

1989

# Vernessa Reed v. Merrill W. Reed, Keith Reed, Georga Reed and John Does 1-15 : Brief of Appellee

Utah Supreme Court

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Glen J. Ellis; Attorneys for Respondent .

Richard B. Johnson; Jackman and Johnson; Attorneys for Appellant .

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BRIEF

**890446**

IN THE SUPREME COURT

OF THE STATE OF UTAH

VERNESSA REED,

Plaintiff/Respondent,

vs.

MERRILL W. REED, KEITH REED,

GEORGA REED & JOHN DOES 1 thru 15

Defendants/Appellants.

Case No. 890446

BRIEF OF RESPONDENT

APPEAL FROM ORDER & JUDGMENT  
DENYING MOTION TO QUASH SUMMONS  
FOURTH DISTRICT COURT, UTAH CO.  
JUDGE CULLEN Y. CHRISTENSEN.

RICHARD B. JOHNSON for  
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GLEN J. ELLIS  
P.O. Box 668,  
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ATTORNEY FOR PLAINTIFF/RESPONDENT

**FILED**

JAN 22 1990

Clerk, Supreme Court, Utah

IN THE SUPREME COURT  
OF THE STATE OF UTAH

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VERNESSA REED,	)	
	)	
Plaintiff/Respondent,	)	
	)	Case No. 890446
vs.	)	
	)	
MERRILL W. REED, KEITH REED,	)	
GEORGA REED & JOHN DOES 1 thru 15	)	
	)	
Defendants/Appellants.	)	

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BRIEF OF RESPONDENT

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APPEAL FROM ORDER & JUDGMENT  
DENYING MOTION TO QUASH SUMMONS  
FOURTH DISTRICT COURT, UTAH CO.  
JUDGE CULLEN Y. CHRISTENSEN.

---

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

---

VERNESSA REED,	)	
	)	
Plaintiff/Respondent,	)	
	)	Case No. 890446
vs.	)	
	)	
MERRILL W. REED, KEITH REED,	)	
GEORGA REED & JOHN DOES 1 thru 15	)	
	)	
Defendants/Appellants.	)	

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BRIEF OF RESPONDENT

---

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal by only one of the defendants, Keith Reed from an Order and Judgment denying his Motion to Quash Service. Jurisdiction is proper under 78-2a-3 UCA, on referral from the Court of Appeals.

ISSUES PRESENTED:

1. Whether the Appeal was timely filed.
2. Whether the trial court erred in denying Defendant's Motion to Quash.

DETERMINATIVE RULES:

1. As to timeliness, Rule 4(a), Rules of the Utah Supreme Court (and Utah Court of Appeals).
2. As to propriety of service, Rule 4(e)(1), Utah Rules of Civil Procedure.

STATEMENT OF THE CASE:

A. Nature of the Case and Course of the Proceedings:

Defendant Keith Reed only, appeals from a Ruling from Judge Christensen dated October 3, 1988, filed October 4, 1988, and from an Amended Default Judgment dated and filed November 2, 1988. Notice of Appeal was filed with the District Court

August 4, 1989, some ten months after the filing date of the Ruling, and nine months after the Judgment was filed.

B. Statement of Facts:

Plaintiff and Defendant Keith Reed were husband and wife until that marriage was terminated in a divorce in Fourth District, Utah County, Case No. CV96-1419. As part of the divorce, Plaintiff was granted judgment vesting ownership in plaintiff of various items of personal property, including a travel trailer and a four-wheel Ford pickup truck. Defendant, a construction worker, left the state and has since periodically resided with his parents in Orem. After much anguish, Defendant's father finally returned the travel trailer and other property, but not the truck.

On May 8, 1988, Keith Reed was served with summons at his parents home, where he resided at all times during pendency of the divorce action, the constable made his service on the parents, who were also both named defendants, and left Keith's copy, as a service on him at his "usual place of abode with *some person of suitable age and discretion there residing*" (Rule 4(e)(1), Utah Rules of Civil Procedure.

On May 25, 1988, Keith Reed appeared specially and filed a Motion To Quash Service, thru Richard B. Johnson, the same attorney who has represented his parents and him throughout this case. Attached were three affidavits, one from Keith, denying that he lived with his parents, and one from each parent, likewise denying that he lived at their home. All three affidavits are self-serving statements from the three persons who have conspired to deprive Plaintiff of her due rights to her property. Each is notably lacking in any effort to establish just where Keith resided then or now.

By way of Counteraffidavit, Plaintiff detailed the facts: (see copy attached as Exhibit #1), that she personally saw Keith in Provo on May 7th, the day before service was made, and again on May 12th, just a few days after service was made. Checks with his employer, his union and Utah DMV still showed his parents address in Orem as his residence. She had also seen Keith during the same time period, driving the truck in issue, and had seen it parked at his parent's home.

A similar affidavit from Treasa Norton, affirms the fact that Keith was still living in Orem at his parents home shortly before service was made. That Keith made his home with his parents in Orem was admitted by all of them during the long drawn out processes of the divorce, and was not seriously contested until months after the Default Judgment was filed.

On August 1, 1988, Defendant counsel requested an Evidentiary Hearing, See Exhibit #2. That request was granted in a Ruling dated August 26, 1988, see Exhibit #3 attached. When the parties appeared at the hearing, Defendant Keith Reed did not appear and his attorney had no evidence to present, but Plaintiff produced in court a copy of Defendant Keith Reed's 1986 and 1987 income tax returns, filed in early 1988, on which he still claimed his parents address as his residence.

#### SUMMARY OF ARGUMENT:

1. The Ruling appealed from was filed ten months before the Notice of Appeal; the Amended Judgment was filed nine months before the Notice of Appeal, the Appeal was not timely.

2. Service on the Defendant, at the home of his parents, where he had lived for the three years preceeding filing of this action was presumptively proper, and did in fact result in notice to said defendant. He then has the burden of proving



that he does not reside where service was made. No such proof was given.

ARGUMENT:

POINT I: AN APPEAL TO BE TIMELY  
MUST BE FILED WITHIN 30 DAYS

The time for filing an appeal to either the Appeals Court or Supreme Court of the State of Utah is the same; the wording of the two rules, insofar as applicable to this appeal are identical.

"Rule 4 APPEAL AS OF RIGHT: WHEN TAKEN  
(a) APPEAL FROM FINAL JUDGMENT AND ORDER.  
In a case in which an appeal is permitted as a matter of right from the district court to the Supreme Court, the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from..."

In this case, it is obvious that the Notice of Appeal, copy attached as Exhibit #4, dated August 4, 1989, was not timely filed, post dating the appealed Ruling by ten months, and the appealed Judgment by nine months. Not being timely, this court has no jurisdiction. See Burgers vs. Maiben, 652 P.2d 1320 ; this court "cannot take jurisdiction over an appeal which is not timely brought before it." Also see Amica Mutual Insurance Co. vs. Schettler, 768 P.2d 950 at 970 (Utah App. 1989.)

POINT II: SERVICE OF SUMMONS AT DEFENDANT'S  
USUAL PLACE OF ABODE, ON HIS PARENTS, WHERE HE  
HAD LIVED FOR THREE YEARS PRIOR, IS PRESUMPTIVELY  
VALID, AND DEFENDANT CLAIMING TO LIVE ELSEWHERE  
HAS THE BURDEN OF PROVING THAT CONTENTION BY EVIDENCE.

When the parties separated, prior to their divorce, in 1986, Keith Reed went to live with his parents in Orem. He so testified in several hearings on child support, property division and related divorce issues. His whereabouts were well known to his wife and their two teenage daughters. They saw him regularly, and were in communication with his parents too.

Keith's parents, openly supporting their son in his unlawful efforts to hide property decreed to his ex-wife, have always maintained that Keith was "out of the state", when the frequent appearances, and continuous giving out of his parents address as his legal residence, prove that they are not telling the truth. They had submitted Affidavits denying his residency, as did Keith himself, but all the three affidavits are noticeably lacking in one respect; none give any other address as being his residence. Defense counsel obviously must know Keith's whereabouts, but instead of presenting evidence as to Keith's present residence, at the Hearing he had requested, counsel elected to stand on a bare denial.

That was a fatal mistake; the burden of proof is on one claiming he was not served at his residence, to show that he actually resides some other place. The Defendants are so anxious to prevent Plaintiff from learning of Keith's whereabouts (because he owes back support, and for the personal property he converted), that they failed to put on any evidence, other than a blank denial that he lived with his parents. That failure was duly noted in Judge Christensen's Ruling and the subsequently filed Findings and Decree.

Judge Christensen's Ruling, copy attached as Addendum "A" to the Appellant's Brief, correctly cites the definition of "usual place of abode" in Grant vs. Lawrence 37 Ut. 450, 108 P.931, as the place where defendant lives. He knows where he

lives, only he can present that evidence; for him to simply deny that he lives where served is insufficient. It is a question of fact to be determined by the court. (Carnes vs. Carnes, 668 P.2d 555, and the court gave defendant an evidentiary hearing on September 26, 1988. At that hearing Defendant stood moot, electing not to disclose his whereabouts. The court concluded, therefore that he had no evidence to combat the presumption that service was proper, and since he clearly was appraised of the action against him, under Guenther vs. Guenther 749 P.2d 628, defendant was remiss in not presenting evidence sufficient to overcome the presumption.

The obvious purpose of the rule, to see that a defendant is appraised of the suit against him conforms to the interpretation cited by Judge Christensen (referring to Nowell vs Nowell, 384 F.2d 951, 32 ALR 3rd 107,) and is met in this case. The fact that Defendant allowed the court to proceed to issue a Default Judgment against him, after making a vain effort to quash the summons shows only that he knew Plaintiff to be entitled to the relief she sought. Counsel gives no explanation for failure to file an Answer, or having allowed the Default Judgment to be taken, or any good reason why it should not be sustained on appeal.

#### CONCLUSION


1. Defendant Keith Reed appeals from a Ruling and Default Judgment, but his appeal was not filed within the 30 days allowed for an appeal; no extention was obtained, and this court therefore lacks jurisdiction to hear the present appeal.

2. Defendant claims he was not residing at his parents home, where he was served, but failed at an evidentiary hearing to give evidence as to where he was residing; the presumption

that he was regularly served was not adversed, and the court correctly ruled that he had been properly served and that he was required to file an answer. After due delay, and no Answer being filed, he was properly defaulted, and the Judgment entered against him was not appealed from in a timely manner and must be affirmed.

3. This appeal is on its face frivolous and untimely, ; under Rule 33, Rules of Utah Supreme Court, Respondent ought to be awarded both her costs and a reasonable attorneys fee, \$2,000..

Respectfully submitted this 19th of January, 1990.

  
 \_\_\_\_\_  
 Glen J. Ellis, for Respondent

NOTICE OF MAILING:

Ten copies of the foregoing, including the original copy the Respondent's Brief were mailed this 19th of January, 1990 to the Clerk of the Utah Supreme Court, State Capitol Building, Salt Lake City, Utah 84114, with four copies being sent to Richard B. Johnson, attorney for Appellant, 1327 South 800 East, Suite 300, Orem, Utah 94058, postage prepaid, by U.S. Mail.

  
 \_\_\_\_\_

GLEN J. ELLIS, #1514  
DEAN B. ELLIS, #4976  
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P.O. Box 1097  
Provo, Utah 84603  
Telephone: (801) 377-1097

8705B

IN THE FOURTH JUDICIAL DISTRICT COURT, UTAH COUNTY  
STATE OF UTAH

-----  
VERNESSA REED, )  
 )  
Plaintiff, ) AFFIDAVIT OPPOSING MOTION  
 ) TO QUASH SERVICE  
vs. )  
MERRILL W. REED, KEITH REED, )  
GEORGA REED and JOHN DOES )  
1 thru 15, )  
 )  
Defendants. ) CIVIL NO. CV 88-927  
 ) JUDGE CHRISTENSEN  
-----

STATE OF UTAH, )  
 ) SS  
COUNTY OF UTAH. )

The undersigned, Vernessa Reed, being first duly sworn on her oath deposes as follows:

1. That I am the Plaintiff in the above matter and I was also the Plaintiff in the divorce action between myself and Keith Reed, Civil No. CV 86-1419. That case was filed the first week of June, 1986 when I found that my husband was sexually exploiting my seventeen (17) year old daughter and his seventeen (17) year old daughter and a protective order was issued by the District Juvenile Court for Utah County in Case No. 863382.

2. I was subsequently awarded possession of the Doradmore house trailer, which Keith had purchased in Texas just

before we were married from which the payments had been made from our joint income during the twelve (12) years of our marriage.

3. Each of us had a preschool daughter at the time we were married. In the divorce decree I was awarded custody of his daughter Trina, although she is now nineteen (19) years of age, she is retarded and is severely afflicted with Downs Syndrome. He was ordered to pay me \$250 per month to take care of his daughter.

4. Soon after I filed for divorce and criminal charges were filed against him for molesting our two daughters, he transferred every single piece of property of any substantial value to his parents or third parties and they have openly conspired with him to prevent me getting possession of any of the property that I was awarded in the marriage decree as shown on Lists A and B attached hereto. Those lists were prepared at the order of the court by my ex-husband. I elected to take List B as my property and subsequently purchased at Constable Sale all of the property on List A, using for that purpose the money judgment I had been granted against my husband for delinquent child support.

5. That since the time of the filing of the divorce, my ex-husband and his parents have openly conspired to deprive me of possession and the titles to the vehicles, guns and other valueable equipment which were found on that list and Keith made himself totally penniless in his attempts to avoid my being able to collect money that he owes me and possession of the property that I now own.

6. After the last order of the court in this matter Keith disappeared from the community for awhile, taking with him the Ford pickup truck and the travel trailer. He had all of the other vehicles that were my property hauled to various of his brothers or other storage places and has never provided me any of the titles that he was ordered to turn over.

7. Merrill Reed subsequently turned over to my attorney possession of the travel trailer, which we acquired during the marriage but they stripped it of all of the equipment, supplies, batteries, propane tanks, even down to and including the covers off the foam pillows and mattresses in the house trailer and delivered me the trailer and a very old unuseable chain saw that belonged to Merrill Reed but which is not the one mentioned in the various lists.

8. The very same issues of ownership raised by the Defendant Keith Reed, i.e., that he did not live at his parents house and that he did not have ownership or possession of any of the property on Lists A or B were raised at various hearings before Judge Harding, in every instance the Judge ruled that he was still subject to the rule of the court and he was ordered to return the property.

9. Although Keith left the area temporarily, I checked with his employer and with the union and both of them have his parents' address in Orem as his permanent address. I have also personally checked with the Department of Motor Vehicles and with every other source available to me and the only address any of them show is his parents' address in Orem.

10. That just prior to the filing of this action I and my daughter and other friends saw Keith, he is still driving the 1976 Ford pickup truck, which the court has ordered him to deliver to me and numerous times he has been seen in the vicinity and at his parents' home. On May 7th I saw Keith driving his brother's white convertible at the Checker Auto Store in Provo, Utah and again on May 12th I saw him driving the same car southbound on 5th West. He was in town at the time the papers were served. Jaymelin Messick told me that she also saw Keith in the truck with a canoe in April. Also, my neighbor, John Cartwright, told me that Keith was in town for Mother's Day.

11. That although Merrill and Georga Reed have claimed to be the owners of various items, including the pickup truck, it has, in fact, never been out of Keith's possession. He has continued to drive it and I have seen him numerous times since I filed the divorce driving that vehicle and I know that he has never turned it over to his parents and that their conspiracy to deprive me of ownership and possession of my property has been on-going since the day I filed for divorce. Keith has been in open contempt of the various court orders that have ordered him to turn over the property to me and I did not file this action until I was assured through personal knowledge that he had returned to the State of Utah and was once again using his parents home as his home base.

DATED this 1 day of June, 1988.

Vernessa Reed  
VERNESSA REED

STATE OF UTAH,           )  
                                  ) SS  
COUNTY OF UTAH.       )

On the 1st day of June, 1988, personally appeared before me VERNESSA REED the signer of the within instrument, who duly acknowledged to me that she executed the same.

My Commission Expires:

4/30/91

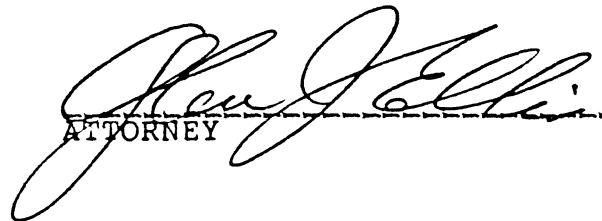
Joy Markham  
NOTARY PUBLIC

Residing at: Drum, Utah



MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing AFFIDAVIT OPPOSING MOTION TO QUASH SERVICE to Richard B. Johnson, Attorney for the Defendants, 1327 South 800 East, Suite 300, Orem, Utah 84058, by depositing the copies of the same into the United States Mail, postage prepaid, this 2 day of June, 1988.

  
\_\_\_\_\_  
ATTORNEY

RICHARD B. JOHNSON, #1722  
Attorney for Defendant Keith Reed  
1327 South 800 East, Suite 300  
Orem, Utah 84058  
Telephone: (801) 225-1632

IN THE FOURTH JUDICIAL DISTRICT COURT FOR UTAH COUNTY  
STATE OF UTAH

---

VERNESSA REED,

Plaintiff,

vs.

REQUEST FOR EVIDENTIARY  
HEARING

MERRILL W. REED, KEITH REED,  
GEORGA REED and JOHN DOES  
1 thru 15,

Defendants

Civil No. CV 88-927  
Judge Christensen

---

COMES NOW the Defendant Keith Reed and request an  
Evidentiary Hearing in this matter on the issue of whether or not  
he was a resident of his parent's home at the time of service.

The Motion is made upon the basis that there is a  
significant amount of conflicting information and accordingly,  
the Defendant is entitled to a Evidentiary Hearing.

DATED this \_\_\_\_ day of August, 1988.

---

RICHARD B. JOHNSON  
Attorney for Defendant

MAILING CERTIFICATE

I hereby certify that on the   1   day of August, 1988, I mailed a true and correct copy of the foregoing to the following, postage prepaid.

Mr. Glen J. Ellis  
Attorney at Law  
60 East 100 South, Suite 102  
Post Office Box 1097  
Provo, Utah 84603

Linda Browning

IN THE FOURTH JUDICIAL DISTRICT COURT  
UTAH COUNTY, STATE OF UTAH

VERNESSA REED,

Plaintiff,

CASE NUMBER: CV-88-927

vs.

RULING

MERRILL W. REED et al,

Defendants.

This matter comes before the Court, under Rule 2.8, on the motions of Defendant seeking to quash service of process and to strike the affidavit of Vernessa Reed. The Court has reviewed the file, considered the memoranda of counsel, and upon being advised in the premises, now makes the following:

RULING

1. Defs' Motion to Strike

(a) As to Para 9 of said affidavit the motion to strike is granted except as to the following:

"I checked with his employer and with the union."

"I have also personally checked with the Dept of Motor Vehicles and with every other source available to me."

(b) As to Para 10 of said affidavit, the motion is denied except as to the statements attributable to Jaymelen Messick and John Cartwright.

(The Court notes that the objected to statements might be admissable if offered only to establish that they

were made rather than for the truth of the matters asserted).

2. Defs' Motion to Quash

(a) With respect to this matter, Defs' request for oral argument is granted and the same will be heard on the **26th day of September, 1988** at the hour of 3:00 o'clock p.m.

Dated this 26th day of August, 1988.

BY THE COURT:

  
CULLEN Y. CHRISTENSEN, JUDGE

cc: Glen J. Ellis, Esq.

Richard B. Johnson, Esq.

RICHARD B. JOHNSON, #1722  
Attorney for Plaintiff  
1327 South 800 East, Suite 300  
Orem, Utah 84058  
Telephone: (801) 225-1632

IN THE FOURTH JUDICIAL DISTRICT COURT FOR UTAH COUNTY

STATE OF UTAH

---

VERNESSA REED,

NOTICE OF APPEAL

Plaintiff,

vs.

MERILL W. REED, KEITH REED,  
GEORGA REED and JOHN DOES  
1 through 15,

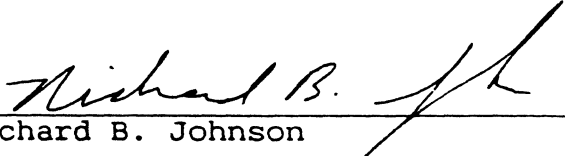
Civil No. CV 88-927

Defendants.

---

COMES NOW the defendant Keith Reed and gives his notice of appeal on the ruling of Judge Cullen Y. Christensen in the above referenced matter entered on October 3, 1988 and from the amended default judgment against Keith Reed only dated November 2, 1988 and from the whole thereof. The defendant hereby appeals to the Utah Court of Appeals.

DATED this 4 day of August, 1989.

  
Richard B. Johnson

CERTIFICATE OF SERVICE

I hereby certify that on the 7 day of August, 1989, I mailed a true and correct copy of the foregoing to the following postage prepaid.

Mr. Glen Ellis  
Attorney for Plaintiff  
P.O. Box 1097  
Provo, Utah 84603

Angela M. Harris