

Parcel No. 9:

In Section 31, Township 1 South, Range 4 East, Salt Lake Base and Meridian, Beginning at a point on the West line of State Highway 248, which point is 2,608.8 feet North and 1,412.0 feet, more or less, East of the Southwest corner of said Section 31; thence Northerly along the said West line of Highway 248 for 388.5 feet; thence West 1,412.0 feet, more or less, to a poin on the West line of said Section 31; thence South 538.5 feet, more or less, along said Section 31 West line; thence East 901 feet; thence North 150 feet; thence East 511 feet, more or less, to the point of beginning hereof.

Parcel No. 10:

The right of way and easement, including Parcel Number 1 and Parcel Number 2, contained and described in that certain Warranty Deed recorded as Entry No. 108283, in Book M-19, at Pages 195-196, on December 19, 1968 @ 9:25 A.M., O.R.

Parcel No. 11:

All of the real property, together with a perpetual 76 foot easement and right of way, as contained and described in that certain Warranty Deed recorded as Entry No. 106902, in Book M15, at Page 619, on April 8, 1968, @ 9:13 A.M.

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IN THE UTAH COURT OF APPEALS

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Brenda Major Weber,	)	OPINION
	)	(For Publication)
Plaintiff and Appellant,	)	
	)	Case No. 890599-CA
v.	)	
	)	
Snyderville West, et al.,	)	F I L E D
	)	October 19, 1990
Defendants and Appellee.	)	

Third District, Summit County
The Honorable Michael R. Murphy
The Honorable J. Dennis Frederick

Attorneys: Robert F. Orton and Virginia Curtis Lee, Salt Lake City, for Appellant
Richard A. Rappaport and William B. Wray, Jr., Salt Lake City, for Appellee

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Before Judges Bench, Garff, and Orme.

ORME, Judge:

This is an appeal by plaintiff Brenda Major Weber[1] challenging interlocutory and final orders setting aside a default judgment in favor of plaintiff and dismissing defendant Snyderville West ("Snyderville") as a party to an action to quiet title to real property. This appeal primarily focuses on the sufficiency of service of process on Snyderville.

FACTS

On April 6, 1983, Steven W. Major filed a complaint to quiet title to eleven parcels of real estate located in Summit

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1. This action was originally brought by Steven W. Major, personal representative of the estate of Robert W. Major, Jr. During the course of the litigation Steven W. Major died and the present plaintiff was named as successor personal representative.

County. Snyderville, a Utah general partnership, and Jim Gaddis were two of seventy named defendants.[2] Jim Gaddis holds a ten-percent interest in Snyderville and is its managing partner.

In 1978, Snyderville purchased from Investor Associates a portion of the property at issue in the quiet title action. Robert W. Major executed the pertinent real estate contract on behalf of Investor Associates. Snyderville took possession of the property and made timely payments, with the final payment being made on July 20, 1983. In October 1983, Snyderville recorded a warranty deed for the property given to it by Investor Associates. Snyderville paid property taxes on the parcel through October 1987, when it learned that the trial court had divested it of title by means of a default judgment against it.

From the time it took possession of the subject property in 1978, Snyderville's address had been correctly listed as Gaddis's office address on the Summit County tax records.

No filing in the appropriate county or state offices revealed the name of any individual affiliated with Snyderville nor did Snyderville have a telephone directory listing. Although Gaddis was served in his individual capacity at his office on May 11, 1983, the summons served upon him was directed to him individually and made no reference to Snyderville except in the lengthy caption listing all seventy defendants. The return of service indicated that Gaddis had been served personally and did not purport that service on Snyderville had been effected through him. By order dated December 17, 1983, the trial court allowed service by publication upon Snyderville and sixteen other named defendants.

As a corollary to service by publication, counsel for Weber prepared a summons for mailing to Snyderville at its tax address, i.e., Gaddis's office at 1253 East 2100 South in Salt Lake City.

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2. As may be expected in litigation involving numerous parties and several transactions, the facts before the court are numerous and complicated. We commend counsel for both parties for their succinct presentation of the relevant facts. We further note that both parties' careful compliance with Utah R. App. P. 24 has assisted the court in efficiently deciding the matters before it. Of particular assistance to the court was the comprehensive addenda of key documents annexed to the briefs.

The affidavit of mailing listed Snyderville's address as "1253 East 7100 South," incorrectly stating the south coordinate by fifty blocks. Although there is no such address, and, according to a Postal Service supervisor's affidavit, the summons directed to Snyderville should have been returned by the Postal Service, counsel for Weber did not recall that the summons had been returned, although other summonses were returned for insufficient postage. The Postal Service does not keep records of returned first class mail and it is therefore unknown if the mailed summons ever reached Snyderville. Gaddis had no recollection of receiving a summons through the mail.

The trial court entered a default judgment against Snyderville on August 29, 1985. In the fall of 1988, Snyderville sought to have the judgment set aside. The district court determined that there was "no adequate explanation . . . [for the] failure to personally serve Snyderville West at its known tax address" and set aside the judgment. In 1989, Snyderville filed a Motion to Dismiss premised on Utah R. Civ. P. 12(b)(5) and 12(b)(6), which was granted. This appeal followed.

On appeal, Weber claims that Snyderville was effectively served through personal service upon Jim Gaddis or, alternatively, that it was properly served by publication. Weber also challenges the court's order of dismissal in favor of Snyderville as improper under Utah R. Civ. P. 52(a).[3]

PERSONAL SERVICE

Weber asserts that Gaddis's position as managing partner of Snyderville qualified him to receive service of process for Snyderville. Weber further claims that service upon Gaddis automatically perfected service upon Snyderville by virtue of his position as managing partner and his status as a partner. We agree that Gaddis was authorized to receive process for Snyderville. See Utah R. Civ. P. 4(e)(5) (service upon a

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3. Weber also claims that, notwithstanding any deficiencies in service of process, Snyderville is bound by a stipulation for settlement and the judgment entered thereon on January 17, 1986, by reason of the fact Gaddis, through his own counsel, was a party to the stipulation. We find no merit in this argument nor in Weber's lis pendens argument, raised for the first time in her reply brief.

partnership shall be effective through service upon managing or general agent). However, personal service upon Gaddis did not confer jurisdiction over Snyderville. Weber incorrectly focuses on Gaddis's capacity, rather than the import of the summons served upon him. Any number of agents or partners of Snyderville might be authorized to receive service for the partnership, yet if no service is ever attempted on the partnership no service on it can be perfected.[4]

Rule 4(c) of the Utah Rules of Civil Procedure states, with our emphasis: "The summons shall contain the . . . names . . . of the parties to the action . . . [and] be directed to the defendant." Gaddis's summons was directed to him, not to Snyderville. While this might have provided Snyderville with constructive or even actual knowledge of the action, the insufficiency of process is not thereby cured. See Stone v. Hicks, 45 N.C. App. 66, 262 S.E.2d 318, 319 (1980) (where one defendant received a summons directed to another defendant, service was ineffective on the receiving defendant even though the caption listed him as a defendant). See generally 62B Am. Jur. 2d Process section 81 (1990). We hold that service of process upon Jim Gaddis in his individual capacity did not effect service of process upon, nor confer jurisdiction over, Snyderville.

SERVICE BY PUBLICATION

Rule 4(f)(1) of the Utah Rules of Civil Procedure, in effect at all times pertinent to this case,[5] authorized service by publication when personal service is impractical because the

> person upon whom service is sought resides outside of the state, or has departed from the state, or cannot after due diligence be found within the state . . . .

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4. Weber's claim that service on Gaddis was adequate to serve the partnership is belied by Weber's own course of conduct. If she believed Snyderville had been properly served through Gaddis there would have been no need to include it in the motion seeking leave to serve by publication, in the order authorizing publication or in the published summons, nor to undertake efforts to mail the published summons to Snyderville.

5. The comparable rule now appears at Utah R. Civ. P. 4(g).

> The party desiring service of process by publication shall file a motion verified by the oath of such party or someone in his behalf for an order of publication. It shall state the facts authorizing such service and shall show the efforts that have been made to obtain personal service within this state . . . . The court shall hear the motion ex parte and, if satisfied that due diligence has been used to obtain personal service within this state, or that efforts to obtain the same would have been of no avail, shall order publication of the summons in a newspaper having general circulation in the county in which the action is pending.

Rule 4 requires the exercise of "due diligence" to locate the defendant before the court may authorize service by publication. "Due diligence must be tailored to fit the circumstances of each case. It is that diligence which is appropriate to accomplish the end sought and which is reasonably calculated to do so." Parker v. Ross, 117 Utah 417, 217 P.2d 373, 379 (1950). See also Carlson v. Bos, 740 P.2d 1269, 1277 n.13 (Utah 1987).

Counsel for Weber was faced with the task of sorting through numerous disorganized files containing Robert Major's personal and business affairs. Many documents were held by family members and former counsel. At the time of trial, counsel could not recall whether he had seen any documents specifically linking Snyderville and Gaddis or any contracts or deeds concerning the conveyance to Snyderville among the records he examined.

Snyderville first came to plaintiff's counsel's attention in a June 1982 title report showing Snyderville's interest.

In an effort to locate information he considered necessary to serve Snyderville, counsel searched in telephone directories, motor vehicle files, corporate filings in Utah and California, the County Recorder's files in Summit and Salt Lake counties, and in postal records. It is apparent, however, that Snyderville's address was set forth in the Summit county tax records pertaining to the very property in issue. Counsel's quest was apparently for the name of a particular individual

tied to Snyderville through whom service upon Snyderville could be perfected. Oddly, however, no inquiry was made by counsel at the address disclosed as Snyderville's address in the tax records, of which counsel had knowledge no later than October 1983, nor was any service of process attempted on Snyderville at this address.[6] Had either been done, Weber would readily have been able to personally serve Snyderville through Gaddis, whose office was the very address stated in the tax records.

A plaintiff seeking authorization for service by publication on a defendant for whom an in-state address is known must, at a minimum, make inquiry at that address. Cf. Downey State Bank v. Major-Blakeney Corp., 545 P.2d 507, 509 (Utah 1976) (plaintiff need not exhaust all possibilities where there is an effort to serve defendant at the only address reasonably known). This requirement is not only a prerequisite for satisfying the due diligence prong of Rule 4, but will also go a long way in establishing a proper factual record upon which the court may base its order for service by publication. Service by publication is inappropriate where no personal inquiry is made at a last known address within the state.[7]

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6. Apparently counsel thought that unless he could advise the constable of the name and title of a particular person through whom Snyderville could be served, he could not appropriately seek service of Snyderville at the address of which he was aware. A personal visit to the address would presumably have elicited such information. But such information is not necessarily required. Had counsel simply advised the constable to serve Snyderville at its known address, by and through any "managing or general agent, or other agent authorized to receive service of process . . . .," Utah R. Civ. P. 4(e)(5), one of two things would have happened, either of which would have served counsel's purposes. The return would have come back indicating service was effected on Snyderville by and through its managing partner, Jim Gaddis, in which event personal service would be complete, or the return would have come back with an "unable to serve" notation, with explanation of the constable's failure to locate at the address any person having knowledge of Snyderville despite diligent inquiry, in which event the entitlement to serve by publication would be ironclad given the extensive other efforts exerted by counsel.

7. We note that any defendant served by publication has standing to challenge the sufficiency of service of process, Carlson, 740 P.2d at 1271, even where authorized by an order which, as here, is not directly attacked.

Since service by publication on Snyderville was not warranted, such service was not sufficient to confer jurisdiction over Snyderville. See Hustace v. Kapuni, 6 Haw. App. 241, 718 P.2d 1109, 1116 (1986) (where service by publication is insufficient, subsequent default judgment is void ab initio).

DISMISSAL

The thrust of Weber's challenge of the ultimate dismissal of the complaint as against Snyderville is that the court failed to "issue a brief written statement of the ground for its decision," as is required on all motions granted under Rules 12(b), 50(a) and (b), 56 and 59 when the motion is based on more than one ground." Utah R. Civ. P. 52(a). Weber points out that Snyderville advanced arguments for dismissal under both Rule 12(b)(5) and 12(b)(6) and therefore Rule 52(a) is applicable. We agree, noting however that Weber did not raise this issue below.

In Alford v. Utah League of Cities and Towns, 791 P.2d 201, 204 (Utah Ct. App. 1990), we held that failure to protest the trial court's apparent noncompliance with Rule 52 at the trial level precludes consideration of the omission on appeal.[8] Weber should have raised the issue with the trial

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8. Without minimizing the importance of the written statement required by Rule 52(a), which acquaints both the parties and any reviewing court of the trial court's rationale, we note that even if the plaintiff had raised the issue of a written statement of grounds before the trial court and the court had not filed its written statement as required by Rule 52(a), we would likely conclude that the omission was harmless error. Cf. Burnett v. Utah Power & Light Co., 142 Utah Adv. Rep. 3 (1990) (where trial court did not identify reason for dismissal, Supreme Court assumed dismissal was premised on one or both of the grounds advanced in motion to dismiss and affirmed after considering only one of those grounds, and determining it was well-taken); Taylor v. Estate of Taylor, 770 P.2d 163, 168 (Utah Ct. App. 1989) (where trial court did not state basis for judgment, appellate court considered grounds advanced in motion for summary judgment and affirmed upon concluding judgment was properly premised on one of such grounds); Dover Elev. Co. v. Hill Mangum Investment, 766 P.2d 424, 426 n.4 (Utah Ct. App. 1988) (where trial court did not state basis for judgment on stipulated facts, appellate court noted similarity to cross-motions for summary judgment and merely noted that "a 'brief written statement of the ground' for the court's disposition would have been appropriate").

court, thereby giving the court the opportunity to cure the problem.

We may affirm the trial court on any proper ground. Buehner Block Co. v. UWC Assocs., 752 P.2d 892, 895 (Utah 1988). Thus, if dismissal in this case can be sustained either on Rule 12(b)(5) or 12(b)(6) grounds, we will affirm. Cf. Burnett v. Utah Power & Light Co., 142 Utah Adv. Rep. 3 (1990) (where trial court did not identify reason for dismissal, Supreme Court assumed dismissal was premised on one or both of the grounds advanced in motion to dismiss and affirmed after considering only one of those grounds, and determining it was well-taken).

Weber has limited her argument on dismissal insofar as premised on Rule 12(b)(5) to an incorporation by reference of her arguments that Snyderville was sufficiently served either through personal service on Gaddis or by publication. We have treated these arguments above and found both to be without merit. Given the limited scope of Weber's 12(b)(5) argument, it follows that the order of dismissal should be affirmed.

CONCLUSION

Because Snyderville West was not properly served either personally or by publication, the default judgment entered against it was properly set aside. Because Weber has raised no argument demonstrating error in dismissal on Rule 12(b)(5) grounds, the order of dismissal will not be disturbed. Affirmed.

Gregory K. Orme, Judge

WE CONCUR:

Russell W. Bench, Judge

Regnal W. Garff, Judge

COVER SHEET

CASE TITLE:

Brenda Major Weber,
Plaintiff and Appellant,
v. Case No. 890599-CA
Snyderville West, et al.,
Defendant and Appellee.

PARTIES:

Robert F. Orton (Argued)
Virgina Curtis Lee
Marsden, orton & Cahoon
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Salt Lake City, Utah 84101

Richard A. Rappaport (Argued)
William B. Wray, Jr.,
Cohne, Rappaport & Segal, P.C.
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525 East First South
P.O. Box 11008
Salt Lake City, Utah 84147-0008

TRIAL JUDGE:

Honorable Michael R. Murphy
Honorable J. Dennis Frederick

Oct. 19, 1990. OPINION (For Publication)
This cause having been heretofore argued and submitted, and the Court being sufficiently advised in the premises, it is now ordered, adjudged and decreed that the judgment of the district court herein be, and the same is, affirmed.
Opinion of the Court by GREGORY K. ORME, Judge;
RUSSELL W. BENCH, and REGNAL W. GARFF, Judges, concur.

CERTIFICATE OF MAILING

I hereby certify that on the 19th day of October, 1990, a true and correct copy of the foregoing OPINION was deposited in the United States mail or personally delivered to each of the above parties.

Deputy Clerk

TRIAL COURT:

e such thoughts would tend to interfere
ieir concentration on defendant's guilt
icence. Any discussion or thought of an
riate sentence should come only after a
ination of guilt.
conclude that the City failed to meet its
to rebut the presumption of prejudice.
ailiff's testimony, standing alone, was
ficient to show that the jury had not in
en influenced by the conversation. Nor
bailiff's testimony remove the taint of
riety caused by his earlier conversation.
id there was insufficient evidence to
a careful, reasoned decision and ther-
he court abused its discretion in concl-
hat the jury was not prejudiced by the
er contact.
use this issue is dispositive of the case,
not reach the other issues raised by
ant. Accordingly, the conviction is
d and the matter remanded for a new

ial W. Garff, Judge

CUR IN THE RESULT:
ell W. Bench, Judge

, J. (concurring):

ncur in the court's opinion. I write
ely only to highlight how rigorous the
Utah clearly now is on the question of
with jurors in criminal cases, notwit-
ng that I recently suggested otherwise.
ate v. Larocco, 742 P.2d 89, 97-98
Ct. App. 1987) (Orme, J., concurring).
w was effectively rejected in *State v.*
n, 749 P.2d 620 (Utah 1987), a deci-
hich I also believe calls into serious
n the continued precedential vitality of
Durand, 569 P.2d 1107 (Utah 1977).
rickson makes clear, any contact "more
brief, incidental contact where only
s of civility [are] exchanged," 749 P.2d
gives rise to a presumption of preju-
nd therefore to an order of reversal,
cannot be overcome even with testi-
by the "tainted" juror that he or she
t "influenced by the encounter." *Id.*
r the juror contact is by "witnesses,
ys, or court personnel" is irrelevant. *Id.*
cope and subject matter of the conver-
," so long as more than mere pleasan-
nd, in the case of witnesses, the relative
ance of the witness to the prosecution,
o irrelevant. *Compare Larocco*, 742
t 97-98 (Orme, J. concurring) *with*
n, 749 P.2d 620.
utmost care is required on the part of
dges to insure that contacts with jurors
occur. To do otherwise is to risk rev-
id a duplicative new trial.

Cite as
146 Utah Adv. Rep. 40

IN THE UTAH COURT OF APPEALS

Brenda Major WEBER,
Plaintiff and Appellant,
v.
SNYDERVILLE WEST, et al.,
Defendants and Appellee.

No. 890599-CA
FILED: October 19, 1990

Third District, Summit County
The Honorable Michael R. Murphy
The Honorable J. Dennis Frederick

ATTORNEYS:

Robert F. Orton and Virginia Curtis Lee, Salt Lake City, for Appellant

Richard A. Rappaport and William B. Wray, Jr., Salt Lake City, for Appellee

Before Judges Bench, Garff, and Orme.

OPINION

ORME, Judge:

This is an appeal by plaintiff Brenda Major Weber[1] challenging interlocutory and final orders setting aside a default judgment in favor of plaintiff and dismissing defendant Snyderville West ("Snyderville") as a party to an action to quiet title to real property. This appeal primarily focuses on the sufficiency of service of process on Snyderville.

FACTS

On April 6, 1983, Steven W. Major filed a complaint to quiet title to eleven parcels of real estate located in Summit County. Snyderville, a Utah general partnership, and Jim Gaddis were two of seventy named defendants.[2] Jim Gaddis holds a ten-percent interest in Snyderville and is its managing partner.

In 1978, Snyderville purchased from Investor Associates a portion of the property at issue in the quiet title action. Robert W. Major executed the pertinent real estate contract on behalf of Investor Associates. Snyderville took possession of the property and made timely payments, with the final payment being made on July 20, 1983. In October 1983, Snyderville recorded a warranty deed for the property given to it by Investor Associates. Snyderville paid property taxes on the parcel through October 1987, when it learned that the trial court had divested it of title by means of a default judgment against it.

From the time it took possession of the [illegible] address on the Summit County tax records.

No filing in the appropriate county or state offices revealed the name of any individual affiliated with Snyderville nor did Snyderville have a telephone directory listing. Although Gaddis was served in his individual capacity at his office on May 11, 1983, the summons served upon him was directed to him individually and made no reference to Snyderville except in the lengthy caption listing all seventy defendants. The return of service indicated that Gaddis had been served personally and did not purport that service on Snyderville had been effected through him. By order dated December 17, 1983, the trial court allowed service by publication upon Snyderville and sixteen other named defendants.

As a corollary to service by publication, counsel for Weber prepared a summons for mailing to Snyderville at its tax address, i.e., Gaddis's office at 1253 East 2100 South in Salt Lake City.

The affidavit of mailing listed Snyderville's address as "1253 East 7100 South," incorrectly stating the south coordinate by fifty blocks. Although there is no such address, and, according to a Postal Service supervisor's affidavit, the summons directed to Snyderville should have been returned by the Postal Service, counsel for Weber did not recall that the summons had been returned, although other summonses were returned for insufficient postage. The Postal Service does not keep records of returned first class mail and it is therefore unknown if the mailed summons ever reached Snyderville. Gaddis had no recollection of receiving a summons through the mail.

The trial court entered a default judgment against Snyderville on August 29, 1985. In the fall of 1988, Snyderville sought to have the judgment set aside. The district court determined that there was "no adequate explanation ... [for the] failure to personally serve Snyderville West at its known tax address" and set aside the judgment. In 1989, Snyderville filed a Motion to Dismiss premised on Utah R. Civ. P. 12(b)(5) and 12(b)(6), which was granted. This appeal followed.

On appeal, Weber claims that Snyderville was effectively served through personal service upon Jim Gaddis or, alternatively, that it was properly served by publication. Weber also challenges the court's order of dismissal in favor of Snyderville as improper under Utah R. Civ. P. 52(a).[3]

PERSONAL SERVICE

Weber asserts that Gaddis's position as managing partner of Snyderville qualified him to receive service of process for Snyderville. Weber further claims that service upon Gaddis [illegible] partner and his status as a partner. We agre
that Gaddis was authorized to receive proces
for Snyderville. See Utah R. Civ. P. 4(e)(
(service upon a partnership shall be effectiv
through service upon managing or gener
agent). However, personal service upo
Gaddis did not confer jurisdiction over Sny
derville. Weber incorrectly focuses o
Gaddis's capacity, rather than the import c
the summons served upon him. Any numbe
of agents or partners of Snyderville might b
authorized to receive service for the partne
ship, yet if no service is ever attempted on th
partnership no service on it can be perfected.[4]

Rule 4(c) of the Utah Rules of Civil Proce
dure states, with our emphasis: "The summon
shall contain the ... names ... of the parties t
the action ... [and] *be directed to the defen
dant.*" Gaddis's summons was directed t
him, not to Snyderville. While this might hav
provided Snyderville with constructive or eve
actual knowledge of the action, the insuffici
ency of process is not thereby cured. *See Ston
v. Hicks*, 45 N.C. App. 66, 262 S.E.2d 31
319 (1980) (where one defendant received
summons directed to another defendant
service was ineffective on the receiving defe
ndant even though the caption listed him as
defendant). *See generally* 62B Am. Jur. 2d *Pro
cess* section 81 (1990). We hold that servic
of process upon Jim Gaddis in his individua
capacity did not effect service of proces
upon, nor confer jurisdiction over, Snyderv
ille.

SERVICE BY PUBLICATION

Rule 4(f)(1) of the Utah Rules of Civ
Procedure, in effect at all times pertinent t
this case,[5] authorized service by publicatio
when personal service is impractical becaus
the

> person upon whom service is sought resides outside of the state, or has departed from the state, or cannot after due diligence be found within the state ....
>
> The party desiring service of process by publication shall file a motion verified by the oath of such party or someone in his behalf for an order of publication. It shall state the facts authorizing such service and shall show the efforts that have been made to obtain personal service within this state .... The court shall hear the motion ex parte and, if satisfied that due diligence has been used to obtain personal service within this state, or that efforts to obtain the same would have been of no avail, shall order publication of the summons in a newspaper having general cir-

to locate the defendant before the court uthorize service by publication. "Due ice must be tailored to fit the circumst- of each case. It is that diligence which is priate to accomplish the end sought and is reasonably calculated to do so." *Parker* oss, 117 Utah 417, 217 P.2d 373, 950). *See also Carlson v. Bos*, 740 P.2d 1277 n.13 (Utah 1987).

unsel for Weber was faced with the task ting through numerous disorganized files ning Robert Major's personal and bus- affairs. Many documents were held by members and former counsel. At the of trial, counsel could not recall whether d seen any documents specifically linking rville and Gaddis or any contracts or concerning the conveyance to Snyderv- long the records he examined.

derville first came to plaintiff's el's attention in a June 1982 title report ng Snyderville's interest.

an effort to locate information he cons- l necessary to serve Snyderville, counsel hed in telephone directories, motor e files, corporate filings in Utah and rnia, the County Recorder's files in nit and Salt Lake counties, and in postal ds. It is apparent, however, that Snyde- 's address was set forth in the Summit y tax records pertaining to the very rty in issue. Counsel's quest was appa- for the name of a particular individual o Snyderville through whom service upon erville could be perfected. Oddly, ver, no inquiry was made by counsel at ddress disclosed as Snyderville's address ie tax records, of which counsel had ledge no later than October 1983, nor ny service of process attempted on Sny- lle at this address.[6] Had either been done, r would readily have been able to pers- y serve Snyderville through Gaddis, e office was the very address stated in the cords.

plaintiff seeking authorization for service iblication on a defendant for whom an in- address is known must, at a minimum, inquiry at that address. *Cf. Downey Bank v. Major-Blakeney Corp.*, 545 507, 509 (Utah 1976) (plaintiff need not ust all possibilities where there is an effort rve defendant at the only address reaso- known). This requirement is not only a quisite for satisfying the due diligence g of Rule 4, but will also go a long way tablishing a proper factual record upon h the court may base its order for service ublication. Service by publication is ina- priate where no personal inquiry is made last known address within the state.[7] Since *Hustace v. Kapuni*, 6 Haw. App. 241, 718 P.2d 1109, 1116 (1986) (where service by publication is insufficient, subsequent default judgment is void ab initio).

DISMISSAL

The thrust of Weber's challenge of the ultimate dismissal of the complaint as against Snyderville is that the court failed to "issue a brief written statement of the ground for its decision," as is required on all motions granted under Rules 12(b), 50(a) and (b), 56 and 59 when the motion is based on more than one ground." Utah R. Civ. P. 52(a). Weber points out that Snyderville advanced arguments for dismissal under both Rule 12(b)(5) and 12(b)(6) and therefore Rule 52(a) is applicable. We agree, noting however that Weber did not raise this issue below.

In *Alford v. Utah League of Cities and Towns*, 791 P.2d 201, 204 (Utah Ct. App. 1990), we held that failure to protest the trial court's apparent noncompliance with Rule 52 at the trial level precludes consideration of the omission on appeal.[8] Weber should have raised the issue with the trial court, thereby giving the court the opportunity to cure the problem.

We may affirm the trial court on any proper ground. *Buehner Block Co. v. UWC Assocs.*, 752 P.2d 892, 895 (Utah 1988). Thus, if dismissal in this case can be sustained either on Rule 12(b)(5) or 12(b)(6) grounds, we will affirm. *Cf. Burnett v. Utah Power & Light Co.*, 142 Utah Adv. Rep. 3 (1990) (where trial court did not identify reason for dismissal, Supreme Court assumed dismissal was premised on one or both of the grounds advanced in motion to dismiss and affirmed after considering only one of those grounds, and determining it was well-taken).

Weber has limited her argument on dismissal insofar as premised on Rule 12(b)(5) to an incorporation by reference of her arguments that Snyderville was sufficiently served either through personal service on Gaddis or by publication. We have treated these arguments above and found both to be without merit. Given the limited scope of Weber's 12(b)(5) argument, it follows that the order of dismissal should be affirmed.

CONCLUSION

Because Snyderville West was not properly served either personally or by publication, the default judgment entered against it was properly set aside. Because Weber has raised no argument demonstrating error in dismissal on Rule 12(b)(5) grounds, the order of dismissal will not be disturbed. Affirmed.

Gregory K. Orme, Judge

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1. This action was originally brought by Steven W. Major, personal representative of the estate of Robert W. Major, Jr. During the course of the litigation Steven W. Major died and the present plaintiff was named as successor personal representative.

2. As may be expected in litigation involving numerous parties and several transactions, the facts before the court are numerous and complicated. We commend counsel for both parties for their succinct presentation of the relevant facts. We further note that both parties' careful compliance with Utah R. App. P. 24 has assisted the court in efficiently deciding the matters before it. Of particular assistance to the court was the comprehensive addenda of key documents annexed to the briefs.

3. Weber also claims that, notwithstanding any deficiencies in service of process, Snyderville is bound by a stipulation for settlement and the judgment entered thereon on January 17, 1986, by reason of the fact Gaddis, through his own counsel, was a party to the stipulation. We find no merit in this argument nor in Weber's lis pendens argument, raised for the first time in her reply brief.

4. Weber's claim that service on Gaddis was adequate to serve the partnership is belied by Weber's own course of conduct. If she believed Snyderville had been properly served through Gaddis there would have been no need to include it in the motion seeking leave to serve by publication, in the order authorizing publication or in the published summons, nor to undertake efforts to mail the published summons to Snyderville.

5. The comparable rule now appears at Utah R. Civ. P. 4(g).

6. Apparently counsel thought that unless he could advise the constable of the name and title of a particular person through whom Snyderville could be served, he could not appropriately seek service of Snyderville at the address of which he was aware. A personal visit to the address would presumably have elicited such information. But such information is not necessarily required. Had counsel simply advised the constable to serve Snyderville at its known address, by and through any "managing or general agent, or other agent authorized to receive service of process ...," Utah R. Civ. P. 4(e)(5), one of two things would have happened, either of which would have served counsel's purposes. The return would have come back indicating service was effected on Snyderville by and through its managing partner, Jim Gaddis, in which event personal service would be complete, or the return would have come back with an "unable to serve" notation, with explanation of the constable's failure to locate at the address any person having knowledge of Snyderville despite diligent inquiry, in which event the entitlement to serve by publication would be ironclad given the extenslve other efforts exerted by counsel.

7. We note that any defendant served by publication has standing to challenge the sufficiency of service of process, *Carlson*, 740 P.2d at 1271, even where authorized by an order which, as here, is not directly attacked.

8. Without minimizing the importance of the written statement required by Rule 52(a), which acquaints both the parties and any reviewing court of the trial we would likely conclude that the omission harmless error. *Cf. Burnett v. Utah Power & Li Co.*, 142 Utah Adv. Rep. 3 (1990) (where trial cc did not identify reason for dismissal, Supreme Cc assumed dismissal was premised on one or both the grounds advanced in motion to dismiss affirmed after considering only one of th grounds, and determining it was well-taken); *Taylo Estate of Taylor*, 770 P.2d 163, 168 (U Ct. App. 1989) (where trial court did not state b for judgment, appellate court considered grou advanced in motion for summary judgment affirmed upon concluding judgment was prop premised on one of such grounds); *Dover Elev. v. Hill Mangum Investment*, 766 P.2d 424, 426 (Utah Ct. App. 1988) (where trial court did not s basis for judgment on stipulated facts, appel court noted similarity to cross-motions summary judgment and merely noted that "a 'b written statement of the ground' for the cou disposition would have been appropriate").

Cite as
146 Utah Adv. Rep. 43

IN THE UTAH COURT OF APPEALS

STATE of Utah,
Plaintiff and Appellee,
v.
Randall TUCKER,
Defendant and Appellant.

No. 890423-CA
FILED: October 24, 1990

Third District, Salt Lake County
The Honorable Michael R. Murphy

ATTORNEYS:

Brooke C. Wells and Richard G. Uday, Sal Lake City, Attorneys for Appellant

R. Paul Van Dam and Charlene Barlow, Sa Lake City, Attorneys for Appellee

Before Judges Bench, Billings, and Greenwood.

OPINION

BILLINGS, Judge:

Randall D. Tucker appeals his convict for theft, a third degree felony, in violatior Utah Code Ann. §76-6-404 (1990). affirm.

On March 29, 1989, Mr. Hansen drove his property near Redwood Road wher locked storage shed containing his son's sessions was located. Mr. Hansen found