

1980

Val Roberts v. Douglas K. Freeland : Respondent'S Brief

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

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

Recommended Citation

Brief of Respondent, *Roberts v. Freeland*, No. 16869 (Utah Supreme Court, 1980).
https://digitalcommons.law.byu.edu/uofu_sc2/2120

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT
OF THE STATE OF UTAH

VAL ROBERTS, :

Plaintiff and Respondent, :

vs. :

Case No. ~~16896~~ 16869

DOUGLAS K. FREELAND, :

Defendant and Appellant. :

RESPONDENT'S BRIEF

Appeal from the Judgment of the 5th

District Court for Millard County

Hon. J. Harlan Burns

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

Scott W. Hblt
50 North Main St.
Layton, Utah 84041
Attorney for Appellant

FILE

MAR 20 1980

IN THE SUPREME COURT
OF THE STATE OF UTAH

VAL ROBERTS,

:

Plaintiff and Respondent,

:

vs.

:

Case No. 16869

DOUGLAS K. FREELAND,

:

Defendant and Appelant.

:

APPELANT'S BRIEF

Appeal from the Judgment of the 5th

District Court for Millard County

Hon. J. Harlan Burns

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

Scott W. Holt
50 North Main St.
Layton, Utah 84041
Attorney for Appelant

TABLE OF CONTENTS

OVERVIEW OF CASE.....	1
DISPOSITION IN LOWER COURT.....	1
RELIEF SOUGHT ON APPEAL.....	1
STATEMENT OF FACTS.....	2
ARGUMENT	
ISSUE I: THE COURT DID HAVE JURISDICTION..	7
Point I: The Summons and the Complaint which Defendant acknowledges having received November 8, 1978, bore the sheriff's endorsement and the time and place of serving "by leaving with Ed Obert, a friend living at residence" and the sheriff's name and official title.	
Point II: NO ORAL PROMISE TO FOREGO DEFAULT	8
Point III: THERE IS NO SURPRISE OR EXCUSABLE NEGLIGENCE UNDER RULE 60 AND SERVICE WAS EFFECTIVE.....	9
CONCLUSIONS.....	11
AUTHORITY AND STATUTES CITED IN BRIEF.....	12
MAILING CERTIFICATES.....	13

IN THE SUPREME COURT OF THE STATE OF UTAH

VAL ROBERTS,)	
Plaintiff)	RESPONDENT'S BRIEF
vs.)	
)	Case No. 16869
DOUGLAS FREELAND)	
Defendant)	

Plaintiff-respondent brought this action to collect on an agreement wherein Plaintiff fed Defendant's livestock on A Pound Gain basis.

The Complaint was filed November 3, 1978. Summons was served November 8, 1978, by delivering to one Ed Obert, a friend of Defendant who claimed to be living at the residence. Defendant acknowledged receiving the complaint and summons the day of service or the following day and called Plaintiff's counsel to discuss the case.

Default certificate was entered February 21, 1979 and default judgment March 22, 1979. Thereafter, on June 20th, 1979, Defendant filed a motion to set aside default judgment on inadvertance and surprise which was denied and Defendant appealed.

DISPOSITION IN LOWER COURT

The district court denied Defendant's Motion to set aside Default Judgment.

RELIEF SOUGHT ON APPEAL

Appelant seeks to have judgment of district court entered by default set aside on the grounds :

a. Of surprise, inadvertance and excusable neglect.

b. Defendant alleges that a telephone call initiated by defendant to

when Defendant offered to get the weigh tickets from his truck driver, for which he had been obliged to get since April 20, 1978, (date of removing cattle) was a waiver or indefinite extension, against default which was taken by Plaintiff March 22, 1979, four and a half months later.

STATEMENT OF FACTS

It is undisputed that Plaintiff-respondant and Defendant-appellant entered into an oral agreement December 1977 when Plaintiff agreed to feed 200 head of livestock for Defendant on a weight gain of 33cents per pound gain.

Defendant was to truck the cattle and weigh them at Intermountain Farmers Scale at Delta, Utah as a weigh in figure. Defendant claims to have had them weighed, but said he lost the weigh tickets and when the animals were weighed and delivered back to the Defendant April 21, 1979, there was a requirement for defendant to furnish the December 1977 weigh tickets which defendant agreed to do as a basis to compensate the Plaintiff for the gain, instead he reported yard weight before leaving Defendants yards.

Because of the weigh tickets final payment on gain was not made on April 20, and after numerous requests, Plaintiff filed an action November 1978. Service of Summons and Complaint were made on November 8, 1978 on one Ed Obert at Defendant's home, who said he resided there, and on said date, Defendant called Plaintiff's attorney and said he would still try and obtain the December 1977 weigh tickets. Some brief comment

was made that the amount of gain being charged for during the period was not very substantial gain (a short gain). (Transcript page 23, line 15) There was nothing said about negotiating a settlement (Transcript page 23, line 15) Plaintiff's Counsel told Defendant if he had a dispute he should get legal counsel. (Transcript page 24, line 7.)

The weigh tickets were discussed with Plaintiff's attorney who stated that Plaintiff has not received from the Defendant the weigh tickets (Transcript 24, line 23). Plaintiff's attorney told defendant that if there was an area of settlement it should be followed, but that Defendant should get legal counsel. (Transcript page 25, line 17)

The principal question involved relates to the question of the Service of Summons.

The Davis County Sheriff in his return dated the 8th of Nomenber 1978 stated.

State of Utah)
) ss.
County of Davis)

I hereby certify and return that I received the within and hereunto annexed Summons and Complaint on the 3rd day of November, 1978, and that I duly served the same upon the within named Deferdant Douglas K. Freeland by delivering to and leaving with Ed Obert, friend living at residence (Emphasis ours as typewritten on printed form). A person of suitable age and discretion and residing at the usual place of abode of said Defendant in Layton, County of Davis, State of Utah, a true and correct

copy of said summons on the 7th day of November, 1978 together with a copy of the Complaint attached thereto. The return shows the further compliance by endorsement, etc.

Defendant testified having looked at the summons when he received it November 7, 1978, and further testified "Well, I went through, and of course at that time I was somewhat disturbed, but I had an idea that something was going to come up on it because we hadn't been able to come to an agreement. That's when I first became aware of the problem." (Transcript Page 9, line 5-8).

"The following day I made a call to Mr. Robert's attorney." (Transcript page 9, line 15) quoting Transcript 10, line 2) "Well, it came down the issue of what the cattle weighed when they were received at Delta. Well I had instructed the trucker that trucked the cattle from Skoal Valley to weigh the cattle at Delta." (Transcript page 10, line 2.)

(Transcript page 10, line 20) "The 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 trucker, the discussion was that I would get the weigh tickets and get together with Mr. Roberts and his attorney and try to get things worked out. No date was set." (Transcript Page 10, line 23-27.)

"I had some difficulty getting ahold of Mr. Warr---Warr is the trucker that trucked the cattle." (Transcript page 12, line 3) "I got hold of Mr. Warr a few days after I talked with the attorney Mr. Eliason. He couldn't find the weigh tickets." (Transcript page 12, line 10).

Judgment right after April 11, 1979.

On being asked "What did you do upon receiving the Default Judgment?"

"I immediately called Mr. Eliason concerning it." Further quoting from Defendant's testimony, "After you had the second conversation with Mr. Eliason, what action did you take?"

"I did contact you (Defendant's attorney) and ask you to represent me." (Transcript page 16, line 26. The Judgment was certified April 11, 1979. (Transcript page 16, line 1)

Question: "And when did you contact me?" (Defendant's attorney) (Transcript page 16, line 26).

Answer: "I would say the first of May."

Question: "And is it true that I prepared legal documents for your signature?"

Answer: "Correct." (Transcript page 16, line 25)

Question: "Did you leave the state after I prepared the documentation?"

Answer: "We were gone for a week--two weeks at a time all through the period."

Question: "And when did you return from Idaho? When did you return to the state?"

Answer: "Well, we returned many times. I have a man in Idaho and I was up there for a week and back here, up there for two weeks and back here."

Question: "And when was the earliest convenience that you signed

Answer: "I think I got a letter from your office." (Transcript page 17, line 7).

From November 7, 1978 (date of service) until March 22, 1979, Defendant didn't contact anybody, an attorney or anybody else.

Question: (by Plaintiff's attorney) "Now you received a copy of the Judgment shortly after April 11, 1978 in the mail, is that correct?"

Answer: "That's correct." (Transcript page 20, line 20).

Question: "And talked with me about it?"

Answer: "That's correct."

Question: "So from approximately the 11th of April until the 20th of June you didn't communicate anything to me?"

Answer: "No, I didn't." (Transcript page 21, line 10)

Here the Court asked Defendant as follows: "The Court has one or two questions: How old are you?"

Answer: "Thirty-nine."

Court: "How far did you go in school?"

Answer: "I graduated from Weber State College."

Court: "So you have no difficulty reading and writing and you understood the contents of the summons?"

Answer: "That is correct."

The Court

(Transcript page 21, line 20-30-)

The Court at the conclusion of arguments stated, "After hearing

the proof and testimony, the Court finds no good cause to vacate and

set aside the Default Judgment." (End of statement)

ARGUMENT

POINT I

THE COURT DID HAVE JURISDICTION.

The summons and the complaint which defendant acknowledges having received November 8, 1978, bore the sheriff's endorsement and the time and place of serving "by leaving with Ed Obert, a friend living at residence" and the sheriff's name and official title.

Even though defendant talked on phone with Plaintiff's attorney the day following about the case, he never at any time raised any question on the service. Defendant's counsel, June 20, 1979, in filing an affidavit of surprise and excusable neglect under rule 60 raises the first question about the service, more than 7 months after service and more than 60 days after receipt of the judgment.

The sheriff's certificate and affidavit of November 8, 1978, is positive and controlling. Defendant on July 18th caused Ed Obert to sign an affidavit which alleged that on or about the 16th day of November, 1978, while visiting at the residence of defendant, was given the summons. The affidavit is substantially in error on the date of service and other circumstances. It is purely hearsay with no opportunity for cross examination.

Rule 4 was fully complied with when Ed Obert in defendant's house stated he was a resident there and accepted service. With the endorsement "by leaving with Ed Obert, a friend living at residence and" defendant accepted the service with the endorsement as contained, talked with

Plaintiff's attorney about the complaint and summons so served without ever objecting, for more than seven months, even though he received copy of the judgment April 11, 1979.

Contrary to defendant's contention and argument, the requisite formality of the manner of service were not sacrificed requiring the service to be supplanted by some other form of notice. Ed Obert was residing at the residence and so advised the sheriff and accepted service as resident and delivered it to defendant the same day without prejudice to . . . POINT II NO ORAL PROMISE TO FOREGO DEFAULT

The contention of the defendant that there was an oral promise by Plaintiff's attorney to forego taking a default is absurd and is not supported by one word of evidence. Defendant was told if he had a dispute with the claims of the Plaintiff he should get legal counsel. (Transcript page 24, line 7 and Transcript page 25, line 19). Defendant said he expected the ad

Defendant had supposedly been looking for weigh tickets since December 1977, the date of delivery of the cattle and for him to comment to Plaintiff's attorney in a phone call made by the defendant at the time of service of summons that he was still looking for the weigh tickets, could in no way be inferred that Plaintiff would defer proceedings until he had found his long lost weigh tickets.

Defendant told the court he was a graduate of Weber College and had read and understood the summons. (Transcript page 21, line 20)

POINT III

THERE IS NO SURPRISE OR EXCUSABLE NEGLECT UNDER
RULE 60. AND SERVICE WAS EFFECTIVE.

Counsel for the Plaintiff has reviewed carefully all of the cases cited by defendant's counsel in his brief and finds nothing that is in point with the fact situation of the instant case; for instance in Zucherman vs. McCullay 7-FRD-739, 1970 F 2 1015, there was a ruling where service had been made on a janitor. In the case of Leo vs. Shin-shu 30 FRD. 56 Judson vs. Judson FRD 366; Smith vs. Kincaid 249 Federal 2nd 243, where service was made on a landlady; such relationship bear no resemblance to the instant case where the person served was in the home and affirmed to the sheriff that he resided with the defendant.

The court has made some observations in the case of Utah Sand And Gravel Products, Corp. vs. Tolbert 16 Utah 2nd 407, 402 Pacific 2nd 703. In that case the action had been filed in the wrong court and the jurisdiction of the city court was limited to \$1000 and judgment was demanded in excess of \$20,000.00. Obviously, the court designated was without jurisdiction in the action and the summons was obviously invalid on its face because it sought recovery in excess of the jurisdiction of the court. In the instant case there was nothing defective in the service or the return of service. The court in Utah Sand and Gravel Products Company vs. Tolbert stated "Liberality in interpretation and application of new rules of civil procedure should be indulged where no prejudice or disadvantage to anyone results, but where failure to comply with rules will result in some substantial prejudice or disadvantage to a party, they should be adhered to with fidelity.

Requisite formalities of summons and manner of service prescribed by law are intended to assure to recipient bona fides of court process and importance of his giving serious attention thereto, and they cannot be dispensed with. Notice by letter, telephone or any other such means."

Sponsored by the Utah State Library, a part of the Utah State Office Building. Digitized by the Utah State Library. Library Services and Technology Act, administered by the Utah State Library. Machine-generated OCR, may contain errors.

Plaintiff in this action is hurt by defendant's inaction and the trial court has a responsibility to protect him. Of such was the holding of the Supreme Court in the Case of BARBER vs. CALDER 522 P2 700, where this court unanimously stated:

"However discretion is not a one way street. As is sometimes said No pancake can be fried so thin that it does not have two sides. Both parties have rights which it is the responsibility of the trial court to protect. In situations where the exercise of discretion is appropriate, considerable weight should be given to the determination of the trial court, whichever way it goes. This is true because due to his close involvement with the parties, the witnesses, and the total circumstances of the case, he is in the best position to judge what the interests of justice require in safeguarding the rights and interests of all parties concerned."

The defendant in the instant case was more derelict and self assuming than was the defendant in the case of PACER SPORT AND CYCLE Inc. MYERS Utah 534 P2 616 where defendant told plaintiff's attorney that he was not liable because he had only signed for purpose of obtaining credit for his son and that he thought the action had been taken care of and therefore took no steps to answer the complaint. This court held:

"That such was neither sufficient to establish excusable neglect to require trial court to set aside default judgment entered against defendant." and "None of these claims even approaches excusable neglect as required under Rule 60 (b) URCP in order to be relieved from a default judgment." "The trial court has a discretion in determining whether or not default judgment should be set aside and we, on appeal, should not reverse its ruling except for abuse of discretion, to wit, that it is arbitrary, capricious, or not based on adequate findings of fact or on the law"

The instant case has much in common with DOWNEY STATE BANK vs. MAJOR BLAKENEY CORPORATION Utah 545 P2 507.

The defendant in that case appealed, attacking the trial court's

He contends (1) that the Court did not acquire jurisdiction because the plaintiff's affidavit was insufficient to justify an order to publish summons; that no diligent inquiry was made; (2) that the summons as published was defective and (3) that the motion should have been granted on equitable grounds. In this case the number assigned the action was 4473A, but the summons as published contained the number without the A" The Court in upholding the ruling said:

"No one will gainsay that accuracy is always to be desired. But there should be no penalty or adverse effect for mere error which causes no harm." "It does not appear that the defendant was in any way misled or adversely affected by this variance in the number."

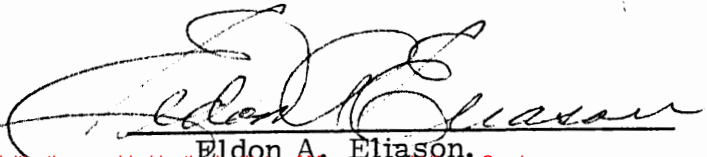
The further issue of the case was that the defendant contended that the court abused its discretion in refusing to set aside the default judgment, the Supreme Court answered:

"A primary difficulty he confronts is that as a general proposition, one who seeks to vacate a default judgment must proffer some defense of a least sufficient ostensible merit as would justify a trial of the issue thus raised. As the trial court appropriately remarked on this point: the defendant failed to proffer any meritorious defense, or in fact any defense at all."

Also in the instant case there was no defense proffered by the defendant.

CONCLUSION

The court in the instant case had jurisdiction, found no surprise or excusable neglect, used wisely its discretion in ordering that the inaction for approximately 7 months after service upon defendant was prejudicial to the plaintiff if defendant were to be relieved of all the effects of his judgment and without submitting a meritorious defense.



Eldon A. Eliason

AUTHORITIES CITED

<u>Zucherman v. McCullay</u> , 7 FRD 739 App. 739 170 P2d 1015.....	
<u>Leo V. Shin-shu</u> , 30 FRD 56.....	1
<u>Judson v. Judson</u> FRD 366.....	1
<u>Smith v. Kincaid</u> 249 F2d 243.....	1
<u>Utah Sand and Gravel Products Corp, v. Talbert</u> 16 Ut 2d 407 402, P2d 703.....	1
<u>Barber v. Calder</u> 522 P2d 700.....	10
<u>Pacer Sport and Cycle Inc. v. Myers</u> , Utah 534 P2 616.....	10
<u>Downey State Bank v. Major Blakeney Corporation</u> , Utah 534 P2 507.....	10

STATUTE CITED

Rule 60)b) (1), Utah Rules of Civil Procedure.....	7, 8
---	------

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 24th day of May, 1980.

MAILING CERTIFICATE

I hereby certify that I mailed a copy of the foregoing to Mr. Scott W. Holt, 50 North Main St. Layton, Utah 84041, Attorney for Appellant, this 24th day of May, 1980.

A handwritten signature in black ink, appearing to read "Gordon B. Jensen". The signature is fluid and cursive, with a long horizontal stroke at the end.