2016

Staci Baker, Defendant/Appellant vs. C504750p, LLC, Plaintiff/ Appelle

Utah Court of Appeals

39155

IN THE UTAH COURT OF APPEALS

STACI BAKER, Defendant/Appellant, vs. C504750P. LLC, Plaintiff/Appellee.	Case No. 20150826-CA

REPLY BRIEF OF APPELLANT

Appeal from Order Denying Relief from Default Judgment of the
Fourth District Court, Utah County, State of Utah,
the Honorable James R. Taylor Presiding

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Plaintiff/Appellee C504750P, LLC ("Plaintiff") tries desperately in its brief to avoid the relevant issues that require reversal of the trial court's default judgment to be set aside. First, it asserts that Defendant/Appellant Staci Baker ("Mrs. Baker") failed to preserve two of the three issues she asserts on appeal: that (1) Mrs. Baker has a meritorious defense, and was thus entitled to have the default judgment set aside; and (2) the trial court erred in awarding attorney fees. Plaintiff is wrong. As discussed below, Mrs. Baker specifically preserved both issues.

Plaintiff also tries to avoid the third issue—that service by publication is constitutionally deficient, because there were other means of service available—by attempting to change the issue to whether alternative service was justified. However, as has been plainly stated, Mrs. Baker does not contest on appeal whether alternative service was justified. This appeal is about whether the particular *method* of alternative service ordered was constitutionally sound. In keeping with this charade, Plaintiff goes so far as to assert in its "Constitutional or Statutory Provisions" section that it "does not believe there is a constitutional provision which is directly relevant or material to this appeal." Appellee's Brief at 1. When Plaintiff finally gets around to addressing publication, it boldly asserts that "publication through a newspaper was a likely means to inform Defendant of the lawsuit." *Id.* at 27. Mrs. Baker will discuss why this assertion, directly contrary to United States Supreme Court precedent, Utah Supreme Court precedent, and common sense, is also unsupported by any fact in this case.

I. MRS. BAKER PRESERVED ALL ISSUES SHE HAS RAISED ON APPEAL.

In order to avoid having to deal with (1) the caselaw requiring default judgments to be set aside in the presence of a meritorious defense, and (2) the plain error in awarding attorney fees in the absence of a contract authorizing such a remedy, Plaintiff asserts that Mrs. Baker failed to preserve either of these issues. In support of this fiction, Plaintiff represents that the sole basis for relief asserted by Mrs. Baker in her motion to set aside the judgement was that "the default judgment was 'void' for lack of service pursuant to Rule 60(b)(4)." Appellee's Brief at 13. Plaintiff made the same representation to the trial court below in an effort to get the trial court to disregard the other bases supporting relief, which it asserts were raised for the first time in Mrs. Baker's reply memorandum. R. 292 ("Defendant, in her Initial Memorandum, claimed only that the default judgment was void and, therefore, sought relief from the default judgment on the basis that the judgment was void due to lack of service under Rule 60(b)(4)."); R. 365 ("As we have set forth in our motion to strike and in fact in our memorandum in opposition, the only issue raised in this motion was that the service was void.").[1] Plaintiff was wrong then and it is wrong now.

As an initial matter, Mrs. Baker did not cite only Rule 60(b)(4), as represented by Plaintiff. In fact, her motion did not cite any specific subsection of the rule. It did, however, discuss more than one subsection, R. 129, and plainly set forth both arguments Plaintiff represents were not raised. With respect to attorney fees, Mrs. Baker argued: "Moreover, there is no basis or evidence for award and attorneys' fees when Mrs. Baker never signed any

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[1] The trial court never ruled on this issue. R. 372–373; R. 328–331; and R. 332–333.

document providing for the recovery of attorneys' fees and there is no basis under the law for which attorneys' fees should be awarded. (Utah R. Civ. P. 73)." R. 131 (Memorandum in Support of Defendant's Motion for Relief from Default Judgment) at n. 1. With respect to the meritorious defense, Mrs. Baker then argued in her moving memorandum:

> Similarly, there is no basis for the award of title to the Property considering the appraised value of the Property of $124,000.00 and the purported purchase price of $15,000.00 for which the Plaintiff purchased the Property from a relative (everything about this transaction appears to be an effort to fraudulently deprive Mrs. Baker of her interest in the Property).

Id.[2]

Plaintiff's effort to ignore these arguments began immediately. In its memorandum in opposition, Plaintiff cited an email from Mrs. Baker's husband, which set forth the meritorious defense. However, Plaintiff quoted only selectively from the email, leaving out any mention of Mr. Baker's concerns over the illegitimate nature of the transaction. Plaintiff

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[2] Plaintiff notes on appeal that "Defendant acknowledged in her memorandum in support of her Motion to Set Aside that '[b]ecause it is not appropriate on Rule 60(b) motions to examine the merits of the claim, [Defendant] will reserve briefing all issues that go to the merits of the claim and award sought by Plaintiff.'" Appellee Brief at 19. Meritorious defense arguments, however, do not seek to resolve the merits of a dispute, despite their nomenclature. Rather, a defendant is entitled to have a default judgment set aside if it can establish that an issue has sufficient color at least to be tried. *See Menzies v. Galetka*, 2006 UT 81, ¶ 108, 150 P.3d 480 ("A defense is sufficiently meritorious to have a default judgment set aside if it is entitled to be tried.") (quoting *Erickson v. Schenkers Intern. Forwarders, Inc.*, 882 P.2d 1147, 1149 (Utah 1994)). Indeed, Plaintiff's overly narrow reading of the caselaw limiting Rule 60(b) review from any consideration of the case's underlying merits would eviscerate the entire body of caselaw holding that defendants are generally "entitled" to have a default judgment set aside where a meritorious defense exists. *See, e.g., Aspenbrook Homeowners Ass'n v. Dahl*, 2014 UT App 99, ¶10, 329 P.3d 822, 826 cert. denied sub nom. *Aspenbrook v. Dahl*, 337 P.3d 295 (Utah 2014) ("Generally, 'a movant is entitled to have a default judgment set aside under [rule] 60(b) [of the Utah Rules of Civil Procedure] if . . . the movant has alleged a meritorious defense.") (citations omitted).

thus stated, referring to a letter it had sent requesting Mrs. Baker's presence at the closing scheduled for the transaction:

> On July 31, 2014, Defendant responded to this letter via email. The email stated that "I am providing the following on behalf of my wife Staci Baker regarding the tax sale property at 161 W. Pacific Drive in American [F]ork." He continued, stating that he "will not be cooperating with [Plaintiff] on the proposed sale of the tax sale home at 161 Pacific Drive in American Fork." He finally stated that he "intend[s] to pursue collection of these lost rents in any legal proceedings that become necessary. Conduct yourselves accordingly, Staci Baker."

R. 193 at ¶ 7.

By selectively quoting the email, Plaintiff attempted to avoid dealing with the following language regarding the meritorious defense:

> I am quite confident that the 'sale' referenced in the tax sale statute was never intended to refer to a process in which the original owner who had lost interest in the property was able to cheat the tax sale interest purchaser out of their [sic] statutorily defined return by selling the property to a related party in a non-arm's length transaction and at a very steep discount from fair market value. Furthermore, I am strongly convinced you would have a difficult time selling that interpretation to a judge. If you would like to put the property up for sale and sell it at fair market value then I would not oppose the sale. Unless and until such time, I oppose the sale and will not cooperate with it. However, if Mr [sic] Collings believes his 'sale' represents the property's fair value, then I would happily agree to purchase the property for $15,100 and buy Mr. Collings out of his interest.

R. 235–36.

Mrs. Baker, of course, pointed out this omission in her reply memorandum, where she expounded upon the arguments she first raised in her moving memorandum. With respect to the meritorious defense, Mrs. Baker argued:

> Such a disparity in the appraised value of the Property [$124,000] and the purchase price [$15,000] in the REPC, under which the Property was sold to

> a relative in a non-arm's length transaction at the expense of Defendant, Mrs. Baker, calls into question the entire transaction contemplated by the REPC, if not the integrity of the Plaintiff and the seller under the REPC. A case with such facts is the precise reason for Rule 60(b)'s catchall language which allows the Court "upon such terms as are just" and in the "furtherance of justice" to relieve a party from final judgment based on any of the reasons set forth therein, including "any other reason justifying relief from the operation of the judgment." Utah R. Civ. P. 60(b).

R. 229–30. Mrs. Baker also expounded upon her attorney fees argument:

> The award of attorneys' fees against Stacie Baker is also unjust. In Utah an award of attorneys' fees can be made if a statute provides for such an award or a contract between the parties provides for such an award. *IHC Health Services v. D&K Management*, 2008 UT 73, ¶ 39, 196 P.3d 588. The basis for attorneys' fees stated in the judgment is section 17 of the Real Estate Purchase Contract. That was not a contract between Plaintiff and Mrs. Baker, and Mrs. Baker is not a signatory to that contract. Therefore, there was no basis for an award of attorneys' fees and the judgment should be set aside.

R. 229.

In short, Mrs. Baker preserved the meritorious defense and attorney fees issues, in addition to the constitutionally deficient service issue, for appeal by squarely presenting the issues to the trial court for decision. *See Pratt v. Nelson*, 2007 UT 41, ¶ 15, 164 P.3d 366 (citations omitted) ("Generally, 'in order to preserve an issue for appeal the issue must be presented to the trial court in such a way that the trial court has an opportunity to rule on that issue.'").

Accordingly, the caselaw Plaintiff cites holding that a party may not rely on 60(b)(6)'s catchall provision "if the asserted grounds for relief fall within any other subsection of rule

60(b)," Appellee's Brief at 16 (citations omitted), is inapposite here, as Mrs. Baker's motion to set aside the judgment was based on three independent errors, two of which fall within the rule's catchall provision.

II. MRS. BAKER DID NOT ABANDON ANY BASIS FOR RELIEF DURING ORAL ARGUMENT.

Plaintiff's effort to avoid the meritorious defense and attorney fees issues does not stop with its argument about preservation. Apparently feeling the need to have a backup to this unfounded argument, Plaintiff also represents that Mrs. Baker abandoned these two issues during her oral argument on the motion to set aside (an assertion necessarily premised on an admission that the issues had, in fact, been raised to begin with). Plaintiff represents: "During oral argument, Defendant effectively abandoned such other arguments and only argued that the default judgment was void because of failure of service (i.e., pursuant to Rule 60(b)(4))." Appellee Brief at 18. In support of this representation, Plaintiff cites R. 342-373; that is, the entire hearing transcript save the caption and appearance pages, as well as the index. There is a reason Plaintiff does not cite to any specific excerpt of the transcript to support its representation: none exists. Rather, the transcript of the hearing is replete with argument from Mrs. Baker's counsel in support of both issues.

For example, with respect to the meritorious defense, Mrs. Baker's counsel argued: "On November 26th of 2014 this court entered a default judgment against Staci Baker which in essence sanctioned an insider transaction that deprived Ms. Baker of 40%, her 40% interest in a home worth about $124,000 in exchange for which she only received $5,000, at

least in the judgment." R. 343 at lines 4:16–20. Counsel returned to this issue later in his argument:

> But that is the insider transaction. Those are the same people. That's Mr. Collings (phonetic) and his son is on the other transaction, Mr. Collings (phonetic). So you've got Mr. Collings (phonetic) and his son on both sides of this transaction where they, they sell this property for $15,000 instead of what it was worth.

R. 345 at lines 6:19–25.

With respect to attorney fees, Mrs. Baker's counsel argued: "But there was no basis for attorney's fees as to Mrs. Baker because she never signed a contract which would allow them to take attorney's fees, nor did she, nor is there a statute which would allow that." R. 343–44 at lines 4:24–5:2. At the close of his argument, counsel stated: "And then I just emphasize again that we've got this problem of an attorney's fee award that there's no basis for." R. 357 at lines 18:9–11.

In short, just as there is no factual basis to support Plaintiff's representation that Mrs. Baker failed to preserve all appellate issues, there is no factual basis to support its representation that Mrs. Baker abandoned these issues at oral argument. Rather, the record directly refutes Plaintiff's representations.[3]

III. MRS. BAKER'S MERITORIOUS DEFENSE ENTITLED HER TO HAVE THE DEFAULT JUDGMENT SET ASIDE.

Plaintiff argues in its brief that "Utah's Partial Interest Tax Purchaser statute mandates that a person who purchases an undivided interest of less than 49% at a tax sale 'may not

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[3] Plaintiff did not raise any objection to these arguments at the hearing, nor did it press for a ruling on its motion to strike these arguments, which it had alleged, erroneously, were made for the first time in Mrs. Baker's reply memorandum.

object' to a subsequent sale by the majority property owner." Appellee Brief at 12 (quoting Utah Code § 59-2-1351.7). Mrs. Baker takes no issue with this assertion; however, Plaintiff's argument merely begs the question of what the legislature meant by *sale*. Plaintiff would argue that the word *sale* includes an inside deal with a close relative at a reverse-engineered price far below its actual market value. Mrs. Baker submits that it would not.

Plaintiff quotes *State v. Anderson*, 2007 UT App 304, 169 P.3d 778, for the proposition that the court's "'task is to interpret the words used by the legislature, not to correct or revise them.'" *Id.* at ¶ 11 (quoting *State v. Wallace*, 2006 UT 86, 19, 150 P.3d 540). Mrs. Baker could not agree more. The question becomes which party's interpretation most faithfully adheres to the common, ordinary, and reasonable meaning of *sale*, and which seeks to interpret the term in a way foreign to common understanding. *See Hutter v. Dig–It, Inc.*, 2009 UT 69, ¶ 32, 219 P.3d 918 ("When interpreting a statute, we assume, absent a contrary indication, that the legislature used each term advisedly according to its ordinary and usually accepted meaning."). Mrs. Baker submits that interpreting *sale* to include sham inside transactions reflects neither the ordinary nor usually accepted meaning of the word.

The unreasonableness of Plaintiff's interpretation is reflected in the unreasonableness of its actions surrounding the sale. After reverse-engineering the price, Mrs. Baker's husband demanded that, if Plaintiff were interested in *selling* the property, that it list the property on the market where it's fair market value could be obtained. R. 235–36. Mr. Baker further offered that if Plaintiff truly believed $15,000 truly represented the property's fair market value, he "would happily agree to purchase the property for $15,100 and buy

[Plaintiff] out of his interest." R. 235–36. Plaintiff, of course, ignored this offer, as it was never its interest to *sell* the property; only to rid Mrs. Baker from title as inexpensively as possible.

Finally, it must be remembered that to mount a meritorious defense, a defendant need not prove its case but only show that its defense is entitled to be heard and tried. *Menzies v. Galetka*, 2006 UT 81, ¶ 108, 150 P.3d 480 ("A defense is sufficiently meritorious to have a default judgment set aside if it is entitled to be tried.") (quoting *Erickson v. Schenkers Intern. Forwarders, Inc.*, 882 P.2d 1147, 1149 (Utah 1994)). Plaintiff never even attempted to distinguish this caselaw or its application to this case, seeking instead to try to avoid this issue completely by arguing it was not preserved.

IV. MRS. BAKER'S MERITORIOUS DEFENSE IS BASED ONLY ON MATTERS PROPERLY CONTAINED IN THE RECORD.

An appellate court's "review is 'limited to the evidence contained in the record on appeal.'" *Shurtleff v. United Effort Plan Trust*, 2012 UT 47, ¶ 6 n.4, 289 P.3d 408 (citations omitted). Plaintiff argues that Mrs. Baker's assertions regarding "the value of the property and the circumstances of the sale are not factually supported by the record." Appellee's Brief at 33 (emphasis in original). Plaintiff asserts that this defense was not properly raised or preserved below," because Mrs. Baker's "conclusory value assertions (i.e., that the value of the property was $140,000) in her Reply Memorandum were unverified and inadmissible and must be disregarded on appeal (as in the District Court)." *Id.*

As an initial matter, Plaintiff did not argue that Mrs. Baker's value assertions (an appraisal) were unverified or inadmissible in any of its papers below. R. 191-223 (Plaintiff's

memorandum in opposition to Mrs. Baker's motion to set aside default judgment); R 288-289 (Plaintiff's motion to strike portions of Mrs. Baker's reply memorandum); R 290–295 (Plaintiff's memorandum in support of its motion to strike); R. 306–311 (Plaintiff's reply memorandum in support of its motion to strike). Nor did Plaintiff object to the introduction of this testimony at the hearing on the motions. R. 342-373.

Moreover, like the other issues Plaintiff represents were raised for the first time in Mrs. Baker's reply memorandum, Plaintiff's representation that Mrs. Baker's value assertion was raised for the first time in her reply memorandum has no basis in fact. Indeed, Mrs. Baker squarely asserted the property's value ($124,000, not $140,000) in her memorandum in support of her motion to set aside the judgment. R. 127 at ¶ 12 ("A retrospective appraisal of the Property resulted in an appraised value of $124,000.00 (the 'Appraisal') (See *Appraisal* attached hereto as Exhibit D).") (emphasis in original). Mrs. Baker also discussed the appraised value in her reply memorandum, R. 229 ("However, the appraised value of the Property is $124,000.00 (Exhibit C to Defendant's Memorandum, also attached hereto as Exhibit 'C')"), as well as at the hearing, R. 343, again without objection. Thus, there is no merit to Plaintiff's argument that Mrs. Baker relied on matters not of record in support of her meritorious defense.[4]

V. THE COURT ERRED IN AWARDING ATTORNEY FEES.

Further explaining why Plaintiff is desperate to argue Mrs. Baker failed to preserve certain issues—desperate enough to make representations that have no basis in fact—is that

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[4] Ironically, as discussed below, in section VI, it is Plaintiff, not Mrs. Baker, that has relied on matters not of record.

Plaintiff can offer no justification for the trial court's award of attorney fees, or Plaintiff's decision to put such an award into its proposed form of order submitted to the trial court. There being no basis for an award of attorney fees in this case, Plaintiff led the trial court into committing plain error. Plaintiff makes no attempt whatever in its brief to justify its actions or the unfounded award. Instead, its only defense is to try to convince this Court not even to consider the issue. The fact remains, however, that the issue was properly preserved—in Mrs. Baker's moving memorandum, in her reply memorandum, and at the hearing. Once brought to the trial court's attention, this egregious error alone should have caused the trial court to set aside its judgment. The trial court's refusal to do so must be corrected.

VI. SERVICE BY PUBLICATION WAS IMPROPER IN THIS CASE.

Presumably trying to raise a strawman it can knock down, Plaintiff devotes most of its brief relating to service by publication to arguing that alternative service was justified. As Mrs. Baker has repeatedly made clear, however, she is not challenging the trial court's *factual* determination that alterative service was justified. She is challenging the trial court's *legal* determination that publication was an appropriate means of alternative service in light of United States Supreme Court precedent (*Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)) and Utah Supreme Court precedent (*Graham v. Sawaya*, 632 P.2d 851, 853–54 (Utah 1981)) to the contrary.

In an attempt to side-step this precedent, Plaintiff argues that Mrs. Baker's reliance on *Mullane* is misplaced. Plaintiff asserts that Mrs. Baker "ignores Utah case law directly on point." Appellee's Brief at 22. "In *Jackson Const. Co., Inc. v. Marrs*, 2004 UT 89, ¶ 11,

100 P.3d 1211, 1215," it argues, "the Utah Supreme Court made clear that Utah courts satisfy the due process concerns outlined in *Mullane* by first requiring a plaintiff to exercise reasonable due diligence in attempting to locate and serve a defendant before alternative service by publication may be sought or allowed." *Id.* This assertion is misleading. *Jackson Construction* is actually fatal to Plaintiff's position.

While *Jackson Construction* held that "litigants may not resort to service by publication until they have first undertaken reasonably diligent efforts to locate the party to be served," *Jackson Const.* at ¶ 11, Mrs. Baker does not argue on appeal that Plaintiff failed to meet this requirement. After all, there was no need for Plaintiff to locate Mrs. Baker; it knew where she lived and had already communicated regarding these matters with her husband, who was acting in her behalf, via email. Moreover, although the evidence presented to the trial court strongly refutes any notion that Mrs. Baker was attempting to evade service of process,[5] Mrs. Baker does not contest on appeal that it was reasonable for the trial court to order alternative service after five failed service attempts. Rather, the issue is whether service by publication to the exclusion of all other known means of service readily

[5] Among other things, evidence presented to the trial court established that: (1) the front room of Mrs. Baker's residence was converted by her husband as an office; (2) Mr. Baker had instructed his assistant, who worked at this office, not to answer the front door, as anyone coming to the front door would be there for personal reasons; (3) Mr. Baker also maintained a legally confirming apartment in his residence and had tenants living there during the relevant time; (4) Mrs. Baker, who was five months pregnant with twins during this time, was not home very often due to complications she was experiencing with her pregnancy; (5) the Bakers eventually lost the twins, and in aftermath fell behind for a time in many of life's administrative tasks, such as reviewing mail. R. 285–87.

available was constitutionally permissible—the actual due process concern addressed by *Mullane*.

Moreover, *Jackson Construction* did not hold that service by publication is appropriate in all circumstances so long as the litigant satisfies the diligent efforts requirement. Indeed, the facts of *Jackson Construction* did not concern *Mullane*'s factual scenario where a defendant was served exclusively by publication even though the defendant "could [have] easily be[en] informed by other means at hand." *Mullane*, 339 U.S. at 318–19. Rather, *Jackson Construction* reiterated *Mullane*'s "recognition that publication alone is generally *not* a reliable means of informing interested parties that their rights are at issue before the court." *Jackson Const.* at ¶ 11 (citing *Mullane*, 339 U.S. at 315) (emphasis added). Based on this recognition, and still following *Mullane*'s precedent, it then reiterated that even where "alternative service is authorized, it must be 'reasonably calculated, under all the circumstances, to apprise the interested parties of the pendency of the action to the extent reasonably possible or practicable.'" *See Jackson Const.* at ¶ 22 (quoting 339 U.S. at 314). Based on this precedent, the Court concluded that service by publication in the *Jackson Construction* case was "functionally equivalent to rolling up the summons, shoving it into a bottle, and throwing it into the ocean." *Id.* at ¶ 22.

Despite the universal recognition that service by publication is not likely to apprise anyone of anything, Plaintiff argues that Mrs. Baker's "position that alternative service by publication was not calculated to provide her notice is disingenuous." *Id.* at ¶ 27. To support this incredible assertion, Plaintiff cites facts *not* contained in the record but *invented* by

Plaintiff; for example, that Mrs. Baker learned about the tax sale from reading the newspaper. Because Mrs. Baker learned about the tax sale in the newspaper, the argument goes, she would likely have also seen the legal notice regarding the complaint filed against her.

Putting aside the giant leap this argument requires the Court to make (that is; because Mrs. Baker saw one notice on one occasion she would have seen all other notices on all other occasions), there is nothing in the record actually establishing that Mrs. Baker learned of the tax sale in this fashion or that she even reads the newspaper. Nor is there anything in the record that even hints that publication in the newspaper is the only way the county notices tax sales.

Not to be hampered by this or the prohibition of citing matters not of record, *Shurtleff*, 2012 UT 47 at ¶ 6 n.4, Plaintiff cites to the Utah County website to show that notice of tax sales are published in *The Daily Herald*. The problem with this, of course, is the reason this information is not in the record is because it was not raised below. Had it been, Mrs. Baker would have had the opportunity to point to the other methods Utah County uses to publish notice of tax sales, which Plaintiff omits from its argument, and establish the means she actually used to discover the sale. Regardless, Plaintiff's conclusory argument should be given only the weight to which it is entitled—nothing. The fact is, like *Jackson* and virtually every other case, serving Mrs. Baker by running a legal notice in the newspaper was akin to putting a note in a bottle and throwing it out to sea.

In sum, service by publication in this case, where Plaintiff had other means of service (mail and email) readily available to it, simply does not pass constitutional muster. Because

(1) "[a] lack of [personal jurisdiction] is fatal to a court's authority to decide a case with respect to a particular litigant;" (2) "[f]or a court to acquire jurisdiction, there must be a proper issuance and service of summons; and (3) "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections," *Jackson Const.* 2004 UT 80 at ¶¶ 7 (citation omitted, second alteration in *Jackson Const.*), the trial court in this case never obtained proper jurisdiction over Mrs. Baker and its judgment must be set aside.

Rule 4's general allowance to serve by publication under certain circumstances does not trump this precedent nor the constitutional requirement that publication may not be invoked except when there is no other possible means of service. As the Utah Supreme Court ruled 35 years ago: "Even [where publication is justified generally], however, publication is not a constitutionally acceptable means of notice of the pendency of litigation where 'it is not reasonably calculated to reach those who could easily be informed by other means at hand.'" *Graham v. Sawaya*, 632 P.2d 851, 853–54 (Utah 1981) (quoting *Mullane*, 339 U.S. at 319).

VII. THE COURT SHOULD AWARD ATTORNEY FEES TO MRS. BAKER.

Plaintiff should be sanctioned for filing a frivolous brief containing multiple misstatements of material fact. Rule 33 of the Utah Rules of Appellate Procedures provides that if either party files a frivolous brief, the Court "shall award just damages," including

reasonable attorney fees to the aggrieved party. Utah R. App. P. 33(a). The rule defines a frivolous brief as "one that is not grounded in fact . . . ." *Id.* at 33(b). The rule states that the Court "may award damages upon request of any party . . . as part of a party's response to a motion or other paper." *Id.* at 33(c)(1). A party against whom damages are sought is entitled to a hearing on the matter. *Id.* at 33(c)(3).

Appellee's brief is not grounded in fact. To the contrary, the brief's principal arguments are supported by assertions contrary to the facts of this case. For example:

1. Plaintiff's assertions that there is no "constitutional provision which is directly relevant or material to this appeal, " Appellee's Brief at 1, ignores the fact that one of the principal arguments advanced by Mrs. Baker, and the only argument squarely addressed by Plaintiff, is that service in this case was constitutionally deficient under the Due Process clauses of the United States and Utah Constitutions;[6]

2. Plaintiff's representation that Mrs. Baker failed to raise the meritorious defense and attorney fees issues in her moving memorandum, is false and refuted by the record;

3. Plaintiff's similar representation that Mrs. Baker's moving memorandum cited only Rule 60(b)(4), when in fact Mrs. Baker's memorandum did not cite *any* specific subsection, including 60(b)(4), is false and refuted by the record;

4. Plaintiff's representation that Mrs. Baker abandoned the meritorious defense and attorney fees issues at oral argument, is false and refuted by the record;

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[6] It is astonishing that Plaintiff could assert that no constitutional provision is relevant to this appeal when it itself discusses due process at pages 16, 21 (twice), 22 (four times), 23, and 28 ("In sum, [Mrs. Baker] was properly served in accordance with appropriate due process considerations . . . .").

5. Plaintiff's representation that Mrs. Baker's property value assertion was not part of the record but raised for the first time in her reply memorandum, is false and refuted by the record;

6. Plaintiff asserts that the Utah Supreme Court, in *Jackson Construction*, "made clear that Utah courts satisfy the due process concerns outlined in *Mullane* by [satisfying the diligent efforts requirement]," when the due process concerns actually discussed in *Mullane* had nothing to do with efforts to *find* defendants but the prohibition of serving defendants whose location was already known exclusively by publication.

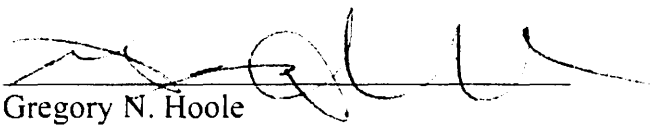
Had Plaintiff made only one minor misrepresentation, or two, Mrs. Baker would not think to seek fees under Rule 33. But when Plaintiff makes three, four, five, and even six, material misrepresentations, it submits that an award of fees under the rule is in order.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in her opening brief, Mrs. Baker respectfully requests that this Court reverse the trial court's decision to deny relief to Mrs. Baker under rule 60(b) of the Utah Rules of Civil Procedure and remand this action to the trial court for further proceedings.

DATED this 13th day of June, 2016.

HOOLE & KING, L.C.



Gregory N. Hoole
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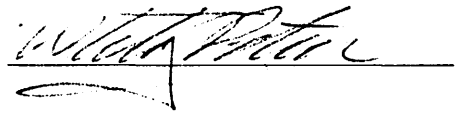
CERTIFICATE OF COMPLIANCE

The text of this brief is presented in a proportionally spaced typeface using WordPerfect in Times New Roman 13-point type, and, according to WordPerfect's word count feature, consists of 5,160 words, including headings, footnotes and quotations.



CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of June, 2016, a true and correct copy of the foregoing was served upon the following in the manner indicated below:

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