

2016

**C504750, LLC, a Utah Limited Liability Company, Plaintiff/
Appellee vs. Staci Baker, Defendant/Appellant**

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca3



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah.

Recommended Citation

Brief of Appellant, *C504750 v Baker*, No. 20150826 (Utah Court of Appeals, 2016).
https://digitalcommons.law.byu.edu/byu_ca3/3485

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs (2007–) by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

39154

IN THE COURT OF APPEALS, STATE OF UTAH

C504750, LLC, a Utah limited liability
company,

Plaintiff and Appellee,

vs.

STACI BAKER

Defendant and Appellant.

APPELLEE'S BRIEF

Appellate Case No.: 20150826-CA

District Court Case No.

ON APPEAL FROM THE DECISION OF THE FOURTH DISTRICT COURT,
UTAH COUNTY, HONORABLE JAMES R. TAYLOR, PRESIDING

Gregory N. Hoole (7894)
HOOLE & KING, L.C.
4276 South Highland Drive
Salt Lake City, Utah 84114-0858

Attorney for Appellant

Wm. Kelly Nash (4888)
Kimberly N. Baum (14589)
DURHAM JONES & PINEGAR,
PC
3301 N. Thanksgiving Way, Ste 400
Lehi, Utah 84043

Attorneys for Appellee

FILED
UTAH APPELLATE COURTS

MAY 11 2016

IN THE COURT OF APPEALS, STATE OF UTAH

C504750, LLC, a Utah limited liability
company,

Plaintiff and Appellee,

vs.

STACI BAKER

Defendant and Appellant.

APPELLEE'S BRIEF

Appellate Case No.: 20150826-CA

District Court Case No.

ON APPEAL FROM THE DECISION OF THE FOURTH DISTRICT COURT,
UTAH COUNTY, HONORABLE JAMES R. TAYLOR, PRESIDING

Gregory N. Hoole (7894)
HOOLE & KING, L.C.
4276 South Highland Drive
Salt Lake City, Utah 84114-0858

Attorney for Appellant

Wm. Kelly Nash (4888)
Kimberly N. Baum (14589)
DURHAM JONES & PINEGAR,
PC
3301 N. Thanksgiving Way, Ste 400
Lehi, Utah 84043

Attorneys for Appellee

TABLE OF CONTENTS

JURISDICTIONAL STATEMENT.....	1
CONSTITUTIONAL OR STATUTORY PROVISIONS	1
ISSUE AND STANDARD OF REVIEW.....	1
STATEMENT OF THE CASE	2
STATEMENT OF FACTS.....	5
SUMMARY OF THE ARGUMENT.....	11
I. Sections II and III are not properly before this Court on appeal	11
II. The District Court did not err when it denied Defendant’s Motion to Set Aside where it found Plaintiff exercised reasonable diligence and had good cause to believe Defendant was avoiding service, and authorized service by publication	11
III. Should the Court consider Defendant’s alleged meritorious defense, arguendo, Defendant’s arguments are unsupported	12
ARGUMENT	13
I. SECTIONS II AND III OF DEFENDANT’S BRIEF SHOULD BE DISREGARDED AS THEY RAISE ARGUMENTS THAT WERE NOT PRESERVED BELOW, EXCEED THE SCOPE OF THE APPEAL AND ARE IRRELEVANT	13
A. Defendant’s Appeal is Limited to a Review of the District Court’s Denial of Plaintiff’s Rule 60(b)(4) Motion to Set Aside	14
B. While Defendant’s New Arguments Respecting Rule 60(b)(6) Relief and Extraneous and/or Equitable Considerations Were Not Preserved, Arguendo, Such Are Not a Basis For Relief on Appeal	15
C. Defendant Did Not Preserve Her New Arguments Under Rule 60(b)(6), Including Regarding Timeliness or Concerning the Existence of a Meritorious Defenses	17

D. <i>Arguendo</i> , Defendant’s Arguments Regarding Timeliness, the Alleged Existence of a Meritorious Defense and Any Other Equitable Factors are Irrelevant and Should Be Disregarded	19
II. AS DETERMINED BY THE DISTRICT COURT, PLAINTIFF WAS REASONABLY DILIGENT IN ATTEMPTING TO SERVE DEFENDANT AND HAD GOOD CAUSE TO BELIEVE DEFENDANT WAS AVOIDING SERVICE BEFORE OBTAINING APPROVAL TO SERVE DEFENDANT BY PUBLICATION AS AUTHORIZED UNDER RULE 4.....	20
A. Plaintiff Was Reasonably Diligent In Attempting To Serve Defendant And Had Good Cause To Believe Defendant Was Avoiding Service.....	24
B. Service By Publication Not Only Was a Reasonable Means of Informing Defendant, But Also Was Expressly Authorized By The Rules.....	27
III. <i>ARGUENDO</i> , SHOULD THE COURT CONSIDER DEFENDANT’S ALLEGED MERITORIOUS DEFENSE, DEFENDANT’S ARGUMENTS ARE UNSUPPORTED.....	29
Conclusion.....	35

TABLE OF AUTHORITIES

A. Cases

<i>438 Main St. v. Easy Heat, Inc.</i> , 2004 UT 72, 99 P.3d 801	17
<i>Badger v. Brooklyn Canal Co.</i> , 966 P.2d 844 (Utah 1998)	17
<i>Bodell Const. Co. v. Robbins</i> , 2014 UT App 203, 334 P.3d 1004	14
<i>Bonneville Billing v. Whatley</i> , 949 P.2d 768 (Utah App. 1997)	2, 21
<i>Brimhall v. Mecham</i> , 494 P.2d 525 (Utah 1972)	12, 20
<i>Brookside Mobile Home Park, Ltd. v. Peebles</i> , 2002 UT 48, 48 P.3d 968.....	17
<i>Carson v. Northstar Development Co.</i> , 62 Wash. App. 310, 814 P.2d 217 (1991).....	23
<i>Cnty. Dental Servs. v. Tani</i> , 282 F.3d 1164 (9th Cir. 2002)	16
<i>Cooke v. Cooke</i> , 2001 UT App 110, 22 P.3d 1249	12, 21
<i>Crane-Jenkins v. Mikarose, LLC</i> , 2015 UT App 270	1, 21
<i>Downey State Bank v. Major–Blakeney Corp.</i> , 545 P.2d 507 (Utah 1976).....	23
<i>Encon Utah, LLC v. Fluor Ames Kraemer, LLC</i> , 2009 UT 7, 210 P.3d 263	2, 22, 29
<i>Express Recovery Services v. Davis</i> , 2012 UT App 296, 289 P.3d 606	14
<i>Foutz v. City of S. Jordan</i> , 2004 UT 75, 100 P.3d 1171	30
<i>Franklin Covey Client Sales, Inc. v. Melvin</i> , 2000 UT App 110, 2 P.3d 451	14
<i>Garcia v. Garcia</i> , 712 P.2d 288 (Utah 1986).....	15, 20
<i>Jackson Const. Co., Inc. v. Marrs</i> , 2004 UT 89, 100 P.3d 1211	21, 22, 23
<i>Larsen v. Collina</i> , 684 P.2d 52 (Utah 1984)	19
<i>Laub v. S. Cent. Utah Tel. Ass'n.</i> , 657 P.2d 1304 (Utah 1982)	16
<i>Marion Energy, Inc. v. KFJ Ranch P'ship</i> , 2011 UT 50, 267 P.3d 863.....	29

<i>McComb v. Aboelessad</i> , 535 N.W.2d 744 (N.D. 1995)	23
<i>Menzies v. Galetka</i> , 2006 UT 81, 150 P.3d 480, 506.....	16
<i>Mgmt. Servs. v. Dev. Assocs.</i> , 617 P.2d 406 (Utah 1980)	23
<i>Miller v. Weaver</i> , 2003 UT 12, 66 P.3d 592	30
<i>Mountain States Tel. & Tel. Co. v. Pub. Serv. Comm'n</i> , 107 Utah 502, 155 P.2d 184 (1945)	32
<i>Mullane v. Cent. Hanover Bank & Trust Co.</i> , 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950)	22, 23
<i>O'Dea v. Olea</i> , 2009 UT 46, 217 P.3d 704	17, 29
<i>Perrine v. Kennecott Mining Corp.</i> , 911 P.2d 1290 (Utah 1996)	30
<i>Pioneer Inv. Servs. Co. v. Brunswick Assocs.</i> , 507 U.S. 380, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993)	16
<i>Platts v. Parents Helping Parents</i> , 947 P.2d 658 (Utah 1997)	32
<i>Russell v. Martell</i> , 681 P.2d 1193 (Utah 1984).....	16
<i>Salt Lake City Corp. v. Jordan River Restoration Network</i> , 2012 UT 84, 299 P.3d 990	21
<i>State ex rel. Z.C.</i> , 2007 UT 54, 165 P.3d 1206	29
<i>State ex rel. L.B.</i> , 2003 UT App 349	12, 21
<i>State v. Anderson</i> , 2007 UT App 304, 169 P.3d 778	31
<i>State v. Maestas</i> , 2002 UT 123, 63 P.3d 621	32
<i>State v. Phathamavong</i> , 860 P.2d 1001 (Utah App.1993)	18
<i>State v. Wallace</i> , 2006 UT 86, 150 P.3d 540.....	32
<i>Stevens v. LaVerkin City</i> , 2008 UT App 129, 183 P.3d 1059	17, 18

<i>Swallow v. Kennard</i> , 2008 UT App 134, 183 P.3d 1052	14
<i>United Nat'l Bank v. Searles</i> , 331 N.W.2d 288 (S.D.1983)	23
<i>Utah Res. Int'l, Inc. v. Mark Techs. Corp.</i> , 2014 UT 60, 342 P.3d 779	2, 21
<i>Utah State Tax Comm'n v. Stevenson</i> , 2006 UT 84, 150 P.3d 521	32
<i>Western Capital & Sec. v. Knudsvig</i> , 768 P.2d 989 (Utah App. 1989)	2, 21
<i>Wood v. Weenig</i> , 736 P.2d 1053 (Utah App. 1987)	23, 26
<i>Workman v. Nagle Const., Inc.</i> , 802 P.2d 749 (Utah App. 1990)	15, 17, 20

B. Statutes

Fed. R. Civ. P. 60(b)(6)	16
Utah Code Ann. § 59-2-1351(2)	28
Utah Code Ann. § 59-2-1351.7	3, 6, 12, 14, 30
Utah Code Ann. § 59-21351.7(2)	31
Utah Code Ann. § 78A-4-103(2)(j)	1
Utah R. Civ. P. 4	1, 5, 10
Utah R. Civ. P. 4(d)(4)(A)	1, 4, 22, 25, 27, 28
Utah R. Civ. P. 60(b)	1, 5, 10, 13, 14, 15, 16, 19, 20, 21
Utah R. Civ. P. 60(b)(1)	15, 17, 19
Utah R. Civ. P. 60(b)(2)	15, 17, 19
Utah R. Civ. P. 60(b)(3)	15, 17, 19
Utah R. Civ. P. 60(b)(4)	1, 5, 10, 11, 13, 14, 15, 16, 18, 19, 20, 29
Utah R. Civ. P. 60(b)(6)	11, 15, 16, 17, 18

JURISDICTIONAL STATEMENT

This Court's jurisdiction rests upon Utah Code Ann. § 78A-4-103(2)(j).

CONSTITUTIONAL OR STATUTORY PROVISIONS

Despite Defendant/Appellant Staci Baker's ("**Defendant**") assertion, Plaintiff/Appellee C504750, LLC ("**Plaintiff**") does not believe there is a constitutional provision which is directly relevant or material to this appeal because the sole issue and scope of appellate review concerns the District Court's August 21, 2015 *Order Denying Motion for Relief from Default Judgment*, which Motion was asserted pursuant to Utah R. Civ. P. 4 and 60(b)(4).

ISSUE AND STANDARD OF REVIEW

Issue: Did the District Court err when it denied *Defendant's Motion for Relief from Default Judgment* ("**Motion to Set Aside**"), where the District Court found Plaintiff exercised reasonable diligence and had good cause to believe the Defendant was avoiding service, and based thereon, authorized service by publication pursuant to Rule 4(d)(4)(A)?

Standard of Review: A denial of motion to set aside a default judgment is generally reviewed under an abuse of discretion standard, with the underlying factual determination of whether a defendant was served with process reviewed under a clearly erroneous standard. *Crane-Jenkins v. Mikarose, LLC*, 2015 UT App 270, ¶ 9. ("A 'district court has broad discretion in ruling on a motion to set aside an order of judgment under rule 60(b), and [t]hus, we review a district court's denial of a 60(b) motion under an

abuse of discretion standard.”) (*quoting Utah Res. Int’l, Inc. v. Mark Techs. Corp.*, 2014 UT 60, ¶ 11, 342 P.3d 779 (alteration in original). If a motion to set aside a default judgment is brought because the judgment is “void” for lack of process, however, such is reviewed under a correction-of error standard. *Bonneville Billing v. Whatley*, 949 P.2d 768, 771 (Utah App. 1997). Importantly, a court can only overturn the factual finding of proper service if the district court’s findings were “without adequate evidentiary support or induced by an erroneous view of the law.” *Western Capital & Sec. v. Knudsvig*, 768 P.2d 989, 991 (Utah App.), *cert. denied*, 779 P.2d 688 (Utah 1989). Further, “[f]indings of fact are not clearly erroneous unless they are so lacking in support as to be against the clear weight of the evidence.” *Encon Utah, LLC v. Fluor Ames Kraemer, LLC*, 2009 UT 7, ¶ 11, 210 P.3d 263.

STATEMENT OF THE CASE

Nature of Case and Procedural History. This appeal is from the Utah Fourth Judicial District Court’s July 20, 2015 bench ruling, as confirmed in an August 21, 2015 final *Order Denying Motion for Relief from Default Judgment*. Based on “the pleadings, papers and evidence filed” and “good cause appearing”, the District Court found, *inter alia*, that “Defendant has avoided service” and “service by normal means is unreasonable and impracticable under the circumstances” and denied Defendant’s Motion for Relief from Default Judgment (“**Motion to Set Aside**”).

This case arises out of an action for specific performance relating to Plaintiff’s June 10, 2014 attempted purchase of Defendant’s 40% undivided interest in a

residential property, which Defendant purchased at a July 31, 2013 tax sale for the nominal amount of \$5,070.07 (i.e., whereby Defendant became a “tax sale interest purchaser” pursuant to Utah Code Ann. § 59-2-1351.7). Notwithstanding receipt of a certified letter from Plaintiff’s counsel respecting Plaintiff’s June 10, 2014 execution of a Real Estate Purchase Agreement (“REPC”) to purchase the property, Defendant refused to sell her interest in the property to Plaintiff (i.e., as required by § 59-2-1351.7) (emphasis added), which mandates that a “tax sale interest purchaser may not object to the sale of the tax sale property” under the facts herein. Defendant also threatened legal proceedings relating to the property. As a result and on August 28, 2014, Plaintiff filed suit to quiet title to Defendant’s interest in the property.

The record is undisputed that Plaintiff thereafter attempted, in good faith, from September 1, 2014 to September 18, 2014 to serve process on and/or to make contact with Defendant on multiple occasions and by multiple means. In process server Matthew Dyches’ Declaration of Non-Service, filed with the District Court, he testified to attempting to personally serve Defendant in September of 2014 on at least five separate occasions, each on a different day of the week over an 18 day time period and at a different time of day (i.e., Monday 9/1 at 6:40 p.m., Friday 9/5 at 5:10 p.m., Sunday 9/7 at 8:11 p.m., Tuesday 9/16 at 11:53 a.m. and Thursday 9/18 at 7:36 p.m.). During several of these attempts, Mr. Dyches saw people in the house and/or cars in the driveway, but they ignored him and/or refused to answer the door. He talked to neighbors on two separate occasions and confirmed Defendant resided at the residence.

On one occasion, Mr. Dyches left his business card at the door to facilitate a phone or in-person contact without response from Defendant. Mr. Dyches made visual contact with at least one person in the residence, who ignored him, and who, only after Mr. Dyches was driving off, walked out of the residence to get the mail. Thereafter, Mr. Dyches saw the same man sitting in an office in the residence, the front door of which was slightly open, and Mr. Dyches yelled to him, rang the doorbell and knocked loudly, though the man continued to ignore and refused to speak with him. After returning from a neighbor's, whereby he reconfirmed Defendant resided there and as Mr. Dyches was leaving, he observed that the door had been closed and the blinds to the office had been pulled shut. Independently, Ms. Staci Robison-Reith, a paralegal for Plaintiff's counsel, also performed an electronic address search on Defendant, confirmed the address was current and mailed a certified letter, return receipt requested, to Plaintiff, which was returned unclaimed. Significantly, "[a]fter careful inquiry and diligent attempts" and based on his experience, Mr. Dyches reasonably concluded Defendant had avoided service and professionally "recommended" that Plaintiff seek an "alternate method of service." R. 47.

Understandably frustrated by Defendant's avoidance of service and pursuant to Rule 4(d)(4)(A), Plaintiff requested approval from the District Court to serve Defendant through publication. On October 1, 2014 and in ordering Plaintiff to publish notice of the action to Defendant by publication (as also subsequently proven

to the District Court thereafter in connection with Defendant's Motion to Set Aside), the District Court considered Plaintiff's request and specifically found:

1. Defendant has avoided personal service and there are no other means to personally serve Defendant.
2. The whereabouts of the person to be served are either unknown and cannot be ascertained through reasonable diligence, or there exists good cause to believe that the persons to be served are avoiding service of process, and service by normal means is unreasonable and impracticable under the circumstances.

Amended Order Granting Ex Parte Motion For Alternative Service By Publication, R.

61-62. Plaintiff complied with the District Court's foregoing directives.

When Defendant failed to timely file an answer, Plaintiff sought and was granted a default judgment. Months later, Defendant filed her Motion to Set Aside the default judgment pursuant to Utah R. Civ. P. 4 and 60(b) (effectively under 60(b)(4), asserting and arguing the default judgment was "void"). On July 20, 2015, a hearing was held regarding Defendant's Motion to Set Aside. Having carefully reviewed "the pleadings, papers and evidence filed" in regard thereto and "good cause appearing", the District Court denied the Motion to Set Aside, from which the appeal was taken.

STATEMENT OF FACTS

1. C161P, LLC was the sole owner of the property located at 161 W. Pacific Dr., American Fork, UT 84003 (the "Property"). (R. 126; R. 2.)
2. An undivided interest in the Property was auctioned off at a tax sale to satisfy past due property tax obligations, which was impliedly effectuated at a below market value. *See Fact 3, infra.*

3. On/or about July 31, 2013, Defendant purchased a 40% undivided interest as a “tax sale purchaser” for \$5,070.07. (R. 126; R. 2.)

4. C161P, LLC continued to own 60% of the undivided interest and decided to sell the Property to Plaintiff. (R. 2.)

5. On/or about June 10, 2014, C161P, LLC entered into a REPC. (R. 27-30.)

6. Defendant was intended to be a seller of her 40% interest in the Property under the REPC (with an associated third party beneficiary interest).

7. On July 25, 2014, Plaintiff’s counsel sent Defendant a letter via certified and regular mail addressed to Staci Baker at 1748 Glendell Drive, Orem, UT 84058. (R. 203-704.)

8. This letter stated Plaintiff’s counsel was aware that Defendant had “a 40% undivided interest in the property” and referenced the entry number, and attached the relevant Tax Deed. The letter informed Defendant “that this property currently has an offer on it and is under contract for sale” (for which Defendant was a beneficiary). The letter further stated “as a tax sale interest purchaser, you are entitled to the pro rata share of the sale price of the property based on your undivided interest in the property in accordance with section 59-2-1351.7 of the Utah Code.” A copy of Utah Code Ann. § 59-2-1351.7 was attached to the letter. Finally, the letter provided, “[t]herefore, in compliance with this statute, please attend the closing on this property currently set for August 1, 2014 at 10 a.m. to sign a quit claim deed for your interest in the property in exchange for the check for your pro rata share of your interest.” The letter established the

address and contact information for the closing. (R. 206-220.)

9. On July 31, 2014, Defendant's husband responded to the foregoing letter via email. The email stated "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." It 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." The letter finally stated he "intend[s] to pursue collection of these lost rents in any legal proceedings that become necessary. Conduct yourselves accordingly, Staci Baker." (R. 222-223.)

10. After receiving this response and on August 28, 2014, Plaintiff filed its Complaint for quiet title. (R. 1-5.)

11. Out of an abundance of caution, although Plaintiff already knew Defendant's address was correct, Plaintiff's counsel ran an updated internet search to confirm Defendant's address was current. (R. 050-051.)

12. Further, Plaintiff's counsel drafted and Staci Robison-Reith (paralegal for Plaintiff's counsel) sent Defendant another letter via certified mail, but was then returned unclaimed. (*Id.*)

13. On August 28, 2014, Plaintiff contracted for the independent, professional services of Mr. Matthew Dyches, an experienced process server, at Court Ops, to serve the Complaint upon Defendant at Defendant's address according to Plaintiff's knowledge. (R. 047.)

14. On Monday, September 1, 2014 at 6:40 p.m., Mr. Dyches first attempted service on Defendant at 1748 Glendell Drive, Orem, Utah, 84058 (“**Defendant’s Residence**”). There was no answer. Mr. Dyches confirmed with a neighbor that Defendant lived at the residence. (*Id.*)

15. On Friday, September 5, 2014 at 5:10 p.m., Mr. Dyches again attempted service at Defendant’s Residence. He left his business card (i.e., to facilitate a phone or in person contact). (*Id.*)

16. On Sunday, September 7, 2014 at 8:11 p.m., Mr. Dyches attempted service a third time at Defendant’s Residence. He saw a note at the residence addressed to Defendant, which reconfirmed it was her address. He also believed he saw someone through the window as he left. (*Id.*)

17. On Tuesday, September 16, 2014 at 11:53 a.m., Mr. Dyches returned again to the Defendant’s Residence to serve her. He saw individuals moving inside the home in addition to three vehicles at the property. No one answered the door, but as Mr. Dyches was driving off, he saw a gentleman walk out to get the mail and the gentleman observed Mr. Dyches drive off. (*Id.*)

18. Finally, on Thursday, September 18, 2014 at 7:36 p.m., Mr. Dyches again tried to serve Defendant at Defendant’s Residence. The blinds were open and the lights were on and he could see the same gentleman inside who got the mail on the previous service attempt. The front door was open a few inches and the blinds to an office next to the front door were open and the lights were on. Mr. Dyches yelled to the man inside,

knocked loudly and rang the doorbell. While Mr. Dyches could see him sitting in his office in front of his computer, the man would not respond to Mr. Dyches. Mr. Dyches then walked to the neighbors on the south side of the home and verified that the Defendant still lived there. When Mr. Dyches walked back to Defendant's Residence, shortly thereafter, he observed that the front door had been shut all the way and the blinds to the office had been closed. (*Id.*)

19. At that time, Mr. Dyches completed his sworn Declaration of Non-Service, stating that "[a]fter careful inquiry and diligent attempts", he was "unable to serve" Defendant, and based on his experience, he independently recommended alternative service. (*Id.*)

20. On September 23, 2014 and following the foregoing service attempts over a period of nearly 3 weeks, Plaintiff filed a Motion for Alternative Service by Publication detailing the various service attempts by Mr. Dyches and establishing Plaintiff's reasonable diligence in attempting to serve Defendant. (R. 042-054.)

21. On October 1, 2014, the District Court granted Plaintiff's Motion for Alternative Service and expressly found, *inter alia*, Defendant "had avoided personal service". The District Court ordered, *inter alia*, that Defendant shall be served through publication on two occasions on consecutive weeks in a newspaper of general circulation in Utah County, Utah. (R. 061-062.)

22. In compliance with the District Court's order, Plaintiff published notice in The Daily Herald, based out of Utah County, Utah, on October 5, and 12, 2014. (R. 065-067.)

23. Plaintiff incurred over \$200 in costs to serve Defendant through publication.

(*Id.*)

24. On October 14, 2014, Plaintiff filed the Summons with Proof of Publication with the Court. (*Id.*)

25. Approximately a month later, on November 12, 2014, the Court Clerk signed a Praecipe upon Default and Default Certificate of Defendant Staci Baker. (R. 070-071.)

26. On November 26, 2014, the Court entered Default Judgment. (R. 098-100.)

27. On February 24, 2016, Defendant filed her Motion to Set Aside pursuant to Utah R. Civ. P. 4 and 60(b), arguing under 60(b)(4) that Defendant was not served, therefore rendering the judgment void. (R. 121-132.)

28. On July 20, 2015 and following briefing and oral argument, the District Court issued a bench ruling, stating that

having reviewed the affidavits, rereviewed what I did in the first instance in authorizing the service by publication. I would do it the same way. I'm satisfied that based upon the affidavit that was presented to me that there was sufficient evidence to justify alternative service. The process server didn't merely knock on the door five times and say nobody is there. He checked with neighbors, he saw people moving around. . . . He had to believe there were people there that were refusing to respond to him.

(R. 0372.) The District Court concluded that service through publication in The Daily Herald was sufficient under these circumstances. (*Id.*)

29. On August 21, 2015, the District Court issued its final Order Denying Motion for Relief from Default Judgment, wherein it found, *inter alia*, that:

1. Defendant has avoided personal service and there are no other means to personally serve Defendant.
2. The whereabouts of the person to be served are either unknown and cannot be ascertained through reasonable diligence, or there exists good cause to believe that the persons to be served are avoiding service of process, and service by normal means is unreasonable and impracticable under the circumstances.

(R. 61-62.)

SUMMARY OF THE ARGUMENT

I. Sections II and III are not properly before this Court on appeal.

Defendant's Motion to Set Aside and related argument were presented on the basis that the default judgment was "void" for lack of service pursuant to Rule 60(b)(4). As such, the scope of Defendant's appeal is limited to whether the District Court erred in denying the Motion to Set Aside on that basis. Defendant incorrectly attempts to argue, *inter alia*, that she is entitled to relief pursuant to the Utah R. Civ. P. 60(b)(6), which is for "any other reason that justifies relief." This is a "catch-all" provision that cannot be invoked if any of the other bases for relief are applicable. Defendant's extraneous arguments regarding the merits of the underlying default judgment (i.e., attorney's fees and timing) and the merits of Defendant's alleged defense, if any, thereto should not be considered as beyond the scope of the appeal. These arguments were not preserved and are irrelevant.

II. The District Court did not err when it denied Defendant's Motion to Set Aside where it found Plaintiff exercised reasonable diligence and had good cause to believe Defendant was avoiding service, and authorized service by publication. Rule 60(b)(4) allows for relief from a judgment where the judgment is shown to be "void",

however, “[t]he concept of a void judgment is narrowly construed in the interest of finality.” *Brimhall v. Mecham*, 494 P.2d 525, 526 (Utah 1972). Significantly, “[w]hether a defendant was properly served with process is a question of fact, reviewed under the clearly erroneous standard.” *State ex rel. L.B.*, 2003 UT App 349 (citing *Cooke v. Cooke*, 2001 UT App 110, ¶ 7, 22 P.3d 1249) (emphasis added). Plaintiff “diligently” attempted to serve Defendant at her known residence, through at least five separate service attempts as referenced in the Facts, *supra*, and came to believe based on “good cause” that Defendant was “avoiding service”. Only upon Plaintiff’s proof of such (by undisputed and admissible evidence) did the District Court soundly exercise its discretion to allow Plaintiff to serve Defendant by publication. The District Court neither made clearly erroneous findings, nor misapplied the law.

III. Should the Court consider Defendant's alleged meritorious defense, *arguendo*, Defendant's arguments are unsupported. *Arguendo*, Defendant’s urged statutory interpretation is inconsistent with the plain language of Utah Code Ann. § 59-2-1351.7. 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 object” to a subsequent sale by the majority property owner. *See id.* Nowhere in the statute does it provide, expressly or impliedly, that a minority owner can object. Indeed, consistent with the majority owner’s unconditional right to sell the property as and when he/she chooses, the statute contains an explicit guarantee respecting the return of the tax sale interest purchaser’s interest in specified proceeds of sale from the property. In this case, the

majority interest owner sold the property and offered Defendant 40% of the purchase price of the property, which exceeded the statutorily guaranteed 12% return on her investment. This satisfied the plain terms of statute. Defendant's request that the Court construe and interpret the statute in a manner that is contrary to the plain and unambiguous language thereof should be rejected.

The District Court's denial of Defendant's Motion to Set Aside should be affirmed.

ARGUMENT

I. SECTIONS II AND III OF DEFENDANT'S BRIEF SHOULD BE DISREGARDED AS THEY RAISE ARGUMENTS THAT WERE NOT PRESERVED BELOW, EXCEED THE SCOPE OF THE APPEAL AND ARE IRRELEVANT.

Defendant asserts several arguments which should not be considered on appeal. While general reference was made to Rule 60(b), Defendant's Motion to Set Aside and related argument were presented on the basis that the default judgment was "void" for lack of service pursuant to Rule 60(b)(4). As such, the scope of Defendant's appeal is limited to whether the District Court erred in denying the Motion to Set Aside on that basis (i.e., whether Defendant was properly served). Defendant's extraneous arguments regarding the merits of the underlying default judgment (i.e. attorney's fees) and the merits of Defendant's alleged defense, if any, thereto should not be considered as beyond the scope of the appeal. These arguments were not preserved and are irrelevant.

A. Defendant's Appeal is Limited to a Review of the District Court's Denial of Plaintiff's Rule 60(b)(4) Motion to Set Aside.

This Court has long recognized that the “review of a district court’s rule 60(b) order is ‘limited in scope’ because such an appeal must only address ‘the propriety of the denial or grant of relief,’ not the correctness of the underlying judgment.” *Bodell Const. Co. v. Robbins*, 2014 UT App 203, ¶ 5, 334 P.3d 1004 (quoting *Franklin Covey Client Sales, Inc. v. Melvin*, 2000 UT App 110, ¶ 19, 2 P.3d 451). See also *Express Recovery Services v. Davis*, 2012 UT App 296, ¶ 4, 289 P.3d 606; *Swallow v. Kennard*, 2008 UT App 134, ¶ 19, 183 P.3d 1052, 1057.

As grounds for her Motion to Set Aside and citing Rules 4 and 60(b), Defendant specifically asserted, “[d]ue to the lack of diligence by Plaintiff and the lack of notice to [Defendant], the November 26, 2014 Order is void.” R. 122. Consistent therewith, Defendant similarly reasserted in her supporting memorandum that “[u]nder these relevant rules and authorities, the Order is void and should be vacated.” R. 129. Having thereby established and preserved only the issue of whether the District Court abused its discretion in denying Defendant’s Motion to Set Aside based on the default judgment being “void” under Rule 60(b)(4), Defendant cannot be heard to raise new arguments on appeal or to challenge extraneous proceedings below.

Because Defendant’s reference to and arguments regarding the merits of the default judgment, including attorney’s fees (Section II of Appellant’s Brief), the interpretation of Utah Code § 59-2-1351.7 (Partial Interest Tax Sale), and/or relief under

Rule 60(b)(6), are improperly asserted and cannot be considered on appeal, such should be disregarded as beyond the scope of this appeal.

B. While Defendant's New Arguments Respecting Rule 60(b)(6) Relief and Extraneous and/or Equitable Considerations Were Not Preserved, *Arguendo*, Such Are Not a Basis For Relief on Appeal.

Arguendo, in her Brief, Defendant references Rule 60(b)(6) (which considers relief for “any other reason that justifies relief from the operation of the judgment”), presumably as a new and additional ground to set aside the default judgment. As the Court is aware, Rule 60(b) identifies six general categories or reasons for which a party may seek relief from a judgment. For example, Rule 60(b)(1), (2) and (3) permit relief by reason of mistake, inadvertence, surprise, or excusable neglect; newly discovered evidence; and fraud, respectively. Lack of proper service, whereby a court may determine that a “judgment is void”, however, falls under Rule 60(b)(4). *See Garcia v. Garcia*, 712 P.2d 288, 290 (Utah 1986) (discussing a judgment being considered void for fatally defective service of process). Unlike other categories of relief under Rule 60(b), under Rule 60(b)(4), a district court has no discretion in deciding relief — if there was adequate service, the court cannot set aside the judgment as void. *Workman v. Nagle Const., Inc.*, 802 P.2d 749, 754 (Utah App. 1990) (“Generally, the district court has some discretion in ruling on a rule 60(b) motion. However, if the judgment is determined to be void, the court has no discretion, and the judgment must be set aside.”). Thus, the court cannot consider other equitable factors (i.e., timeliness, meritorious defense, etc.) as it may do under other 60(b) bases for relief as further discussed, *infra*, in Section I.D.

Significantly, “Rule 60(b)(6) is the ‘catch-all’ provision of rule 60(b). . . . Because rule 60(b)(6) is meant to operate as a residuary clause, it may not be relied upon if the asserted grounds for relief fall within any other subsection of rule 60(b).” *Menzies v. Galetka*, 2006 UT 81, ¶ 71, 150 P.3d 480, 506 (emphasis added) (citing *Cnty. Dental Servs. v. Tani*, 282 F.3d 1164, 1168 (9th Cir. 2002); *Russell v. Martell*, 681 P.2d 1193, 1195 (Utah 1984); and *Laub v. S. Cent. Utah Tel. Ass’n.*, 657 P.2d 1304, 1306–07 (Utah 1982)). “In other words, the grounds for relief under 60(b)(6) are exclusive of the grounds for relief allowed under other subsections.” *Id.* (citing *Russell*, 681 P.2d at 1195; *Tani*, 282 F.3d at 1168 & n.8. Of course, relief under Rule 60(b)(6) “should be ‘sparingly invoked’ and used ‘only in unusual and exceptional circumstances.’” *Id.* (quoting *Laub*, 657 P.2d at 1307–08; see also *Pioneer Inv. Servs. Co. v. Brunswick Assocs.*, 507 U.S. 380, 393, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993) (under Fed. R. Civ. P. 60(b)(6), a party must show “extraordinary circumstances”); *Tani*, 282 F.3d at 1168 (same)).

While erroneously stating that she moved for relief pursuant to Rule 60(b)(6) (Appellant’s Brief, p. 15), Defendant clearly requested relief from the judgment because the judgment was “entered without due process of law [and is] void.” See Appellant’s Brief, p. 15. Because relief based on a judgment being “void” only falls under Rule 60(b)(4), Defendant’s indirect reference to relief under the catchall provision of Rule 60(b)(6) is misplaced. This distinction is of critical importance because the scope of review under Rule 60(b)(4) is different from the basis for relief under Rule 60(b)(4), as

the court may only consider whether the Defendant was properly served or not. *See Workman, supra*. Thus, Defendants' other arguments regarding extraneous and/or equitable considerations or requirements, such as timeliness under Rule 60(b)(1), (2) or (3), the mechanics of the tax sale, or any alleged defense Defendant may have, are simply irrelevant and not properly before the Court, as also further discussed, *infra*, in Section I.C and I.D.

C. Defendant Did Not Preserve Her New Arguments Under Rule 60(b)(6), Including Regarding Timeliness or Concerning the Existence of a Meritorious Defenses.

As suggested, *supra*, Defendant's new claim for relief based on Rule 60(b)(6), various timing considerations and the alleged existence of a meritorious defense under Rule 60(b)(6) were not timely asserted or preserved in the District Court proceedings. Utah law is clear that "to preserve an issue for appellate review, a party must first raise the issue in the trial court," because "a trial court must be offered an opportunity to rule on an issue." *O'Dea v. Olea*, 2009 UT 46, ¶¶ 17-18, 217 P.3d 704 (*quoting Badger v. Brooklyn Canal Co.*, 966 P.2d 844, 847 (Utah 1998)). "[I]n 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." *438 Main St. v. Easy Heat, Inc.*, 2004 UT 72, ¶ 51, 99 P.3d 801 (*quoting Brookside Mobile Home Park, Ltd. v. Peebles*, 2002 UT 48, ¶ 14, 48 P.3d 968) (alterations in original). Importantly, when a party "first raise[s an] issue in his reply memorandum, it [is] not properly before the trial court and we will not consider it for the first time on appeal." *Stevens v. LaVerkin City*, 2008 UT App 129, ¶¶

30-31, 183 P.3d 1059 (*quoting State v. Phathammavong*, 860 P.2d 1001, 1004 (Utah App.1993)) (alterations in original).

In *Stevens*, the appellate court refused to consider a new basis for relief from a default judgment that the moving party raised for the first time in a reply memorandum. *Id.* This Court noted that although there was no motion to strike, the District Court “did not acknowledge or otherwise address” the new basis, which was raised for the first time in defendant’s reply. *Id.* at ¶ 30. Therefore, the new basis was not properly preserved and could not be reviewed on appeal. *Id.*

Here, Defendant filed a Motion to Set Aside simply asserting that the default judgment was void under Rule 60(b)(4). R. 129-131. Plaintiff opposed the Motion to Set Aside. R. 191-201. Only thereafter, did Defendant, for the first time, raise new and additional grounds and factors for relief in her *Reply in Support of the Motion for Relief from Default Judgment*. R. 228-232. Naturally, Plaintiff moved to strike such new bases as being improperly raised for the first time on reply. R. 288-89. 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)). R. 342-373. Thus, the District Court properly denied Defendant’s Motion to Set Aside solely on the question of whether the Defendant was properly served. Defendant’s after-the-fact reference to new additional grounds (i.e., under Rule 60(b)(6), whereby the existence of a meritorious defense might be a relevant factor) was not considered. As such arguments were not preserved below, they are not properly before this Court.

Notably, Defendant has admitted that any arguments regarding an alleged meritorious defense or the merits of the underlying default judgment were not raised in the District Court. 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. *See also Larsen v. Collina*, 684 P.2d 52 (Utah 1984).” R. 0131. Though Defendant appears to have changed her position on this issue for purposes of appeal, the underlying merits of the default judgment (including awarding attorney’ fees) or the existence of an alleged meritorious defense thereto were not addressed by or preserved in the District Court and cannot be raised for the first time on appeal. Thus, these issues and arguments (which make up the entirety of Sections II and III of the Defendant’s brief) should be disregarded by the Court on appeal.

D. *Arguendo*, Defendant’s Arguments Regarding Timeliness, the Alleged Existence of a Meritorious Defense and Any Other Equitable Factors are Irrelevant and Should Be Disregarded.

While she only argued to the District Court that the default judgment should be set aside under Rule 60(b)(4) because it was “void” due to lack of service, on appeal, Defendant addresses several new and irrelevant questions relating to timing, equitable factors and the alleged existence of a meritorious defense. Though improper, as argued *supra*, Defendant’s arguments, *arguendo*, are contrary to controlling case law.

First, the 3 month filing or timing requirement relating to Rule 60(b)(1), (2) and (3) does not apply to a Rule 60(b)(4) request for relief respecting a “void” judgment due

to defective service. *Garcia*, 712 P.2d at 290 (“where the judgment is void because of a fatally defective service of process, the time limitations of Rule 60(b) have no application.”).

Second, Utah law is also clear that equitable considerations, such as excusable neglect, mistake, diligence in defense, and even the existence of a possible meritorious defense are not relevant to or considered in determining whether a judgment is void.

Workman, 802 P.2d at 754. *See also Garcia*, 712 P.2d at 290 (“Nor is there any requirement, as there usually is when default judgments are attacked under Rule 60(b) that the moving party show that he has a meritorious defense.”). Thus, this Court should properly focus on only whether the judgment is void (i.e., or if the judgment is invalid) without regard to unrelated equitable considerations). As equitable factors are not relevant or to be considered, Defendant’s assertion that she has a statutory defense relating to the underlying tax sale statute is irrelevant. Accordingly, Section III of the Appellant’s Brief should not be considered on appeal.

II. AS DETERMINED BY THE DISTRICT COURT, PLAINTIFF WAS REASONABLY DILIGENT IN ATTEMPTING TO SERVE DEFENDANT AND HAD GOOD CAUSE TO BELIEVE DEFENDANT WAS AVOIDING SERVICE BEFORE OBTAINING APPROVAL TO SERVE DEFENDANT BY PUBLICATION AS AUTHORIZED UNDER RULE 4.

Rule 60(b)(4) allows for relief from a judgment where the judgment is shown to be “void”, however, “[t]he concept of a void judgment is narrowly construed in the interest of finality.” *Brimhall v. Mechem*, 494 P.2d 525, 526 (Utah 1972). Specifically, “[a] judgment is void only if the court which rendered it lacked jurisdiction . . . of the parties,

or if it acted in a manner inconsistent with due process of law.” *Id.* Of course, “the burden of demonstrating a lack of jurisdiction lies on the party challenging jurisdiction.” *Jackson Const. Co., Inc. v. Marrs*, 2004 UT 89, ¶ 9, 100 P.3d 1211. Even when a default judgment is entered “the law presumes that jurisdiction exists, and the burden is on the party attacking jurisdiction to prove its absence.” *Id.* (internal quotations and citation omitted).

Significantly, “[w]hether a defendant was properly served with process is a question of fact, reviewed under the clearly erroneous standard.” *State ex rel. L.B.*, 2003 UT App 349 (citing *Cooke v. Cooke*, 2001 UT App 110, ¶ 7, 22 P.3d 1249) (emphasis added); *Salt Lake City Corp. v. Jordan River Restoration Network*, 2012 UT 84, ¶ 47, 299 P.3d 990, 1005299 P.3d 990 (“However, because [these questions require] the application of facts in the record to the due process standard, we incorporate a clearly erroneous standard for the necessary subsidiary factual determinations.”).¹

¹ Significantly, while a denial of motion to set aside as default judgment is generally reviewed under an abuse of discretion standard, the underlying factual determination of whether Defendant was served with process is reviewed under a clearly erroneous standard. *Crane-Jenkins v. Mikarose, LLC*, 2015 UT App 270, ¶ 9 (“A ‘district court has broad discretion in ruling on a motion to set aside an order of judgment under rule 60(b), and [t]hus, we review a district court’s denial of a 60(b) motion under an abuse of discretion standard.’”) (quoting *Utah Res. Int’l, Inc. v. Mark Techs. Corp.*, 2014 UT 60, ¶ 11, 342 P.3d 779 (alteration in original)). If a motion to set aside a default judgment is brought because the judgment is void for lack of process, such is reviewed through a correction-of-error-standard. *Bonneville Billing v. Whatley*, 949 P.2d 768, 771 (Utah App. 1997). However, a court can only overturn the factual finding of proper service if the district court’s findings were “without adequate evidentiary support or induced by an erroneous view of the law.” *Western Capital & Sec. v. Knudsvig*, 768 P.2d 989, 991 (Utah App.), *cert. denied*, 779 P.2d 688 (Utah 1989). Further, “[f]indings of fact are not clearly erroneous unless they are so lacking in support as to be against the clear weight of

Mindful of due process rights, Utah R. Civ. P. 4(d)(4)(A) expressly authorizes service by publication only.

where there exists good cause to believe that the person to be served is avoiding service of process, the party seeking service of process may file a motion supported by affidavit requesting an order allowing service by publication

While citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950), which considered whether service by publication violates a defendant's due process rights, Defendant ignores Utah case law directly on point, which applies *Mullane* in the specific context of Utah's Rule 4(d)(4)(A). In *Jackson Const. Co., Inc. v. Marrs*, 2004 UT 89, ¶ 11, 100 P.3d 1211, 1215, 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. The *Jackson* Court stated:

Under this rule, litigants may not resort to service by publication until they have first undertaken reasonably diligent efforts to locate the party to be served. This reasonable diligence requirement arises from constitutional due process rights and the recognition that publication alone is generally not a reliable means of informing interested parties that their rights are at issue before the court.

Id. (citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950)). The *Jackson* Court emphasized, however, that “[t]he reasonable diligence standard does not require a plaintiff to ‘exhaust all possibilities’ to locate and

the evidence.” *Encon Utah, LLC v. Fluor Ames Kraemer, LLC*, 2009 UT 7, ¶ 11, 210 P.3d 263. Therefore, this Court not only must find that the District Court abused its discretion or it must correct an error in the District Court's ruling, but also must conclude that its underlying actual findings of proper service were clearly erroneous.

serve a defendant.” *Jackson*, ¶ 19 (quoting *Downey State Bank v. Major–Blakeney Corp.*, 545 P.2d 507, 509 (Utah 1976), *overruled in part on other grounds by Mgmt. Servs. v. Dev. Assocs.*, 617 P.2d 406 (Utah 1980)). This standard only requires that a “means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.” *Id.* Other jurisdictions similarly recognize that “a plaintiff need not exhaust all conceivable means of personal service before service by publication is authorized.” *McComb v. Aboelessad*, 535 N.W.2d 744, 748 (N.D. 1995) (citing *Carson v. Northstar Development Co.*, 62 Wash. App. 310, 814 P.2d 217, 221 (1991)). The *McComb* court explained: “Rather, reasonable efforts under the circumstances are all that is required.” *Id.* (citing *Mullane*, 339 U.S. at 317, 70 S. Ct. at 658); *United Nat’l Bank v. Searles*, 331 N.W.2d 288, 292 (S.D.1983)). Importantly, Utah law recognizes the realities facing a process server, observing,

personal service should not become a “degrading game of wiles and tricks” nor should a defendant be able to defeat service simply by refusing to accept the papers or instructing others, suitable under the rules of civil procedure, also to reject service.

Wood v. Weenig, 736 P.2d 1053, 1055 (Utah App. 1987).

The *Jackson* case thus establishes the minimum requirement for reasonable diligence. Specifically, the Court held plaintiff’s actions were insufficient where he only obtained a single California address for both defendants from a recorder and sent a letter addressed to that California address that was returned as “undeliverable.” *Jackson*, ¶21. Finding this attempt insufficient, the Court reasoned plaintiff could have taken other steps, such as “consulting a telephone directory or by contacting a resident of Washington

County, who was [defendants'] cotenant before [plaintiff] acquired its interest in the property.” *Id.* These few simple, additional actions would have provided reasonable diligence in plaintiff’s attempts to serve the defendant. *Id.* (emphasis added).

As applied herein, the foregoing authorities support the conclusion that the District Court neither made a clear error in its findings, nor abused its discretion in denying Defendant’s Motion to Set Aside.

A. Plaintiff Was Reasonably Diligent In Attempting To Serve Defendant And Had Good Cause To Believe Defendant Was Avoiding Service.

Plaintiff “diligently” and reasonably attempted to serve Defendant at her known residence, through at least five separate service attempts as referenced, *supra*, and came to believe based on “good cause” that Defendant was “avoiding service”. Nevertheless, in satisfaction of Defendant’s due process interests, only upon Plaintiff’s proof of such (by undisputed and admissible evidence) did the District Court exercise its discretion to allow Plaintiff to serve Defendant alternatively via publication.

Plaintiff’s evidence included the sworn testimony of a disinterested and qualified process server, Mr. Dyches, who diligently attempted to serve Defendant, on at least five separate days, at different times (mid-morning to evening), over a period of nearly 3 weeks. *See Facts*, ¶¶ 14-20, *supra*. Despite Plaintiff’s efforts, Defendant refused to accept personal service. During these visits, Mr. Dyches independently verified Defendant still lived at the address he had been given by Plaintiff, by speaking with neighbors during two of his visits. As evidenced by the Declaration of Staci Robison-Reith, Plaintiff also verified, through an updated internet search, that it had Defendant’s

correct address. Mr. Dyches also observed that a note left on the doorstep of Defendant's Residence was addressed to Defendant, further confirming Defendant resided there. During one visit, Mr. Dyches even left his business card at Defendant's door to facilitate a phone or in person contact with Defendant. During another service attempt, Mr. Dyches observed that a man at Defendant's Residence waited until he was driving away before coming out of the residence to get the mail. During two of his service attempts, Mr. Dyches observed not only that people were home, but also that he made visual contact with one or more of them, further evidencing their intentional refusal to answer the door. During his last visit and despite Mr. Dyches shouting directly at a man in the office through an open front door, knocking loudly and ringing the doorbell, the adult resident utterly ignored him and persisted in avoiding Plaintiff's attempted service. Consistent with the foregoing avoidance of service, when Mr. Dyches returned from reconfirming Defendant's address with a neighbor, someone in Defendant's Residence had closed the office blinds and shut the opened front door. Finally, Plaintiff also sent a certified letter to the address, which Defendant refused to accept and which was returned unclaimed.

Applying Rule 4(d)(4)(A) strictly, the District Court weighed this evidence and in its sound discretion allowed alternative service via publication as expressly authorized by the rules of procedure. According to the District Court, these undisputed facts established that (1) Plaintiff "diligently" attempted to serve Defendant at her known

residence, and (2) had “good cause” to believe that Defendant was “avoiding service”. R. 61-62.

Significantly, pursuant to Defendant’s Motion to Set Aside (and considering the opposing arguments of Defendant, which were not previously before the Court), the Court carefully reconsidered its Amended Order and the basis for such. Unwilling to allow Plaintiff’s good faith attempts of personal service to “become a ‘degrading game of wiles and tricks’” (*Wood*, 736 P.2d at 1055), the District Court thoughtfully stated:

But I will tell you that having rereviewed the affidavits, rereviewed what I did in the first instance in authorizing the service by publication, I would do it the same way. I’m satisfied that based upon the affidavit that was presented to me that there was sufficient evidence to justify alternative service.

R. 0372. The District Court thereby reiterated its earlier determinations, *inter alia*, that “Defendant has avoided personal service and there are no other means to personally serve Defendant” and “good cause [exists] to believe that the persons to be served are avoiding service of process, and service by normal means is unreasonable and impracticable under the circumstances.” R. 61-62. Having applied the law in a well-reasoned, deliberate and reasonable manner given the record evidence, the District Court neither made clearly erroneous findings, nor misapplied the law, under the circumstances.

B. Service By Publication Not Only Was a Reasonable Means of Informing Defendant, But Also Was Expressly Authorized By The Rules.

Service by publication is explicitly authorized as a valid and acceptable form of alternative service. Utah R. Civ. P. 4(d)(4)(A). The Utah Legislature, like legislatures across the country, has explicitly legislated that publication is a valid and authorized means of providing notice regarding a variety of legal rights and proceedings. In addition to the service of lawsuits (where, as here, the propriety of such is reviewed and found appropriate by a court under Utah law), service or notice by publication is explicitly recognized as a common and acceptable form of providing notice of tax sales, notice to creditors of an estate, notice for judicial and non-judicial foreclosures and the like. Such notice has not been the basis to void all or portions of such proceedings, which involve basic property and related rights.

Moreover, under these circumstances, publication through a newspaper was a likely means to inform Defendant of the lawsuit. Defendant's position that alternative service by publication was not calculated to provide her notice is disingenuous. Ironically, Defendant was a tax sale interest purchaser of the property at issue in the underlying case. R. 345; *see* Facts, ¶ 2. Defendant's counsel has acknowledged that Defendant "bought [her undivided 40% interest in the property] at the tax sale, because those are noticed by the county" R. 0345. Utah County states on its website, and it is commonly known, that notices of tax sales are posted in the newspaper, including the very newspaper through which Plaintiff published its service upon Defendant, The Daily

Herald. *See* Utah Code 59-2-1351(2) (directing tax sales are to be noticed in the newspaper published in that county); <http://www.utahcounty.gov/taxsale/index.html> (“Public notices will be published in either The Daily Herald, Deseret News, or Salt Lake Tribune starting 4 weeks prior to the sale.”). Given this information, Defendant’s historic dealings with notices by publication and the reasonable inference from Defendant’s counsel’s record statement, Defendant was likely to check the newspaper, as she impliedly did when she received notice of the tax sale, whereby she purchased the underlying property interest in the first place. These circumstances provide useful context and additional considerations that, in furtherance of Plaintiff’s reasonable diligence and good cause belief that Defendant was avoiding service, demonstrate service by publication was reasonably fashioned to accomplish the objective of notifying Defendant of the lawsuit.

In sum, Defendant was properly served in accordance with appropriate due process considerations and as expressly authorized by Rule 4(d)(4)(A) under the circumstances.² Based on undisputed evidence of Plaintiff’s diligent efforts and Defendant’s avoidance of service, the District Court soundly exercised its discretion in permitting Plaintiff to serve Defendant through publication, the requirements with which

² The District Court, at the hearing on the Motion to Set Aside, recognized Plaintiff’s diligent efforts and Defendant’s avoidance of service. Judge Taylor found in denying the Motion to Set Aside, that “[t]he process server didn’t merely knock on the door five times and say nobody is there. He checked with neighbors, he saw people moving around. . . . He had reason to believe there were people there that were refusing to respond to him.” R. 0372.

Plaintiff strictly complied. Moreover, the District Court neither made clearly erroneous findings, nor misapplied the law, in denying the Motion to Set Aside.

III. ARGUENDO, SHOULD THE COURT CONSIDER DEFENDANT’S ALLEGED MERITORIOUS DEFENSE, DEFENDANT’S ARGUMENTS ARE UNSUPPORTED.

Arguendo, should the Court consider Defendant’s alleged meritorious defense respecting the underlying default judgment (i.e., though such was not preserved and is outside Rule 60(b)(4) and the scope of this appeal, as noted, *supra*), Defendant’s arguments do not establish a valid or meritorious defense for several reasons.

First, Defendant’s statutory interpretation is inconsistent with the plain language of the statute. Regarding statutory construction, the Utah Supreme Court has observed:

The best evidence of the legislature's intent is “the plain language of the statute itself. Thus, [w]hen interpreting a statute, we assume, absent a contrary indication, that the legislature used each term advisedly according to its ordinary and usually accepted meaning. Additionally, we presume[] that the expression of one [term] should be interpreted as the exclusion of another. We therefore seek to give effect to omissions in statutory language by presuming all omissions to be purposeful.

Marion Energy, Inc. v. KFJ Ranch P'ship, 2011 UT 50, ¶ 14, 267 P.3d 863 (citing *O'Dea v. Olea*, 2009 UT 46, ¶ 32, 217 P.3d 704; *Encon Utah, LLC v. Fluor Ames Kraemer, LLC*, 2009 UT 7, ¶ 73, 210 P.3d 263; *State ex rel. Z.C.*, 2007 UT 54, ¶ 13, 165 P.3d 1206.) (internal quotations omitted) (alterations in original).

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 object” to a subsequent sale

by the majority property owner. *See* Utah Code Ann. § 59-2-1351.7. This statutory directive is clear, plain and unambiguous.

Second, consistent with principles of statutory construction, the foregoing mandate is internally consistent with the rest of the relevant statutory language. *Foutz v. City of S. Jordan*, 2004 UT 75, ¶ 11, 100 P.3d 1171 (“We read the plain language of the statute as a whole, and interpret its provisions in harmony with other statutes in the same chapter and related chapters. . . . We strive to construe statutes in a manner that renders ‘all parts thereof relevant and meaningful.’”) (*quoting* *Miller v. Weaver*, 2003 UT 12, ¶ 17, 66 P.3d 592) and *Perrine v. Kennecott Mining Corp.*, 911 P.2d 1290, 1292 (Utah 1996)).

Nowhere in the statute does it provide, expressly or impliedly, that a minority owner can object, including if he/she thinks the purchase price is too low, is too high, is not at market price, is untimely, or that the property has not been properly sold, or for any other of a myriad reasons. Thus, the legislature’s presumptively advised inclusion of the phrase “may not object” can only be properly construed to the exclusion of any interpretation to the contrary, including giving a purchaser the right to challenge the fair market value or other terms of such subsequent sale.

Indeed, consistent with the majority owner’s unconditional right to sell the property as and when he/she chooses, the statute also contains the following explicit guarantee respecting the tax sale interest purchaser interest in the proceeds of sale from property:

(2) [the] tax sale interest purchaser may only receive from the sale of the tax sale property, an amount equal to the greater of:

- (a) The amount the tax sale interest purchaser paid for the undivided interest in the tax sale property at the tax sale plus 12% interest; or
 - (b) The tax sale interest purchaser's pro rata share of the sale price of the tax sale property based on the percentage of the undivided interest the tax sale interest purchaser holds in the tax sale property.
- (3) A tax sale interest purchase may not object to the sale of the tax sale property if the tax sale interest purchaser receives an amount in accordance with Subsection (2).

Id. at § 59-2-1351.7(2) (emphasis added). This language provides an explicit safeguard or guarantee for the tax sale interest purchaser's investment.³ The tax sale interest purchaser is guaranteed at least a 12% return, regardless of any subsequent sale price for the property. The plain language of the statute thus ensures that though a tax sale interest purchaser "may not object to the sale", a safeguard exists to protect him/her from the loss of his purchase price or investment on resale of the property. Thus, the mandate of disallowing any objection and simultaneous guaranteeing a minimum return to a minority owner are harmonized in the statute. Such is also consistent with the public policy of encouraging people to purchase tax sale property interests (which facilitates the taxing authority's primary objective of expeditiously liquidating properties to satisfy tax obligations and timely raise needed tax revenues).

Third, Utah law is clear that it is not the role of the judiciary to write, or indeed, rewrite Utah law. *State v. Anderson*, 2007 UT App 304, ¶ 11, 169 P.3d 778 ("Moreover,

³ Clearly, the safeguard the legislature chose to include in the statute reduces, if not entirely eliminates, sale related complications, lawsuits, challenges and disputes, including whether the majority interest owner sold the property on terms that satisfy the minority tax sale interest purchaser.

‘[o]ur task is to interpret the words used by the legislature, not to correct or revise them. When the words are clear, however incongruous they may appear in policy application, we will interpret them as written, leaving to the legislature the task of making corrections when warranted.’” (quoting *State v. Wallace*, 2006 UT 86, ¶ 9, 150 P.3d 540)); *Platts v. Parents Helping Parents*, 947 P.2d 658, 662 (Utah 1997) (“The judiciary is obligated to interpret statutes as they are crafted, not to redesign them.”).⁴ Rather, courts are to interpret statutory language so as to give meaning to the entirety thereof and in accordance with the plain terms thereof without either adding to or detracting from the plain meaning thereof. *Anderson*, (“When interpreting a statute, we look first to its plain language to determine its meaning. . . . While examining a statute's plain language, we do so under the presumption that the “legislature used each term advisedly.” (citing *Utah State Tax Comm'n v. Stevenson*, 2006 UT 84, ¶ 32, 150 P.3d 521; *State v. Maestas*, 2002 UT 123, ¶ 52, 63 P.3d 621).

In this case, the majority interest owner sold the property and offered Defendant 40% of the purchase price of the property, which exceeded the statutorily guaranteed 12% return on her investment. This satisfied the plain terms of statute.

⁴ *Mountain States Tel. & Tel. Co. v. Pub. Serv. Comm'n*, 107 Utah 502, 505, 155 P.2d 184, 185 (1945) (“We therefore address ourselves to its meaning, keeping in mind one of the cardinal rules of statutory construction, viz., that the interpretation must be based on the language used, and that the court has no power to rewrite a statute to make it conform to an intention not expressed. ‘The legislative intent being plainly expressed, so that the act read by itself, or in connection with other statutes pertaining to the same subject, is clear, certain and unambiguous, the courts have only the simple and obvious duty to enforce the law according to its terms.’” (internal citations omitted)).

Fourth, that market value is plainly not a factor in the initial tax sale or in any subsequent sale is not surprising, as the legislature and taxing authority are not concerned with obtaining the highest value possible for a foreclosed property; rather, it is interested in quickly liquidating a tax debt. For this reason, the minority tax sale interest purchaser presumably acquires the property interest at a distressed sale and/or for less than fair market value. Had the legislature wished to make fair market value a determining factor in either the initial or any subsequent sale of such properties, it certainly could have included such language. Clearly, it did not do so. Defendant's attempt to write into the statute new, additional or contradictory terms is at odds with the plain language thereof and the manifest intent of the legislature.

Arguendo, even assuming Defendant's interpretation of the statute, Defendant's further assertions regarding the value of the property and the circumstances of the sale are not factually supported by the record. As this defense was not properly raised or preserved below, issues regarding the value of the property are not part of the record. Even Defendant'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). The record does, however, necessarily reflect that Defendant paid only \$5,070 for a 40% interest in the property (regardless that such is presumably at a below fair market value). This established the amount of Defendant's investment for purposes of Utah's Partial Interest Tax Purchaser, and

significantly, demonstrates Plaintiff's compliance therewith.⁵ Defendant's arguments notwithstanding, no meritorious defense can be said to exist based on the record.

Defendant's alleged defense is based on conjecture and speculation. Defendant cites no law in support; rather, offers mere assumptions not supported by the record, upon which she urges this Court to rewrite the plain language of tax sale purchaser statute. Defendant's "argument" is not evidence and her introduction of new and/or additional words or concepts into the statute has the effect of contradicting, expanding and/or modifying the plain meaning and scope thereof.

In sum, to establish an alleged meritorious defense regarding the underlying default judgment, Defendant necessarily urges the Court to construe and interpret the statute in a manner that is contrary to the plain and unambiguous language thereof. Her variously urged and requisite factual assumptions are likewise based on conjecture, speculation and information parol to the statute. Likewise, her so-called equitable considerations are unsupported in the record and are hardly equitable under the circumstances. The District Court correctly and wisely disregarded such in denying the Motion to Set Aside. As such, *arguendo*, even if her alleged defense were considered, Defendant cannot establish a meritorious defense.

The District Court's denial of Defendant's Motion to Set Aside should be affirmed.

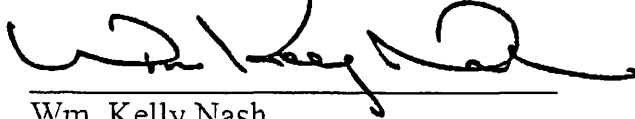
⁵ Ironically, by Defendant's reasoning, Defendant's alleged "equitable" defense is based on Defendant's purchase for \$5,070 of a 40% interest in the property she claims to be worth \$56,000. This equitable argument is untenable. Likewise, Defendant's accusation that Plaintiff has, directly or indirectly, engaged in "laundering" the property is frivolous, speculative and unsupported factually and legally. Such arguments cannot be considered.

Conclusion

For the foregoing reasons, Plaintiff urges this Court to affirm the District Court's August 21, 2015 Order Denying Motion for Relief from Default Judgment.

RESPECTFULLY SUBMITTED this 9th day of May, 2016.

DURHAM JONES & PINEGAR

A handwritten signature in black ink, appearing to read 'Wm. Kelly Nash', written over a horizontal line.

Wm. Kelly Nash

Kimberly N. Baum

Attorneys for Appellee

Certificate of Compliance with Rule 24(f)(1)

1. This brief complied with the type-volume limitation of Utah R. App. P. 24(f)(1) because it contains 10,667 words, in total.

2. This brief complies with the typeface requirements of Utah R. App. P. 27(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Windows 2010, Times New Roman, Font Size 13.

DATED this 9 day of May, 2016.

DURHAM JONES & PINEGAR

A handwritten signature in black ink, appearing to read 'Wm. Kelly Nash', written over a horizontal line.

Wm. Kelly Nash

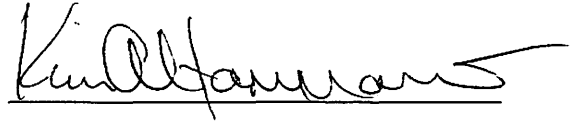
Kimberly N. Baum

Attorneys for Appellee

PROOF OF SERVICE

I hereby certify that, on the 9th day of May, 2016, two true and correct copies of the foregoing **REPLY BRIEF OF APPELLEE** were mailed, postage prepaid, to the following:

Gregory N. Hoole, Esq.
HOOLE & KING, L.C.
4276 South Highland Drive
Salt Lake City, Utah 84114-0858

A handwritten signature in black ink, appearing to read "Kim O'Hanrahan", is written over a horizontal line.