

1989

Jerry Gillespie dba Jerry's Drywall and Pamela Gillespie v. John P. Pizzello : Reply Brief

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Joseph J. Joyce; Strong & Hanni; Attorneys for Defendant-Appellant.

J. Kent Holland; Gordon J. Swenson; Anderson & Holland; Attorneys for Plaintiffs-Respondents.

Recommended Citation

Reply Brief, *Gillespie v. Pizzello*, No. 890387 (Utah Court of Appeals, 1989).
https://digitalcommons.law.byu.edu/byu_ca1/2000

This Reply Brief 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 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.

UTAH
DOCUMENT
KFU
50
A10
DOCKE.

890387-CA

THE UTAH COURT OF APPEALS

JERRY GILLESPIE dba JERRY'S
DRYWALL and PAMELA GILLESPIE,

Plaintiffs
and Respondents,

Case No. 89037-CA

Category 14(b)

vs.

JOHN P. PIZZELLO,

Defendant
and Appellant.

REPLY BRIEF OF APPELLANT

Appeal from the order denying motion to set aside default
of the Third Judicial District Court, Salt Lake County
Honorable Scott Daniels

Joseph J. Joyce
STRONG & HANNI
Sixth Floor Boston Building
Salt Lake County, Utah 84111
Attorneys for Defendant-Appellant

J. Kent Holland
ANDERSON & HOLLAND
623 East First South
Salt Lake City, Utah 84102
Attorneys for Plaintiffs-Respondents

Mary T. Nothman
Clerk of the Court
Court of Appeals

THE UTAH COURT OF APPEALS

)
)
)
)
)
)
)
)
)
)
)

Appeal from the order denying motion to set aside default
of the Third Judicial District Court, Salt Lake County
Honorable Scott Daniels

J. Kent Holland
ANDERSON & HOLLAND
623 East First South
Salt Lake City, Utah 84102
Attorneys for Plaintiffs-Respondents

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	11
ARGUMENT	1
POINT I. THE TRIAL COURT'S FAILURE TO SET ASIDE THE DEFAULT JUDGMENT CONSTITUTES A VIOLATION OF THE DEFENDANT'S DUE PROCESS RIGHTS AS GUARANTEED BY BOTH THE UNITED STATES CONSTITUTION AND THE UTAH CONSTITUTION.	1
POINT II. DUE PROCESS IS A FUNDAMENTAL RIGHT AND VIOLATION CAN BE CONSIDERED BY THIS COURT ON APPEAL.	6
POINT III. THE UTAH SUPREME COURT PROMULGATED A RULE REQUIRING SHOWING OF MERITORIOUS DEFENSE PRIOR TO RELIEF FROM DEFAULT JUDGMENT IS A VIOLATION OF DUE PROCESS BOTH UNDER THE UNITED STATES CONSTITUTION AND THE UTAH CONSTITUTION.	7
CONCLUSION	9

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
 <u>FEDERAL</u>	
<u>Davis v. Museler</u> , 713 F.2d 970 (2d Cir. 1983). . . .	3, 5
<u>Facio v. The Honorable Maurice Jones and Collection Management Agency, Inc.</u> , No. 88-C0965G (D. Utah 1989).	8, 9
<u>Mullane v. Central Hanover Bank & Trust Co.</u> , 339 U.S. 306, 314, 70 S. Ct. 652, 657 (1950). .	3
<u>Paralta v. Heights Medical Center, Inc.</u> , 108 S. Ct. 896, 99 L. Ed. 2d 75 (1988). . . .	7
 <u>UTAH</u>	
<u>Carlson v. Bos</u> , 740 P.2d 1269, 1271 (Utah 1987). . . .	1
<u>Heath v. Mower</u> , 597 P.2d 855 (Utah 1979).	6
<u>In RE Woodward</u> , 14 Utah 2d 336, 384 P.2d 110 (1963). .	7
<u>Pratt v. City Council City of Riverton</u> , 639 P.2d 172, 174 (Utah 1981).	7
<u>State of Utah by and through Dept. of Social Services v. Musselman</u> , 667 P.2d 1053 (Utah 1983). .	7,8,9
<u>Wood v. Weening</u> , 736 P.2d 1053 (Utah App. 1987). . . .	3
 <u>STATUTES</u>	
United States Constitution, Amendment Fourteen	1
Utah Constitution, Art. I, Sec. 7.	1,9
Utah Rules of Civil Procedure, Rule 4.	1
Utah Rules of Civil Procedure, Rule 4(i).	2,3

ARGUMENT

POINT I

THE TRIAL COURT'S FAILURE TO SET ASIDE THE
DEFAULT JUDGMENT CONSTITUTES A VIOLATION OF
THE DEFENDANT'S DUE PROCESS RIGHTS AS
GUARANTEED BY BOTH THE UNITED STATES
CONSTITUTION AND THE UTAH CONSTITUTION.

The Fourteenth Amendment to the United States Constitution and Article I of the Utah Constitution impose procedural due process restrictions on government's power to proceed against individuals and their property. Implicit in the concept of procedural due process are the guarantees that the forum will be fair and reasonable and that the defendant will have an opportunity to appear and defend against the action.

The Utah Supreme Court recognizes that Federal due process requirements assure, to the extent possible, that the defendant will have an opportunity to be put on notice of pending legal action and to have the opportunity to present defenses. Carlson v. Bos, 740 P.2d 1269, 1271 (Utah 1987).

Rule 4 of the Utah Rules of Civil Procedure provides a mechanism whereby due process guarantees are implemented.

Service of process implements the procedural due process requirement that a defendant be informed of pending legal action and be provided with an opportunity to defend against the action.

Carlson v. Bos, 740 P.2d at 1271.

Defendant asserts that the plaintiffs' failure to comply with Rule 4 has violated the defendant's procedural due process guarantees of both the United States Constitution and the Utah Constitution. Additionally, as a result of the failure to comply with Rule 4, the trial court lacked jurisdiction to enter a default against the defendant.

The defendant recognizes that while personal service of process guarantees that the defendant will be notified of pending legal action, the United States Supreme Court as well as the Utah Supreme Court has held that actual notice is not always necessary. Thus, procedures to effect service other than by personal service have been adopted such as that found in Rule 4(i), Utah Rules of Civil Procedure which provides:

If the person to be served refuses to accept a copy of the process, service shall be sufficient if the person serving the same shall state the name of the process and offer to deliver a copy thereof.

Defendant asserts however that the trial court incorrectly concluded that the defendant Pizzello refused to accept a copy of the process. In order for Rule 4(i) to be harmonious with the procedural due process guarantees, the Rule must be utilized when it is reasonably calculated, under all the circumstances, to appraise the interested party of the pendency of the action and afford them an opportunity to participate in the action. Mullane

v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S. Ct. 652, 657 (1950).

Defendant asserts that he should have been appraised of the action and given an opportunity to defend the action. Defendant did not refuse to accept service and the trial court improperly concluded that service was refused. At worst, defendant refused to answer his door.

The trial court assumedly relied upon the Utah Court of Appeals decision of Wood v. Weening, 736 P.2d 1053 (Utah App. 1987), to assist it in concluding that service had been obtained under Rule 4(i) of Utah Rules of Civil Procedure. The Wood v. Weening decision is distinguishable from the present facts and defendant refers the court to the defendant's original brief for further discussion of the Wood decision.

Although the defendant had been unable to cite authority for the proposition that silence or inactivity may not constitute a refusal, a Federal Second Circuit Court of Appeals decision held that a process server must bring the question of due process within the purview of the person to be served.

In the Federal Second Circuit Court of Appeals case of Davis v. Museler, 713 F.2d 970 (2d Cir. 1983), defendants moved to vacate a default judgment based upon, among other reasons, defective service. In Davis, the plaintiff engaged the services

of a private investigator to locate the defendants Museler and Maloney. According to the investigator's affidavit of service, the investigator arrived at the Museler/Maloney residence and was greeted at the front door by a woman who roughly fit Maloney's description. However, the woman denied ever having heard of Jacqueline Museler. After briefly consulting with the man who was working on the front lawn and who confirmed that "this is the Museler residence", the investigator returned and knocked again. This time he was met by a man who claimed to be "Joe Marshall" but who produced a business card bearing the name of "C. Bellammy". Having seen enough, the investigator asserted that the man at the door was Joseph H. Museler and advised that he had subpoena and deposition notices as well as summons and complaints for him and Jacqueline Maloney. When the man refused to accept service, the investigator informed him that he was leaving the papers on the railing at the front door.

On appeal, the defendants raised the issue that the lower court's denial of a motion to vacate the default judgment was in error based upon improper service obtained by the plaintiff. The defendants submitted affidavits at the lower court indicating that they were not at home on the day of the alleged service. In considering the defendants' motion to set aside the default based upon improper service, the Second Circuit Court of Appeals noted:

With respect to personal service, however, we believe the defendants' motion raised sufficiently serious questions of fact to warrant an evidentiary hearing under New York law . . . We recognize that New York have traditionally and wisely had little tolerance for the type of gamesmanship that plaintiffs claim took place here. It is thus well settled under New York law that where a defendant refuses to accept service, the papers may be left in his general vicinity. [Citations omitted.] But a process server who adopts this course of action must bring "the questioned due process within the purview of the person to be served" [citations omitted], since "the defendant must be made aware that he or she is in fact being served with process." Thus, even if we were to accept that the Vassalotti [investigator] affidavit at face value, we could not necessarily conclude that Maloney had been properly served. [Citations omitted.] For these reasons, a hearing must be held before it can be determined whether the motion to vacate should be granted on the grounds of defective service."

Id. at 914.

Recognizing that the preceding case relies upon New York law, it is significant to note that the court held that the defendants must be made aware they are in fact being served with process. There has not been a decision before the Utah Supreme Court or the Utah Court of Appeals wherein the court has upheld service where the process server simply stated the name of the process and offered to deliver a copy thereof without encountering some individual who could at least put the person to be served on notice.

Defendant asserts that without some further evidence that there was a refusal by the defendant to accept service, the trial court abused its discretion in concluding that there was a refusal and that service was appropriate. Defendant was denied due process as guaranteed by both the United States Constitution and the Utah Constitution.

POINT II

DUE PROCESS IS A FUNDAMENTAL RIGHT AND VIOLATION CAN BE CONSIDERED BY THIS COURT ON APPEAL.

Defendant recognizes the general rule outlined in the brief of plaintiff that issues raised for the first time on appeal which were not raised before the trial court will not be considered on appeal. Heath v. Mower, 597 P.2d 855 (Utah 1979), Brief of Appellant, Page 14. However, the Utah Supreme Court has held that where fundamental rights and jurisdictional issues are raised, even for the first time on appeal, the same will be heard by the Court.

As to the first argument, plaintiff contends that the Act violates Article VI, Section 28 of the Utah Constitution. Issues not raised at trial cannot be raised on appeal. This general rule applies equally to constitutional issues, with the limited exception of where a person's liberty is at stake.

Pratt v. City Council City of Riverton, 639 P.2d 172, 174 (Utah 1981); see also, In re Woodward, 14 Utah 2d 336, 384 P.2d 110 (1963).

The constitutional arguments raised by defendant Pizzello clearly affects the defendant's liberty and due process and therefore is appropriate for review by this Court.

POINT III

THE UTAH SUPREME COURT PROMULGATED A RULE
REQUIRING SHOWING OF MERITORIOUS DEFENSE PRIOR
TO RELIEF FROM DEFAULT JUDGMENT IS A VIOLATION
OF DUE PROCESS BOTH UNDER THE UNITED STATES
CONSTITUTION AND THE UTAH CONSTITUTION.

Plaintiffs attempt to minimize the defendant's argument that the Utah Supreme Court's requirement of showing a meritorious defense as set forth in the opinion of State By and Through the Department of Social Services v. Musselman, 667 P.2d 1053 (Utah 1983), constitutes an unconstitutional denial of due process by distinguishing the facts of the United States Supreme Court decision in Paralta v. Heights Medical Center, Inc., 108 S. Ct. 896, 99 L. Ed. 2d 75 (1988). Plaintiffs argue that the critical facts in Paralta are not present in the instant case. Plaintiffs emphasize that the Court's holding in Paralta arose from the fact that Paralta had never been properly served and therefore had never had proper notice.

However, defendant's argument in the present case that the requirements of Musselman violate both Federal and State constitutional due process guarantees are based upon the Utah Federal District Court decision of Gary Fassio v. The Honorable Maurice Jones and Collection Management Agency, Inc., No. 88-C-965G (D. Utah 1989), in which there was proper service upon the defendant Gary Fassio in the underlying collection action. (See Addendum C, Brief of Appellant, Memorandum Decision and Order in Fassio v. Jones, et al.).

In Fassio, the court in its memorandum decision summarized the facts of the underlying action in the Third Circuit Court of Salt Lake County. As noted in the memorandum decision, Fassio was properly served with the summons and complaint but believed that the matter had previously been resolved and therefore failed to file an answer. With proper service upon Fassio, the Honorable Judge J. Thomas Greene concluded that promulgated procedural rule of court imposed by the Utah Supreme Court in Musselman imposing the showing of a meritorious defense, in addition to the other requirements of Rules 55 and 60 of the Utah Rules of Civil Procedure before a default judgment can be vacated, was declared unconstitutional as a violation of the due process clause of the United States Constitution.

Defendant recognizes that the record is void as to what was the basis for Judge Daniels denial of defendant's motion to set aside the default judgment. However, inasmuch as the Musselman decision was the most current guidance offered by the Utah Supreme Court for a lower court in determining whether or not a motion to set aside a default should be granted, it must be assumed that Judge Daniels relied upon the Musselman decision in denying defendant's motion to set aside the default judgment in the present action.

It would appear clear from the Fassio decision, which the defendant recognizes as not binding upon this Court, that the promulgated rule offered in Musselman is a violation of due process of law if the showing of a meritorious defense is imposed in addition to the procedural requirements which would otherwise justify setting aside the default judgment.

The defendant in the instant action was denied due process of law as guaranteed by the Fourteenth Amendment and Article I, Section 7 of the Utah Constitution and the default judgment should be set aside based on the deprivation of said rights.

CONCLUSION

The trial court erred in refusing to set aside the default judgment entered against defendant Pizzello. The trial court

abused its discretion in concluding that the defendant was served pursuant to Rule 4(i) of the Utah Rules of Civil Procedure.

The trial court's error constituted a violation of the defendant's due process guarantees of both the Fourteenth Amendment and the Utah Constitution.

Additional due process guarantees were violated by the procedural rule promulgated by the Utah Supreme Court in the Musselman decision, requiring a showing of a meritorious defense prior to granting relief from default judgment.

Based upon the foregoing, defendant respectfully request that this Court reverse the trial court's denial of the motion to set aside default judgment.

DATED this 27th day of November, 1989.

STRONG & HANNI

By Joseph J. Joyce
Joseph J. Joyce
Attorneys for Defendant-
Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of November, 1989, I caused four true and correct copies of the foregoing REPLY BRIEF OF APPELLANT to be served upon the following by depositing copies

in the United States mails, postage prepaid, addressed as follows:

Kenneth A. Bronston
ANDERSON & HOLLAND
623 East First South
Salt Lake City, Utah 84102


