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Laura W Caldwell, personally, and Nelda F Wall on
behalf of the Estate of Hal E. Wall v. Steven D.
Caldwell : Petition for Rehearing

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS 50

A10

DOCKET NO. 970239-CA

LAUREL W CALDWELL,)	
personally, and NELDA)	
F WALL on behalf of)	
the Estate of HAL E.)	
WALL,)	
)	
Plaintiffs-Appellees)	
)	Court of Appeals
vs)	Docket No. 970239-CA
)	
STEVEN D CALDWELL,)	
)	Argument Priority 15
Defendant-Appellant)	

APPELLANT'S PETITION FOR REHEARING

Appeal from the Third Judicial District Court

The Honorable Frank G Noel, District Judge

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FILED

FEB 25 1998

COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

LAUREL W CALDWELL,)	
personally, and NELDA)	
F WALL on behalf of)	
the Estate of HAL E.)	APPELLANT'S
WALL,)	PETITION FOR REHEARING
)	
Plaintiffs-Appellees)	
)	
vs)	Court of Appeals
)	Docket No. 970239-CA
)	
STEVEN D CALDWELL,)	
)	
Defendant-Appellant)	

The Defendant-Appellant STEVEN D CALDWELL submits the following APPELLANT'S PETITION FOR REHEARING.

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PETITION FOR REHEARING ARGUMENT

I
INVALID SERVICE OF PROCESS
RENDERS THE DEFAULT JUDGMENT VOID

A
THE COURT'S DECISION MISAPPLIES
THE HOLDINGS OF GRANT VS LAWRENCE
AND REED VS REED

The Court's decision ignores the long-standing HOLDING of the **Grant vs Lawrence**, 37 Utah 450, 108 Pac. 931 (1910) decision, by relying upon dicta (as to a "presumption" of law that a man's residence is where his

family lives), inappropriately applied in only this case. The operative text of Rule 4 does not utilize the term "residence". It utilizes the term "usual place of abode": a term which **Grant vs Lawrence** has, for over eighty-five years, defined to be the place where the Defendant is living at the time the service is made.

The Court's reliance upon **Reed vs Reed**, 806 P.2d 1182 (Utah Supreme Court 1991), as being dispositive to this case, is similarly misplaced. First, **Reed vs Reed** did not overrule **Grant vs Lawrence**, but supports it. Second, the trial court in **Reed** made extensive written findings of fact based upon an evidentiary hearing; in the instant case, no evidentiary hearing was held [because there were numerous other legal issues and because the Defendant's residence out of the state of Missouri had been previously acknowledged by Plaintiff's counsel! Thirdly, in **Reed** there was considerable evidence to show that the defendant was residing at the home of his parents who received service for him and who were co-defendants in that litigation, of which litigation the defendant was made aware even before he was "served"! Fourthly, in **Reed**, there was presented to the trial court considerable evidence to affirmatively show that the defendant's actual residence was, in fact, with his parents and to rebut the Defendant's claim that he was

out of state; that conflicting evidence was resolved by the trial court against the Defendant, who actually presented no evidence.

Lastly, in **Reed** the Utah Supreme Court, quoting a federal court decision stated:

[N]o hard and fast rule can be fashioned to determine what is or is not a party's "dwelling house or usual place of abode" within the rule's meaning; rather the practicalities of the particular fact situation determine whether service meets the requirements of 4(d)(1).

[T]he provision concerning usual place of abode should be [construed liberally] to effectuate service **if actual notice has been received by the defendant** and that in the last analysis the question of service must be resolved by "what best serves to give notice to a defendant that he is being served with process, considering the situation from a practical standpoint.

806 P.2d at _____. Bracketed material in original.

Emphasis added.

In the instant case, the Defendant's affidavit affirmatively states:

3. **I did not receive a copy of the summons** and complaint when I returned home to Appleton, Missouri, **nor was I ever informed** of the existence of the summons and complaint in this action.

Emphasis added. Thus, under the language quoted from **Reed**, above, the Defendant never received "actual notice" of the instant action.

The most cogent reason why the service was defective (in the context of defendant's motion to set aside the

default judgment) is discerned from a careful reading of the **Reed** decision. In **Reed**, the defendant ACTUALLY APPEARED AND HAD AN OPPORTUNITY TO LITIGATE THE MERITS OF THE CASE, prior to the "default judgment" which was ultimately entered against him. This fact alone, but especially so when coupled with the extensive factual findings entered by the trial court, distinguish **Reed** from the case at bar! [While the Appellant herein is not necessarily arguing for a "dual standard" as what constitutes valid service, the opportunity afforded the defendant in **Reed** to actually litigate the merits of the case certainly goes a long way to say that the Appellant should be afforded that same opportunity!]

The Court's decision ignores not only the operative holding of **Grant vs Lawrence** but also the numerous and thoroughly-analytical statements explaining that holding. It is incomprehensible that the Court would now be abandoning the time-honored standard, which is consistent with the wording of Rule 4, in favor of a "presumption".

The issue here is not, per se, one of fact or proof. Rather, the issue is one of law. The Defendant has asserted that he was not residing in Appleton, Missouri at the time service was made; that he resided in Texas---hundreds of miles away. [It's physically impossible to get off work, drive 600 miles---to Missouri---sleep

overnight---and then drive 600 more miles back to Texas, to arrive at work at the begin of the next "work day". The Defendant certainly ought to be entitled to the reasonable inferences arising from the factual statements within his Affidavit.] The only rebuttal the Plaintiffs offered concerned the Defendant's attendance at a family picnic at the Appleton, Missouri address in May 1992---over four months prior to the date of service. That the Defendant attended the picnic in May does not mean that he still resides there in September!

Grant vs Lawrence is absolutely clear in its holding and the explanation for that holding: that "usual place of abode" is a much more narrow term than "residence" (or "legal residence"). Consequently, the Court's adoption of the "presumption" approach is flawed: flawed because it directly contradicts **Grant vs Lawrence** and flawed because it does not adhere to the terms of Rule 4.

Furthermore, to allow the "presumption" to require the Defendant's to establish---by affidavit or otherwise---as to where he was (or wasn't) on a given date some three years earlier) is unrealistic and inappropriate, particularly in this case. That particular factual issue was not directly in dispute; Plaintiffs' counsel---even before service was made---acknowledged that the Defendant was in Appleton only on weekends. [Service was made on a

Monday.] Secondly, the Defendant himself has explained his work schedule: by any stretch of the imagination or any reasonable mathematical calculation, the Appleton residence was not his "usual place of abode", over the short-run period, even though Mr Caldwell's family lived there on a permanent basis.

It is incumbent upon the Plaintiff, as the moving party in the litigation, to effect valid service of process. If valid service is not effected, then any judgment entered thereon---particularly a default judgment---is void. The Plaintiff waited until literally the "last minute"---the absolute "last minute" possible under Plaintiffs' theory of the case---to effect service. Unfortunately, personal service upon the Defendant himself was NOT made and the Missouri sheriff had to leave the summons with Nikki Caldwell, the defendant's wife! Unfortunately, that is not what Rule 4 AND **Grant vs Lawrence** require. The service must be effected at the place where the Defendant is then living! That was Texas!

The whole purpose for the Rule is obvious: to insure that THE DEFENDANT IN THE ACTION---NOT SOMEONE ELSE---gets the "summons" in a timely manner, ostensibly on the very day it was served! To allow (via the Court's "presumption") the default judgment to stand in the face of Defendant's assertions that his "usual place of abode"

was in Texas AND that he was unaware of this proceeding until the garnishment was effected upon him in September 1996 flies in the face of that logic and policy! The Court must consider the realities of modern life in our transient society: people conveniently travel long distances, for extended period of time. [In the Defendant's own case, he travels from state-to-state, at jobs for his regular employer, performing environmental clean-up activities at contaminated sites.] In former times---when the "usual place of abode" criterion was initially developed and when **Grant vs Lawrence** was decided---people didn't move around much. They worked and then went home. They seldom travelled. Consequently, it was extremely likely that they would be made aware of service of process effected at "their usual place of abode" the very day that service was made! In today's world, that may not be the case. As the instant situation illustrates, the Defendant was living hundreds of miles away---in Texas---when the service was made in Missouri. In that context, it may be weeks before he returns to Missouri. In that period of time, the "summons" could be misplaced and/or inadvertently discarded and the Defendant might never know of the proceeding. Somebody---Nikki, one of the children, a visitor, we don't know who---in Appleton may have discarded the "summons". We do

know that Mr Caldwell states, under oath, that he never received the summons or notification of the instant proceeding until the garnishment action in September 1996! The Court's newly-adopted "presumption" rule now penalizes Mr Caldwell for conduct which is not his fault: for having employment out-of-state so that he doesn't actually spend every night in the dwelling where his family resides. Until now, it didn't matter; now, with the Court's enforcement---contrary to the **Grant vs Lawrence** holding---of the "presumption", he now is penalized! That's not right! [All that Mr Caldwell is asking for in this case is to have "his day in court" on the pleaded issues!] In these modern times, it is extremely illogical for the Court to now be abandoning---or at least expanding---the time-proven "usual place of abode" standard from **Grant vs Lawrence**! By so doing will only further engender more "default judgment" claims, appeals and controversy.

Furthermore, the Court must consider the relative "equity" (or inequity, as the case actually is) in allowing certain defendants---who were personally served---to have the "default judgments" against them set aside (ostensibly under a "discretion of the trial court" standard) and not allowing THIS DEFENDANT who WAS NOT PERSONALLY SERVED to set aside that default judgment.

We are talking---under Plaintiffs' theory of the case and as pleaded---here about the alleged "renewal" of an earlier "judgment". The Plaintiffs have waited the maximum amount of time to bring this matter to the attention of the Defendant, via the garnishment proceeding. The Plaintiffs will not, in that setting, be prejudiced by the delay---which was entirely of their own choosing---as far as the presentation of their theory of the case is concerned. If the courts---trial or appellate---have ever allowed a "default judgment" to be set aside in case where the defendant was actually, personally served, then this Court MUST, for equity reasons, allow THIS default judgment to be set aside because the defendant was NOT personally served!

B

IN THE ALTERNATIVE, THE COURT SHOULD REMAND THE CASE TO THE TRIAL COURT FOR A PROPER APPLICATION OF THE NEWLY-ANNOUNCED "PRESUMPTION" STANDARD

In the alternative, this Court should remand this case back to the District Court for application of the Court's newly-announced "presumption" standard, including specific findings following an evidentiary hearing.

II

THE COURT'S DECISION IGNORES THE DEFENDANT'S ANALYSIS OF THE RULE 54(c)(2) VIOLATIONS AND ISSUES

The Court's opinion asserts [p. 2 thereof] that the Appellant [Mr Caldwell] has not provided any "relevant

legal authority or . . . any helpful legal analysis supporting his arguments" for the assertion that the default judgment is defective, as being in violation of Rule 54(c)(2), Utah Rules of Civil Procedure.

The Appellant DID provide the Court with "legal authority": the provision of Rule 54(c)(2), itself! The application of those provisions were carefully and methodically---albeit not extensively, because this is a simple situation---analyzed and applied to the situation at hand, on pages 24 through 25 of the Appellant's original brief and on pages 8 through 10 of the Reply Brief. The Plaintiffs' non-compliance with the Rule is facially discerned and established by the Plaintiffs' own pleadings! To say that the Defendant did NOT provide this Court with legal "authority" or "analysis" is erroneous!

The Rule itself---and its clear provisions---are the best "authority" possible! The Rule itself---as the operative, original ("first-generation") text---is all that is needed. An appellate court decision (a "case" or "case-law support") is not for every assertion of law. The original text---of a constitution, statute, or validly-promulgated and long-standing rule of court---can certainly be the "starting" and the "finishing" point of any given analysis, particularly when that original text is so clear, so unambiguous and so on point!

In the face of such argument and "authority", the Court's decision says, implicitly, that Rule 54(c)(2) does NOT mean what it clearly says! The Court's decision, by ignoring the issue, implicitly upholds an "evolution" from complaint to judgment which Rule 54(c)(2) was expressly designed to prevent! The Court's decision must expressly resolve this issue!

III
**THE COURT'S DECISION IGNORES THE ISSUES
RAISED BY THE STEVENS VS COLLARD DECISION**

The Court's decision totally ignores the standard announced in **Stevens vs Collard**, 837 P.2d 593 (Utah Court of Appeals 1992): that "default" judgments must be legally valid, on their face, and that before entering such judgments the trial court must be satisfied of such validity! These issues were validly raised at the trial court level and have been preserved on appeal. These issues should be resolved by this Court.

The default judgment is facially-flawed in several particulars:

1. Nelda Wall was not a party to the original divorce proceeding from 1983! She has no standing to enforce the provisions of that divorce decree! [Only Plaintiff LAUREL CALDWELL has standing to enforce the original divorce "judgment".] That the original action was a

divorce action is obvious from the face of the Plaintiffs' pleadings: the pleading says so! [Paragraph 3] Judge Noel should have known that the "pay off the Hal Wall mortgage" provision was not a "judgment" enforceable by NELDA WALL, a stranger to the original divorce action!

2. The provision in the 1983 divorce decree is NOT a "judgment" subject to "renewal" [the singularly-pleaded legal theory for Plaintiff NELDA WALL]. This was acknowledged by Judge Noel (of the trial court) and by Judge Billings of this Court! [It is incredible that this Court would "split hairs" and engage in microscopic scrutiny of the Appellant's affidavit (i.e. as to where he was living, his working schedule, and that he did NOT receive the summons) and the inferences to be derived therefrom---all for the purposes of depriving him of "his day in court"---and to then IGNORE this most basic legal issue! It's not fair; it's not right. And it's certainly not what Rule 54(c)(2) mandates or proscribes!

3. The Plaintiff NELDA WALL was NOT the Personal Representative of the Hal Wall estate; she was not validly appointed and she simply

has no "standing" to bring (via the originally filed complaint) an action to enforce the "judgment" (sic) "in favor of the Estate of Hal Wall", even if she is the surviving spouse! Such should have been obvious to Judge Noel: from the face of the pleading itself and from the "judicial notice" available from the District Court's own records. [It is openly acknowledged as a FACT that there was NO probate proceeding filed in behalf of the Estate of Hal Wall in the Third District Court in and for Salt Lake County (or any other county) !]

Under **Collard**, the default judgment should have never been signed or entered! That Judge Noel did not initially discern the foregoing facial defects in the proffered "default judgment" when such was first presented to him is perhaps understandable: trial court judges are undoubtedly very busy. Undoubtedly, trial judges rely upon the integrity, professional competence and compliance with the Rules by the counsel appearing before them. In that setting, the "judgment" was signed and entered! That does not excuse the Court of refusing to set aside when Rule 54(c)(2) is brought to its attention. For this Court to implicitly condone what has


been done---by both Plaintiffs' counsel and by the trial court---when this issue was carefully pointed out to the appellate court---is inexplicable! The Court's decision must also expressly resolve these issues.

CONCLUSION

The Court's decision substitutes a newly-fashioned "presumption" (as to a person's "residence"), to replace and/or expand the time-proven criterion of "usual place of abode" as incorporated into Rule 4 and interpreted by **Lawrence vs Grant** and more recently applied in **Reed vs Reed**. Such an expansion is improvident. In these modern times, the Court should not be expanding the time-proven criterion; rather it should be holding to that time-proven criterion.

The entered (and now-approved) judgment is facially valid, for a number of technical reasons. The standards of **Collard** have not been followed. The Court's opinion is silent on these validly-raised and preserved issues. This Court, in its mandate to dispense justice and fairness to the parties before it, must address (and correctly re-address) these issues!

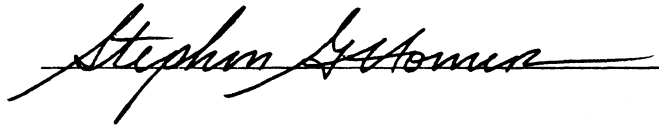
Respectfully submitted this 25th day of February,
1998.


STEPHEN G. HOMER
Attorney for Appellant
STEVEN D. CALDWELL

CERTIFICATE

I certify that the foregoing PETITION FOR REHEARING is presented in good faith and not for purposes of delay. [Appellate Rule 35(a).]

I certify that I caused two copies of the foregoing APPELLANT'S PETITION FOR REHEARING to be mailed to Mr Delano S Findlay, Attorney at Law, 923 East 5350 South, Suite E, Salt Lake City, Utah 84117, this 25th day of February, 1998.

A handwritten signature in cursive script, reading "Stephen G. Thomas", followed by a horizontal line.