

1989

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

Utah Supreme Court

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UTAH SUPREME COURT

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BRIEF

THE SUPREME COURT
OF THE STATE OF UTAH
SALT LAKE CITY, UTAH

| | | |
|------------------------------|---|-----------------|
| VERNESSA REED, |) | |
| |) | |
| Plaintiff/Respondent, |) | |
| vs. |) | |
| |) | Case No. 890446 |
| MERRILL W. REED, KEITH REED, |) | |
| GEORGA REED AND JOHN DOES |) | |
| 1 THROUGH 15, |) | |
| |) | |
| Defendants/Appellants. |) | |

BRIEF OF APPELLANT

APPEAL FROM THE ORDER AND JUDGMENT OF
THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY,
STATE OF UTAH
THE HONORABLE CULLEN Y. CHRISTENSEN, PRESIDING

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ATTORNEYS FOR PLAINTIFF/RESPONDENT

DEC 1

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LIST OF PARTIES

The caption contains a complete list of all the parties to the proceeding.

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IN THE SUPREME COURT
OF THE STATE OF UTAH

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BRIEF OF APPELLANT

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from an Order and Judgment concerning a Motion to Quash Service. This Court has jurisdiction pursuant to Utah Code Ann. Section 78-2a-3 (1986 amended).

ISSUE PRESENTED

Whether a trial court erred in denying the Defendant's Motion to Quash Service given that the service was delivered at the residence of the Defendant's parents and not the residence of the Defendant.

DETERMINATIVE RULES

Rule 4(e)(1) of the Utah Rules of Civil Procedure states:

(e) Personal service in state. 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 this usual place of abode with some person of suitable age and discretion there residing; or by delivering a copy to an agent authorized by appointment or by law to receive service of process.

STATEMENT OF THE CASE

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

This appeal is from the ruling of Judge Cullen Y. Christensen dated October 3, 1988 and from the amended default judgment against Keith Reed only, dated November 2, 1988. The Order and Judgment resolving the issues between the other litigants in the matter was signed by the Honorable Cullen Y. Christensen on July 11, 1989. A Motion for Amendment of Judgment under Rule 59 of the Utah Rules of Civil Procedure was filed by the Plaintiff against the Defendants Merrill W. Reed and Georga Reed on June 20, 1989 with the response being filed by Georga Reed and Merrill Reed on July 5, 1989. No decision has been entered on the Motion to Amend the Judgment. But that Motion does not affect the determination of the Court relative to Keith Reed's Motion to Quash Service.

The Appellant, Keith Reed, appeals from the Court's ruling

denying his Motion to Quash Service in this mater and from the Default Judgment rendered against him based upon that alleged "defective" service. The Summons and Complaint in this case were served by leaving a copy of the same with the Appellant' parents under the assumption that the parent's residence was the Appellant's "usual place of abode." (Findings, paragraph 2, attached as Addendum A). However, the Appellant, Keith Reed, denies that he was living with his parents and further that his parent's address was not his "usual place of abode" at the time of service. (Plaintiff's Addendum A).

B. Statement of Facts.

Merrill W. Reed and Georga Reed (hereafter "parents") are the parents of Keith Reed, the Defendant (Paragraph 1, Addendum A). On May 8, 1988, the Sheriff purportedly served process on the Defendant by leaving a copy of the Summons and Complaint at the parents' residence. (Paragraph 2, Addendum A). The Sheriff assumed that the residence of the parents was the Defendant's "usual place of abode", even though the parents denied that their son lived there and that they did not know of his whereabouts. (Paragraph 2, Addendum A).

The Affidavits taken at trial affirmed that at the time of the purported service, Keith Reed did not reside with his parents; the Affidavits also acknowledge that the parents claimed

their son had left the State of Utah (Addendum A).

The Plaintiff and the Defendant were separated some time during June 1986, and were divorced on or about April 15, 1987. (Addendum A, paragraph 4). Thereafter, the Plaintiff claim to have seen the Defendant a couple of times during May 1988, at which time the Defendant was allegedly driving a pickup truck purportedly owned by his parents (Addendum A, paragraph 5). Treasa Norton, the daughter of the Plaintiff and the Defendant also claimed to have seen the Defendant once at the end of April 1988 under similar circumstances (Addendum A, paragraph 5).

The parents of the Defendant reside at 254 North 300 East, Orem, Utah 84057 (Addendum A, paragraph 7). Some time prior to April 15 of 1987 and 1988, the Defendant listed his parents' address on his income tax returns. (Addendum A, paragraph 9). The trial court found that the Defendant became aware of the service of process about a month after his parents were served. (Addendum A, paragraph 10).

SUMMARY OF ARGUMENT

The trial court erred in denying the Defendant's Motion to Quash Service and in ordering default judgment against the Defendant for several reasons. First, according to the Utah Rules of Civil Procedure and Utah case law, it is proper compliance with the formalities of process is a prerequisite to

the exercise of jurisdiction by the Court. If these formalities are not complied with, then the Court has no jurisdiction. Second, the manner of service made upon the Defendant in the present case, did not satisfy the requirements of the Rules of Civil Procedure. Instead of delivering a copy of the Summons and Complaint to the Defendant's "usual place of abode" as required by the rules, the Sheriff delivered the papers to the residence of the Defendant's parents. The Sheriff made this delivery even after the Defendant's parents informed him that their son no longer lived at their home.

Utah case law also supports a third reason why the service should have been quashed; the fact that the Defendant may have had "actual notice" of the present action does not remove the formal requirements for proper service. The rules of civil procedure do not rely on the chance that parties will hear, through the family grapevine, that they are being sued.

Finally, as an alternative to personal service, the Plaintiff could have obtained Court permission to make service by publication and mailing if they were unable to properly serve Defendant. However, the Plaintiff failed to make any such effort.

For these reasons, the trial court erred in denying the Defendant's Motion to Quash Service. The decision of the trial

court should be reversed and the Defendant should be allowed to defend himself in this action.

ARGUMENT

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO QUASH SERVICE BECAUSE THAT SERVICE WAS MADE UPON THE DEFENDANT'S PARENTS AND NOT UPON THE DEFENDANT.

- A. Proper compliance with the formalities of service is a prerequisite to invoking jurisdiction of a court and to acquiring jurisdiction over a defendant.

It is one of the most fundamental rules of civil procedure that before any court can exercise jurisdiction over a party, there must be proper issuance and service of summons. Murdock v. Blake, 402 P.2d 164 (Utah 1971) Utah Sand and Gravel Products v. Tolbert, 402 P.2d 703 (Utah 1965); Lloyd v. Third Judicial District Court, 495 P.2d 1262 (Utah 1972). The Utah Supreme Court summarized the importance of proper service as follows:

the proper issuance and service of a summons which is the means of invoking the jurisdiction of the court and of acquiring jurisdiction of the defendant is the foundation of the lawsuit. Utah Sand and Gravel Products v. Tolbert, 402 P.2d 703 (Utah 1965).

Rule 4(e) of the Utah Rules of Civil Procedure outlines the requisites of proper service that are applicable in the present case. Rule 4(e) provides that process may be validly served upon an individual

by delivering a copy to him personally, or leaving such copy [i.e., copy of the summons and complaint] at his usual place of abode with some person of suitable age and discretion there residing. Utah R. Civ. P. 4(e).

Without proper service in the present case, the court would have no jurisdiction over the Defendant except to uphold his motion to quash the attempted service.

- B. The residence of the Defendant's parents did not constitute the Defendant's "usual place of abode" required by Rule 4(e).

The Defendant in the present case does not assert that his parents are not of suitable age and discretion, but rather, that the Defendant's "usual place of abode" was not his parents' residence at the time service was attempted. Thus, it is necessary to determine what is meant by the term "usual place of abode" as set forth in Rule 4(e). One of the Plaintiff's arguments is that since the Defendant listed his parents' address on his income tax forms, this is sufficient to constitute the Defendant's "usual place of abode." However, at the time the Sheriff left the Summons and Complaint at the parent's residence, the parents informed the Sheriff that the Defendant did not live there. Moreover, the Affidavits taken in the course of these proceedings affirm that the Defendant was not living at his parent's home when the service was made. In Stan Katz Real Estate Inc. v. Chavez, 565 P.2c 1142, Justice Crockett emphasized the seriousness which should be given to affidavit testimony:

It is my view that the defendant's statement in his affidavit under oath that he did not reside at that address and had not received the summons stands

unrefuted.

Thus, it seems that while the parent's residence may have been the Defendant's last known address according to his income tax forms, it was not his present address at the time service was attempted.

In delineating what is required for proper service, the Utah Supreme Court explained that delivering summons to a person's last known address does not satisfy the requirement:

Neither 'Notice of the Action' nor summons mailed to the defendant at his last known address will give jurisdiction over the defendant." Lloyd v. Third Judicial District Court, 495 P.2d 1262 (Utah 1972).

Thus, merely leaving a copy of the Summons and the Complaint at the parent's residence was not sufficient; particularly since the Defendant's parents explained that the Defendant no longer lived with them. The only possible way this service would have been valid is if the Defendant's parents were agents of the Defendant appointed to receive service for him which they were not. Garcia v. Garcia, 712 P.2d 288 (Utah 1986). In sum, while the question of whether a party has been served with process is a question of fact, Carnes v. Carnes, 668 P.2d 555 (Utah 1983), the facts in the present case show that the personal service attempted on the Defendant was unsuccessful.

C. The fact that the Defendant may have had "Notice of the Present Action" does not remove the formal requirements for proper service.

The Supreme Court of Utah in Murdock v. Blake, 484 P.2d 164 (Utah 1971), explained the importance of complying with the requirements of personal service whether or not the party to be served has actual knowledge of the action.

. . . for it is service of process, not actual knowledge of the commencement of the action, which confers jurisdiction. Otherwise, a defendant could never object to the sufficiency of service of process, since he must have knowledge of the suit to make such objection. The proper issuance and service of summons . . . cannot be supplanted by mere notice by letter, telephone or any other such means. (emphasis added)

Id. at 167.

Using the Supreme Court's reasoning in Blake, the attempted service on the Defendant cannot be deemed proper merely because he may have found out about the action in some other way, such as hearing the news from his parents. Certainly, the news of a summon would travel like wildfire, especially within a family, but the rules of civil procedure do not rely and indeed, refuse to rely on such a haphazard method of informing parties that they are being sued. The Utah Supreme Court has echoed this argument in other cases. Lloyd v. Third Judicial District Court, 495 P.2c 1262 (Utah 1972); Utah Sand & Gravel Products Corp. v. Tolbert, 402 P.2d 703 (Utah 1965).

- D. Alternative means should have been used to give proper notice to the Defendant when the attempt at personal service failed.

In Guenther v. Guenther, 749 P.2d 628 (Utah 1988), the Utah Supreme Court discussed possible alternatives for giving proper notice to parties who could not be personally served. The facts of Guenther are relevant to the facts of the present case. In Guenther, the defendant had resided at his mother's home. Id. at 630. However, when the Sheriff attempted personal service on the defendant at his mother's residence, the defendant's mother said that she did not have an address for him and that she did not know of his whereabouts. Id. Following the Sheriff's unsuccessful attempts to serve the defendant personally, the court permitted service by publication and by mailing a copy of the summons to the defendant's last known address. Id. The Guenther court, stated that the state had an interest in allowing the plaintiffs to obtain jurisdiction over defendant's who were in the state, but could not be found and personally served. Id. at 629. In furthering that interest, the court gave guidelines for plaintiffs who were unsuccessful in their attempts at personal service:

. . . following [the] Sheriff's unsuccessful attempts to serve [the] defendant over [an] extended period of time plaintiff was entitled to move for and obtain an order authorizing service of [the] summons on [the] defendant by publication and by mailing copies of [the] summons to him at his last known address.

Id. Thus, the law has provided effective methods to serve process on difficult-to-find defendants. However, the Plaintiffs

in the present case did not follow any of the alternative methods provided. First, the record did not show that the attempts of personal service on the defendant took place over an "extended period of time." Second, the Plaintiff did not even attempt to obtain an order allowing for publication and service by mail.

In sum, the records and the affidavits taken support the claim that the Defendant was not residing at his parent's residence when personal service was attempted. Therefore, the attempted personal service was invalid. The only other alternative for the Plaintiff was to obtain the Court's permission to serve the Defendant by publication which they did not do. Accordingly, the Defendant's Motion to Quash should be upheld.

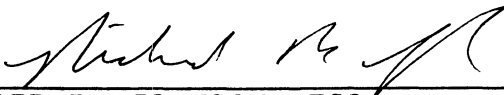
CONCLUSION

Proper compliance with the requisites of service of process are fundamental to a court's exercise of jurisdiction. The method of service outlined in the Rules of Civil Procedure is to personally serve a defendant by leaving a copy of the summons at the person's "usual place of abode." The Plaintiff's service at the residence of the Defendant's parents did not fulfill this requirement. Moreover, Utah case law does not support the argument that the requirements for personal service are waived merely because the person to be served still receives actual

notice. Finally, the Plaintiff did not follow any of the means provided to properly serve the Defendant after her unsuccessful attempt at personal service.

Therefore, the Defendant-Appellant respectfully requests that the portion of the trial court's order and judgment denying Defendant's Motion to Quash Service and the resulting default judgment be reversed.

DATED this 6 day of December, 1989.



RICHARD B. JOHNSON, ESQ.
Attorney for Plaintiff

MAILING CERTIFICATE

I hereby certify that on the 6 day of December, 1989, I caused to be deposited in the mail four (4) true and correct copies of the foregoing to the following, postage prepaid.

Glen J. Ellis, Esq.
ELLIS & ELLIS
60 East 100 South, Suite 102
P.O. Box 1097
Provo, Utah 84603

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ADDENDUM "A"

DISTRICT COURT OF UTAH COUNTY,

STATE OF UTAH

| | | |
|--------------------------|-------|---------------------|
| | - - - | |
| VERNESSA REED, |) | |
| | (| |
| Plaintiff, |) | |
| | (| Case. No. CV-88-927 |
| vs. |) | |
| | (| RULING |
| MERRILL W. REED, et al., |) | |
| | (| |
| Defendants. |) | |
| | (| |
| |) | |

This matter comes before the Court, under Rule 2.8, on the motion of defendant Keith Reed seeking an order quashing the service of process upon him. The Court has reviewed the file, considered the memoranda of counsel, entertained the proffers and argument of counsel, and upon being advised in the premises, now makes the following:

FINDINGS

1. Merrill W. Reed and Georga Reed are the parents of Keith Reed.

2. Keith Reed was purportedly served on May 8, 1988, with process by leaving the same with said parents under the assumption that the residence of the parents was "the usual place of abode" of Keith Reed (Rule 4(e)(1)URCP.); that said parents have disavowed any knowledge of the whereabouts of Keith Reed.

3. Defendants, by affidavit, have affirmed that at the time of the purported service, Keith Reed did not

reside with his parents; that said parents have claimed that Keith Reed had left the State of Utah (Norton affidavit).

4. That plaintiff and defendant Keith Reed were divorced on or about April 15, 1987; that said parties separated during or about the month of June, 1986.

5. That plaintiff personally observed Keith Reed in Provo, Utah on May 7, 1988, driving a 1976 Ford pickup truck which truck said parents claim to own, and which truck is one of the subjects of controversy in this action; that plaintiff again personally observed Keith Reed in Provo, Utah on May 12, 1988.

6. That Keith Reed was personally seen in the vicinity of Orem, Utah on April 26, 1988 by Treasa Norton, daughter of the plaintiff, and Keith Reed was at said time driving said truck.

7. That the said parents of Keith Reed reside at 254 North 300 East, Orem, Utah 84057.

8. That sometime prior to April 15, 1987, Keith Reed filed income tax returns for the year 1986 upon which his address was stated as being 254 North 300 East, Orem, Utah 84057.

9. That sometime prior to April 15, 1988 and after February 5, 1988, the said Keith Reed filed income tax returns for the year 1986 upon which his address was stated

as being 254 North 300 East, Orem, Utah 84057.

10. That no later than June 8, 1988, Keith Reed became aware of the process served upon his parents on May 8, 1988.

DISCUSSION

The Court is of the view that "domicile" and "usual place of abode" for the purposes of the service of process are not synonymous.

As stated in Grant vs. Lawrence, 37 Ut. 450, 108 P.931,

"Usual place of abode is sometimes referred to as being synonymous with domicile or permanent residence. In our judgment there is a broad distinction between domicile and usual place of abode as the latter term is used in our statute. Such also seems to be the conclusion reached by the authorities. . .

That is, where a person abides -- lives -- at the particular time when the summons is served, constitutes his usual place of abode. A similar question was before the Supreme Court of the United States in Earle v. McVeigh, 91 U.S., where at page 508 (23 L. Ed. 398), it is held that, "usual place of abode," such service, in order to constitute legal service, must be made at the defendant's "then present residence." In other words, at the place where the defendant then lives or abides. . ."

It thus becomes a question of fact to be determined by the Court (Carnes vs. Carnes, 668 P.2d 555) and for which purpose the evidentiary hearing of September 26, 1988 was convened.

However, as further stated in Carnes, Supra:

"Although a sheriff's return of process is presumptively correct and is prima facie evidence of the facts stated

therein, the invalidity or absence of service of process can be shown by clear and convincing evidence,"

and as stated in Guenther vs. Guenther, 749 P.2d 628, in a situation somewhat analogous to the one now before the Court:

"Defendant's interest to be appraised of the pendency of the action against him by personal service upon him is outweighed by the state's interest that persons using the state's courts, such as plaintiff, be allowed to maintain their actions and obtain jurisdiction over defendants who are in the state but who cannot after the exercise of due diligence, be found and personally served."

It also appears to the Court that the Rules with respect to service of process are to be liberally construed to insure the just, speedy and inexpensive determination of every action, as long as a party is actually apprised of the pendency of an action (Rule 1(a) URCP).

In the case of Nowell vs. Nowell, 384 F.2d 951, 32 ALR 3rd 107, the Fifth Federal Circuit Court in construing similar language of "dwelling house or usual place of abode" under the Federal Rules stated:

"The appropriate construction of Rule 4(d)(1) varies according to whether the defendant received notice of the suit. 4(d)(1) should be broadly construed where the defendant, as in this case, received notice of the suit. This rule of construction is, of course, subject to the limitation that the construction of the statute's language must be a natural rather than an artificial one. Frasca vs. Eubank. DC Pa. 1959, 24 FRD 268. Otherwise, *no hard and fast rule can be fashioned to determine what is or is not a party's 'dwelling house or usual*

place of abode' within the rule's meaning; rather the practicalities of the particular fact situation determine whether service meets the requirements of 4(d)(1).

" . . . the provision concerning usual place of abode should be liberally construed to effectuate service if actual notice has been received by the defendant and that in the last analysis the question of service must be resolved by 'what best serves to give notice to a defendant that he is being served with process, considering the situation from a practical standpoint.'

" . . . Rovinski vs. Rowe, C.C.A.6th 1942, 133 {131} F.2d 687"

Based upon the foregoing, the Court further finds and concludes as follows:

11. Defendant has not produced clear and convincing evidence to overcome the presumptively correct service of process.

12. That defendant has been fully apprised of the pendency of the proceedings against him.

13. That a just, speedy and inexpensive determination of this action dictates that defendant should be required to answer the complaint of the plaintiff.

14. That defendant's motion to quash should be denied.

RULING

15. That defendant's motion to quash service of process be and the same is hereby denied.

Dated this 3rd day of October 1988.

BY THE COURT:


Cullen Y. Christensen, Judge