1980

# Val Roberts v. Douglas K. Freeland : Appellant'S Brief

Utah Supreme Court


Scott W. Holt; Attomey Appellant Eldon A. Eliason; Attomey for Respondent

IN THE SUPREME COURT

OF THE STATE OF UTAH

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| VAL ROBERTS, | : | |
| Plaintiff and Respondent, | : | |
| vs. | : | Case No. 16869 |
| DOUGLAS K. FREELAND, | : | |
| Defendant and Appellant. | : | |

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# APPELLANT'S BRIEF

Appeal from the Judgment of the 5th
District Court for Millard County
Hon. J. Harlan Burns

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50 North Main Street
Layton, Utah 84041
Attorney for
Appellant

Eldon A. Eliason
22 N. 300 W.
Delta, Utah 84624
Attorney for
Respondent

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## OVERVIEW OF CASE

This is an action to recover money alleged to be owed Respondent for his feed and feeding of Appellant's cattle. The parties agreed to compensate Respondent so much money per pound increase or gain on Appellant's cattle. The weight of the cattle on delivery being a key issue.

Appellant contends that he was never served a Summons and Complaint according to the rules of civil procedure and, therefore, the district court lacked jurisdiction to enter a default judgment. Appellant also contends that he was mislead by representations made to him by Respondent's attorney and that Appellant understood that no legal action would be filed i.e., a default judgment, until weigh tickets were obtained; that the parties would settle it out of court.

## DISPOSITION IN LOWER COURT

Appellant appeals to this court from an Order denying Appellant's Motion to Vacate or Set Aside a Default Judgment.

## RELIEF SOUGHT ON APPEAL

Appellant seeks to have the lower court's Order overturned and the default judgment set aside on the grounds that: (1) the lower court never obtained jurisdiction over the Appellant and (2) Appellant's inadvertance in not filing an Answer was because he was mislead by Respondent's attorney's representations that he would not be defaulted.

## STATEMENT OF FACTS

On or about the 7th day of November, 1978, a deputy sheriff from Davis County Sheriff's Office went to the home of Appellant, Douglas K. Freeland, at 445 East 450 North, Layton, Utah, to serve Appellant a Summons and Complaint in an action that had been filed in Millard County District Court by Respondent. A friend of the Appellant, Edward Oberg, who happened to be at Appellant's home when the sheriff came, answered the door. The deputy sheriff inquired of Mr. Oberg whether or not he was Appellant. Mr. Oberg informed the process server that he was not the party he sought and suggested that the officer return later. The deputy asked Mr. Oberg whether he lived at the home of the Appellant, to which he responded that he did not live there, but was a friend of the Appellant. The deputy gave Mr. Oberg the papers and asked him to give them to the Appellant.

The next day, when Appellant returned from a business trip, in Idaho, Appellant found some papers stuck in his screen door. Within a day or two thereafter, Appellant called Respondent's attorney, Eldon A. Eliason, since his name appeared on the Complaint.

Appellant and Respondent's attorney discussed the allegations set forth in the Complaint. Respondent's attorney informed Appellant that he had been in the cattle business

for a number of years and that Respondent's Complaints were not strong ones; that the weight gain on the cattle was not what one would expect, and that the dollar amount his client, the Respondent, would be entitled to, if any, could be best determined by obtaining certain weight tickets which would show the weight of the cattle at the time Respondent took possession of them.

Appellant informed Respondent's attorney that if Respondent did not have the weight tickets in his possession he would obtain them himself from the trucker who trucked the cattle for Appellant.

Appellant understood from the telephone conversation that Respondent's attorney agreed not to pursue any further legal action until the weight tickets could be obtained by Appellant. It was further agreed that the parties were to have gotten together to settle this issue since with the weight tickets, the weight of the cattle delivered to Respondent would be known with a certainty and if there was any amount of money due and owing Respondent, Appellant agreed he would pay it. It was Appellant's understanding from the telephone conversation with Respondent's attorney that no further legal action would be taken against him until the weight tickets could be obtained. Respondent's attorney did not tell Appellant to file an Answer or obtain legal

counsel at any time during the conversation.

Several weeks later, around the 3rd or 4th week of November, 1978, Appellant contacted the truck driver who informed him that he had the weight tickets and would mail them to Appellant. Appellant waited for approximately a month and then contacted the trucker several additional times, with three to four weeks lapsing between contacts and being informed each time, that the trucker had the weight tickets and would send them right away to the Appellant.

Appellant proceeded under the assumption that nothing further would be done until the weight tickets were obtained. No additional contact was made between the parties until Respondent's attorney filed a default judgment, for Appellant's failure to file an Answer to Respondent's Complaint, on April 11, 1979.

Appellant contacted Respondent's attorney after receiving an undated letter informing him that default judgment had been entered against him on the 11th day of April, 1979, in the amount of $5,879.46. Appellant contacted Respondent's attorney upon receipt of the letter and inquired as to why he had entered judgment against him, since he had agreed not to do anything further. Respondent's attorney informed him that his client had pressured him to enter the default.

Appellant contacted Scott W. Holt, Attorney for Appellant, shortly thereafter and Appellant filed a Motion to Vacate Judgment upon the grounds that the Court lacked jurisdiction

over the Appellant in that he had not been served according to Rule 4(e)(1), Utah Rules of Civil Procedure, and that Appellant had been mislead as to what actions he should have taken by Respondent's attorney's statements and the agreements, that no further action would be taken by Respondent until Respondent had obtained the weight tickets.

The Motion to Vacate was argued on the 17th day of July, 1979, and briefs were submitted on the issue of jurisdiction. Appellant's Motion was denied on the 18th day of December, 1979. Wherefore Appellant respectfully appeals to this Court.

## STATEMENT OF POINTS

Appellant believes that the sole issues before this Court are as follows:

1. Whether or not the lower court obtained jurisdiction over the Appellant.

2. Whether the lower court erred in not granting Appellant's Motion to Set Aside a Default Judgment after Appellant demonstrated that there was reasonable justification and excuse for his failure to file an answer.

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Appellant's argument is outlined as follows:

Issue I: The District Court failed to obtain jurisdiction over the Appellant in that the Appellant was not served with a Summons and Complaint in accordance with the procedure as is set forth in Rule 4(e)(1) Utah Rules of Civil

Procedure.

Point 1: In order to obtain jurisdiction over Defendant the service of process must be made upon a suitable person who is living at Defendant's usual place of abode.

Point 2: Strict compliance of the statute is required when service is made in a manner other than by personal service.

Point 3: Actual notice is no cure for defective service of process where the statute allowing process has not been complied with.

Point 4: The burden of proof shifts to the Plaintiff once the Defendant has established the service of process to be defective.

Issue II: The trial court erred in refusing to vacate a default judgment entered against the Appellant where the Appellant demonstrated that there was a reasonable justification and excuse for his failure to file an Answer.

Point 1: Appellant was mislead into not filing an Answer to Respondent's Complaint by statements made to him by Respondent's attorney.

Point 2: It is an abuse of discretion to refuse to vacate a default judgment where reasonable justification exists.

Point 3: Appellant's motion under Rule 60(b)(1), Utah Rules of Civil Procedure was timely made.

## ARGUMENT

### ISSUE I

THE DISTRICT COURT FAILED TO OBTAIN JURISDICTION OVER THE APPELLANT IN THAT THE APPELLANT WAS NOT SERVED WITH A SUMMONS AND COMPLAINT IN ACCORDANCE WITH THE PROCEDURE AS IS SET FORTH IN RULE 4(e)(1) UTAH RULES OF CIVIL PROCEDURE.

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POINT 1: IN ORDER TO OBTAIN JURISDICTION OVER DEFENDANT THE SERVICE OF PROCESS MUST BE MADE UPON A SUITABLE PERSON WHO IS LIVING AT DEFENDANT'S USUAL PLACE OF ABODE.

Respondent never effected service of process on the Appellant in this matter since Appellant was never served in accordance to Rule 4 (e)(1) Utah Rules of Civil Procedure. Rule (e)(1) requires that the Defendant either be served personally or that some person who is residing at Defendant's usual place of abode be served in order for jurisdiction to be obtained over the Defendant. Rule (e)(1) is as follows:

> Personal service within the state shall be as follows: (1) Upon a natural person of the age of 14 years or over, by delivering a copy thereof to him personally, or by leaving such copy at his usual place of abode with some person of suitable age and discretion there residing. [Emphasis added]

It is clear from the facts and record that Defendant

was never personally served. It is undisputed that a friend of Appellant, a Ed Oberg was served with the papers while he was at Appellant's residence. Ed Oberg's sworn Affidavit revealed that he was not living or residing at Appellant's place of abode. Quoting from Ed Oberg's Supplemental Affidavit in Support of Motion to Dismiss, paragraph 3:

> That Affiant was not a resident of 2445 East 450 North, Layton, Utah, nor living at said residence at the time the Summons and Complaint was received by him; that I informed the officer of this fact at the time I was given said papers, but I was instructed to take them anyway.

The law is as stated in 62 Am Jur 2d 887, and 14 L.Ed 2d 751 should be controlling on this issue. 62 Am Jur 2d 887, 888 states:

> That the person with whom the papers are left must live within the occupied premises of the Defendant.

Federal courts have uniformly held accordingly and have ruled upon the exact question as is present in the instant case. Utah's statute is almost identical to the Federal Rules of Civil Procedure. 14 L.Ed 2d 751 states that:

> There is authority to the effect that where a Defendant maintains a household, the words "then residing therein" mean, so far as the "residing" aspect is concerned, that the person with whom the papers are left must live within the occupied premises, so that a servant for example, who sleeps elsewhere would not be a person "residing therein".

In Zucherman v. McCullay, 7 FRD 739 app. dismd. 1970 F 2d 1015, the Defendant in that case filed a motion to quash

service of process in that a Summons and Complaint had not been left at Defendant's "dwelling house or usual place of abode with some person of a suitable age and discretion then residing therein" in conformity with Rule 4 (d)(1) of the Federal Rules of Civil Procedure. At the hearing, evidence was presented that showed the person served was an employee of the Defendant's, a janitor, who worked there during the day, but who lived elsewhere. The District Court concluded that the person served was not "residing therein" within the meaning of the Rule. The United States Court of Appeals affirmed the lower court's ruling. See also: Leo v. Shin Shu, 30 FRD 56 and Judson v. Judson, FRD 366; Smith v. Kincaid, 249 F 2d 243, (case distinguished because court felt a "nexus" existed where landlady was served). It is clear from the cases cited that a person served must be living or residing at Defendant's place of abode at the time the person is served in order for jurisdiction to be obtained over Defendant. Because our statute is nearly identical to the one cited in Zucherman, supra., this court should also require service on a person living or residing at Defendant's residence in order to have valid service of process. This was not done in the instant case and, therefore, this Court should rule in favor of the Appellant.

POINT 2: STRICT COMPLIANCE OF THE STATUTE IS REQUIRED WHEN SERVICE IS MADE IN A MANNER OTHER THAN BY PERSONAL SERVICE.

Utah courts have uniformly held that there must be

strict compliance with the statute allowing service of process by means other than by serving the Defendant personally. Redwood Land Company v. Kimball, 20 UT 2d 113, 433 P 2d 1010 (1967), Utah Sand and Gravel Products Corp. v. Tolbert, 16 UT 2d 407, 402 P 2d 703. It may be pointed out that the legislative intent which allows even a substituted form of service of process was done with the belief that persons residing with the person served would likely be family members of that person. In Bank of America National Trust and Savings Association v. Carr, 292 P 2d 587, the Court held that even though the service of process procedures were substantially complied with, that "the statutory conditions on which service depends must be strictly observed. Unless the statute has been complied with there is no power to render a judgment".

In the instant case, the said statute was not complied with. Our statute requires that substitute service, i.e., service other than by personal service, be made on a person of a suitable age residing or living with the person on whom service is desired, living at that person's usual place of abode. It is clear from the record that no one but the Appellant lived or resided at 445 East 450 North, Layton, Utah. Quoting from the transcript of the hearing on this matter at page 17 line 24:

> Q. (By Mr. Eliason) What members of your family did you have residing with you on November the 3rd, 1978, at that address?

A. There is no one that resided at that address besides myself.

Q. And who is Ed Obert? (sic)

A. Ed Obert (sic) is a friend of mine.

Q. And where did Ed Obert (sic) live on the third day of November, 1978?

A. I assume he lived in Roy.

The Court: The 7th is the day.

And quoting further at line 19 page 18:

Q. (By Mr. Eliason) Did he [Ed Oberg] report to you about the Sheriff having served a Summons upon him?

A. He did.

Skipping to line 26, supra.

Q. What did he [Ed Oberg] tell you in that regards?

A. He just told me that the Sheriff brought a Summons and wanted him to give it to me.

There can be no question that the statute allowing substitute service was not complied with. The issuance and service of a Summons is a requirement of acquiring jurisdiction over a Defendant. Since the correctness of service is of such prime essence to a lawsuit, the procedure by which service of process is allowed must be strictly complied with.

POINT 3: ACTUAL NOTICE IS NO CURE FOR DEFECTIVE SERVICE OF PROCESS WHERE THE STATUTE ALLOWING PROCESS HAS NOT BEEN COMPLIED WITH.

Actual notice of a lawsuit does not remedy defective service of process. Opposing counsel will argue that Appel-

lant received the Summons and Complaint. This fact is admitted. However, receiving the papers by any other means than is allowed by statute still would not correct a defective service. The hearing record is clear how Appellant received notice regarding the lawsuit. Quoting from the transcript page 3 line 10:

> The Court: What you are saying is that service was effective upon one Ed Obert (sic)?
>
> Mr. Holt: That is correct, your honor.

Skipping line 16; supra:

> The Court: And that Ed Obert (sic), pursuant to his Affidavit, left those pleadings, Summons and Complaint with or in the screen door?
>
> Mr. Holt: That is correct.

Continuing to line 17 page 8:

> Q. Would you tell the Court and inform the Court when you first knew or gained knowledge regarding a lawsuit had been commenced against you and the circumstances surrounding that?

Continuing to line 28, supra:

> A. (Appellant) I am not sure of the date; I'm sure it was that part of the year.
>
> The Court: All right, next question.
>
> The Witness: I arrived home late at night, sometime probably after 9:00 and I find an envelope that is stuck in the back door, and I, of course, opened it and

looked inside and it was the Summons...

In Utah Sand and Gravel Products Corp., at 705, supra, the court held that there is no other substitute for following the procedures required for service of process.

> The requisite formalities of the Summons and the manner of service prescribed by law are intended to assume the recipient the bona fides of the Court process and the importance of his giving serious attention thereto. These cannot be supplanted by the mere notice by letter, telephone or any other such means.

Clearly, finding papers stuck in a screen door late at night would not constitute service of process. Although Appellant received the papers, the manner in which he received them would leave much to be desired. Actual notice is no cure for a defective service of process, and even though he received the papers, no jurisdiction was obtained over him and he was under no duty to respond, because the service of process was defective. Defective service of process is not currible by any means except re-servicing him. It would appear then, that since no jurisdiction was obtained over the Appellant, that the lower court would have no authority to enter a default judgment and Appellant's appeal should be granted.

POINT 4: THE BURDEN OF PROOF SHIFTS TO THE PLAINTIFF ONCE THE DEFENDANT HAS ESTABLISHED THE SERVICE OF PROCESS TO BE DEFECTIVE.

It is logical to believe that once the issue of defective service of process has been raised and there is sufficient evidence to rebut the correctness of the Affidavit of

Return of Service, the burden is upon the Plaintiff to establish that the facts as are set forth in said Affidavit are correct.

The only evidence before the district court presented by the Respondent was the Affidavit of the Return of Service wherein the process server stated that he left the papers with "a person of suitable age and discretion and residing at the usual place of abode of the said Defendant." Appellant testified that no one lived with him; that he dwelt alone with no family, etc. Ed Oberg, on his oath, stated that he told the officer that he did not live at Appellant's residence, but was instructed to take the papers anyway. There was no evidence presented, other than what the pre-printed standard Affidavit of Return of Service set forth.

Appellant met his burden to rebute the validity of the return and the burden then shifted to Respondent to establish the validity of the return. No evidence was presented to substantiate that the person served was "residing at Appellant's place of abode." Appellant believes that Respondent failed to meet his burden in that Respondent failed to verify the correctness of the Return of Service and that the lower Court erred in not granting Appellant's Motion to Set Aside the Default Judgment.

## ISSUE II

THE TRIAL COURT ERRED IN REFUSING TO VACATE A DEFAULT JUDGMENT ENTERED AGAINST THE APPELLANT WHERE THE APPELLANT DEMONSTRATED THAT THERE WAS A REASONABLE JUSTIFICATION AND EXCUSE FOR HIS FAILURE TO FILE AN ANSWER.

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POINT 1: APPELLANT WAS MISLEAD INTO NOT FILING AN ANSWER TO RESPONDENT'S COMPLAINT BY STATEMENTS MADE TO HIM BY RESPONDENT'S ATTORNEY.

Appellant was mislead as to what actions he should take to protect his legal interest in the instant case by certain statements and representations made to him by Respondent's attorney. Utah law provides a remedy from a default judgment where the defaulting party was mislead as to what actions he should take to protect himself. Rule 60 (b)(1) states:

> On motion and upon such terms as are just, the Court may in the interest of justice, relieve a party...from a final judgment...for the following reasons: (1) mistake, inadvertance...or excusable neglect.

Ample authority exists that this mislead party is entitled to relief under the said rule. Yarbrough v. Yarbrough, 301 P 2d 426, a California Appeal case stated that there is excusable neglect where there are settlement negotiations and where there is an oral or implied understanding that no default will be taken without notice.

> There can be no doubt that a trial court may find excusable neglect or surprise where settlement negotiations are being had between counsel, and where there is an oral or implied understanding

> that no default will be taken without notice and counsel takes such a default without notice.

Yarbrough, supra at p.430 (see also Wayburn v. Anderson, 253 P. 148; Greenamyer v. Bd. of Lugo E. S. Dist., 2 P 2d 848; Beard v. Beard, 107 P 2d 385; Bonfilio v. Granger, 140 P 2d 861; Greenwell v. Caro 249, P 2d 573 for additional authority). It would therefore seem logical to assume where the understanding is made between the opposing counsel and a Defendant, that even greater latitude would be allowed for the lay person to be excused by his inadvertance in defending himself. The evidence produced at the hearing to set aside the default judgment clearly demonstrated that Appellant was mislead into not filing an Answer to Respondent's Complaint because he was to obtain weigh tickets and then a settlement would be reached.

Appellant, in his Affidavit and his testimony reasonably demonstrated that Respondent's attorney agreed to forego further legal action until Appellant could obtain weight tickets which were in the possession of a third party. The tickets which were in the possession of a third party. The hearing transcript establishes Appellant's understanding of what he had agreed to do. Quoting from line 13 page 9:

> [After Appellant found the papers in his screen door]
>
> Q. What action did you take on your part?
>
> A. Either the following day or the day after, I don't recall whether I had trouble getting ahold of the attorney or not, but I made a call to Mr. Roberts' attorney's office and I told the attorney that I was

surprised, and that I thought it wasn't a founded matter; there was no basis for it, and we talked at length about cattle; he indicating to me that he, himself, raised cattle and thought that the issues weren't exactly strong and the gain on the cattle wasn't exactly what you would expect it to be.

Q. Who did you talk to?

A. Mr. Eliason.

Q. Did he identify himself to you on the phone as being Mr. Eliason?

A. He did.

Continuing to line 2 page 10:

A. ...Well, it come down to the issue of what the cattle weighed when they were received at Delta. Well, I had instructed the truckers that trucked the cattle from Skoal Valley to weigh the cattle at Delta.

Going to line 18 page 10:

Q. Did he indicate to you at any time that he would forego taking a default judgment?

A. Our conversation was that I would get ahold of the trucker, get the weigh tickets, which apparently were not picked up by Mr. Roberts and taken by the truckers; the discussion was I would get the weigh tickets and get together with Mr. Roberts and his attorney and try to get this thing worked out.

Q. Did at any time Mr. Eliason give you a date to

which this needed to be accomplished?

A. No date was set.

Q. So with your conversation, what was your understanding, then, as to what Mr. Eliason--

[An objection was raised at this question which was overruled.] Continuing to line 9 page 11:

The Court: I think it is a conclusion he can properly draw and testify to. Answer the question.

The Witness: My understanding was, I was to get ahold of the trucking company, obtain the weight tickets and set up a meeting with Mr. Eliason and Mr. Roberts to resolve the issue.

Q. At any time did he advise you that you needed to obtain counsel or file an Answer to the Complaint?

A. At no time.

Going to line 12 page 13:

Q. Then you proceeded on the assumption that nothing further would be done on it [further legal action] with regards to the lawsuit until these weigh tickets could be obtained by you and that you and Plaintiff's attorney would meet together and resolve the issue?

A. Correct.

Respondent's attorney verified on direct examination, that the conversation took place and testified to substantially the same outline of the conversation. (see lines 9 through 18 at page 23, lines 3 through 24 at page 24 of the

transcript). Respondent's attorney admitted that the weight tickets were essential to the case and that the weight tickets "would be a fundamental question involved." line 10 page 24.

Respondent's attorney also stated and advised the Appellant to pursue the obtaining of the weigh tickets in order that the parties could reach a settlement in the instant case. Respondent's attorney admitted that Appellant should pursue the possibility of settlement, quoting from line 12 page 25:

> Q. Did you ever tell him [Appellant] or infer to him that you and your client, Mr. Roberts, and he should have a meeting to see if this issue [the weigh tickets and difference in gains] could be resolved after he obtained the weight tickets?
>
> A. (Respondent's attorney) I don't remember that kind of a conversation. I definitely told him that if there was any area of settlement of this case that we should follow it. But I advised him, I am sure, that he should get legal counsel.
>
> Q. But then you did discuss there an area of settlement that it should be followed with him, then, is that correct?
>
> A. Oh, I suppose that I might have said, "If there's any possibility of settlement that you should follow it."

Although Respondent's attorney could not remember ex-

actly what was said, the record reveals sufficient evidence to establish that a reasonable man discussing a case with the opposing attorney could reasonably infer from that conversation that nothing further would be done until the weigh tickets could be obtained. Furthermore, Respondent had been advised to pursue the "possibilities of settlement", and that after the weigh tickets were obtained, "we'll meet" and resolve the issue. It is undisputed that the conversation took place after Appellant found the Summons and Complaint. A reasonable man could reasonably infer that no further action would be taken. The district court erred in not vacating the default judgment since reasonable justification existed to show that Appellant was mislead and as to what he should do.

POINT 2: IT IS AN ABUSE OF DISCRETION TO REFUSE TO VACATE A DEFAULT JUDGMENT WHERE REASONABLE JUSTIFICATION EXISTS.

It has long been held that it is an abuse of the discretion of a court to refuse to vacate a default judgment where a reasonable justification exists as to why the Defendant failed to file a response to an action. Mayhem v. Standard Gilsonite Co., 14 Utah 2d 52, 376 P 2d 951; Byland v. Crook, 60 Utah 285, 288, 208 P 504, 505 (1922). Rule 60(b)(1) state in part that:

> The court may in the furtherance of justice relieve a party of his legal representative from a final judgment, order or proceedings for the following

> reasons: (1) mistake, inadvertance, surprise, or excusable neglect.

In Warren v. Dixon Ranch Company, 123 Utah 415, 260 P 2d 741, the court stated at page 743 that where an oral promise is made to forego taking a default and the time for answering is extended that

> Relief in such instances is granted not because the other party was fraudulent but because Complainant [the Defendant] was deprived of his chance to present his case by the conduct of the party whether or not the conduct was consciously wrongful.

In the instant case, the Defendant herein complains to the Court that representations were orally made to him by the Respondent's attorney that no further legal action would take place until he obtained certain weigh slips and that the parties hereto could meet and settle the matter without the need of the lawsuit.

Applying the rule set forth in Warren v. Dixon Ranch Co., supra, this Court should have found that Respondent's attorney's conduct could have reasonably mislead the Appellant into a false sense of security regarding what action would be necessary to take on his part in order to preserve his legal rights in this case. The testimony of both the Appellant and Respondent's attorney of the conversation that took place between them, leaves a little doubt as to what was agreed on and that the Appellant could have reasonably been mislead as to what he should have done. Respondent's attorney testified that he could have discussed the possibility of settlement

and it was possible. Under the circumstances and purview of the topics discussed, that the Appellant was lead into a mistaken belief that he would not have to file an Answer until the weigh slips were obtained.

Respondent's attorney's forebearance to file a default judgment, (which he could have filed approximately four and one-half months earlier), would tend to support Appellant's contention that an agreement between them existed. Respondent's attorney, on direct examination testified to the fact that Appellant was not instructed to file an answer within 20 days, contrary to other testimony. Quoting from line 19 page 26 from the transcript:

> Q. I said, in your conversation you did not tell him at any time that you expected him to have the answer filed within 20 days as per the summons?
>
> A. I don't think that specific statement was made....

Furthermore, on direct examination, Respondent's attorney admitted that he felt Appellant had become "dilatory". Why would an adverse party believe someone was "dilatory" if there was not some understanding that that party was to perform something? Respondent's attorney acknowledged thereby that he had indeed been waiting for Respondent to obtain the weigh tickets. Quoting from line 11 page 27, Respondent's attorney makes this acknowledgement:

> Q. (Appellant's attorney) Is one reason why [waiting 4½ months before taking default] is because you were waiting for him [Appellant] to obtain the weigh tickets,

so that you could settle this matter, or the reason that you proceeded was because your client pressured you to take default?

A. I had been waiting quite some time before and felt that he [Appellant] had become dilatory and felt that the only answer was to file a default and default judgment.

Q. Did you ever attempt to contact him either by writing or by oral communication to tell him that he had better respond or you were going to take default?

A. No. I had no obligation to....

Certainly from the record, it is clear that there was an understanding between Appellant and Respondent's attorney, that no further action would be taken until the weigh slips were obtained. It is clear Appellant exercised good faith and attempted to obtain the weigh slips. (see Appellant's testimony lines 27 page 11 through line 17 page 13 of transcript) It is undisputed that Appellant was selling his property in Utah and moving to Idaho during the interval prior to the entry of the default. Appellant exercised his best effort. Where such evidence was before the Court, the Court erred in not granting Appellant's motion. The facts and evidence presented show that a reasonable justification existed for the Appellant not to act and his actions came clearly within the meaning of Rule 60 (b)(1) and as such, the lower court abused its discretion in not setting aside the

default.

POINT 3: APPELLANT'S MOTION UNDER RULE 60 (b)(1), UTAH RULES OF CIVIL PROCEDURE WAS TIMELY MADE.

The trial court made no findings or conclusions in this matter to the contrary that Appellant's motion was not timely made. It is clear from the record, that Appellant filed his motion around three months from the date the judgment was entered and clearly within three months from the date Appellant received notice that a default judgment had been filed. (See transcript line 18 page 20 through line 12 at page 21)

## CONCLUSION

The District Court erred in not granting Appellant's Motion to Set Aside a Default Judgment on two grounds. The first ground is that the Court never obtained jurisdiction over the Appellant because a person was served who did not "reside at Appellant's place of abode" as required by statute. Lack of jurisdiction is a question that can be attacked at any time. There is overwhelming evidence which established that the person served was not living or residing with the Appellant at the time of service. Respondent failed to produce any evidence to the contrary. For these reasons, Appellant's appeal should be granted and the default judgment should be vacated for lack of jurisdiction.

Secondly, this case deals with the very elements and reasons why Rule 60 (b)(1) Utah Rules of Civil Procedure was established, namely, to allow a person to respond where there

has been a "mistake, inadvertance or excusable neglect." The facts establish beyond doubt that Appellant believed and understood that Respondent's attorney had agreed to forego further legal action until weigh tickets, which were "fundamental" to the issue of the lawsuit, could be obtained. That Appellant exercised "due diligence" in obtaining them; that Appellant was never instructed to perform by a certain date or contacted subsequent by Respondent's attorney to give him notice of Respondent's attorney's intent to file a default because Appellant had been "dilatory". If this Court finds that there was jurisdiction over the Appellant by the lower court, then irregardless, Appellant is entitled to have the default judgment vacated and the issues between the parties heard on their merits, because of the equitable doctrine of excusible neglect.

Therefore, Appellant respectfully requests that his Appeal be granted and the default judgment entered against him in the lower court be vacated.

DATED this 27th day of March, 1980.

SCOTT W. HOLT, Attorney for
Appellant, Douglas K. Freeland

## AUTHORITIES CITED



## STATUTE CITED

MAILING CERTIFICATE

I hereby certify that I mailed the foregoing to the Supreme Court of the State of Utah, at 332 State Capitol, Salt Lake City, Utah, 84114, this_____day of_____, 1980.

_____

MAILING CERTIFICATE

I hereby certify that I mailed a copy of the foregoing to Mr. Eldon A. Eliason, Attorney for Respondent, at Delta, Utah, 84642, this_____day of_____, 1980.

_____