1997

# Laura W Caldwell, personally, and Nelda F Wall on behalf of the Estate of Hal E. Wall v. Steven D. Caldwell : Reply Brief

Utah Court of Appeals


Stephen G. Homer; Attorney for Appellant.
Delano S. Findlay; Attorneys for Appellees.

IN THE UTAH COURT OF APPEALS

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| 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, | ) | |
| Defendant-Appellant | ) | Argument Priority 15 |

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**APPELLANT'S REPLY BRIEF**

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Appeal from the Third Judicial District Court

The Honorable Frank G Noel, District Judge

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IN THE UTAH COURT OF APPEALS

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| LAUREL W CALDWELL, personally, and NELDA F WALL on behalf of the Estate of HAL E. WALL, | ) | APPELLANT'S REPLY BRIEF |
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| Defendant-Appellant | ) | |

The Defendant-Appellant STEVEN D CALDWELL submits the following APPELLANT'S REPLY BRIEF.

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## REBUTTAL ARGUMENT

### I
### NON-COMPLIANCE WITH RULE 4 RENDERS THE DEFAULT JUDGMENT VOID

Plaintiffs argue [p. 5 of their brief] that the Appellant (Defendant) must overcome the "giant hurdle" (Plaintiffs' term) of establishing the Defendant was not

personally served with the summons. Plaintiff misconstrues who actually has the "giant hurdle". It is the Plaintiffs who must establish that he WAS VALIDLY SERVED! Without proper service, there is no obligation to appear and the judgment, entered in assumed "default", IS VOID. Utah case law (**Garcia vs Garcia**, 712 P.2d 288 (Utah 1986) allows an attack---through Rule 60(b)(7)---to be made at any time, BECAUSE THE JUDGMENT IS VOID!

Proper service of process IS JURISDICTIONAL to the case! Without valid service, the court has NO JURISDICTION over the defendant and cannot enter a valid judgment. A default judgment---entered upon the non-appearance of an invalidly-served defendant---is VOID!

The case of **Wisden vs Bangerter**, 793 P.2d 1057 (Utah Supreme Court 1995) is clearly inappropriate. **Wisden** involved a plaintiff, who knew his case had been adjudicated! That plaintiff was simply late in bringing his appeal. In this case, it is the Defendant---who, because of the defective service, was not properly brought into the proceedings---who has a very legitimate reason to challenge the void judgment!

Plaintiffs' Brief [pp. 6-7] mistates the facts and misrepresent the law on the issue of the "usual place of abode". That phrase is one of legal significance! As used in Rule 4 of the Utah Rules of Civil Procedure and as

that phrase has been historically interpreted [**Grant vs Lawrence**, 37 Utah 450, 108 Pac. 931 (1910)] and applied to be the location where the person resides at the time he is actually served. The Defendant---at the time of service of the summons (28 September 1992) was NOT living in Missouri at the Appleton address with his wife; he was LIVING IN TEXAS. This fact is (was) implicitly admitted by counsel in his letter to the Missouri sheriff, even before service of process was attempted.

That the Defendant attended [as described in page 8 of Plaintiff's Brief] a family barbecue in Missouri in May 1992---THREE MONTHS BEFORE the defective service of process was even attempted---is absolutely immaterial and irrelevant to the instant issue. All that can be said concerning the May 1992 family barbecue is that the Defendant attended that barbecue! So what? The inference might---but is not required to---be drawn that he lived in Missouri. So what? That was in May! The simple fact remains: the Defendant was not "personally served" at "his usual place of abode", per **Grant vs Lawrence**, supra! A fact implicitly admitted by Plaintiffs' counsel even before the fact in his letter to the Missouri sheriff.

Plaintiffs' Brief [p. 9] is full of all kinds of assumed---but not established---"facts", certainly not material to the issue of the invalidity of service.

Plaintiffs argue [p. 9-10 of their Brief] that they are only required to use "reasonable efforts" to serve process upon the Defendant. No! The Plaintiffs have the burden of properly serving the defendant, according to the standards prescribed by Rule 4 and interpreted by cases such as **Grant vs Lawrence**, supra. The Plaintiffs' citation to **In re Schwenke**, 865 P.2d 1350 (Utah Supreme Court 1993), is inappropriate, because it is obvious from the case decision that Mr Schwenke was served and was aware of the proceedings against him!

The Plaintiffs misread the effect and rationale of **Garcia vs Garcia**, 712 P.2d 288 (Utah Supreme Court 1990). **Garcia** was decided not because the Supreme Court was "chagrined" [Plaintiff's term, p. 10 of their Brief] because the summons could have been left with the defendant in that case; **Garcia** was decided on the basis that the plaintiffs simply did NOT follow the clear mandate of Rule 4 and the court thus had no jurisdiction over the defendant! That's exactly what we have here: Rule 4's prescriptions have not been followed! Nikki---the wife---was served; Steven---who was NOT living there at the time---wasn't. Plaintiffs have an obligation to insure that they caused to be served the right person in the right manner; otherwise, the court is without jurisdiction. That the Plaintiffs waited laterally until

the last possible minute to attempt the service of process cannot avail them when that service is invalidly effected, because they served the wrong address.

The trial court is simply without jurisdiction over the Defendant and any judgment entered against him is void! **Garcia**, supra. See also **Woody vs Rhodes**, 461 P.2d 465 (Utah Supreme Court 1969).

## II
## THE DEFAULT JUDGMENT SHOULD BE SET ASIDE

The default judgment should be set aside---if only on equitable principles. The Defendant did not appear until he was properly notified---via the garnishment proceeding---that a judgment had been entered. The Plaintiffs' brief [p. 13] correctly acknowledges the law's "preference" for trying cases on their merits. The Plaintiffs' attempted character assassination of the Defendant through repetitious statements concerning alleged conduct or misconduct are immaterial to this case, in which the Plaintiffs have simply not effected service in the manner prescribed.

The underlying obligation is NOT, in theory, the renewal of a judgment (as Plaintiff has incorrectly pleaded the case), but rather whether or not the Defendant paid the mortgage requirements. The payment (or non-payment) of mortgage obligations are established by documentary evidence. We are dealing here not with a case

which---like a traffic accident---must of necessity deal with witnesses' perceptions and recollections, which fade with the passage of time. Plaintiffs have not claimed---nor, given their own lack of diligence in pursuing the case in the first instance---any disadvantage or prejudice due to the length of time. For the most part, the delay in the case has been either of their own making or certainly because of their own choice!

One must also wonder if a default judgment had been entered against the Plaintiffs if they would be quite so cavalier about arguing that "reasonable efforts" (in attempted compliance with Rule 4) were sufficient basis to uphold the default judgment against them.

Plaintiffs incorrectly assert [p. 14] that the Court could---on "stipulation"---have amended the judgment and issued it in the name of Laurel Caldwell. While such might have been done had the Defendant actually been there to so "stipulate", he wasn't there! Because he was not properly served and was not notified of the proceeding! That the plaintiffs---upon "stipulation"---might have been able to correct a lot of things in the case does not overcome the Plaintiffs' failure in the fatal mistakes that they made!

## III

## PLAINTIFFS' NON-COMPLIANCE WITH RULE 54(c)(2)

The Plaintiffs argue [pp. 13-14 of their Brief] that the Defendant has not been prejudiced by the subtle "switch" which was effected in the pleadings and the judgment actually entered.

The issue is whether or not the Plaintiffs have followed the Rules. Rule 54(c)(2) requires the judgment to conform to the pleadings (complaint), by providing:

> (2) Judgment by default. **A judgment by default shall not be different in kind from**, or exceed the amount, **that specifically prayed for in the *demand for judgment***.

Emphasis added.

The pleadings (complaint) initially alleged the action was brought by Nelda Wall "in behalf of the Estate of Hal E Wall". The Plaintiffs admit [p. 13] that there were no formal probate proceedings for Hal Wall, deceased. Thus, Nelda Wall---simply as surviving spouse---has no legal authority to bring an action "in behalf of the estate" of her deceased husband, unless and until she is lawfully appointed as Personal Representative or Special Administrator pursuant to court order, entered pursuant to the Probate Code [Title 75 of the Utah Code]. The critical issue here is NOT whether there is an "estate" of Hal E Wall; the dispositive issue is whether or not Nelda---not legally appointed to do so---may bring

and maintain an action "in behalf of the estate" of a deceased person. She cannot!

**Stevens vs Collard**, 837 P.2d 593 (Utah Court of Appeals 1992), holds that the trial court is to examine the face of the pleadings and decide whether or not a default judgment can be supported. There are two reasons in this case why the proffered "default judgment" cannot be supported, from the face of the pleadings. First, it should have been obvious to Judge Noel that the action was not one to "renew" the previous divorce judgment, that Nelda was not---and could not be---a party to that original (1982) divorce "judgment", so as to be able to "renew" the same. Secondly, it should have been obvious that Nelda Wall had no legal authority to bring the action "in behalf of the estate" of Hal Wall, deceased.

The Plaintiffs assert [p. 14 of their Brief] that the trial court could "amend the judgment and issue it into the name of plaintiff Laurel Caldwell, who could assign the judgment to Nelda F Wall." While this could possibly have been done---had the Defendant been there and had the Defendant agreed, which is NOT the case---the fact remains that it was not so done!

That the default judgment "does nothing more than implement the practicalities of the situation in an equitable way" [p. 14 of Plaintiffs' Brief] is incorrect.

Rule 54(c)(2) requires strict conformity with the original pleadings; otherwise, the whole integrity of the system is subject to abuse.

That the Plaintiffs are now willing to have no objection to an amendment of the default judgment to be issued in name of Laurel Caldwell does not correct the errors Plaintiffs have made. In fact, this statement alone implicitly acknowledges the correctness of the Defendant's assertions: that Nelda F Wall is not the correct party to be bringing the action. Thus, the default judgment entered in her name (Nelda F Wall) is, for the foregoing reasons, facially defective and cannot be allowed to stand.

CONCLUSION

The Court DOES have jurisdiction, at any time, to entertain a motion to set aside a VOID JUDGMENT---even a default judgment---improperly entered because of a lack of personal service, as required by Rule 4. **Garcia**, supra. The summons was NOT served upon the Defendant Steven D Caldwell "at his usual place of abode", which, per **Grant vs Lawrence** is the place he was living at the time service was made; it was served upon Nikki, at her residence. Rule 4 has not been complied with; the default judgment is simply void!

The default judgment ought to be set aside on

equitable grounds. The Defendant has not had "his day in court", has promptly responded when he first became aware of the proceeding, and the Plaintiffs' have claimed no prejudice in trying the case on the merits. Most---if not all---of the delay is attributable to the inaction of the Plaintiffs.

Nelda F Wall---not being legally appointed as the Personal Representative---has no authority to bring an action "in behalf of the estate" of any deceased person! The judgment is facially defective. The Plaintiffs' non-compliance with Rule 54(c)(2) further makes the default judgment defective.

The trial court's decision (to uphold the previously-entered default judgment) must be overturned.

Respectfully submitted this 11th day of September, 1997.

STEPHEN G HOMER
Attorney for Appellant
STEVEN D CALDWELL

CERTIFICATE

I certify that I caused two copies of the foregoing APPELLANT'S REPLY BRIEF to be mailed to Mr Delano S Findlay, Attorney at Law, 923 East 5350 South, Suite E, Salt Lake City, Utah 84117, this 11th day of September, 1997.