IN THE UTAH COURT OF APPEALS

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Kami Washington and Josephine Ishaya, Plaintiffs and Appellants, v. Jonathen Kraft and Joseph Phalen, Defendant and Appellee.	MEMORANDUM DECISION (Not For Official Publication) Case No. 20090687-CA F I L E D (September 30, 2010) 2010 UT App 266

Second District, Ogden Department, 060901726
The Honorable Michael D. Direda

Attorneys: Richard H. Thornley, Ogden, for Appellants
W. Kevin Tanner, Salt Lake City, for Appellee

Before Judges McHugh, Thorne, and Voros.

McHUGH, Associate Presiding Judge:

Plaintiffs Kami Washington and Josephine Ishaya appeal the dismissal of their lawsuit against Defendants Joseph Phalen and Jonathen Kraft.[1] The trial court ruled that Plaintiffs were required to obtain the court's permission before serving Defendants under the substitute service provision in Utah's Nonresident Motorist Statute (the Statute), see Utah Code Ann. § 41-12a-505 (Supp. 2010). Because Plaintiffs did not do so, the trial court held that service on Defendants was ineffective. The trial court subsequently dismissed the lawsuit without prejudice because Defendants were not properly served before the expiration of the limitations period for service of the summons and complaint specified by rule 4(b) of the Utah Rules of Civil

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[1]Kraft is the only defendant represented or participating on appeal. Apparently, Kraft never received notice of the pending lawsuit and was unaware of the proceedings in the trial court. Furthermore, Kraft's counsel was unaware of Kraft's whereabouts but had been "employed by [Kraft]'s insurer." It is unclear from the record whether either Kraft or Phalen are aware of the proceedings in this court.

Procedure, see Utah R. Civ. P. 4(b). Plaintiffs have failed to adequately brief the issues before us on appeal. Therefore, we affirm the trial court's rulings.

Plaintiffs were injured in an automobile accident on August 31, 2000, while passengers in a car driven by Kraft that collided with a vehicle driven by Phalen. Plaintiffs timely filed a complaint on March 30, 2006,[2] alleging that their injuries were the result of Defendants' negligence. Despite the employment of a private investigator and numerous extensions, Plaintiffs concluded that they could not locate Defendants to serve them personally before the deadline established by the ninth order enlarging the time for service expired on February 9, 2009.[3]

Instead, Plaintiffs initiated service under the Statute's substitute service provision, which states that a nonresident of Utah or "a resident who has departed Utah" who uses or operates "a motor vehicle on Utah highways" consents to the appointment of "the Division of Corporations and Commercial Code [(the Division)] as the true and lawful attorney for service of legal process in any action or proceeding against the person arising from the use or operation of a motor vehicle over Utah highways." Utah Code Ann. § 41-12a-505(1)(a). The Statute further provides that to effect service on a nonresident or a departed resident, a plaintiff must "serv[e] a copy upon the Division" and send "notice of the process together with plaintiff's affidavit of compliance with [the Statute] to the defendant by registered mail at the defendant's last-known address." Id. § 41-12a-505(2). The express language of the Statute deems compliance with its substitute service procedures to be "of the same legal force and validity" as personal service. Id. § 41-12a-505(1)(b).

Plaintiffs pursued substitute service under the Statute and filed their notice of service in the trial court on January 29, 2009. In the notice, Plaintiffs stated that, pursuant to the

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[2]Plaintiffs previously filed a complaint that was dismissed without prejudice on April 8, 2005, for failure to serve Defendants. Plaintiffs' March 30, 2006 complaint was filed nine days before the statute of limitations ran under Utah's savings statute, see Utah Code Ann. § 78-12-40 (2006) (current version at Utah Code Ann. § 78B-2-111 (2008)) (allowing a plaintiff to re-file an action within one year after a timely filed previous action failed for reasons "otherwise than upon the merits").

[3]The trial court granted the ninth and final extension on December 11, 2008, which gave Plaintiffs until February 9, 2008, to serve Defendants. In doing so, the trial court stated that "no further extensions [would] be granted."

Statute, they had served Defendants by "fil[ing] two copies of the . . . Summons and Complaint" with the Division and by mailing a copy of the notice of service, along with the Summons and Complaint, to the Defendants' "last known addresses." Plaintiffs also attached an Affidavit of Compliance detailing their efforts to locate Defendants before attempting substitute service pursuant to the Statute. Before doing so, however, Plaintiffs had neither sought nor obtained the trial court's approval.

In response, Defendant filed a motion to quash service on the ground that "no alternative service was authorized by [the trial] [c]ourt." The trial court agreed with Defendant and, on May 18, 2009, quashed service, reasoning that under Carlson v. Bos, 740 P.2d 1269 (Utah 1987), court permission was required before utilizing the Statute's substitute service provisions. Nine days later, on May 27, 2009, Plaintiffs filed a motion requesting permission to use substitute service. The trial court first denied the motion because "the time limit for effectuating service on Defendants ha[d] expired" in February, and then dismissed the complaint without prejudice, pursuant to the mandate of rule 4, see Utah R. Civ. P. 4(b)(i) ("If the summons and complaint are not timely served, the action shall be dismissed, without prejudice . . . ."). Plaintiffs now appeal from those orders.

On appeal, Plaintiffs first argue that it was error for the trial court to quash service because neither the Statute nor the applicable rules of procedure require a plaintiff to obtain court approval before initiating substitute service of a nonresident or departed resident under the Statute. Plaintiffs reason that the Statute's appointment of the Division as Defendants' agent to receive process permits service to be made pursuant to rule 4(d)(1)(A), which does not mandate prior court approval, see id. R. 4(d)(1)(A), rather than rule 4(d)(4), which requires a court order permitting substitute service, see id. R. 4(d)(4). Ordinarily, we review the trial court's interpretation of a statute's requirements for correctness. See General Sec. Indem. Co. of Ariz. v. Tipton, 2007 UT App 109, ¶ 7, 158 P.3d 1121. Here, however, we do not reach the merits of Plaintiffs' argument because Plaintiffs' brief[4] does not comply with rule 24 of the Utah Rules of Appellate Procedure. See Utah R. App. P. 24(k) ("Briefs which are not in compliance [with rule 24] may be disregarded or stricken, on motion or sua sponte by the court . . . ."); Beehive Tel. Co. v. Public Serv. Comm'n, 2004 UT 18, ¶ 16, 89 P.3d 131 ("[W]e will disregard those portions of [an appellant]'s brief that we find inadequate."). See generally Utah R. App. P. 24 (outlining appellate briefing requirements).

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[4]Plaintiffs did not file a reply brief.

"Our rules of appellate procedure clearly set forth the requirements that appellants and appellees must meet when submitting briefs before [the appellate courts of this state]," and compliance with those rules "is mandatory." Beehive Tel., 2004 UT 18, ¶ 12 (internal quotation marks omitted). The brief submitted by Plaintiffs' counsel does not comply with the rules in several significant respects.

First, Plaintiffs' brief does not "comply with simple formatting requirements." See id. ¶ 13. The brief does not contain a coherent statement of the applicable standard of review as required by rule 24(a)(5), see Utah R. App. P. 24(a)(5). Instead, Plaintiffs' brief purports to challenge the trial court's legal conclusions but, citing to Ute-Cal Land Development v. Intermountain Stock Exchange, 628 P.2d 1278 (Utah 1981), states a standard of review that solely applies to the trial court's findings of fact: "The trial court's findings will not be disturbed on appeal unless that court has misapplied the law to establish[ed] facts." Such a statement "does not satisfy the requirements of rule 24(a)(5)." State v. Smith, 2010 UT App 231, ¶ 2, 663 Utah Adv. Rep. 16 (per curiam). Similarly, Plaintiffs' mere statement that they preserved the issues raised in their brief by filing their Notice of Appeal does not comply with the requirement that they provide "[a] citation to the record showing that the issue[s] w[ere] preserved in the trial court," Utah R. App. P. 24(a)(5)(A).

Second, and of greater concern, Plaintiffs' brief does not comply with "the substantive rule requirements," see Beehive Tel., 2004 UT 18, ¶ 14, because it is "devoid of any meaningful analysis," see State v. Marquez, 2002 UT App 127, ¶ 10, 54 P.3d 637 (internal quotation marks omitted). In order for this court to engage in "meaningful appellate review" of the trial court's decision, a brief must "enable us to understand . . . what particular errors were allegedly made . . . and why, under applicable authorities, those errors are material ones necessitating reversal." State v. Lucero, 2002 UT App 135, ¶ 13, 47 P.3d 107 (first omission in original) (internal quotation marks omitted). Consequently, rule 24 mandates that the argument section of a brief "contain the contentions and reasons of the appellant with respect to the issues presented, including the grounds for reviewing any issue not preserved in the trial court, with citations to the authorities, statutes, and parts of the record relied on." Utah R. App. P. 24(a)(9). This "requires not just bald citation to authority but development of that authority and reasoned analysis based on that authority." State v. Thomas, 961 P.2d 299, 305 (Utah 1998). Plaintiffs' brief falls well below that standard.

The argument section of Plaintiffs' brief consists of three and one-half pages, only one of which is relevant to the trial court's decision to quash service. In that section, Plaintiffs state that despite the trial court's "candid[] acknowledge[ment] that the . . . case did not specifically require prior court approval," the trial court relied on Carlson v. Bos, 740 P.2d 1269 (Utah 1987), in quashing service because the trial court "felt that it was clear . . . that this was the intent of the case." Plaintiffs then state their grounds for challenging the trial court's decision as follows:

> [Plaintiffs] respectfully submit that [the trial court] err[ed] in treating the subject case as 'alternative service' when in fact it was a statutory service involving another part of [r]ule 4. Appellants proceeded under [r]ule 4(d)(1)(A) and not [r]ule 4(d)(4)(A) entitled 'Other Service.'
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> Requiring prior court approval under the wording of [r]ule 4(d)(1)(A) results in somewhat of a trap for a plaintiff's attorney.

As Defendant points out, Plaintiffs' brief provides us with no analysis or authority to support their contention that the trial court erred in interpreting Carlson to require prior court approval before effecting service under the Statute. Indeed, Plaintiffs' brief completely ignores the fact that, in Carlson, the Utah Supreme Court determined that federal due process requirements apply to the Statute's substitute service provisions, see Carlson, 740 P.2d at 1274-75; see generally U.S. Const. amend. XIV, § 1, and that, although not required by the plain language of the Statute, the supreme court interpreted the Statute "to require implicitly a showing of due diligence similar to that mandated by [r]ule 4[(d)(4)]," [5] in order "to save th[e] [S]tatute from constitutional infirmity," Carlson, 740 P.2d at 1276 (emphasis added). The supreme court elaborated further on this requirement, stating that "before a plaintiff may effect service under [the Statute], there must be a showing that the

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[5] Although neither the trial court nor the parties discuss it, this requirement actually consists of two parts: (1) a showing "that after diligent effort, [the plaintiff] has determined to a reasonable certainty that defendant motorist is either a nonresident or a resident who has departed from the state" and (2) a showing "that a diligent attempt has been made to obtain defendant's current address." Carlson v. Bos, 740 P.2d 1269, 1277 (Utah 1987) (footnote omitted).

facts justify use of the [S]tatute, rather than [r]ule 4." Id. (emphasis added). Based on that portion of the supreme court's decision, the trial court concluded that Carlson required Plaintiffs to file a motion and obtain the trial court's approval before serving Defendants under the Statute, and the trial court quashed service because Plaintiffs "failed to move for the [trial c]ourt's permission before using alternative service" under the Statute, as required by rule 4(d)(4) and "federal due process requirements."

Plaintiffs' brief contains no authority or analysis to indicate that Carlson does not require prior court approval before effecting service pursuant to the Statute. However, for the first time at oral argument, counsel pointed out that in Carlson, the supreme court remanded the case "for further factual findings" regarding whether the plaintiff had met the diligence requirements, see id. at 1278, despite the plaintiff's failure to obtain the trial court's permission to use the Statute's substitute service provision, to state in the affidavit of compliance that the defendant was living out of the state, or to provide any information regarding the efforts to locate the defendant,[6] see id. at 1270. While these facts may be important in determining whether Carlson mandates prior court approval before proceeding under the Statute, we decline to address the issue due to inadequate briefing. Indeed, the brief contains only a cursory, one-sentence reference to the Carlson decision. At oral argument, Plaintiffs' counsel was asked to explain why no analysis of Carlson and the substitute service issue was included in Plaintiffs' brief. Counsel responded that he read Carlson for the first time the day before oral argument and was "absolutely amazed" by what the supreme court had actually decided. We are unwilling to consider Plaintiffs' belated argument.

To consider Plaintiffs' arguments asserted for the first time at oral argument would unfairly prejudice Defendant, who was provided no opportunity to prepare a response. See Maak v. IHC Health Servs., Inc., 2007 UT App 244, ¶ 30, 166 P.3d 631 (stating that issues not adequately discussed in an appellant's opening brief are deemed waived in order to "prevent the resulting unfairness to the [appellee]," who would have "no opportunity to respond" to the appellant's arguments (internal quotation marks omitted)); cf. Allen v. Friel, 2008 UT 56, ¶ 8, 194 P.3d 903 (refusing to consider arguments raised for the first time in a

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[6]We also note that the Carlson court favorably cited other jurisdictions with nonresident motorist statutes, but only one of the jurisdictions cited imposed a requirement that a plaintiff first obtain a court order, and in that case, the requirement was imposed by statute, not due process. See id. at 1277 n.16.

reply brief because "the appellee would have no opportunity to respond to those arguments"). Furthermore, if we considered Plaintiffs' arguments raised for the first time at oral argument, the burden of research and argument would inappropriately shift to this court. See Smith v. Smith, 1999 UT App 370, ¶ 8, 995 P.2d 14 ("An issue is inadequately briefed when 'the overall analysis of the issue is so lacking as to shift the burden of research and argument to the reviewing court.'" (quoting Thomas, 961 P.2d at 305)); see also Allen, 2008 UT 56, ¶ 9 ("An appellate court is not a depository in which [a party] may dump the burden of argument and research." (alteration in original) (internal quotation marks omitted)). Therefore, we conclude that Plaintiffs failed to adequately brief the substitute service issue, and we do not reach the merits of that issue, nor do we reach the merits of the arguments asserted by Plaintiffs' counsel for the first time at oral argument.

We also reject Plaintiffs' argument that the trial court should have granted their motion for alternative service, which was filed more than three months after the ninth extension of the time for service had expired, because this case presents "unusual circumstances." While characterizing their argument in terms of unusual circumstances, Plaintiffs rely upon Westinghouse Electric Supply Co. v. Paul W. Larsen Contractor, Inc., 544 P.2d 876 (Utah 1975), which discusses "justifiable excuse,"[7] see id. at 878-79. In Westinghouse, the Utah Supreme Court reversed the dismissal of the plaintiff's claim for failure to prosecute because the trial court failed to consider several factors relevant to the question of whether there was justifiable excuse for the plaintiff's failure.[8] See id. These factors include "the conduct of both parties, and . . . the opportunity each has had to move the case forward[;] . . . what difficulty or prejudice may have been caused to the other side; and . . . whether injustice may result from the dismissal." Id. at 879. Here, Plaintiffs did not address those factors or their relevance in the trial court, nor

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[7]Although Plaintiffs did not specifically cite or discuss it at trial or in their appellate brief, "[r]ule 6(b) of the Utah Rules of Civil Procedure allows the trial court discretion to enlarge the time allowed for service of summons . . . , even after the prescribed time for such action has expired, . . . if [Plaintiffs'] failure [to serve Defendants] was the result of excusable neglect," Callahan v. Sheaffer, 877 P.2d 1259, 1262 (Utah Ct. App. 1994).

[8]We express no opinion as to whether the factors discussed in Westinghouse Electric Supply Co. v. Paul W. Larsen Contractor, Inc., 544 P.2d 876 (Utah 1975), are relevant to the issues of excusable neglect or unusual circumstances.

did they do so in their brief before this court.[9] Consequently, we decline to consider an argument of justifiable excuse. See generally Allen, 2008 UT 56, ¶ 9 (declining to address issues that were inadequately briefed); State v. Holgate, 2000 UT 74, ¶ 11, 10 P.3d 346 ("As a general rule, claims not raised before the trial court may not be raised on appeal.").

In sum, Plaintiffs inadequately briefed the substitute service issue and we decline to address the arguments raised by Plaintiffs' counsel for the first time at oral argument. Plaintiffs similarly failed to preserve in the trial court or to adequately brief either excusable neglect or justifiable excuse, and we decline to address the merits of Plaintiffs' argument that the trial court exceeded its discretion in denying their motion for alternative service. Accordingly, we affirm the trial court's orders quashing service and dismissing Plaintiffs' case because Defendants were not timely served.

Affirmed.

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Carolyn B. McHugh,
Associate Presiding Judge

WE CONCUR:

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William A. Thorne Jr., Judge

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J. Frederic Voros Jr., Judge

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[9]Plaintiffs simply list the factors and make two conclusory statements asserting that the trial court's conclusion that court approval was required before attempting service under the Statute was in conflict with rule 4(d)(1)(A), which does not require court approval, see Utah R. Civ. P. 4(d)(1)(A), and because "Plaintiff[s] had never indicated that [they] wanted to abandon [their] case and a dismissal would be harsh, severe and result in injustice."